

DECISION



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

61042

FILE: B-184938

DATE: June 29, 1976

MATTER OF: Structural Composites Industries, Inc.

98383

DIGEST:

1. NASA's exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767 (Optimum Systems, Inc.).
2. Allegation that NASA does not possess authority to implement procedure waiving review of cost-reimbursement prime contractor award of subcontracts fails in light of fact that grant of general procurement authority carries discretion for agency to contract by any reasonable method and NASA procedure waiving review of subcontracts under stipulated circumstances is reasonable exercise of discretion and was accomplished in accordance with NASA regulations.
3. Contention that in view of audit and settlement responsibilities (31 U.S.C. § § 41, 53, and 71) GAO lacks authority to divest itself of subcontract reviews as matter of policy is rejected.

Structural Composites Industries, Inc. (SCI), has requested reconsideration of our decision Structural Composites Industries, Inc., B-184938, October 28, 1975, 75-2 CPD 260, where we declined to consider the merits of SCI's protest of a subcontract award because it did not fall within any of the exceptions to our general policy of not considering subcontract protests stated in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

The National Aeronautics and Space Administration's (NASA) prime contract with Rockwell International is for the design, development, test, and evaluation of orbiter vehicles and related support work in connection with the space shuttle. The items in question are three sets of gas storage pressure tanks.

As background, NASA states:

"The ground rules established and the concept utilized by Rockwell in its Shuttle Orbiter Program proposal was to draw on the experience and technology available from the Apollo Program. Therefore, the baseline established at award of the Shuttle Orbiter contract to Rockwell International in 1972 included high pressure gas storage tanks of an all metal configuration. In 1972, SCI was not a competitor for all metal pressure storage tanks.

"During the first quarter of 1973, Rockwell investigated the possibility of utilizing composite overwrapped vessels with a metal load sharing liner. This interest was in part stimulated by the NASA/Lewis funded technology development program with SCI, Contract NAS3-16770, dated June 1972. Information from that program was presented to Rockwell during a May 7, 1973, meeting with NASA/Lewis personnel.

"As a result of the interest shown by Rockwell, a meeting was requested by NASA at Houston to discuss additional data pertinent to the filament wound tank concept. During a meeting held on June 6, 1973, Rockwell presented a briefing emphasizing the need for additional development of filament wound tanks for possible Shuttle Orbiter use while at the same time retaining the contract baseline of all metal tanks.

"In early 1974, the overall weight of the Shuttle Orbiter Vehicle became a serious problem. A technical status review of the filament wound tanks was given to NASA in March 1974 by Rockwell. It was indicated that a weight saving of 500 to 600 pounds per Orbiter might

be achieved. However, that review also disclosed that the results of the existing development programs were so marginal that the potential use of the filament wound concept could not be technically justified. The programs reviewed included two NASA funded development programs using cryogenically stretched 301 stainless steel, NASA Contract NAS3-11194, February 1970 - December 1971, and 5AL-2.5SN Titanium, Contract NAS3-12023, February 1970 - December 1971. These programs were not too successful due to the high failure rate on fabricated pressure vessels. In addition, at that time the SCI development contract, NAS3-16770, was experiencing schedule and technical problems.

"Because of these difficulties, yet in the interest of potentially saving substantial weight, Rockwell recommended the initiation of a development program with Brunswick utilizing titanium as the liner material to parallel and complement the existing SCI NASA funded development program.

* * * * *

"The Rockwell proposed development program with Brunswick was authorized by NASA on March 15, 1974. On June 27, 1974, Rockwell awarded a technology program to Brunswick. This program was placed for the purpose of further developing the filament wound tank concept and was baselined to utilizing a titanium tank liner. This technology program was awarded by Rockwell based substantially on the competitive proposals submitted by SCI and Brunswick in connection with the Orbiter ARPCS Nitrogen and Oxygen pressure storage vessel procurement.

