



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Automatic Control Solutions, Inc.

File: B-261961

Date: July 18, 1995

DECISION

Automatic Control Solutions, Inc. protests the award of a contract under request for quotations No. 259665-5736 by EG&G Mound acting as a management and operating (M&O) contractor for the Department of Energy (DOE).

We dismiss the protest.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 *et seq.* (1988 and Supp. V 1993), authorizes us to resolve bid protests concerning solicitations issued by federal contracting agencies. We have interpreted the Act to authorize our review of subcontract awards where, as a result of the government's involvement in the award process or due to the contractual relationship between the prime contractor and the government, the subcontract is in effect awarded on behalf of the government. 4 C.F.R. § 21.3(m)(10); Edison-Chouest Offshore, Inc.; Polar Marine Partners, B-230121.2; B-230121.3, May 19, 1988, 88-1 CPD ¶ 477. Pursuant to this interpretation, we have traditionally reviewed procurements by prime contractors operating and managing DOE facilities, measuring the propriety of their actions against the terms of their prime contracts, their own-agency approved procedures, and the "federal norm." See Maxwell Laboratories, Inc., B-253737, Oct. 19, 1993, 93-2 CPD ¶ 239; United Telephone Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374, *aff'd*, Dept. of Energy-Recon.; et al., B-246977.2; *et al.*, July 14, 1992, 92-2 CPD ¶ 20.

However, this review role was called into question by U.S. West Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), which held that under CICA the General Services Administration Board of Contract Appeals does not have jurisdiction over protests of subcontract awards. Construing statutory language basically identical to that applicable to the General Accounting Office, the court held that the Board was not empowered to hear a protest of a procurement conducted by a DOE M&O contractor because the procurement was not a federal agency procurement. We subsequently declined to rule on a challenge to our

064277 / 154888

protest jurisdiction in this area, pointing out that we would consider the protest in any event because the DOE Acquisition Regulation (DEAR), 48 C.F.R. § 970.7107 (1994), provides for our review of such protests. See AT&T, B-250516.3, Mar. 30, 1993, 93-1 CPD ¶ 276. DOE has now revised its regulations, eliminating requirements for applying the "federal norm" standard to M&O procurements and further eliminating the language providing for our review of its M&O contractor procurement protests. See 60 Fed. Reg. 28737 (1995). The revisions became effective on June 2, 1995.

Meanwhile, on January 31, 1995, we issued proposed revisions to our Bid Protest Regulations. See 60 Fed. Reg. 5871 (1995). The proposed revisions eliminate the current regulatory language in 4-C.F.R. § 21.3(m)(10) regarding our review of subcontractor awards and provide instead for our review of subcontract protests only where we are requested in writing by the federal agency involved to do so. See 60 Fed. Reg. 5871, proposed section 21.5(h). We explained that in light of the U.S. West decision and the absence of any language in the recently-enacted Federal Acquisition Streamlining Act of 1994, Pub. Law 103-355, Oct. 13, 1994, addressing the matter, we considered it appropriate to treat subcontract award protests as "non-statutory," that is, subject to our review upon the request of the federal agency awarding the prime contract.

Although our revised Regulations have not yet been issued in final form, our concern about the effect of the U.S. West decision remains. Moreover, since DOE's regulations no longer provide for our review of M&O contractor procurements, and since DOE has not otherwise requested our review, we do not think it appropriate to continue our practice of reviewing protests of procurements by DOE M&O prime contractors. See Geo-Centers, Inc., B-261716, June 29, 1995, 95-1 CPD ¶ _____. Accordingly, the protest is dismissed.



Ronald Berger
Associate General Counsel