

DECISION

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

FILE: B-175917

DATE: August 27, 1976

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MATTER OF: Parmatic Filter Corporation

DIGEST:

Protester contends that prime contractor's rationale for award of subcontract to another firm which was accepted by agency has no basis in fact, that consideration of protester's proposal was sham, and that agency's consent to award was predetermined. Where, as here, only Government involvement in subcontractor selection process is approval of subcontract award, GAO will only review agency's approval action if fraud or bad faith is shown. In view of prime contractor's responsibility for total system under fixed-price incentive contract and audit review of situation, no fraud or bad faith in agency's approval of award is found.

The instant case involves the protest of Parmatic Filter Corporation against the award of a subcontract to Hamilton Standard Division of United Aircraft Corporation (Hamilton Standard) by the Ingalls Shipbuilding Division of Litton Systems Inc. (Litton), Pascagoula, Mississippi, and the Navy's subsequent consent to that award.

The Navy's contract with Litton provided that the Government would have a right to consent to subcontracts of the type here in question.

As we indicated in Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166:

"* * * 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. * * *

For the reasons set forth below, we do not believe that Parmatic has sustained its burden of showing that the Navy's actions were fraudulent or evidenced bad faith.

In view of a number of factual discrepancies in the positions presented to us by the Navy and the protester, we utilized audit personnel in resolving this matter. The relevant facts of the case as indicated to us by Parmatic, the Navy and our own independent analysis are as follows.

On December 15, 1972, Litton awarded a contract to Parmatic to design and fabricate moisture separators with hollow vanes for anti-icing on the engine air intakes of the DD-963 destroyers. Parmatic had been the sole responsive proposer under a Litton procurement. The Navy consented to this contract on June 21, 1973. Changes were issued to the specifications increasing both operating temperature and pressure. Thereafter, because of Parmatic's high estimated cost for these changes, Litton issued a suspension of work on the hollow vane design and changed the specifications from the hollow vane to a vane bank design. In November 1973, Litton received Parmatic's firm price proposal on the changes to the specifications. The price greatly exceeded Parmatic's proposal for separators of hollow vane design. Thereafter, on November 28, 1973, Litton asked Hamilton Standard to submit a proposal on the revised specifications calling for a vane bank concept. A proposal was submitted by Hamilton Standard on December 13, 1973, but Litton then determined that the Hamilton Standard approach would not meet the revised specifications.

On December 28, 1973, Parmatic submitted a revised proposal at a lower price. On January 2, 1974, Litton authorized Parmatic to proceed with the vane bank concept. Litton stated that this action was taken to protect scheduled commitments while its engineers made a decision on the revised specifications. Shortly thereafter,

Hamilton Standard made another presentation to Litton, and Litton accepted a revised proposal for a mesh pad type separator at a price lower than that offered by Parmatic for the vane bank concept. Hamilton Standard's bid was \$3,650,000 subject to confirmation of raw material costs. The final price as indicated in the consent package furnished the Navy was \$4,832,015. On January 18, 1974, Litton terminated Parmatic's contract for convenience and authorized Hamilton Standard to proceed with the design and fabrication of mesh pad separators.

Thereafter, on February 4, 1974, Parmatic protested to the Navy that the award to Hamilton Standard had been accomplished on a noncompetitive basis and that Parmatic had not been given the opportunity to compete on the mesh pad procurement. After a discussion between Litton and the small business representative, Litton agreed to evaluate Parmatic's proposal for the mesh pads. Parmatic's price for these items was \$3,140,000. On March 5, 1974, the Navy contracting officer reminded Litton that the Navy had to consent to the Hamilton Standard subcontract for moisture separators before Litton could receive progress payments from the Navy for the work done on that subcontract. On March 21, 1974, Litton provided the Navy a rationale for procuring moisture separators from Hamilton Standard rather than Parmatic. While recognizing that Parmatic's proposal represented substantial cost savings, Litton made the following conclusions:

"Ingalls feels that the decision to terminate Parmatic and award the moisture separator requirement to Hamilton Standard was in the best interests of the U.S. Navy, Ingalls Shipbuilding Division and the DD963 Program because:

- "1. High degree of confidence in Hamilton Standard's ability to deliver hardware on schedule based on past performance. Low level of confidence in Parmatic based on past performance.
- "2. High degree of credibility in Hamilton Standard's cost proposal. No credibility in Parmatic cost proposal due to lack of supporting documentation and past experience with cost growths. As an example, in its proposal

dated 4/19/72, Parmatic proposed knit mesh pads at \$1,126,500 exclusive of framing. Framing weighs approximately 12,000 pounds per shipset. Parmatic currently is proposing \$1,358,060 (\$3,140,060 - \$1,782,000 for heated louvers) for knit mesh pads and framing.

