DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-207681.3 DATE: July 14, 1983

MATTER OF: J. F. Small & Co., Inc.--Reconsideration

DIGEST:

1. Where a prime contractor is acting for the Government subject to agency approval, agency must act reasonably in approving the procurement actions taken by the prime contractor.

2. Where agency involvement in subcontract award made by its prime contractor is limited to mere approval, there is no legal basis upon which the agency can be required to pay proposal preparation costs to a firm the prime improperly did not select for a subcontract award. The basis for the payment of such costs is the breach of an implied duty to review proposals fairly and honestly; where the agency only approves subcontract awards, it makes no express or implied assurances to prospective subcontractors with respect to the evaluation of proposals and, therefore, did not breach any duty to this subcontractor. Prior decision reversed.

The Department of Energy (DOE) requests reconsideration of our decision in John F. Small & Co., Inc., B-207681.2, December 6, 1982, 82-2 CPD 505. Our decision sustained a protest filed by John F. Small & Co., Inc. which alleged that a nonresponsibility determination made by a joint venture of The Ralph M. Parsons Company and Gilbane Building Corporation (P-G), a DOE prime contractor, was improper. P-G is the construction manager for DOE's Strategic Petroleum Reserve Project Management Office. We also found that DOE's approval of P-G's nonresponsibility determination entitled Small to proposal preparation costs.

DOE contends that our decision was wrong in several respects. We affirm our previous decision in part and reverse in part.

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Initially, we note that Small contests the timeliness of DOE's request for reconsideration. Under our Bid Protest Procedures, 4 C.F.R § 21.9 (1983), a request for reconsideration must be filed within 10 working days after the basis for reconsideration is known or should have been known, whichever is earlier. In this regard, we have held that it is reasonable to assume that interested parties will receive our decision within 1 week after its issuance. Dillon Supply Company; Department of Energy--Request for Reconsideration, B-203937, January 19, 1982, 82-1 CPD 41. Our decision was issued on December 6, 1982, and the record reflects that DOE received the decision on December 13, exactly 1 week after issuance. DOE would then have 10 working days after that date within which to file a request for reconsideration with our Office. Since December 24 was a Federal holiday, DOE's filing on December 28 was timely.

DOE requests that we reconsider our finding that P-G's determination that Small was nonresponsible was improper. P-G had argued that certain actions taken by John Small and Jackie Cox, directors of Small, were in violation of the P-G conflict of interest statement that both men had executed. Specifically, P-G determined that the submission of a bid by Small to Tri-Coast, a P-G subcontractor, at a time when both men were still employed by P-G, violated the conflict of interest statement, and otherwise reflected poorly on Small's integrity. This, coupled with allegations that Small had a poor performance record and also had influenced a subcontract award by threatening the prime contractor with its connections with P-G and DOE, formed the basis for P-G's determination that Small was not responsible.

We found that P-G's nonresponsibility determination was not reasonable based on the factual record. The record indicated that although a proposal was submitted by Small to a P-G subcontractor, no work or services were performed by Small until after John Small was terminated by P-G. Also, the record showed that Jackie Cox was not actively involved with Small until well after the submission of the proposal to Tri-Coast. Based on this information, we determined that, even assuming that a technical breach of P-G's conflict of interest policy had occurred, it was insufficient to support a nonresponsibility determination. Furthermore, there was no documentary evidence to support

the allegations that Small used threats to influence a subcontract award. Consequently, we found that P-G's nonresponsibility determination could not be reasonably supported.

In its reconsideration request DOE argues that Small's breach of P-G's conflict of interest policy was much more serious than a mere technical breach. DOE states that while John Small was telling officials of the Ralph M. Parsons Company that he was very interested in staying with the company, he was also submitting a bid, for subcontract work, to a P-G customer. In addition, DOE points to the Tri-Coast and Mar-Len statements indicating intimidation of P-G's subcontractors for Small's benefit, and poor performance. While DOE notes that Small denied these allegations, it argues, "the totality of information showing lack of integrity, past conflicts of interest, and poor performance provided reasonable information" to find Small nonresponsible.

We still disagree. The record indicates that Mr. Small had been employed by P-G as its manager at the West Hackberry site for 2 years prior to those events giving rise to the conflict of interest charge. We have no indication that during this time Mr. Small's integrity was open to question. Furthermore, we note that P-G's conflict of interest policy prohibited its employees from doing business with its customers. In fact, Mr. Small did not begin work for P-G's customer until after he had been released at his own request as manager of the West Hackberry project. While Mr. Small did submit a bid to P-G's customer about 3 weeks prior to his release, we do not think this action indicates that Mr. Small and his firm lacked integrity to perform a construction job.

With respect to the allegations of coercion and nonperformance by Small, these allegations are based on statements made by officials of Tri-Coast and Mar-Len, both of which had been subcontractors for P-G on the SPR project. These officials stated to P-G that Tri-Coast did not want to award a subcontract to Small but Small's representative threatened to jeopardize Tri-Coast's business relationship with Conoco, Tri-Coast's prime contractor on another project. Small, on the other hand, denies that its representative ever threatened Tri-Coast. Small speculates

that the Tri-Coast and Mar Len allegations were motivated by the desire to get even with Small for asking Conoco to intervene in its behalf to elicit payment from Tri-Coast for work performed by Small for Tri-Coast.

