



Comptroller General  
of the United States

Washington, D.C. 20548

B-208159.14

September 19, 1988

The Honorable Carl Levin  
Chairman, Subcommittee on  
Oversight of Government Management  
Committee on Governmental Affairs  
United States Senate

Dear Mr. Chairman:

This is in response to your letter dated June 24, 1988, asking us to answer a series of questions regarding how our Office handles bid protests filed by potential subcontractors on government procurements.

As you know, we currently decide bid protests pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (Supp. IV 1986). Under our Bid Protest Regulations, which implement CICA, we review only those subcontractor protests which concern subcontracts "by or for the government," 4 C.F.R. § 21.3(m)(10) (1988). As we explain below, at this time we do not favor expansion of our current jurisdiction over subcontractor protests.

Our detailed responses to your questions follow.

Did GAO deny subcontractors standing to file bid protests as a matter of policy, or does GAO believe that this decision was compelled by the language of the Competition in Contracting Act? What was the basis for this decision?

In our view, the language of CICA compelled the current limitation on our consideration of subcontractor protests. CICA authorizes us to consider protests of "federal agency" procurements filed by interested parties, 31 U.S.C. § 3552, and defines an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award the contract." 31 U.S.C. § 3551(2). Since contract awards by prime contractors generally are not federal agency procurements and since a subcontractor is not "an actual or prospective bidder or offeror," we no longer consider many subcontractor protests which we reviewed prior to CICA. See PolyCon Corp., 64 Comp. Gen. 523 (1985), 85-1 CPD ¶ 567;

Ocean Enterprises, Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, affirmed, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10. We continue to consider subcontractor protests which concern subcontracts "by or for the government," however, because in those limited situations the prime contractor acts as an agent of the government, awarding contracts on the government's behalf.

The GAO regulation states that subcontractor protests may be entertained "where the subcontract is by or for the government." Does this exception cover a case in which government approval is required for a subcontract and the government withholds approval? How many cases have been filed under this provision and how many cases have been accepted by GAO? What types of cases were involved?

A subcontract is considered to be by or for the government where the circumstances are such that the prime contractor essentially is acting as a middleman or 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 Electric 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, Bryant Organization, Inc., B-228204.2, Jan. 7, 1988, 88-1 CPD ¶ 10, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. University of Michigan, et al., B-225756, et al., June 30, 1987, 66 Comp. Gen. \_\_\_\_, 87-1 CPD ¶ 643. A requirement for government approval of a subcontract, standing alone, does not make a subcontract award by or for the government.

Of the approximately 8,000 protests filed during the 3-year period from January 1985, when CICA took effect, through January 1988, we received approximately 60 subcontractor protests. Of those, approximately 45 were dismissed because they did not concern subcontracts by or for the government. Those cases generally can be classified into four types:

1. Prospective subcontractors protesting the terms of the government's prime solicitation.
2. Prospective subcontractors disappointed at not being selected by the prime contractor.

3. Prospective subcontractors protesting the contracting agency's award or failure to award the prime contract.

4. Prospective subcontractors protesting the award or failure to award a subcontract by a second or third tier subcontractor.

Approximately 15 protests involved subcontracts by or for the government. We sustained two of those protests, University of Michigan, et al., B-225756, et al., supra, and Westinghouse Electric Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145.

How many subcontractor bid protests prior to CICA did GAO consider on an annual basis? How many of these resulted in relief to the protester? What issues were raised in these protests? What restrictions, if any, were placed on GAO's acceptance of these protests, beyond the restrictions for prime contractor protests?

We received approximately 94 subcontractor protests from 1980 through 1984, or an average of 18 such protests per year during this period. Prior to CICA, we generally reviewed subcontractor protests under the following circumstances described in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD ¶ 166:

1. Where the prime contractor is acting as a purchasing agent of the government.
2. Where the government's active or direct participation in the selection of the subcontractor has the net effect of causing the rejection or selection of a potential subcontractor, or of significantly limiting subcontractor sources.
3. Where possible fraud or bad faith is shown in the government's approval of the subcontract award or proposed award.
4. Where the subcontract is "for" an agency of the government.
5. Where questions concerning the award of the subcontract are submitted by federal officials entitled to advance decisions by our Office.

From 1980 through 1984, we dismissed approximately 10 of the 18 subcontractor protests filed per year because they did

not involve the circumstances described above. The remaining cases, approximately 8 per year, were considered on the merits or dismissed for reasons unrelated to the protester's status as a subcontractor.

Of the subcontractor protests we considered during this period, a total of five were sustained. One of the sustained cases fell within the first Optimum Systems category (W.H. Mullins, B-207200, Feb. 16, 1983, 83-1 CPD ¶ 158); three fell within the second category (National Data Corp., B-202953, Apr. 6, 1982, 82-1 CPD ¶ 313; U.S. Duracon Corp., B-196760, Feb. 22, 1980, 80-1 CPD ¶ 154; ITC-Distribution & Control Division, B-216462, Mar. 25, 1985, 85-1 CPD ¶ 493); and one fell within the fourth category (CMI Corp., B-205829, Sept. 8, 1982, 82-2 CPD ¶ 204).

Are there any additional circumstances under which a subcontractor should have standing to file a bid protest? For example, are there cases in which the subcontractor has no alternative remedy available, because only the government can provide complete relief?

What considerations militate against permitting subcontractors to file bid protests? For example, would subcontractor bid protests significantly increase the GAO's case load or force the GAO to decide private disputes between prime contractors and subcontractors?


In the "by or for the government" cases which we currently consider, the prime contractor acts as an agent of the government with an ongoing purchasing responsibility and awards contracts on behalf of the government. In these limited circumstances, the protesting subcontractor's complaint is not simply a private dispute with the prime contractor; it involves, in essence, an award made by the government and for that reason is appropriate for review under the bid protest system. In most cases, however, a prime contractor is an independent entity and complaints about the propriety of subcontract awards by such firms essentially involve disputes between private parties.

Moreover, as our discussion above demonstrates, compared to the approximately 3,000 protests filed annually, subcontractor protests are few in number (annually approximately 18 cases prior to CICA and 20 under CICA). Further, we found legal merit in only five subcontractor protests in the 5 years prior to CICA, two of which, W.H. Mullins, B-207200, supra, and CMI Corp., B-205829, supra, would be reviewed under the current "by or for the government"

standard. Thus, narrowing the standard for review of subcontractor protests under CICA did not result in a significant detriment to the procurement system as a whole, and, in our view, amending CICA now to include an additional small number of such cases would not be of significant benefit to the system. Accordingly, we do not believe that legislation to expand our bid protest jurisdiction over subcontractor protests is warranted at this time.

We are ready to assist you with any additional information you may need.

Sincerely yours,

*for*   
Comptroller General  
of the United States