

Eileen Pettit

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DECISION



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

FILE: B-190472

DATE: January 30, 1978

MATTER OF: J. H. Rutter Rex Manufacturing Co., Inc.;
Martin Manufacturing Company, Inc.

DIGEST:

Protests concerning proposed award of labor surplus area set-aside portion of procurement which is conducted pursuant to Arms Export Control Act (formerly Foreign Military Sales Act) are not for consideration under GAO Bid Protest Procedures and are, therefore, dismissed. However, our position in this area is currently under review.

J. H. Rutter Rex Manufacturing Co., Inc. (Rutter Rex), and Martin Manufacturing Company, Inc. (Martin), have protested against the proposed award to Kings Point Mfg. Co. Inc. (Kings Point), of a contract for 374,110 durable press shirts, the labor surplus area set-aside portion of invitation for bids (IFB) No. DSA 100-77-B-1046 issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center, Philadelphia, Pennsylvania.

The IFB was issued on August 11, 1977, for a total of 748,220 units; bid opening was extended by amendment to September 12, 1977. Of the five bids received, Rutter Rex was the low bidder on the non-set-aside portion; Martin, second low bidder; and Kings Point, the high bidder. DLA's drawing by lot on October 12, 1977, determined that Kings Point should be awarded the set-aside portion of the procurement; award, however, has been withheld pending resolution of the protests.

Counsel for Rutter Rex and for Martin essentially contend that the drawing procedure and proposed award are improper because Kings Point's bid on the non-set-aside portion constituted a "token offer," rendering the firm ineligible for the set-aside portion. See Armed Services Procurement Regulation (ASPR) §§ 1-904.2(b)(2) and 7-2003.5(b) (1976 ed.).

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By letter to our Office dated December 2, 1977, DLA stated that the shirts being procured are part of a sale of defense articles to Saudi Arabia pursuant to the Arms Export Control Act, 22 U.S.C. §§ 2751 et seq., formerly known as the Foreign Military Sales Act (see section 201 of the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729, 734 (1976)). The agreement between the United States and Saudi Arabia is denominated a "Dependable Undertaking (Code 4)." This designation not only signifies that the foreign government has made a firm commitment to pay the full costs of contracts so entered, but also means that funds will be made available as required to meet the payments called for by the contracts. 22 U.S.C. § 2762(a) (Supp. V 1975); Army Regulation 37-80, 1-5(b)1 (July 31, 1970). Consequently, DLA contends that the protests should be dismissed, citing our decisions in J. H. Rutter Rex Manufacturing Co., Inc., B-189931, October 18, 1977, 77-2 CPD 300; Gibraltar Industries, Inc., B-187635, January 21, 1977, 77-1 CPD 43; Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD 60, in which we declined to consider protests concerning foreign military sales procurements conducted pursuant to 22 U.S.C. § 2762 because they did not involve the expenditure of appropriated funds.

In this regard, counsel for Rutter Rex further contends that DLA failed to conduct the procurement according to "normal procurement procedures," i.e., ASPR §§ 1-804.2(b) (2) and 7-2003.5(b) (1976 ed.), expressly prescribed by note 10 of the agreement with Saudi Arabia.

We agree with DLA that the protests should be dismissed. The record clearly shows that this procurement implements a foreign military sales agreement pursuant to which the Saudi Arabian Government is obligated to make periodic payments in accordance with the payment schedule of the agreement. We note that the instant agreement is, in fact, the same agreement which was the basis for the procurement under protest in our decision in J. H. Rutter Rex Manufacturing Co., Inc., B-189931, October 18, 1977, 77-2 CPD 300. Both the Rutter Rex and the Martin protests are silent concerning this salient characteristic of the procurement. Moreover, neither protester has asserted that our prior line of decisions is not equally applicable to the present, substantially identical case.

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Accordingly, the protests are dismissed.

It should be noted, however, that although this decision represents our position at this time, this area is currently under review by our Office.

Paul G. Dembling
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General Counsel