



Comptroller General
of the United States

946258

Washington, D.C. 20548

Decision

Matter of: Kerr-McGee Chemical Corporation--
Reconsideration

File: B-252979.2

Date: August 25, 1993

Alan A. Pemberton, Esq., Covington & Burling, for the
protester.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

The General Accounting Office does not have jurisdiction to consider a protest of subcontract awards by a government prime contractor, even assuming that the government effectively directed the award selections, where the procurement is concededly not "for" the government and is not "by" the government because the prime contractor retained substantial responsibility for the conduct of the subcontract procurement such that the prime contractor is not merely a conduit for an acquisition by the government.

DECISION

Kerr-McGee Chemical Corporation requests reconsideration of our decision in Kerr-McGee Chem. Corp., B-252979, May 3, 1993, 93-1 CPD ¶ 358, in which we dismissed Kerr-McGee's protest of the award of a subcontract to Western Electrochemical Company (WEC) under request for proposals (RFP) No. DWD-X0859, issued by Morton Thiokol, Inc. for ammonium perchlorate. Thiokol has a prime contract with the National Aeronautics and Space Administration (NASA) to provide the space shuttle solid rocket motor, of which the ammonium perchlorate is an essential component. We found that Thiokol's subcontract awards were not "by" the government because NASA's involvement was not so pervasive that NASA in effect took over the procurement from Thiokol.

We affirm the dismissal.

Thiokol has a cost-plus-award-fee contract with NASA for the manufacture of the space shuttle solid rocket motor. Ammonium perchlorate is an oxidizer¹ that is one of the principal ingredients of the solid fuel used in the space shuttle's boosters. Thiokol requires a substantial quantity of ammonium perchlorate to perform its rocket motor contract with NASA. Ammonium perchlorate is also an essential component in the rocket fuels for many military rockets and missiles, such as the MX and Trident intercontinental ballistic missiles and the Harpoon anti-ship missile.

Kerr-McGee and WEC are the only domestic producers of ammonium perchlorate. Until May 4, 1988, Pacific Engineering and Production Company of Nevada (PE) and Kerr-McGee were the only domestic producers of ammonium perchlorate. On May 4, PE's manufacturing facility was destroyed, eliminating approximately 50 percent of the domestic ammonium perchlorate production. WEC acquired PE's technology, trade secrets and proprietary information to enter this market.

NASA and the Department of Defense (DOD) entered into a memorandum of understanding that they would, individually and collectively, place "sufficient orders" with WEC for ammonium perchlorate through the agencies' respective prime contractors to ensure that WEC could acquire the necessary private financing to build its production facilities and to amortize its construction debt. NASA effected its agreement with DOD by authorizing Thiokol to negotiate and execute appropriate subcontract agreements with WEC to facilitate the construction of an ammonium perchlorate processing plant. These agreements entered into by Thiokol and WEC were incorporated into Thiokol's prime contract with NASA, and provided in pertinent part:

"It is recognized that there is a need for a positive cash flow for [WEC]. [Thiokol] will place sufficient orders with [WEC] for the delivery of [ammonium perchlorate] under the requirements of [the] [c]ontract . . . which, when combined with the orders from other customers, will provide [WEC] with the required revenues to assure that the outstanding debt is repaid by [WEC]. . . . Deliveries under such orders are intended to provide the basis for surcharge collections covering adequate debt repayment installments. As such, the orders from all customers are planned to be not less than 5,000,000 pounds per quarter,

¹An oxidizer is used to support the combustion of a rocket propellant.

20,000,000 pounds per year, and 140,000,000 total pounds."²

Thiokol's contract provided that Thiokol should normally acquire ammonium perchlorate on a competitive basis from major suppliers "to the extent such requirements exceed the minimum requirements specified herein." Thiokol's agreement with WEC also contained the following limitation:

"Notwithstanding anything herein to the contrary, [Thiokol's] obligations under this agreement shall be subject to the availability of appropriations to NASA, and, accordingly, [Thiokol] shall not be obligated hereunder unless appropriations are made available to NASA, and NASA in turn obligates . . . sufficient funding to Thiokol to satisfy its obligations. . . ."

