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QUESTIONS CONCERNING DOE'S ASSIGNMENT OF OPERATING AND TESTING --ETC(U)
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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

ENERGY AND MINERALS
DIVISION

B-201346.2

The Honorable Ronald (Bo) Ginn
House of Representatives

Dear Mr. Ginn:

Subject: Questions Concerning DOE's Assignment of
Operating and Testing Responsibilities
for OTEC-1. (EMD-81-92)

By letter dated December 3, 1980, you requested that we examine several contractual procedures used by the Department of Energy (DOE) in assigning operating and testing responsibilities for its Ocean Thermal Energy Conversion (OTEC) test facility, called OTEC-1. These responsibilities were assigned to the Energy Technology Engineering Center (the Center) which is a Government-owned facility operated under contract for DOE by Rockwell International Corporation. Your request indicated that your interest in this matter stemmed from a protest filed with our Office of the General Counsel on November 25, 1980, by Global Marine Development, Inc. 1/ The protest centered on the following questions, which, as agreed with your office, we addressed during our review: (1) was the assignment prohibited by Rockwell's contract to operate DOE's Center; (2) why was the assignment made without competition or justification; and (3) was the assignment in violation of DOE's conflict-of-interest regulations?

We conducted our work at DOE headquarters in Washington, D.C.; the DOE San Francisco Operations Office in Oakland, California; the Center located in Canoga Park, California; and Global Marine Development, Inc., in Irvine, California. We

1/ As you know, we delayed our review pending completion of our Office of the General Counsel's work relating to the protest. On May 7, 1981, our Office dismissed the protest because it was untimely and raised no significant issue related to procurement practices or procedures. (See enclosure I.)

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interviewed DOE and contractor officials, and reviewed and analyzed the pertinent procurement documents, regulations, and procedures applicable to these questions.

We concluded from our review that DOE properly followed its procurement and related administrative procedures. Specifically we found that DOE's assignment of operating and testing responsibilities to the Center (1) was not prohibited by Rockwell's contract to operate the Center; (2) was assigned instead of competed because of cost considerations and the Center's existing involvement; and (3) was not in violation of DOE's conflict-of-interest regulations. The assignment was essentially within the realm of DOE's normal process for administratively assigning tasks to contractors having responsibility for operating Government facilities, such as the Center. This administrative process which is allowable under Federal procurement regulations is not widely known in that DOE seems to be one of few Federal agencies that uses it. This unfamiliarity may account for a misinterpretation of applicable procedures on the part of Global Marine.

The following sections provide background and briefly address each question raised by the bid protest.

BACKGROUND

OTEC is one of the potential energy sources being developed to provide alternatives for reducing the Nation's dependence on imported oil. When developed, OTEC is to use the temperature variants of the ocean to produce electricity and energy intensive products. OTEC-1 is a major part of DOE's developmental program for OTEC. It is a floating test facility designed primarily for conducting sea tests of the cleanability and performance of heat exchangers, a major component of OTEC systems. Related OTEC subsystems are also being tested.

OTEC-1 was to be accomplished in three phases; design (phase I); construction (phase II); and operations and testing (phase III). In July 1977, DOE contracted with TRW, Inc. to design and develop the heat exchanger to be used on OTEC-1. In September 1978, DOE contracted with Global Marine to refurbish, retrofit, and deploy an old Navy ship with OTEC subsystems including TRW's heat exchanger. Together Global Marine and TRW were the OTEC-1 design and construction contractors for phases I and II with Global Marine having overall responsibility for integrating its and TRW's work. Global Marine's

contract also included an option for performing work in phase III.

DOE selected the Center in March 1978 to be responsible for technical management and assistance during all three phases of the project. Under a cost reimbursement contract with DOE, Rockwell on behalf of the Government is to manage, administer, and operate the Center, which is described in the contract as a research and development facility.

In May 1979 DOE met with Global Marine and the Center to discuss their probable roles in phase III operations should DOE decide to exercise Global Marine's contract option. Based on prepared statements of work which were subsequently submitted, the Center apparently would have been responsible for operating most of the OTEC-1 subsystems, as well as for providing technical management and project control; and, Global Marine would have been primarily responsible for operating and maintaining the OTEC-1 ship and related support services. In addition, Global Marine would have been responsible for operating and monitoring some test equipment.

Subsequent events, including cost overruns and funding limitations, resulted in changes in DOE's approach for phase III. Because of a need to conserve program funds in 1979 and 1980, DOE explored alternative ways of performing phase III including (1) having the Department of the Navy operate the OTEC-1 ship and provide support services under an interagency agreement, (2) soliciting new contracts for this work, or (3) assigning responsibility for the work to the Center and authorizing a Center subcontract.