- "3. Hamilton Standard is using Monel knit mesh pads. Parmatic has proposed Polypropylene knit mesh pads apparently as a cost-saving measure, even though in a proposal dated 7/22/72, Parmatic stated:

"Both materials (Monel and Polypropylene) have certain advantages with Monel having the better overall features. Monel can be produced in smaller diameter fibres for a given strength, which is desirable since optimum performance is obtained from a knitted mesh pad where there is a maximum surface area of fibres and a maximum number of fibre joints. * * * Moreover, Polypropylene does not withstand, as well as Monel, the action of ozone and ultra-violet light typical of a marine environment. * * * Polypropylene has to be replaced more frequently."

- "4. In its letter dated March 4, 1974 to Mr. N.J. Marandino, Parmatic states:

"As the record shows, in the likely event that ship performance with knitted mesh pads is not satisfactory, retrofit of the entire system with attendant cost and disruption would be necessary * * *."

"Such a statement does not promote confidence."

On April 29, 1974, the Navy engineering officer at Pascagoula advised the contracting officer that the former's office had reviewed the technical proposals of both Hamilton Standard and Parmatic with mesh pad designs and had no technical objection to either one. On May 15, 1974, Litton, replying to Navy questions, advised that Hamilton Standard had changed the original design from a

two-stage to a three-stage water separator system and also changed the knitted mesh pad material from monel to a form of nylon. The estimated cost of this change would be \$750,000. On July 15, 1974, Litton submitted the consent package for the Hamilton Standard contract to the Navy.

Our audit review was initiated to examine the precise means by which the consent to this subcontract was ultimately granted. In this regard, what follows is our examination of the Navy's compliance with ASPR § 23-202 (1973 ed.), which sets forth the factors to be considered in reviewing proposed subcontract awards for purposes of granting consent, and states in pertinent part:

- "(i) the technical justification for selection of the particular supplies, equipment, or services;"

The Hamilton Standard proposal was reviewed for consistency with the general specifications for moisture separators in the prime contract and the more detailed Litton purchase order specification included in the proposed subcontract. The engineer reviewing the matter said he did not make a tight technical review which was in line with Navy policy. The assistant contracting officer indicated that in an earlier shipbuilding program at Litton the Navy had attempted strict technical reviews but such reviews had delayed consent as much as 30 days. Thereafter, when Litton had filed claims, the firm cited its sole responsibility for performance under a fixed-price incentive contract, stating that the delays were costing Litton money. Therefore, the policy was instituted to reduce the scope of technical reviews. This policy antedated the DD-963 program and had been in effect since the start of the DD-963 program.

- "(ii) whether the decision to enter into the proposed subcontract is consistent with the contractor's approved 'make-or-buy' program * * *"

The subcontract review/consent summary indicates that the subcontract was consistent with Litton's make-or-buy program but the file contains no documentation to support the statement.

"(iii) whether the proposed subcontract will require the use of Government-furnished facilities and, if so, whether proper consideration has been obtained;"

This factor was considered to be inapplicable.

"(iv) the responsibility of the proposed subcontractor * * *;"

The subcontract review/consent summary indicates that the contracting specialist found Hamilton Standard to be responsible based on past performance. In the presentation to the Navy on the Hamilton Standard subcontract, Litton had indicated that Hamilton Standard had a very high confidence credibility rating based on (1) past performance; (2) long-established policies and procedures; (3) strong financial structure as a division of United Aircraft Corporation with a strong Dun and Bradstreet rating; (4) highly skilled production personnel currently employed; (5) necessary production facilities currently available with only minor rearrangement; and (6) proven ability to carry complex designs through production.

"(v) the basis for selecting the proposed contractor, including the price competition obtained;"

Although the Parmatic proposed price was about \$1.5 million less than Hamilton Standard's, Litton elected to continue with Hamilton Standard because of the lack of performance on the part of Parmatic on the terminated letter contract. Litton also said that it had no confidence in Parmatic's ability to deliver the equipment in question because Parmatic had no production equipment and no engineering and production personnel. When asked by the Navy why Litton awarded the earlier letter contract to Parmatic for the vane type equipment, Litton replied that at the time Parmatic was the only proposer.

"(vi) any cost or price analysis or price comparisons accomplished, with particular attention to whether cost or pricing data are accurate,

complete, and current, and to whether any
required certification has been obtained
* * *

The subcontract review/consent summary shows that the contracting officer judged the cost data submitted in the consent file to be accurate, current and complete. The Navy was also of the view that the cost data submitted in the consent package was acceptable. Moreover, the assistant contracting officer stated that the Navy had a mere incidental interest in cost because the DD-963 contract was a fixed-price incentive-type contract whereunder the cost in question would be essentially borne by the prime contractor.

-(vii) the effectiveness of subcontract management
by the prime contractor;"

The subcontract review/consent summary states that subcontract management by Litton is adequate. A report of the contract procurement systems review dated March 29, 1974, indicated that Litton's overall performance on procurements over \$100,000 was above average in all but a very few instances.

"(viii) the appropriateness of the type of subcontract used * * *

The proposed subcontract here was a purchase order calling for a fixed price.

"(ix) the estimated total extent of subcontracting,
including procurement of parts and materials;"

The contract specialist checked this item as adequate on the subcontract review/consent summary.