Thiokol issued the RFP to Kerr-McGee and WEC, and sought fixed-price proposals for five "flight sets" of ammonium perchlorate for the 1993 fiscal year and quotations for future year requirements.³ Kerr-McGee and WEC were informed that it was Thiokol's "primary intent to award the [ammonium perchlorate subcontracts] on the [basis] of the lowest price per pound submitted . . . from the two qualified suppliers," and that the other "significant factors" were: (1) the contractor's manufacturing and technical capabilities; (2) quality control systems; (3) on-time delivery schedules; (4) general customer and program support; and (5) price protection for long-term shuttle or replacement program needs. Offerors were also informed that multiple awards could be made.

Subcontract offers were received from Kerr-McGee and WEC. Thiokol conducted discussions with both offerors and received revised offers. From its evaluation of the revised offers, Thiokol determined to award two flight sets to WEC and one flight set to Kerr-McGee, although Kerr-McGee's price per flight set was slightly lower than WEC's for up to three flight sets. Thiokol requested and received NASA's consent to the intended subcontract awards.⁴

²Thiokol's contract also provided for surcharge payments to Kerr-McGee to compensate Kerr-McGee for its agreement to increase its ammonium perchlorate production capacity.

³A "flight set" is approximately 800 tons of ammonium perchlorate, which represents the amount of ammonium perchlorate needed for two solid rocket shuttle boosters.

⁴The Thiokol contract contained the standard NASA "Consent to Subcontracts" clause.

After being informed that Thiokol intended to award only three flight sets of ammonium perchlorate and that WEC would be awarded the greater quantity of flight sets, Kerr-McGee filed an agency-level protest with NASA. The agency dismissed this protest because Thiokol's subcontract awards were not made "by or for" NASA; that is, NASA states, the subcontract award selections were made solely by Thiokol and not by NASA. Kerr-McGee then protested Thiokol's intended awards to our Office. We also dismissed Kerr-McGee's protest because we found that Thiokol's awards were not made "by or for" the government.

As explained in our prior decision, under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a Federal agency." 31 U.S.C. § 3551(1) (1988). In the context of subcontractor procurements, we interpret CICA as authorizing us to review protests only in limited situations where, as a result of the government's involvement in the award process or the contractual relationship between the prime contractor and the government, the subcontract in effect is awarded on behalf of the government, that is, where the subcontract is awarded "by or for" the government.⁵ Ocean Enters., Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, aff'd, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10. We have considered subcontractor selections to have been made "by" the government only in limited situations where the agency's involvement in the procurement was so pervasive that the prime contractor is no more than a mere conduit for the government. See St. Mary's Hosp. and Medical Center of San Francisco, CA, 70 Comp. Gen. 579 (1991), 91-1 CPD ¶ 597; University of Mich.; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. On the other hand, we have not found subcontract procurements to be "by" the government, even where the agency effectively directed the subcontractor selections, where the prime contractor handled the other meaningful aspects of the procurement. See ToxCo, Inc., 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170; Perkins-Elmer Corp., Metco Div., B-237076, Dec. 28, 1989, 89-2 CPD ¶ 604.

The crux of Kerr-McGee's arguments on reconsideration is that given NASA's "right under the prime contract to allocate awards--the ultimate power of 'source selection'," NASA controlled all meaningful aspects of the procurement. In other words, Kerr-McGee claims that NASA determined

⁵Kerr-McGee did not contend that this subcontract procurement was "for" the government.

"which offeror would get what award."⁶ Hence, Kerr-McGee argues that our decision--which found that Thiokol was not merely a conduit for the government in this procurement--is inconsistent with our decisions in University of Mich. and St. Mary's. Kerr-McGee contends also that the contractual limitation of Thiokol's obligation to purchase "sufficient" ammonium perchlorate from WEC to the availability of NASA's appropriated funds demonstrates that Thiokol was a mere conduit or agent for the government in this procurement.

