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Comptroller General
of the United States
Washington, D.C. 20548

Decision

348194

Matter of: Americable International, Inc.

File: B-251614; B-251615

Date: April 20, 1993

George R. Schlossberg, Esq., and David R. Lloyd, Esq., Cotten & Selfon; and James E. Meyer, Esq., and Lee Peltzeman, Esq., Baraff, Loerner, Olender & Hochberg, P.C., for the protester.
Gerald A. Marshall, Department of Navy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Since the General Accounting Office's (GAO) statutorily-based bid protest jurisdiction extends only to procurements conducted by a federal agency, the award of franchise contracts for cable television services and telephone services by a nonappropriated fund instrumentality which is not a federal agency, is beyond the scope of GAO's jurisdiction.

DECISION

Americable International, Inc. protests the award by the Morale, Welfare and Recreational (MWR) Office--a nonappropriated fund instrumentality (NAFI)--at the U.S. Naval Submarine Base in San Diego, California, of contracts to: (1) Intelligent Communities, Inc., d/b/a Ameritel, for a telephone system; and (2) Cable Alternatives, Inc. (CAI), for a cable television system. The contracts do not cover the entire base, but are limited to the Bachelor Officer's Quarters (BOQ) and Bachelor Enlisted Quarters (BEQ) at the base.

We dismiss the protests.

These protests--both arising from overlapping facts, both challenging actions of the MWR office at the San Diego submarine base, and both involving the same housing facilities at the base--will be considered jointly, as they both raise a threshold issue of the jurisdiction of our Office over NAFIs. According to the Navy's MWR Office, our bid

protest forum lacks jurisdiction because a NAFI is not a federal agency.

As a preliminary matter, we note that among the many arguments raised by the protester against the Navy's assertion that we lack jurisdiction, is a contention that our failure to review these procurements will result in a violation of Americable's existing franchise contract with the Naval Submarine base. To the extent that Americable believes these actions violate its earlier franchise agreement, it raises a matter of contract administration, not for review by our Office. 4 C.F.R. § 21.3(m)(1) (1993).

The statutory authority of the General Accounting Office to decide protests of procurement actions is set forth in the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 et seq. (1988). CICA defines a protest as a written objection by an interested party to a solicitation by a federal agency for bids or proposals for a proposed contract for the procurement of property or services, or a written objection by an interested party to the award or proposed award of such a contract. 31 U.S.C. § 3551.

Since the passage of CICA, our jurisdiction has not been based on the expenditure of appropriated funds, see T.V. Travel, Inc., 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640, aff'd, 65 Comp. Gen. 323 (1986), 86-1 CPD ¶ 171, or on the existence of some direct benefit to the government. See Spectrum Analysis & Frequency Eng'g, B-222635, Oct. 8, 1986, 86-2 CPD ¶ 406. Thus, our jurisdictional concerns here are unrelated to the fact that no appropriated funds are involved in the procurements, and the fact that the Navy itself claims to receive no benefit from making these services available to temporary or permanent residents of BOQ/BEQ facilities.[1]

Our threshold concern is whether the procurements at issue are being conducted by a federal agency. See Monarch Water Sys., Inc., 64 Comp. Gen 756 (1985), 85-2 CPD ¶ 146. In limiting our jurisdiction to procurements by federal agencies, CICA adopted the definition of that term set forth in the Federal Property and Administrative Services Act of 1949, now codified at 40 U.S.C. § 472 (1988). 31 U.S.C. § 3551. As defined therein, an executive branch federal

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[1]In fact, both before and after the enactment of CICA, our Office has taken jurisdiction over virtually identical procurements of services by a federal agency. See B.M.I., Inc., B-212286, Nov. 2, 1983, 83-2 CPD ¶ 524; Americable Int'l, Inc., B-225570, May 5, 1987, 87-1 CPD ¶ 471, aff'd, Dep't of the Navy--Recon., B-225570.2, July 20, 1987, 87-2 CPD ¶ 64.

agency includes any executive department or independent establishment, including wholly-owned government corporations. NAFIs thus do not meet the statutory definition of federal agencies, and are therefore beyond the jurisdiction of our bid protest forum. Liquipharm, Inc.--Recon., B-245069.2, Aug. 28, 1991, 91-2 CPD ¶ 212; ATD-American Co., B-240048, July 18, 1990, 90-2 CPD ¶ 49; Kold-Draft Haw., Inc., B-222669, Apr. 4, 1986, 86-1 CPD ¶ 331.