"(x) the extent to which the prime contractor
obtains assurance of the adequacy of the
subcontractors' procurement system;"

Here, the Navy states that Litton had made adequate effort to determine that Hamilton Standard's procurement system was adequate. Litton had previously said that Hamilton Standard had a very aggressive purchasing department.

"(xi) availability from Government sources of industrial facilities or special test equipment * * *"

This factor was inapplicable to the proposed subcontract.

"(xii) whether consideration was given to the solicitation of small business and labor surplus area subcontract sources * * *"

Litton solicited Hamilton Standard, a large business, as a single source procurement for mesh type moisture separators for the DD-963 class ships while Litton had Parmatic Filter Corporation, a small business, under letter contract to develop a vane type moisture separator. When Litton terminated Parmatic for convenience and awarded Hamilton Standard a letter contract for mesh type equipment, Parmatic protested. A small business review team composed of representatives from the Small Business Administration, and the Navy noted that Litton had revised the purchase order specification for moisture separators, and concluded that Litton was remiss in administering the Small Business Subcontracting Clause of the prime contract because Litton failed to solicit known small business firms on the revised specification. Litton acknowledged the omission. To cure the situation Litton officials accepted, considered, and rejected a proposal for mesh type equipment from Parmatic.

The Navy small business specialist said that, in his opinion, Litton's action had provided competition on this procurement, and brought Litton in compliance with the Small Business Subcontracting Clause of the DD-963 Development and Production Contract.

"(xiii) the degree of involvement by the Government in secondary contract administration including source inspection, quality and reliability

aspects, and standardization requirements
* * *"

The contract specialist requested that a Navy quality assurance specialist determine the point of inspection for the moisture separators. The quality assurance specialist replied that source inspection was required.

"(xiv) whether all clauses required by the prime contract such as Records, Excess Profits, Military Security, Termination, Changes, Government-Furnished Property, and Non-discrimination Clauses are included * * *"

The contract specialist checked the appropriate place on the subcontract review consent summary to indicate that the subcontract contained the required clauses.

The contracting specialist's review of the consent package was completed about August 9, 1974.

The contracting officer indicates that the period between August 9, 1974, and September 26, 1974, the date upon which the consent was granted, was used to make a detailed analysis of the legal ramifications of Litton's termination for convenience of Parmatic's contract for vane type moisture separators, Litton's subsequent award to Hamilton Standard as a single source for the mesh pad separators and Litton's retroactive consideration and rejection of Parmatic's low-priced proposal for mesh pads. According to Navy officials, the decision was made that since Litton had total systems responsibility under the contract, the Navy would in no case intervene and direct Litton procurement for moisture separators.

The total systems responsibility for Litton is set forth in the following clause which is a portion of Litton's DD-963 contract:

"ARTICLE XIX. TOTAL SYSTEM RESPONSIBILITY

"(a) The specifications identified in ARTICLE II of this contract, and the Contractor-developed drawings referenced therein, define the Contractor's DD 963 Ship System. The Contractor has represented, and this contract has been executed on the basis that these specifications, and the drawings referenced therein, define the performance capabilities of the Contractor's Allocated Baseline Ship. Accordingly, the Contractor warrants that its Product Baseline Ship will meet or exceed the performance capabilities of its Allocated Baseline Ship. * * * by its execution of this contract, the Contractor hereby waives any and all claims and demands against the Government, its officers, agents, or employees based on alleged impossibility of performance, defective specifications, or any similarly grounded claim, it being the express purpose of this Total System Responsibility Article to establish and record the Contractor's obligation to deliver DD 963 ships that meet or exceed the performance capabilities of said specifications."

In addition to the total systems responsibility concept, another consideration which certainly influenced the decision to consent to the Hamilton Standard contract is the fact that the prime contract is a fixed-price incentive contract and that Navy's legal counsel is of the opinion that the Government has only an incidental interest in the cost of a subcontract thereunder.

Parmatic states that (1) none of the reasons cited by Litton and accepted by the Navy for preferring the Hamilton Standard proposal to that of Parmatic has any basis in fact; (2) the facts clearly show that consideration of Parmatic's knitted mesh pad proposal was a sham; and (3) the subsequent consent to the Hamilton Standard award was predetermined.

Our review of the situation does indicate that, in view of the two overriding considerations, i.e., the total systems responsibility concept and the fixed-price incentive nature of the Litton prime contract, the Navy proceeded in a very calculated manner.

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While the Navy reviewed the consent package, it is clear that absent unusual circumstances, which we do not perceive in the instant case, in the face of Litton's total systems responsibility, the Navy would not have challenged the prime contractor's decision. It may or may not have been to the Government's long-term interests for the Navy to have challenged Litton. Also, the equipment in question poses a developmental problem where competition is limited or uneven because of the state of the art and problems in translating design concepts into hardware. In view of all of the surrounding circumstances, we do not believe that there was any fraud or bad faith in the Government's approval of the subcontract award.

Accordingly, Parmatic's protest is denied.

R. J. K. Miller
Acting Comptroller General
of the United States