



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** United Telephone Company of the Northwest--  
Reconsideration

**File:** B-246333.2

**Date:** February 19, 1992

Thomas J. Madden, Esq., Venable, Baetjer, Howard & Civiletti, for the protester.  
Thomas P. Humphrey, Esq., Davis, Graham & Stubbs, for US WEST Communication Services, Inc., and Richard L. Moorhouse, Esq., Dannels, Duvall & Porter, for Westinghouse Hanford Company, interested parties.  
Paul Lewis, Esq., Department of Energy, for the agency.  
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Dismissal of an untimely protest of a 1989 subcontract award, filed at the General Accounting Office in 1991, is affirmed; protest of a subcontract award is generally measured from the prime contractor's award selection, not the government's approval of the selection.

### DECISION

United Telephone Company of the Northwest requests reconsideration of our decision in United Tel. Co. of the Nw., B-246333, Dec. 18, 1991, 91-2 CPD ¶ \_\_\_\_, in which we dismissed United's protest against the award of a purchase order to US WEST Communications Services, Inc. for the acquisition of a telecommunications system for the Department of Energy (DOE) Hanford Site. Westinghouse Hanford Company, a Hanford Site management and operations (M&O) contractor, conducted the procurement "by or for" DOE and advised United that it had selected US WEST for award on March 2, 1989. We dismissed the protest as untimely because United failed to file at our Office within 10 days of the subcontract award decision.

We affirm the dismissal.

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On April 27, 1989, after pursuing an agency-level protest, United protested to the General Services Administration Board of Contract Appeals (GSBCA) that a conflict of interest tainted Westinghouse's award selection of US WEST, a selection which DOE was prepared to approve. After determining that it had jurisdiction, the GSBCA proceeded to trial on the merits and sustained United's protest. United Tel. Co. of the Nw., No. 10031-P, July 25, 1989, 89-3 BCA ¶ 22,108. The GSBCA directed award to United as the only remaining acceptable offeror.

US WEST and Westinghouse appealed the GSBCA's decision to the Court of Appeals for the Federal Circuit. DOE, through the Department of Justice, and United argued for the affirmance of the GSBCA decision. On July 29, 1991, the Court of Appeals vacated the GSBCA's decision on jurisdictional grounds without reaching the merits of United's bid protest. US WEST Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991). Westinghouse then awarded the contract to US WEST on October 8, 1991, having obtained DOE's approval. United protested the award to our Office on October 18, 1991.

We found this protest fell under the rule established in System Automation Corp., B-224166, Oct. 29, 1986, 86-2 CPD ¶ 493, where we dismissed as untimely a protest previously filed at the GSBCA but vacated for lack of jurisdiction by the Court of Appeals. We found that the forum election rule established in the Competition of Contracting Act of 1984 (CICA), 31 U.S.C. § 3552 (1988), did not contemplate that a filing at the GSBCA would toll the General Accounting Office's protest timeliness rules. Thus, we dismissed the protest because United did not file within 10 days of Westinghouse's subcontract award decision.

United argued that it was entitled to await DOE's approval of the subcontract award before protesting to our Office in view of the GSBCA decision sustaining the United protest and the DOE litigation position before the Court of Appeals requesting affirmation of the GSBCA decision. We found that the timeliness of a subcontract award protest should be measured from the time of the subcontract award decision, not the government approval of such decision. This position is consistent with our bid protest authority under CICA, which authorizes our Office to consider "written objection[s] by an interested party to a proposed award or the award of such a contract." 31 U.S.C. § 3551(1). That provision does not provide for review of the approval of contract awards.

United renews its contention that agency approval of a subcontract award decision is also a protestable event on

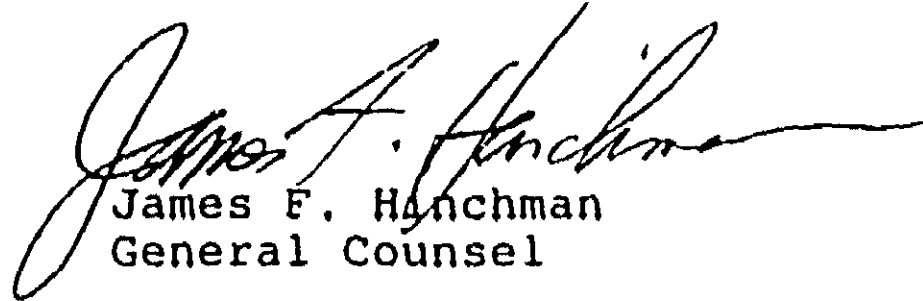
which to base protest timeliness, citing J.F. Small & Co., Inc., B-207681.2, Dec. 6, 1982, 82-2 CPD ¶ 505, aff'd in part and rev'd in part, J.F. Small & Co., Inc.--Recon., B-207681.3, July 14, 1983, 83-2 CPD ¶ 89. In that case, the protester challenged a nonresponsibility finding by an M&O contractor responsible for awarding a contract "by or for" the Department of Energy. As noted by United, a secondary issue in the J.F. Small decision was the reasonableness of DOE's approval of the subcontract award. Prior to enactment of CICA, which provided authority to award bid preparation costs, we awarded such costs only after finding arbitrary or capricious agency action, not based upon the action of the contractor that acted for the agency. T&H Co., 54 Comp. Gen. 1021 (1975), 75-1 CPD ¶ 345. Under CICA, entitlement to costs may arise from arbitrary action by the contractor awarding the protested contract. Westinghouse Elec. Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145. The secondary issue discussed in J.F. Small did not relate to our authority to review the protest, which was predicated on the fact that an M&O contractor conducted the procurement "by or for" DOE. It only concerned whether we would award bid preparation costs. The protestable event in that case was the contractor's procurement decision, not the DOE approval of that action.

United also argues that the degree of DOE involvement in this procurement was much greater than represented by Westinghouse and DOE. As discussed in our prior decision, neither DOE's alleged control of the subcontractor selection nor its approval of the subcontract award decision establishes our jurisdiction to review subcontractor protests of the agency's M&O contractor. The contract between the M&O contractor and DOE establishes that the contractor effectively awards subcontracts on behalf of the government. Ridek Land & Dev. Co., B-245434, Dec. 30, 1991, 91-2 CPD ¶ \_\_\_\_\_. Thus, it is not DOE's approval that is at issue and is protestable. Even where we review subcontractor protests because the government's involvement is so pervasive that it effectively takes over the procurement, including the evaluation of proposals and source selection, we believe that it is the contractor's action that constitutes a protestable event. See St. Marys Hosp. & Med. Center at San Francisco, CA, B-243061, June 24, 1991, 91-1 CPD ¶ 597. Given the wide variety of agency involvement in the activities of contractors purchasing "by and for" the government, the contractor's actions provide a finite and readily identifiable point after which protesters must expeditiously file challenges.

United has not shown any errors of law or fact upon which to change our view that the protestable event in this protest is the subcontract award selection, not the agency's

approval of the selection.<sup>1</sup> Since United's protest concerns the validity of the 1989 source selection, its 1991 protest to our Office was untimely filed under our Bid Protest Regulations and was properly dismissed.

The dismissal is affirmed.



James F. Hanchman  
General Counsel

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<sup>1</sup>Thus, we need not consider United's additional arguments relating to the DOE approval process, e.g., that the approval of US WEST constituted an affirmative responsibility determination not based upon current information and that it could not reasonably anticipate the approval given DOE's litigation position before the Court of Appeals.