In a letter dated March 5, 1980, DOE notified Global Marine that it would not exercise the option in Global Marine's contract. Rather DOE had decided to involve the Navy in phase III operations. DOE received inquiries from Global Marine and several Congressmen on this decision. Subsequently, the Navy withdrew from participation in the project and DOE eventually decided to proceed with the work through a Center subcontract. On June 20, 1980, DOE assigned the Center overall responsibility for phase III of OTEC-1, and directed the Center to competitively subcontract for an OTEC-1 ship operator. DOE officials informed us that although ship operations are supportive of the Center's technical management responsibilities, they directed the Center to subcontract this effort because the Center did not have capability to do the work itself. The Center's request for proposals was issued on August 7, 1980, and called

for receipt of proposals by September 12, 1980. Global Marine submitted its initial proposal on September 12, 1980, and its final offer on October 17, 1980.

Only Global Marine and another firm, Tracor Marine, Inc. (Tracor), submitted offers to the Center. Both offerors were deemed technically qualified to perform the work, but the Center recommended award to Tracor because Tracor's price--at \$7.6 million--was \$1.6 million below Global Marine's price. With approval of DOE's San Francisco Operations Office, the Center awarded a contract to Tracor on November 13, 1980. Afterwards Global Marine protested.

WAS DOE'S PHASE III ASSIGNMENT
PROHIBITED BY ROCKWELL'S CON-
TRACT TO OPERATE THE CENTER?

DOE's assignment of phase III to the Center was made through an administrative process which authorized Rockwell to perform the work under its existing contract to operate the Center. Neither this contract nor DOE's related administrative procedures prohibited this task from being assigned.

In its protest, Global Marine stated that the scope of work in Rockwell's contract to operate the Center did not indicate that Rockwell is to provide any services to DOE other than in a management or technical assistance capacity. In this regard, Global Marine said that DOE's actions in assigning the Center overall responsibility for phase III was an unjustified expansion of Rockwell's contract to operate the Center.

Since early 1978, the Center has performed the technical management and assistance work for OTEC-1 at both the Center and aboard ship, as part of Rockwell's contract to operate the Center. In addition to this work, the overall responsibility for phase III, including OTEC-1 ship operations, was assigned on June 20, 1980, to the Center through an administrative process using task assignment documents and financial plans as supplemented by letters from applicable DOE project offices. 1/ This administrative process which is allowable under Federal procurement regulations is not widely known in

1/ This administrative process is commonly known as the "189a process" after the form number used in this process.

that DOE seems to be one of few Federal agencies that uses it. This unfamiliarity may account for a misinterpretation of applicable procedures on the part of Global Marine.

This administrative process is used by DOE to authorize or assign work which is within the scope of an existing contract to operate a DOE facility. DOE assigns work to its facilities based on considerations such as the needs of its programs, the capacity of the facility, the qualifications of facility personnel, and the funds available to DOE for the work. DOE uses this same administrative process to funnel billions of dollars in program funds each year either to or through its vast network of Government-owned contractor-operated facilities.

Our review of Rockwell's contract disclosed that its scope is broad enough to encompass--not prohibit--the work DOE assigned to the Center. The contract requires Rockwell to manage, operate, and maintain the Center's facilities. This includes providing assistance and engineering consultation to DOE and performing research and development in support of the Center's assigned functions. With respect to such assigned functions, other provisions of the contract provide that the Center will perform whatever functions it and DOE agree to in writing from time to time. Since the assignment of phase III to the Center was made in writing via the previously mentioned administrative process, this requirement was met. Thus, the assignment was within the scope of Rockwell's contract.

WHY WAS THE ASSIGNMENT MADE
WITHOUT COMPETITION OR
JUSTIFICATION?

Although Global Marine raised this question, as previously mentioned, the Center was assigned responsibility for phase III of OTEC-1 through an existing contract between DOE and Rockwell for operating the Center. This assignment was within the broad scope of that contract and was made by DOE because of cost considerations and the Center's existing involvement in the project.

In its bid protest Global Marine believed that DOE's assignment of responsibility for phase III to the Center was made without obtaining competition or justification. Global Marine stated that it violated fundamental Federal procurement policy of obtaining competition to the maximum extent practicable in all contracts.

