DECISION

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

95
60984

FILE: B-182236 DATE: June 15, 1976 98828

MATTER OF: Probe Systems, Inc. - Reconsideration

DIGEST:

Protest alleging that GAO should review prime contractor's selection of subcontractor on basis that agency acted fraudulently or in bad faith in approving award is dismissed as no fraud or bad faith on part of agency is shown.

Probe Systems, Incorporated has requested the reconsideration of our decisions in Probe Systems, Incorporated, B-182236, January 2, 1975, 75-1 CPD 2, and April 25, 1975, 75-1 CPD 260, in which we dismissed its protest of the action of McDonnell Aircraft Company, a division of McDonnell Douglas Corporation (McDonnell), in awarding a subcontract to Applied Technology, a Division of Itek Corporation, under McDonnell's prime contract No. 33657-75-C-0017. Probe contends that we should reverse our prior determinations not to review the subcontract selection procedures used by McDonnell because Probe has received information which it believes indicates that the Air Force was guilty of fraud or bad faith in approving the subcontract award.

The subcontract in question was awarded pursuant to a McDonnell solicitation for firm fixed-price proposals for furnishing eight preproduction models of special warning receivers for the F-4 aircraft, together with budgetary quotes for various follow-on production quantities. The principal irregularity in subcontracting procedures of which Probe complains is McDonnell's alleged amendment of the subcontract solicitation to reduce the preproduction model quantity requirement from eight to six units without notice to all bidders. Essentially, Probe claims that McDonnell advised only Applied Technology of the quantity reduction and conducted negotiations only with that firm notwithstanding that Probe was allegedly advised by the prime contractor that its offer was lower than Applied Technology's and of virtually identical technical competence.

In our two prior decisions we dismissed Probe's protests because Probe did not allege facts which would bring its protest under one of the exceptions to our general policy of not considering protests involving the award of subcontracts. See Optimum Systems, Incorporated-Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

Since our decision of April 25, 1975, however, it has come to Probe's attention that McDonnell awarded two contracts to Applied Technology for the special warning receivers. Probe contends:

> "* * * that this was done to obscure from it the true amount of the * * * award so that it would not be known that Probe was the low bidder by a very substantial amount. Probe believes that line items of [McDonnell's] original solicitation for bids may have been shifted to the second contract in furtherance of that objective.* * *
>
> "Probe submits that the Air Force was aware that two contracts were awarded by [McDonnell] to[Applied Technology]. The two contracts were negotiated concurrently, and they both required Air Force approval. Probe submits that the Air Force had a duty to disclose the full and true facts concerning the * * * procurement in its response to Probe's protest. This the Air Force did not do. It withheld information within its possession concerning the second contract, thus misleading both Probe and the GAO. Such failure of candor suggests that the Air Force participated in practicing a fraud upon Probe, and, in failing to disclose the existence of the second contract, the Air Force demonstrated bad faith. Accordingly, the Comptroller General must now reopen Probe's protest and reconsider it on its merits."

In response, the Air Force states that the existence of two subcontracts is not the result of a split procurement to obscure the true amount of the award. The initial subcontract for 6 special warning receiver preproduction units and related non-recurring engineering effort was submitted to the administrative contracting officer (ACO) on August 23, 1974, for his advance notification and consent. The ACO reviewed the matter and concluded that the proposed award was proper under the circumstances. The Air Force points out that:

> "[a]t no time did the ACO participate in the decision by [McDonnell] to select Applied Technology or attempt

> to influence [McDonnell] in its selection of a subcontractor for this effort. At this point in time, the ACO had not received any notice through Air Force channels or from [McDonnell] that a second subcontract for follow-on effort on the Special Warning Receiver would be awarded * * * to Applied Technology."

The initial subcontract was then issued to Applied Technology on August 29, 1974.

Also on August 23, 1974, McDonnell issued a request for a proposal to Applied Technology for a pilot production effort. This request for a proposal was amended on October 3, 1974. Applied Technology submitted proposals in response to this initial request and amended request on September 17, 1974, and October 17, 1974, respectively. On October 24, the Air Force - McDonnell prime contract was amended to include a pilot production phase. On October 29, the proposed subcontract calling for four special warning receiver pilot production units, hardware and engineering was given to the ACO for advance notification. The ACO acknowledged the advance notification and determined that Air Force consent for the subcontract was not needed under the terms of the prime contract. The second subcontract was then issued to Applied Technology on November 6, 1974.

The Air Force points out that in response to Probe's prior protests, it commented on the procedural issue involved rather than the merits of the protests. Accordingly there was no misrepresentation, bad faith, or fraud involved in its not mentioning the second subcontract.

At Probe's request we have reviewed the subcontracts which McDonnell awarded to Applied Technology. Probe has contended that while it has not seen these subcontracts, it believes that they would indicate McDonnell's intention to split the requirements of its original solicitation and show that the Air Force was completely aware of McDonnell's scheme.

Our examination of the subcontracts bears out the Air Force contention that the requirements of McDonnell's solicitation were not split between the two subcontracts so as to obscure the true amount of the award to applied Technology. Moreover, the evidence of record does not establish that Air Force officials participated in a scheme to prevent Probe from receiving these subcontract awards, as suggested. Rather it appears to us that the award selection was made by the prime contractor. Therefore, while Probe strongly questions the propriety of the subcontracting procedures used by McDonnell for

the reasons stated in our prior decisions, the matter is not for resolution by this Office.

Paul G. Dembling
General Counsel