Americable argues that our Office should take jurisdiction here because, in Americable's view, the MWR Office is merely acting as an agent for the Navy. In support of this contention, Americable points out that the cable television franchise in effect at the submarine base since 1987--Americable's franchise--was negotiated and signed by Navy officials as an agency procurement; that the acquisition of telephone and cable television services for BOQ/BEQ facilities is not uniquely related to MWR operations and instead benefits the Navy; that Navy officials were involved in the procurement decision; and that the Navy must give its approval for construction on the base related to the contracts. In addition, Americable points to three prior decisions of our Office where it contends we took jurisdiction over NAFI procurements after concluding that "a [f]ederal agency and a NAFI [had] blended [their] roles and responsibilities with regard to procurement actions."

As an initial matter, before addressing the factual contentions, we disagree with Americable's characterization of our jurisdictional conclusions in the three cases highlighted. In each of these cases, our jurisdiction was based on a finding that the agency, not a NAFI, was conducting the procurement. For example, in Artisan Builders, 65 Comp. Gen. 240 (1986), 86-1 CPD ¶ 85, we took jurisdiction over a procurement by an Air Force contracting office of improvements for a base golf course. The decision explains that our jurisdiction arose from the conduct of the procurement by a federal agency--the Air Force--even though the procurement was for the benefit of a nonappropriated fund activity.[2] Here, there is no dispute about the entity with whom Ameritel and CAI have contracted--both have signed franchise contracts with the MWR Office. Americable is asking that we treat these contracts as if they were Navy contracts because of the apparent close relationship between the naval base and the MWR Office.

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[2]Similarly, in Ace Amusements, Inc., B-222479, July 14, 1986, 86-2 CPD ¶ 65, and in Micronesia Media Distribs., Inc., B-222443, July 16, 1986, 86-2 CPD ¶ 72, our Office took jurisdiction because the procurement at issue, while conducted for the benefit of a nonappropriated fund activity, was being conducted by a federal agency.

Americable's contentions about the Navy's involvement in this protest are analogous to those we have seen in challenges to subcontractor selections where the protesting subcontractor alleges that the prime contractor is acting "by or for" the government, or as a mere conduit for the agency. See St. Mary's Hosp. and Med. Center of San Francisco, Cal., 70 Comp. Gen. 579 (1991), 91-1 CPD ¶ 597. In those cases, as here, protesters suggest that our Office should take jurisdiction based on a claim that an entity other than a federal agency--i.e., a prime contractor--is acting in concert with an agency, and should not be viewed as a separate entity.

Generally, we will conclude that a subcontract is awarded "by or for" the government where the prime contractor principally provides large-scale management services to the government, and as a result, has on-going purchasing responsibility. Aviation Data Serv., Inc.--Recon., B-238057.2, Apr. 11, 1990, 90-1 CPD ¶ 383. We will not take jurisdiction over such a procurement, however, unless the government's involvement in the procurement is so pervasive that the prime contractor becomes a mere conduit for the government. See Perkin-Elmer Corp., Metco Div., B-237076, Dec. 28, 1989, 89-2 CPD ¶ 604. In fact, we stated in Perkin-Elmer that "even where there is active government involvement in the subcontracting process" we will not invoke jurisdiction until the government's involvement is pervasive. Id. at 4.

Here, we find unpersuasive Americable's claim that the MWR is acting merely as an agent for the Navy because the services now at issue were included as part of an earlier contract awarded by the Navy. Nor do we agree with Americable that the services at issue here are unrelated to MWR activities. The delegation of responsibility for BOQ/BEQ facilities by the military services to MWR Offices is not new, and there is nothing in the record to suggest that the MWR Office is somehow acting in concert with the Navy to circumvent applicable procurement statutes.

Our review of the record indicates that while Americable is correct in its assertions that the base commander was present during discussions about the steadily increasing costs of cable television service under Americable's existing franchise contract, and that the franchise contracts include certain provisions requiring Navy involvement--such as approval of the liability insurance carried by the franchisees, and approval of any expected on-base construction--there is no evidence of any significant Navy participation in the procurement process. In fact, even though an early draft of one of the agreements (prepared by the contractor, not the government) anticipated signature by the Navy, there was no participation by Navy contracting officials in the

agreements finally ratified, and no suggestion that the Navy was ever intending to sign the agreement. Nor is there any evidence to suggest that agency contracting officials dictated the terms of the franchise contracts.[3]

In our view, this evidence does not constitute the kind of pervasive involvement required for our Office to conclude that an entity that is not a federal agency has become a mere conduit for the agency. See St. Mary's Hosp. and Med. Center of San Francisco, Cal., supra; Perkin-Elmer Corp., Metco Div., supra. Without evidence of such involvement by a federal agency, and since there is no question that the franchise contracts were awarded by a NAFI, we have no jurisdiction over the procurements here.

The protests are dismissed.

Robert M. Strong
Associate General Counsel

[3]In addition, we note that the Director of the MWR who signed the agreement had no warrant authority to spend funds on behalf of the government.