Our review of the circumstances surrounding DOE's assignment of phase III work to the Center showed that DOE did not compete the assignment because it believed that the assignment was within the scope of the existing Rockwell contract. As mentioned in the preceding section, our work showed that the type of work involved in phase III was within the broad scope of Rockwell's contract. In addition, DOE's related procurement documents indicated that the assignment was made because of cost considerations and the Center's existing involvement in the project.

WAS THE ASSIGNMENT IN VIOLATION
OF DOE'S CONFLICT-OF-INTEREST
REGULATIONS?

DOE's assignment to the Center for phase III did not violate DOE's conflict-of-interest regulations. In addition, our review showed that Rockwell's contract with DOE contains the essential provisions for preventing such conflicts from arising.

Global Marine stated that because the Center performed consulting and technical assistance services to DOE on phases I and II of OTEC-1 and then was assigned responsibility for phase III, DOE's conflict-of-interest regulations were violated. Global Marine's statement was based on section 9-1.5408.2(b) of DOE's procurement regulations which states that a firm providing technical consulting or management support services under contract to DOE is ineligible to participate in further DOE contracts or proposals which stem directly from that firm's contract.

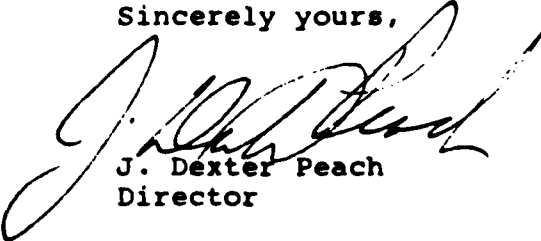
The section of the regulations cited by Global Marine does not apply in this case because Rockwell's contract is for operating a Government facility--the Center--and not solely for providing technical consulting or management support services. Nevertheless, in cases such as this, our review showed that DOE has other regulations for avoiding conflict-of-interest situations from arising. These regulations require contracts for operating DOE facilities to include appropriate conflict-of-interest provisions. These provisions, in effect, are designed to preclude a private firm from using its contract to (1) obtain a competitive advantage over other firms in obtaining further Government work and (2) render partial or bias assistance and advice. Rockwell's contract contained all of the essential provisions.

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As requested by your office, we did not obtain official DOE comments on this report; however, as further requested, we discussed with DOE officials the report's contents. These officials had no substantive comments to offer.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days from the date of its issuance. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,



J. Dexter Peach
Director

DECISION

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

FILE: B-201346

DATE: May 7, 1981

MATTER OF: Global Marine Development, Inc.

DIGEST:

Protest against Department of Energy (DOE) having operating contractor conduct subcontract competition rather than direct procurement by DOE filed after closing date for receipt of proposals is untimely under 4 C.F.R. § 20.2(b)(1) (1980) since relationship of parties was apparent from solicitation. Contention that requirement was beyond scope of operating contract and should have been competed is not significant issue under 4 C.F.R. § 20.2(c) (1980) because GAO has previously ruled in area of contract modification versus new procurement.

Global Marine Development, Inc. (GMDI), has protested the award of a contract to Tracor Marine Inc. (Tracor) under request for proposals (RFP) No. PE80-11897 issued by the Energy Technology Engineering Center (ETEC).

ETEC is a Government-owned facility operated by Rockwell International (RI) under Department of Energy (DOE) operating contract No. DE-AM03-76SF007C0.

In 1978, GMDI was awarded a contract by DOE for the design and conversion (phases I and II) of a Government-owned tanker into an engineering test facility to be used in at-sea testing of ocean thermal energy conversion subsystems and components. The contract contained an option for the system operation and support, designated as

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phase III, following the completion of phases I and II. Under phases I and II, RI was the test director for the program.

After completion of phases I and II, DOE determined not to exercise the option under GMDI's contract for phase III. After exploring various alternatives, DOE decided to add the ship (designated the SS Energy Converter) as part of the ETEC facilities, operated by RI, and have RI conduct a competitive procurement for phase III. It is the award of this subcontract for phase III which GMDI has protested.

On August 7, 1980, RI issued the RFP with an initial proposal due date of September 12, 1980. GMDI submitted its initial proposal in a timely manner and submitted its best and final offer on October 17, 1980. One other offer was received from Tracor and on November 13, 1980, award was made to Tracor by RI as the lowest priced, technically acceptable offer. GMDI protested to our Office on November 25, 1980.

