



Comptroller General  
of the United States

20255

Washington, D.C. 20548

## Decision

**Matter of:** Landis & Gyr Powers, Inc.

**File:** B-260485

**Date:** May 5, 1995

### DECISION

Landis & Gyr Powers, Inc. protests the termination of its subcontract for an energy management control system (EMCS) by John J. Kirlin, Inc., the prime contractor on a construction contract awarded by the General Services Administration (GSA) under solicitation No. GS-03P-94-DXC-0013. GSA contends that our Office has no jurisdiction over the subcontract award. We agree.

The protest is dismissed.

Kirlin's prime contract was for the renovation and upgrading of the Operations Building in the Social Security Administration Complex, Woodlawn, Maryland, including installation of an EMCS. Under the terms of its contract, within 14 days of the notice to proceed with the contract, Kirlin was to provide GSA with prequalification data for the EMCS that it proposed to install. The notice to proceed was issued on October 4, 1995. Kirlin had subcontracted with Landis to provide an EMCS and on December 5, Kirlin submitted to GSA data on Landis' system. This data was reviewed by GSA technical representatives, who rejected Landis' EMCS after identifying 60 areas in which the data failed to show compliance with the technical requirements in the contract. Kirlin resubmitted the data on January 20, 1995. The technical representatives again found Landis' data deficient, and on January 24, GSA notified Kirlin that it was to submit EMCS data from a firm other than Landis. On January 27, in response to Kirlin's request for the names of three EMCS manufacturers, GSA informed Kirlin that the responsibility for the selection of sources for the EMCS belonged to Kirlin, not GSA. The subcontract was eventually awarded to Johnson Controls.

Landis contends that we have jurisdiction to determine whether its subcontract was improperly rejected since GSA essentially controlled all matters relating to the award of the subcontract--it reviewed the technical submissions of Landis; it rejected, over the objections of Kirlin, Landis' submissions; and it directed Kirlin to award the subcontract

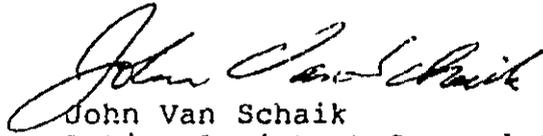
to Johnson. Thus, according to Landis, GSA performed all the substantive aspects of awarding the subcontract, with Kirlin acting only as a "middleman" in the decision and then only by virtue of its contractual status with the agency. See St. Mary's Hosp. and Medical Center of San Francisco, Cal., 70 Comp. Gen. 579 (1991), 91-1 CPD ¶ 597 and University of Michigan; Industrial Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(1) (1988), this Office has jurisdiction to decide protests involving contract solicitations and awards by federal agencies. We have interpreted this provision to authorize us to decide protests of subcontract solicitations and awards only when the subcontract is "by or for the government." 4 C.F.R. § 21.3(m)(10) (1995). A subcontract is considered to be by or for the government where the prime contractor essentially is acting as a middleman or a conduit between the government and the subcontractor. 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 Elec. 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; Industrial Training Sys. Corp., *supra*. Except in these limited circumstances in which the prime contractor is basically acting as the government's agent, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered "by or for the government". Michael L. Cook, Inc.--Recon., B-234940.2, May 11, 1989, 89-1 CPD ¶ 444.

We do not believe this case falls within any of the above limited circumstances. A review of Kirlin's contract indicates that Kirlin is not providing large-scale management services as described above, but rather is performing a construction project with a limited purpose. See Poitra Constr. Co., 57 Comp. Gen. 384 (1988), 88-1 CPD ¶ 386. While Landis alleges that the government effectively directed the selection of the subcontractor, even if true, this alone would not indicate that the prime contractor was acting as the government's agent in the procurement, which is the only basis upon which we would review the subcontract award. Ames Co., Inc.--Recon., B-233314.2; B-233315.2, Dec. 15, 1988, 88-2 CPD ¶ 597. In any event, we note that there is no evidence that Kirlin's original decision to obtain the EMCS from Landis was made with any agency input.

Although GSA disapproved the technical data submitted by Landis, this was done pursuant to a provision in Kirlin's GSA contract which permitted GSA to assure that the EMCS being provided met the contract specifications. Thus, by its actions here, GSA did not direct the agency to award a subcontract to a particular firm, with the prime contractor acting as a conduit; rather, GSA simply administered the prime contract so as to require the rejection of the submissions of Landis under a subcontract that had already been awarded by the prime contractor. Under the circumstances, GSA's conduct in this case provides no basis for our Office to assume jurisdiction.

The protest is dismissed.



John Van Schaik  
Acting Assistant General Counsel