



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ARS Construction Company

File: B-230293

Date: May 18, 1988

DIGEST

Protest against award of subcontract by prime contractor of National Science Foundation will not be considered by General Accounting Office since the contract for construction was not to be performed on government-owned property and that the prime contractor was not otherwise a mere conduit between the government and the subcontractor.

DECISION

ARS Construction Company protests the award of a subcontract to Tee Pee Engineering, Inc., by Associated Universities Inc. (AUI), for work at the Very Long Baseline Array Project, Owens Valley, California.

The protest is dismissed.

AUI is a prime contractor to the National Science Foundation (NSF) for the management, operation and maintenance of the National Radio Astronomy Observatory. AUI's contract calls for AUI, subject to NSF approval, to design, construct and operate a radio telescope system consisting of a very long baseline array of antennas. Under the contract, NSF requires AUI to provide advance notification of any proposed subcontract for construction and written approval of NSF is required before the award of any subcontract for construction in excess of \$25,000.

NSF contends that our Office should not assume jurisdiction of this subcontract protest because the subcontract was not made by or for the government. Our Bid Protest Regulations provide that we will not consider subcontractor protests except where the subcontract is by or for the government. 4 C.F.R. § 21.3(m)(10) (1988).

In support of its position that we should assume jurisdiction, ARS cites, Burn Construction Co. Inc., B-192196, Aug. 21, 1978, 78-2 CPD ¶ 139, which also involved a protest of a subcontract protest under AUI's contract with NSF for management, operation and maintenance of the National Radio

Astronomy Observatory, where we assumed jurisdiction of the protest. In that decision, we assumed jurisdiction because the circumstances indicated the government's active and significant involvement, prior to the approval of a subcontract, in the subcontractor selection. That decision was issued, however, prior to the enactment of the Competition in Contracting Act of 1984 (CICA) 31 U.S.C. §§ 3551-3556 (Supp. III 1985), which limits our bid protest jurisdiction to protests concerning solicitations issued by federal agencies.

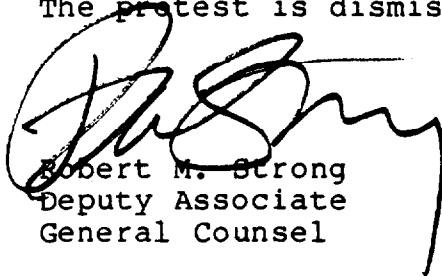
Prior to CICA's enactment, we reviewed subcontractor protests in which it was found the government so actively or directly participated in the selection of the subcontractor that the net effect was to cause or control the prime contractor's selection or rejection of a particular firm. See Optimum Systems Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD ¶ 166. We do not believe, however, that such cases involve solicitations issued by federal contracting agencies within the meaning of CICA's definition of our bid protest jurisdiction. Rohde & Schwarz-Polarad, Inc.--Reconsideration, B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. Accordingly, our determination that we had jurisdiction to entertain subcontractor bid protests under the theory expressed in Burn Construction Co., B-192196, supra is no longer being followed. Rohde & Schwarz-Polarad, Inc.--Reconsideration, B-214108.2, supra.

We consider a subcontract to be by or for the government when the prime contractor principally provides large-scale management services to the government and, as a result, generally has an ongoing purchasing responsibility. In effect, the prime contractor acts as a middleman between the government and the contractor. American Nuclear Corp., B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503. Such circumstances may exist where the prime contractor operates and manages a government facility, Westinghouse Electric Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145, otherwise provides large-scale management services, Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44, serves as an agency's construction manager, C-E Air Preheater Co., Inc., B-194119, Sept. 14, 1979, 79-2 CPD ¶ 197, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. University of Michigan, et al., B-225756, June 30, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 643. Except in these limited circumstances, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered to be by or for the government. Poitra Construction Co., B-230769, Apr. 19, 1988, 88-1 CPD ¶ ____.

In applying the above rules, we note that the construction under this subcontract is to take place on land subleased to AUI by the California Institute of Technology under its lease from the County of Los Angeles. We have held that in order for a subcontract to be "for" the government, the government must own the land upon which the facility is being operated, American Nuclear Corp., B-228082, supra. aff'd at American Nuclear Corp.--Reconsideration, B-228028.2, Feb. 11, 1988, 88-1 CPD ¶ 138, or there must be some other indicia, as noted above, that the prime contractor is acting as a mere conduit between the government and the subcontractor.

The situation here is similar to that found in Control Data Corporation, B-186672, Dec. 15, 1976, 76-2 CPD ¶ 492, in which a subcontractor protest against an award by a prime contractor of NSF was found not to be for the government since the equipment to be purchased was not to be installed at a government-owned plant.

The protest is dismissed.



Robert M. Strong
Deputy Associate
General Counsel