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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Performance Excavators, Inc.

File: B-291771

Date: March 17, 2003

Bonnie Freeman, Esq., Senneff Freeman & Bluestone, for the protester.
Brian A. Bannon, Esq., and David A. Leib, Esq., Blank Rome, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

The Presidio Trust, a wholly-owned government corporation, is not subject to the General Accounting Office's bid protest jurisdiction under the Competition in Contracting Act of 1984 (CICA), since the Trust is statutorily exempt from all federal procurement laws and regulations but for certain enumerated exceptions that do not include CICA.

DECISION

Performance Excavators, Inc. (PerfEx) protests the Presidio Trust's award of a contract to ERRG, Inc. and Associates, Joint Venture (ERRG), under invitation for bids (IFB) No. IFB-2002-016, for environmental cleanup. PerfEx asserts that award to ERRG was improper because ERRG did not satisfy a solicitation requirement for a specific business license.

We dismiss the protest for lack of jurisdiction.

The Presidio Trust is a wholly-owned government corporation established to exercise administrative jurisdiction over the Presidio, a former military post in San Francisco, and to manage the leasing, maintenance, rehabilitation, repair and improvement of property within the Presidio under its administrative jurisdiction. Omnibus Parks and Public Lands Management Act of 1996 (Act), Pub.L. No. 104-333, §§ 103(a), (b), 104(a)-(c), 110 Stat. 4093, 4098, 4101 (1996). The IFB contemplated award of a contract for environmental remediation of a landfill and fill site on the Presidio, and required firms to possess a valid Class A Hazardous California State Contractor's License at the time of bid opening. IFB at 9.

After bid opening, but prior to award, PerfEx advised the contracting officer that it believed that one of the two companies forming the ERRG joint venture (Denbeste Transportation, Inc.), the apparent low bidder, did not hold a valid California General Engineering Contractor's License with Hazardous Waste and Remedial Actions Certification; according to PerfEx, that company's license was defective because the designated responsible managing employee required by California law in fact was not a bona fide employee, and thus the joint venture's license also was defective. In response to PerfEx's allegations, the Trust: (1) verified on the state licensing board's website, and then confirmed in a telephone call to the board, that the licenses of ERRG and each of its component companies were current, active and in good standing, and (2) verified with Denbeste that the designated responsible managing employee was a bona fide employee. Agency Report at 3. Upon learning of the ensuing award to ERRG, PerfEx filed an agency-level protest. When that protest was denied, PerfEx filed this protest with our Office.

The Presidio Trust asserts that it is not subject to our bid protest jurisdiction, and that the protest therefore should be dismissed. We agree.

Under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a Federal agency." 31 U.S.C. § 3551(1) (2000). CICA provides that the term "Federal agency" has the meaning given in 40 U.S.C. § 102 (2000). 31 U.S.C.A. § 3551(3) (West Supp. 2002). Section 102 of Title 40 defines the term "Federal agency" as including any "executive agency," which it defines as including any executive department or independent establishment in the executive branch of the government, and any wholly-owned government corporation. 40 U.S.C. § 102(4), (5). Therefore, the Trust, as a wholly-owned government corporation (Pub.L. No. 104-333, § 103(a), 110 Stat. 4093, 4098), is an executive agency that otherwise would be subject to our bid protest jurisdiction under CICA.

However, the statute establishing the Trust expressly limits the extent to which the Trust is subject to federal procurement laws and regulations. Specifically, the statute provides as follows with respect to the Trust's authority to enter into contracts and other agreements:

Federal laws and regulations governing procurement by Federal agencies shall not apply to the Trust, with the exception of laws and regulations related to Federal government contracts governing working conditions and wage rates, including the provisions of sections 276a-276a-6 of title 40, United States Code (Davis-Bacon Act), and any civil rights provisions otherwise applicable thereto. The Trust, in consultation with the Administrator of Federal Procurement Policy, shall establish and promulgate procedures applicable to the Trust's procurement of goods and services including, but not limited to, the award of contracts on the basis of contractor qualifications,

price, commercially reasonable buying practices, and reasonable competition.

Pub.L. No. 104-333, § 104(b), 110 Stat. 4093, 4101. Pursuant to this statutory authority, the Trust has promulgated a Presidio Trust Procurement Policy (PTPP), which expressly provides that CICA does not apply to the Trust's procurements. PTPP § 1.2.

Since the Trust's establishing legislation provides that federal procurement laws and regulations do not apply to the Trust but for the listed exceptions, which do not include CICA, and the PTPP expressly provides that CICA does not apply to the Trust's procurements, we conclude that the Trust is not subject to the terms of CICA. Since the bid protest jurisdiction of our Office derives directly from CICA, we must further conclude that the Trust is not subject to that jurisdiction.

We note that the rationale that leads us to our conclusion is similar to that on which we have based our determination that the United States Postal Service (USPS) is not subject to our bid protest jurisdiction. The USPS is an independent establishment of the executive branch, 39 U.S.C. § 201 (2000), and thus is a federal agency that would otherwise be subject to our bid protest jurisdiction. 31 U.S.C. § 3551(3); 40 U.S.C. § 102(4), (5). However, under 39 U.S.C. § 410(a) (2000), USPS is expressly exempted from any "Federal law dealing with public or Federal contracts," except for those laws enumerated in 39 U.S.C. § 410(b). Since CICA is not included in the list of statutes expressly made applicable to USPS under section 410(b), we have concluded that USPS is not subject to our bid protest jurisdiction. Falcon Sys., Inc., B-222549, May 14, 1986, 86-1 CPD ¶ 462 at 1, aff'd, Falcon Sys., Inc.—Recon., B-222549.2, June 5, 1986, 86-1 CPD ¶ 526 at 2. The Court of Appeals for the Federal Circuit has reached the same conclusion regarding our USPS jurisdiction. See Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1079 n.7 (Fed. Cir. 2001) (because USPS is exempt from all federal procurement laws not specifically enumerated in 39 U.S.C. § 410(b), and CICA is not specifically enumerated in 39 U.S.C. § 410(b), USPS is not subject to the General Accounting Office's bid protest jurisdiction).

Since the Trust is exempt from federal laws and regulations governing procurement by federal agencies, and CICA is not included in the list of statutes made applicable to the Trust under the Act, the Trust is not subject to our bid protest jurisdiction.

The protest is dismissed.

Anthony H. Gamboa
General Counsel