

6739
DECISION



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

PL I

FILE: B-191385

DATE: June 16, 1978

MATTER OF: American Magnetics, Inc.

DIGEST:

Protest by potential subcontractor against prime contractor's termination for default and reissuance of subcontract to same subcontractor at substantial increase in price without obtaining competition under ERDA contract will not be considered, since protest does not fall within any of stated exceptions of Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166, under which GAO considers subcontract protests.

By letters of February 22 and March 13, 1978, American Magnetics, Inc. (AMI), protests the award of a subcontract to Intermagnetics General Corporation (IGC), under an Energy Research and Development Administration (ERDA) (now Department of Energy) prime contract with TRW, Inc.

The prime contract with TRW, Inc., was for research work to be performed on a cost-plus-a-fixed-fee basis. The protester contends that TRW, the prime contractor, terminated for default IGC, a subcontractor, and then reissued a subcontract to IGC at a substantial price increase without obtaining competition.

Our Office will only consider subcontract protests in limited circumstances as set forth in Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Basically, these circumstances fall into five categories: (1) where the prime contractor is acting as a purchasing agent of the Government; (2) where the Government's active or direct participation in the selection of the subcontractor has the net effect of causing or controlling the rejection or selection of a potential subcontractor, or has significantly limited subcontract sources; (3) where fraud or bad faith in Government approval of the subcontract award or proposed award is shown; (4) where the subcontract award is "for" an agency

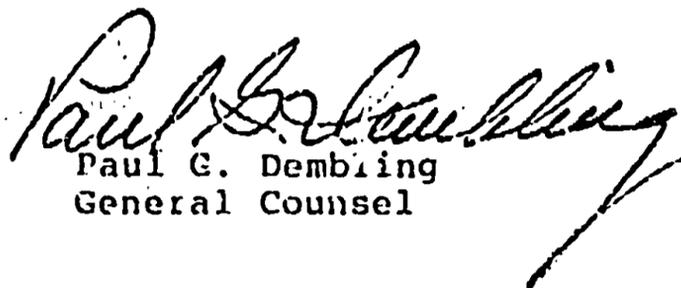
of the Federal Government; and (5) where the question concerning the award of a subcontract is submitted by an official of a Federal agency entitled to advance decisions from our Office.

We afforded the protester an opportunity to submit its views as to whether the award and reinstatement of the subcontract to IGC by TRW, Inc., were matters within one of the five situations enumerated in Optimum Systems. AMI responded that, "TRW apparently was and is acting as an agent for the U.S. Government as a contractor for the Department of Energy (then ERDA)." Apparently, AMI believes the matter to fall within the first category enumerated. We do not agree and cannot find that the matter falls within any of the other enumerated categories either.

There is nothing in the contract to indicate that TRW was acting as an agent for ERDA rather than as an independent contractor and AMI has presented no evidence to show an agency relationship. The Government's only involvement appears to have been that, pursuant to article 2 and article 18 (appendix "C") of the contract with TRW, ERDA approved both the original award to IGC and the reinstatement of the contract with IGC in settlement of IGC's claims against TRW after TRW had terminated IGC for default. In Optimum Systems, we indicated that, where the Government's only involvement in the subcontractor selection process is its approval of the subcontract award, our Office will only review the agency's approval action if fraud or bad faith is shown. AMI has presented no evidence of fraud or bad faith on the part of the Government and careful examination of the record reveals none.

We note, however, that in accordance with sections 1-15.201-2, 1-15.201-3 and 1-15.204(a) of the Federal Procurement Regulations (1964 ed. amend. 142), which were incorporated into appendix "B" of TRW's contract with ERDA, TRW may only be reimbursed its costs to the extent that such costs are reasonable.

In view of the above, the protest will not be considered on the merits.


Paul G. Dembing
General Counsel