* * * * *

"Also, Rockwell recommended and NASA approved the acquisition of titanium, a long lead time item of 40-50 weeks, to cover tank requirements if titanium was used as a liner material for overwrap tanks. However, more important, it protected Orbiter schedules by providing the material for all metal tanks in the event the overwrap technology was not successful. Rockwell saw no need to acquire a supply of stainless steel since stainless steel was available and was not a long lead time item. SCI's metal forming vendor (ARDE) had on hand 10,000 pounds of 301 stainless steel. Rockwell refused SCI's proposal to double the amount on hand since the material was not a long lead time item and was not the material that would be used for all metal tanks if the overwrap technology did not prove successful. Also, it is noted that on April 2, 1975, SCI stated to JSC that there was another 10,000 pounds of stainless steel ready for delivery to ARDE inventory.

"By late 1974, the results of both development programs (SCI and Brunswick) had been reviewed by Rockwell and NASA. It was concluded the composite overwrapped pressure tanks with load sharing metal liners would provide substantial weight savings to Orbiter and appeared to satisfy the safety and reliability requirements. At the Shuttle Orbiter Management Review #28 held on December 17, 1974, Rockwell recommended and NASA approved the baselining of composite filament-wrapped pressure vessels. As a result, Rockwell and NASA developed a specification for Shuttle Orbiter pressure storage tanks. A procurement package was prepared by Rockwell and submitted to industry. Proposals were received in June 1975 and were evaluated by Rockwell in accordance with their approved evaluation procedures. No NASA personnel participated in this evaluation."

SCI maintains that our Office should review the award under two of the Optimum Systems, Inc., standards. First, SCI alleges that NASA so directly and actively participated in the selection of the subcontractor that the net effect of that participation was to cause or control the rejection or selection of a subcontractor, or imposed such conditions as

to significantly limit the sources to which subcontracts could have been awarded. Essentially, this degree of participation by NASA is attributed to its general administration of the RI prime contract and involvement in certain critical decisions regarding technical problem solving. Since the effect of choosing or specifying one technical approach vis-a-vis other technical approaches is to limit the prime contractor's choice of a subcontractor, SCI argues that this type of involvement is sufficient to trigger our review of the resultant award. In this connection, SCI maintains that NASA's preference for the Brunswick approach of using titanium liners in the pressure tanks, as evidenced by providing titanium as Government-furnished property under Brunswick's development contract, thereby effectively mandated Brunswick's selection.

As the second basis for our review under Optimum Systems, Inc., SCI alleges that NASA exhibited bad faith throughout the procurement cycle. This bad faith is said to have manifested itself in NASA's approving the subcontract award by RI (which approval SCI maintains was required under the prime contract), in the face of assurances to SCI that split awards were contemplated to insure a broad competitive procurement base. Bad faith is also alleged to have arisen in the NASA bias towards Brunswick, discussed above, concerning titanium.

Lastly, SCI questions the policy of our Office stated in Optimum Systems, Inc., supra, of imposing limitations on the types of subcontractor protests that we will consider. SCI notes that our authority to review subcontract awards stems from 31 U.S.C. § § 41, 53, and 71 (1970). Once having recognized that our Office is empowered under these statutes to review subcontract awards, it is contended that we are without authority to divest ourselves of that review function as a matter of policy in derogation of our statutory mandate.

NASA has responded to SCI's charges by denying that this is the type of subcontract which our Office will review under the Optimum Systems, Inc., standards. Specifically, NASA states with respect to the first standard that under the terms of the prime contract the subcontract was not one requiring review, concurrence, consent or approval, and NASA did none of the above. As for NASA's involvement in what it characterizes as " * * * the normal and usual process of monitoring the contractor's work * * *," it is NASA's position that these types of routine communications with its prime contractor were not tantamount to controlling or directing award. Further, NASA states that none of its personnel were involved in the procurement process and that no conditions were placed upon the RI selection.

Concerning the second Optimum Systems standard, NASA's position is that since it conducted no review of and gave no consent, concurrence or approval to the award, no opportunity existed to exhibit fraud or bad faith in approving the award. Additionally, NASA maintains that alleged fraud or bad faith in other phases of the procurement is not supported by the record.

In Optimum Systems, our Office clarified and redefined our policy regarding subcontractor protests. Our Office indicated its willingness to review protests against subcontract awards under stated conditions--one of which concerns the degree of Government participation in the subcontractor selection process. Examples of specific instances when the requisite level of involvement was found were included in the case as follows:

"The Government limited the subcontractor sources and exercised control over every aspect of procurements, such that the prime contractors were 'mere conduits.' 47 Comp. Gen., supra.