In our prior decision we recognized that the Tri-Coast/Mar-Len allegations of coercion and poor performance by Small were serious. The record before us indicated, however, that Small did complain to Tri-Coast and then to Conoco about Tri-Coast's failure to make payment to Small. Apparently, amounts in fact were due Small, since the record showed that Tri-Coast subsequently did pay $46,994 to Small. Tri-Coast's allegation of poor performance by Small arose in this context. Based on the record before us, we did not think the Tri-Coast/Mar-Len allegations had been sufficiently substantiated, particularly since neither firm was willing to submit an affidavit for the record in support of the statements they had previously made to P-G on the subject.

While DOE disagrees with our prior decision, it offers no new facts, but only argues about what conclusions should be made from the facts. We continue to think that the conflict of interest violation by Mr. Small was not serious enough to warrant rejection of his company's offer. Our conclusion remained the same even after we considered the other allegations made against Small since each was unsubstantiated and did not justify the finding of non-responsibility.

DOE's next allegations concern the standard we applied in evaluating DOE's actions. While DOE concedes our jurisdiction to review P-G's subcontract award, it argues that DOE merely approved the subcontractor selection made by the prime contractor, and under our decision in Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166, our review of DOE's approval should have been limited to determining whether that approval was tainted by fraud or made in bad faith. DOE suggests that our prior decision represented an expansion of our Optimum Systems decision as it concerns review of subcontractor protests.

We think DOE misreads our Optimum Systems decision. In that decision we listed the limited circumstances in which we will consider subcontract award protests. Among

those circumstances are where the agency directly participates in the subcontractor selection process, and where the subcontract award is made for the Government. See section 21.1(a) of our Bid Protest Procedures, 4 C.F.R. part 21 (1983).

An award is made for the Government, within the meaning of our Bid Protest Procedures, when an agency utilizes a contractor to carry out what is essentially an agency function. In the case of DOE, many of its management contracts involve carrying out its statutory functions through the use of contracts rather than through direct Government operations. Under the typical DOE management contract the prime contractor essentially provides management services. Title to all supplies and equipment procured by the management contractor passes directly from the subcontractor/supplier to DOE, and DOE is responsible for payment to the subcontractor in the event of nonpayment by the contractor. All money spent by the contractor comes from funds advanced by DOE, so that no contractor funds are involved in performing the contract. The reason we review such subcontract awards is not because the Government ultimately is responsible for them based on a principal-agent relationship, but because it is the prime contractor's duty to protect the interest of the United States by making every reasonable effort to obtain a contract on terms most favorable to him, inasmuch as the cost is to be reimbursed by the Government. 37 Comp. Gen. 315 (1957).

We reviewed this subcontract award not because we thought that DOE had directly participated in the selection process, but because it was conceded by DOE that the subcontract award was made "for" DOE by P-G. DOE still concedes that the award was made for the Government. Clearly, once we assume jurisdiction of a subcontract award protest on the basis that the award was made for the Government, the fact that the agency merely approved the award, rather than directly participated in the selection process, does not absolve the agency of all responsibility for the award. The reason is that implicit in the agency's approval of an award made for the Government is the responsibility to insure that the prime contractor complies with fundamental principles of Federal procurement. See Piasecki AirCraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10 at p. 9.

Finally DOE alleges that there is no legal basis for which it can be required to reimburse Small's proposal preparation costs. DOE points out that whatever its failings may have been with regard to the approval of P-G's actions, P-G was acting as an independent contractor and not as DOE's agent in its dealings with Small. Thus, DOE argues, the essential legal requisite for awarding proposal preparation costs, a breach of an obligation by DOE to evaluate Small's proposal fairly and reasonably, never arose.

Upon reconsideration, we find that we agree with DOE's argument, and conclude that Small is not entitled to proposal preparation costs from DOE.

The basis for the payment of proposal preparation costs is the finding of arbitrary or capricious agency action in the award of a Government contract. Decision Sciences - Claim for Proposal Preparation Costs, 60 Comp. Gen. 36 (1980), 80-2 CPD 298. The theory under which the Government is held liable for proposal preparation costs is the breach of an implied assurance given all firms submitting proposals to the Government that each proposal will be fairly and honestly reviewed. The McCarty Corporation v. United States, 499 F.2d 633 (1974); T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

In the present case, DOE did not issue the solicitation, nor did the agency make any express or implied assurances to any firm with respect to the evaluation of submitted proposals. Rather, it was P-G that issued the solicitation and, if any assurances were made as to proposal evaluation, they were made by P-G. In this respect we have consistently recognized that a DOE contract manager, such as P-G, is not a purchasing agent for the Government; this view has been supported by the Supreme Court in United States v. New Mexico et al., 455 U.S. 720 (1982). We believe that to extend the theory that holds the Government responsible for proposal preparation costs to a situation where the Government itself, or by its agent, did not reject the proposal in issue requires some legal basis on which to attribute non-Government actions to the Federal agency. See 51 Comp. Gen. 803, 806 (1972). We do not find such a legal basis here.

Our prior decision is affirmed in part and reversed in part.

for Shelton J. Dorlan
Comptroller General
of the United States