GMDI's protest alleges numerous shortcomings and improprieties in the instant procurement process. Initially, GMDI contends that adding this work to RI's existing operating contract rather than having a competition conducted by DOE leading to the award of a prime contract was improper as the task was beyond the scope of RI's operating contract. Secondly, because of RI's prior role as test director under phases I and II, GMDI alleges a conflict of interest is apparent by RI assuming the role of prime contractor for phase III. Lastly, GMDI contends that because of its experience under phases I and II, a duplication of the services and expertise it possesses by Tracor to perform phase III will cost \$4 million.

DOE contends that GMDI's protest is untimely under our Bid Protest Procedures (4 C.F.R. part 20 (1980)) and not for consideration on the merits. DOE argues that the GMDI protest is based on the fact that RI was acting as a prime contractor for phase III, which was apparent from the RFP issued by RI and from other correspondence GMDI received under Freedom of Information Act requests and, therefore,

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to be timely, the protest should have been filed prior to the closing date for receipt of initial proposals, September 12, 1980. (4 C.F.R. § 20.2(b)(1) (1980)). GMDI's protest was not filed with our Office until November 25, 1980, after GMDI received a letter dated November 14, 1980, advising its best and final offer had not been accepted.

GMDI argues that it was not aware of the changed role of RI from test director to prime contractor for phase III from the contents of the RFP or from oral discussions conducted by RI during the procurement. Because of the alleged confusion in this area, GMDI contends that the role of RI was not made clear until GMDI received an announcement of December 15, 1980, that DOE was adding the SS Energy Converter as part of the Government-furnished property under the ETEC operating contract.

Our review of the record shows that GMDI knew or should have known of the basis for its protest from the RFP and other documents available to it prior to the submission of proposals. GMDI's original contract for phases I and II, with the option for phase III, was a direct DOE contract, awarded by DOE personnel. The instant RFP was issued on RI letterhead, offerors were told to submit proposals to RI for evaluation and discussions, and the RFP stated:

"Rockwell International, Energy Systems Group, Energy Technology Engineering Center (ETEC), is under contract to the Department of Energy to conduct an operational test program for performance of at-sea demonstrations of Ocean Thermal Energy Conversion (OTEC) technology."

We believe this clearly showed that RI was the prime contractor in the process of awarding a subcontract. Moreover, we do not find the announcement of December 15, 1980, 1 month after GMDI's protest was filed with our Office, made GMDI aware of its basis of protest.

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Moreover, GMDI has submitted a chart which it alleges shows the reduction in work from the original phase III GMDI contract, through a negotiated statement of work (SOW) in November 1979 with DOE when it was expected that the phase III option would be exercised and concluding with the SOW for the instant RFP which it states shows the reduction in the scope of the phase III task. We believe this chart shows the alleged changes, which GMDI contends tainted the procurement, were apparent from the RFP.

Therefore, we find the protest of GMDI to have been untimely filed under 4 C.F.R. § 20.2(b)(1) (1980).

GMDI alleges that even if its protest is untimely, our Office should consider the protest on the merits since it involves a significant issue under 4 C.F.R. § 20.2(c) (1980), which states that our Office will consider an untimely protest where it raises issues significant to procurement practices or procedures.

GMDI argues that the instant procurement was based on DOE's procedure of utilizing a form 189a, or a task order to change or add work to an operating contractor's contract, which our Office has never ruled on and which constitutes the award of a contract without competition.

While GMDI has phrased its protest as involving the use by DOE of its form 189a, the crux of the protest is whether the change or addition to RI's operating contract was beyond the scope of the existing contract, thereby necessitating a direct competitive procurement. Our Office has ruled in this area on numerous occasions and does not find it significant as to require waiving the filing requirements contained in our Bid Protest Procedures. Webcraft Packaging, Division of Beatrice Foods Co., B-194087, August 14, 1979, 79-2 CPD 120; American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD 136; 50 Comp. Gen. 540 (1971); Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278.

Finally, regarding GMDI's contention that having Tracor perform phase III will result in a duplication of \$4 million of services and expertise, DOE has

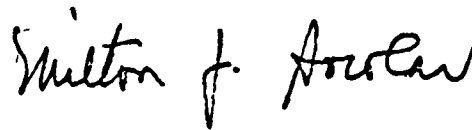
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ENCLOSURE I

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responded that the only special training Tracor personnel needed was evaluated at a cost of \$57,500 and this amount was added to Tracor's proposed cost. Since phase III is different from phases I and II performance, we have no objection to this evaluation factor and the subsequent award to Tracor.

The protest is dismissed in part and denied in part.

A handwritten signature in cursive script, reading "Milton F. Arnold".

Acting Comptroller General
of the United States