"The Government required that the prime contractor procure certain ancillary equipment from a particular company. B-162437, August 6, 1968.

"The Government 'directly participated in the decision' to reject a subcontract proposal and exclude it from competition on resolicitation based on the Government's negative preaward survey performed at the prime contractor's request. 49 Comp. Gen., supra.

"The agency severely limited the prime contractor's rights of selection of subcontractors and was instrumental in drafting the terms of the subcontract. B-170324, April 19, 1971.

"The Government hindered the testing and qualification of a potential subcontractor's product to such an extent that the subcontractor could not receive various awards. B-174521, March 24, 1972.

"The Government specifically recommended an award of a subcontract to a particular company. 51 Comp. Gen. 678.

"The prime contractor rejected a potential subcontractor since the Government required in the sole-source prime contract that only the product manufactured by another company could be used. Matter of California Microwave, Inc., B-180954, September 24, 1974, 54 Comp. Gen. [767].

"However, where the only Government involvement in the subcontractor selection process is its approval of the subcontract award or proposed award (to be contrasted with the circumstances set out above where direct or active Government participation in or limitation of subcontractor selection existed), we will only review the agency's approval action if fraud or bad faith is shown."

From the record in the instant case, we fail to see the type of involvement exemplified by the foregoing examples either in the award of the subject contract or in NASA's actions prior thereto. The background information furnished by NASA, quoted above, as well as the information and documentation furnished by SCI, indicates in our view that while RI was authorized by NASA in 1973 to pursue development of a filament wound tank concept, the baseline concept established by NASA in 1972 at the time of the award of the Shuttle Orbiter contract to RI was that developed by SCI pursuant to a NASA funded technology development program. Although the proposed development program with Brunswick for the purpose of further developing the filament wound tank concept utilizing a titanium tank liner was approved by NASA in 1974, the technology program was awarded by RI on the basis of competitive proposals submitted by SCI and Brunswick.

Furthermore, while NASA approved RI's recommendation for acquisition of titanium, and refused SCI's proposal to acquire stainless steel, it appears from the record that there was a reasonable basis for such divergent action and that it was not based upon a preference for the Brunswick approach. Moreover, the record does not indicate that NASA's ultimate approval of the RI recommendation at the conclusion of both development programs to adopt the Brunswick concept was based upon bias, but rather upon valid technical considerations related to the overall program. In these circumstances, we fail to see any evidence of bias in the selection of the Brunswick concept so as to limit the subcontractor sources. As a matter of fact, it appears from the record that the RI and NASA developed specification resulting from the Brunswick development

program was adequate to permit SCI and another firm to submit competitive proposals under the protested award. Furthermore, NASA denies that it either suggested, approved or directed a sole-source award to Brunswick or directed that the award not be split. While we recognize that SCI strongly disputes NASA's position with respect to the foregoing matters, we do not believe on the basis of the record that SCI has carried the burden of proof to establish that NASA's involvement or alleged bias justifies our consideration of the protest under the first Optimum Systems standard.

SCI also maintains that under the "subcontracts" clause in the RI prime contract, NASA was required to approve any subcontract for developmental work. While SCI recognizes that article XLI of the prime contract exempts subcontracts from the approval requirements when the contracting officer has granted prior written approval of the contractor's purchasing system, SCI alleges that article XLI was unauthorized. The effect of this, it is contended, is that NASA was required to review and approve the subcontract award, which responsibility was not discharged. SCI's contention in this regard is based upon the standard subcontractor approval clause (NASPR § 7.402-8) included in RI's contract pursuant to NASA Procurement Regulation (NASPR) § 23.201-2 (1975 ed.), which sets forth the types of subcontracts for which prior consent is or is not necessary. SCI contends that the present subcontract for developmental work is excluded from the category not requiring prior approval and, therefore, the deviation from the approval requirement was unauthorized and in violation of the NASPR.

NASA's position is that article XLI was authorized since it was issued pursuant to a deviation granted by the NASA Assistant Administrator for Procurement in response to a request by the Johnson Space Center. Therefore, since RI's purchasing system had been approved, pursuant to Space Shuttle Directive No. 3, up to \$10 million, or for sensitive subcontracts below that minimum, it is NASA's position that no subcontract review or approval was required or made.