Kerr-McGee misreads our prior decisions in this area. Prior to the enactment of CICA, we considered subcontractor protests in certain limited circumstances, including where the prime contractor was acting as an agent for the government or where the government's active or direct participation in the selection of the subcontractor had the net effect of rejecting or selecting a potential subcontractor. See Optimum Sys., Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD ¶ 166. CICA limited our bid protest jurisdiction to procurements "by federal agencies," and we concluded that subcontract procurements are not "by a federal agency" simply because the government effectively directed or controlled its prime contractor's subcontractor selection.⁷ See Rohde & Schwarz-Polarad, Inc.--Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. Rather, a subcontract procurement is "by" the government only where the agency handles substantially all the substantive aspects of the procurement, leaving to the prime contractor only the procedural aspects of the procurement. For example, in University of Mich., the government handled the evaluation and scoring of proposals, discussions with offerors, and award selection. Similarly, in St. Mary's, the government drafted the evaluation criteria, evaluated proposals, and made the ultimate source selection. In each of those cases,

⁶Kerr-McGee argued initially that NASA had overruled Thiokol's award "recommendation" that all of the flight sets should be awarded to Kerr-McGee because of Kerr-McGee's allegedly much lower prices. This allegation was not supported in the record, which shows that NASA consented to Thiokol's subcontract selections as presented to the agency. Kerr-McGee did not reiterate this claim in its comments on the agency's report.

⁷Similarly, since the enactment of CICA, we no longer consider protests from potential suppliers, because under CICA, only "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award the contract" is an interested party and eligible to protest to our Office. 31 U.S.C. § 3551 et seq.; North Am. Materials and Supply Assoc., B-224670, Sept. 22, 1986, 86-2 CPD ¶ 332.

the prime contractor's role in the procurement was essentially ministerial, i.e., issuing the subcontract solicitation and receiving proposals, such that the prime contractor was merely acting as a conduit for the government.

Unlike the situation presented in the University of Mich. and St. Mary's cases, Thiokol retained substantial responsibility for the conduct of this subcontract procurement. Thiokol, and not NASA, prepared the subcontract solicitation and evaluation criteria, received and evaluated subcontract offers, negotiated with the offerors (which resulted in significant price reductions), and made the award selections. Even assuming that NASA effectively directed the subcontract awards, as Kerr-McGee's asserts, Thiokol's involvement was more than that of a mere conduit for an acquisition by the government.⁸ See ToxCo, Inc., supra.

We also find it significant that the subcontract supply of ammonium perchlorate is not discrete from Thiokol's responsibilities under its contract with NASA. As noted above, ammonium perchlorate is an essential component of the solid rocket fuel used in the shuttle motors. Thiokol cannot perform its contract with NASA without the ammonium perchlorate. NASA, on the other hand, has no independent need for ammonium perchlorate, which also suggests that Thiokol, given its own significant needs and contract responsibilities, was not acting as a mere conduit for an acquisition by the government. Compare SRI Int'l, 69 Comp. Gen. 334 (1990), 90-1 CPD ¶ 318 and Edison Chouest Offshore, Inc.; Polar Marine Partners, B-230121.2; B-230121.3, May 19, 1988, 88-1 CPD ¶ 477 (prime contractor not a mere conduit where the subcontract work needs to be integrated by the prime contractor with its other functions to perform the prime contract) with University of Mich.; Indus. Training Sys. Corp., supra (subcontracted services were discrete from any of the prime contractors responsibilities under its prime contract).

Finally, the fact that Thiokol's agreement with WEC limited Thiokol's obligations to WEC to the amount of appropriated funds available to reimburse Thiokol for its contract costs does not demonstrate that Thiokol operates as an agent of the government when it awards subcontracts for ammonium perchlorate. As prescribed by Federal Acquisition Regulation § 32.704, "Limitation of Cost or Funds,"

⁸Given the referenced provisions in Thiokol's prime contract and this RFP, as well as the limited sources for ammonium perchlorate, it seems apparent that Kerr-McGee was cognizant, before it participated in the protested procurement, that WEC could be selected by Thiokol, even at a higher price, where other considerations warranted.

Thiokol's prime contract contained provisions prohibiting Thiokol from incurring costs that exceed the amount of funds allotted by NASA to the contract. The apparent purpose of the provision in Thiokol's agreement with WEC, limiting Thiokol's obligations to WEC, is to ensure that Thiokol and the government would not be liable to WEC for the purchase of ammonium perchlorate where appropriations are not available to fund Thiokol's purchases. Rather than demonstrating that Thiokol was the government's agent for the acquisition of ammonium perchlorate, this provision merely protected Thiokol from any legal obligation to WEC in the event that funds were not available to reimburse Thiokol for its incurred costs.

The dismissal is affirmed.


for James F. Hinchman
General Counsel