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Paul Lieberman PL I

DECISION

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

FILE: B-191377 DATE: June 21, 1978

MATTER OF: Magnetic Engineering Associates, Inc.

DIGEST:
Protest by potential subcontractor will not be considered on merits where prime contractor is not acting "for" DOE in making contract award and protest does not fall within any other exception to general GAO policy against consideration of protests of subcontract awards.

Magnetic Engineering Associates, Inc. (MEA), protests the award of a contract for the design, fabrication and installation of a specified type of magnet by the Massachusetts Institute of Technology (MIT), Francis Bitter National Magnet Laboratory (NML), to the Magnetic Corporation of America (MCA). The magnet is to be installed in a Government facility, the Component Development Integration Facility, situated in Butte, Montana. The contract has been awarded in conjunction with Task Order No. 3 of contract EX-76-A-01-2295 between MIT and the Department of Energy (DOE), formerly the Energy Research and Development Administration (ERDA).

The basis of MEA's protest is essentially that MCA's best and final offer, as submitted, was nonresponsive to the specifications contained in NML's amended request for proposal (RFP). However, since MEA's protest concerns the award of a subcontract by a prime Government contractor, a threshold question is raised as to whether, as a matter of policy, our Office should consider the protest.

In Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166, our Office held that we would entertain protests concerning the award of subcontracts by prime contractors only under certain clearly delineated circumstances. Consideration is limited to five categories of cases: (1) where the prime contractor is acting as a purchasing agent of the Government; (2) where the Government so

actively participates in the subcontractor selection process as to effectively cause or control the selection, or significantly limit subcontractor award sources; (3) where fraud or bad faith is shown in the Government approval of the subcontract award; (4) where the subcontract award is "for" an agency of the Federal Government; and (5) where questions concerning subcontract awards are submitted by a Federal agency entitled to advance decisions from our Office.

MEA contends that this subcontract falls in category 4 above, i.e., the proposed award is being made "for" the DOE by MIT. MEA's argument is that the procurement is being made in the context of "a program controlled and directed by [DOE], with the support and assistance of NML." However, even if this is an accurate characterization, it does not meet the above criterion. Article 12 of the General Provisions of the prime contract, entitled "Subcontracts and Purchase Orders," states, in relevant part, that:

> "* * * Subcontracts and purchase orders shall be made in the name of the Contractor, shall not bind nor purport to bind the Government, shall not relieve the Contractor of any obligation under this contract * * *."

This language precludes the creation of a contractual relationship between a subcontractor and the Government. In Truland Corporation; Compuguard Corporation, B-189505, September 26, 1977, 77-2 CPD 226, we specifically held that a subcontract award protest was not within the scope of the Optimum Systems, supra, "for" the Government category when the prime contract contained a provision which precluded the creation of a contractual relationship between the Government and any subcontractor.

MEA has also suggested that MIT was acting as an "agent" of the Government in awarding this subcontract. Clearly MIT could not act as a Government purchasing agent since this would require that MIT subcontracts operated to directly bind the Federal Government. As indicated above, MIT was specifically precluded from so doing.

We might also construe this "agent" theory as an allusion to category 2 of Optimum Systems, supra, relating to direct and controlling participation in the selection process by DOE. However, there is no allegation nor indication in the record of any such participation in the subcontract award on the part of DOE. MEA has not presented any evidence that NML's selection for award of the subcontract was not independently made, or that DOE's active involvement had the net effect of causing or controlling NML's selection.

Also, there is no allegation or suggestion of fraud or bad faith on the part of DOE, in its approval of MIT's subcontractor selection, nor has DOE requested an advance decision.

We note, however, that in accordance with sections 1-15.201-2, 1-15.201-3, and 1-15.204(a), (b) of the Federal Procurement Regulations (1964 ed. amend. 142) MIT may only be reimbursed its costs to the extent that such costs are reasonable.

Accordingly, we decline to consider the merits of this protest.

Paul G. Dembling
General Counsel