SCI's position in this regard ignores NASPR § 23.000, which sets forth policies applicable to the review by NASA of contractor's procurement systems, the approval of which it is stated will usually "* * * obviate the need for reviewing and consenting to individual subcontracts."

Further, NASPR § 1.109-2 provides that deviations from the NASA procurement regulations (as defined in NASPR § 1.109-1) are authorized when approved by the Director of Procurement or his authorized representative. Space Shuttle Directive No. 3 was issued by the Director of the Space Shuttle program and concurred in by the Director of Procurement. The procedures followed in obtaining the deviation comported with NASPR § 1.109. Nor do we think that the general provisions of article XXV of RI's prime contract, "Government Approvals/Concurrences," cited by SCI, which outline NASA's general rights in this regard, may be deemed to supersede the specific provisions of article XLI. Since NASA was not required to and did not participate in the subcontract selection, it follows that no bad faith could be present and the second standard under Optimum Systems is not applicable.

Anticipating the possibility of this conclusion, SCI urges that even if NASA followed its regulations in granting the deviation, such act was in excess of NASA's authority. SCI's basis for this allegation is that NASA's statutory authority does not permit the award of cost-plus-a-fixed-fee development programs without its prior approval. Any contrary conclusion, SCI urges, would be tantamount to permitting circumvention of the statute merely by authorizing any deviations the agency sees fit.

SCI does not point to any specific section of chapter 137 of 10 U.S.C. upon which this argument is based, and our reading of chapter 137 does not support SCI's conclusion. The Court of Claims has commented upon the powers conferred upon agencies under this chapter in G. L. Christian and Associates v. United States, 329 F.2d 345, 348 (1963):

"* * * a general legislation empowering, in broad terms, a government agency to procure and to make contracts normally covers all phases of that process--from the solicitation of bids or proposals, to the making of the contract through its administration and performance, to its completion or termination. 'The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase.' Priebe & Sons v. United States, 332 U.S. 407, 413, 68 S. Ct. 123, 127, 92 L. Ed. 32 (1947). Unless the Congress has prohibited the agency from entering some phase of the contractual process (or using some otherwise lawful method of contracting), a grant of wide and general authority to contract and procure will extend to all reasonable phases and methods."

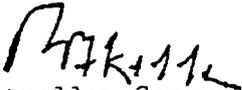
Under this interpretation of the procurement authority granted by chapter 137, we believe that NASA acted reasonably in waiving its subcontract approval authority under the stipulated circumstance. Since we find no Congressional prohibition against NASA's approach and since we also find that NASA's action was a reasonable exercise of its general procurement authority, SCI's argument on this point fails.

SCI also maintains that we do not have the authority to divest ourselves of subcontract reviews, as a matter of policy, on grounds of impracticality of remedial action. We are not persuaded by this approach. The Comptroller General, as head of the General Accounting Office has wide latitude to determine, as a matter of policy, how best to satisfy its statutory mandates. The policy announced in Optimum Systems was a result of a carefully reasoned approach to our function in the area of reviewing subcontract awards in light of the lack of privity with the Government and our authority to scrutinize the expenditure of public funds. In responding to a similar argument in Probe Systems, Incorporated, B-182236, April 25, 1975, 75-1 CPD 260, we stated:

"With regard to Probe's contention that 31 U.S.C. § 71, requiring the General Accounting Office to settle and adjust all claims and demands by or against the Government, obligates this Office to entertain its protest against the award of the subcontract here in question, our decision in the Matter of Optimum Systems, Incorporated, B-183039, supra, amounts to a rejection of that argument. In fact, that decision makes it clear that the extent of our consideration of subcontractor's protests is a matter of policy and the reasons for the stated policy are indicated * * *. Furthermore, as noted in that decision, appropriate attention in our audit functions involving the award of subcontracts under cost-reimbursement type contracts will be given to any evidence indicating that the cost to the Government has been unduly increased because of improper procurement actions by the prime contractor."

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In view of the above, we remain of the opinion, as expressed in our October 28, 1975, decision, that no basis exists for our review of this subcontract award.


Deputy Comptroller General
of the United States