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GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-195675

May 9, 1980

The Honorable John Volz
United States Attorney
Eastern District of Louisiana
New Orleans, Louisiana 70130

Attention: Joan Elaine Chauvin

Gentlemen:

Re: Bayou State Security Services, Inc.
and Citadel Security, Inc., a joint
venture v. Dravo Utility Construction,
Inc., Civil No. 80-7488 (E.D. La.)

This is in response to the letter from the Department of Justice dated April 18, 1980, AD:DE:KO:nlp, 145-19-75, requesting a litigation report in connection with the above-captioned suit.

We have reviewed the complaint and prepared the following response to the plaintiff's allegations concerning the Comptroller General, keyed to the relevant paragraph numbers of the complaint.

Regarding Paragraph III, Elmer B. Staats is the Comptroller General of the United States, appointed to that office by President Johnson pursuant to section 502 of the Budget and Accounting Act, 1921, 31 U.S.C. § 42 (1976). Process was served upon the Comptroller General in his official capacity in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure (F.R.C.P.). However, Mr. Staats was never personally served as we understand is required by Rule 4; we therefore request you seek dismissal of the suit against Mr. Staats individually because of insufficiency of process. F.R.C.P. 12(b)(4).

We admit paragraph XI and XII to the extent that plaintiff filed a timely protest over the award of a subcontract by the Dravo Utility Construction, Inc. (DUCI) in accordance with the General Accounting Office



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(GAO) Bid Protest Procedures, 4 C.F.R. Part 20 (1980). (A copy of the protest including subsequent correspondence is attached as enclosure 1.)

We admit this Office issued a decision dated February 6, 1980 (enclosure 2) dismissing the protest. (Paragraph XIII). We point out, however, that Mr. Staats had no personal involvement with or knowledge of the protest. The decision was prepared by General Accounting Office staff attorneys on the basis of the written record and was signed by the GAO General Counsel pursuant to a delegation of authority from the Comptroller General. This decision reflects our determination that we are without jurisdiction to consider protests of subcontract awards in general because the awards are not "by or for" the Government, see 4 C.F.R. 20.1(a); we only consider subcontract protests in the limited circumstances described in our decision. We dismissed the protest because it did not meet any of these circumstances.

We therefore agree (paragraph XIV) that the Comptroller General's decision to dismiss the protest is, in essence, a denial of jurisdiction over the protest, with no consideration of the merits.

Regarding paragraph XV and XIX, our decision specifically held that there is nothing in the prime contract to indicate that DUCI is acting as an agent for the Government. Consequently, we deny plaintiff's allegation that DUCI's prime contract (No. DE-AC96-79P010000) legally constitutes a principal and agent relationship between DOE and DUCI.

With respect to paragraph XVII, we consider the August 3, 1979 (enclosure 1, tab 1) mailgram (received at GAO on August 6) to be the protest. By letter dated August 24, 1979 (enclosure 1, tab 2), protester filed additional allegations. Enclosure 1, tab 3 is a mailgram dated August 29, 1979 from John C. Derenbecker, Attorney at Law, advising GAO of his entry into the case on behalf of the protester. By letter dated

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September 17, 1979 (enclosure 1, tab 4), Mr. Derenbecker submitted comments on the agency report and made certain additional allegations. Additional correspondence was received from Mr. Derenbecker on October 18 (enclosure 1, tab 5) and on December 7 (enclosure 1, tab 6). All of the foregoing documents speak for themselves.

We also deny that our decision deprived the plaintiff of any legal right or remedy or otherwise constituted a denial of due process (paragraphs XVI, XIX and XX). GAO bid protest authority is based upon the authority to adjust and settle accounts and certify balances in the accounts of accountable officers of the United States under 31 U.S.C. § 71, § 74 (1976). The decisions rendered in bid protest cases are, in effect, advance decisions which advise contracting agencies as to the legality of proposed expenditures under a contract. These decisions do not create legal rights in the parties, see United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 100 (D.C.D.C. 1964), affirmed 339 F.2d 753 (D.C. Cir. 1964), and bidders are not required to initially protest the legality of agency actions with respect to the award of a contract with GAO as a prerequisite to judicial review. See Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 875 (D.C. Cir. 1970); A. & M. Gregos, Inc., v. Robertory, 384 F. Supp. 187, 191 (E.D. Pa. 1974).

Therefore, to the extent plaintiff's claim for relief is based upon an alleged denial by GAO of a property right or right to a remedy, we suggest that you seek its dismissal for failure to state a claim upon which relief can be granted, F.R.C.P. 12(b)(6).

We also deny paragraph XX that this Office effectively conspired with DOE and DUCI to delay our decision or to otherwise deprive plaintiff of due process.

In this case, DOE submitted the report and transmitted DUCI's report on September 5, 1979. Two weeks

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later and before the protester/plaintiff submitted any comments on the report, we requested a supplemental report which we received on October 16. Although our decision was not issued within the 25 working day goal established by our Bid Protest Procedures, 4 C.F.R. § 20.8, the delay was caused by internal workload problems and was not in any way attributable to any effort to prejudice the plaintiff.

Finally, our records show no claim against the plaintiff which might furnish the basis of a counter-claim or set-off in the present action.

Sincerely yours,

Henry D. Van Cline
for Milton J. Socolar
General Counsel

Enclosures

cc: U. S. Department of Justice
ATTN: David Epstein, Director
Commercial Litigation Branch