

DECISION



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

12894

FILE: B-196457

DATE: February 20, 1980

MATTER OF: Overseas Logistics Company Ltd.

DIGEST:

[Protest of RFQ Cancellation]

Potential subcontractor's protest will not be considered since protest does not fall within any of the limited Optimum Systems, Inc., criteria under which GAO will consider subcontract protests.

On May 17, 1979, the Department of the Army, Corps of Engineers (Corps), awarded two contracts, No. DACA52-79-C-0003 to Air Base Constructors (ABC) and No. DACA52-79-C-0004 to Negev Airbase Constructors (NAC), for the design and construction of two separate airbases in Israel. Overseas Logistics Company Ltd. (OLC) protests the cancellation of ABC's request for quotation (RFQ) dated September 25, 1979, and of NAC's RFQ dated September 27, 1979. Both solicitations were issued for the transportation from the United States to Israel of equipment needed by each of the prime contractors for the construction of their respective airbase.

The first question to be resolved is whether this subcontract protest is of the type over which our Office will exercise jurisdiction under the standards set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

In Optimum Systems, Inc., we held that our Office would only consider protests concerning the award of subcontracts by prime contractors in certain circumstances. Essentially, the circumstances relevant here are: (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

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a potential subcontractor, or has significantly limited subcontract sources; and (3) where fraud or bad faith in Government approval of the subcontract award or proposed award is shown.

ABC's cancellation resulted from the Corps' refusal to approve award of a contract, pursuant to ABC's RFQ, because the Corps determined that the RFQ contained serious defects which made it impossible to determine the low bidder. Subsequently, a new solicitation was issued, six firms responded including OLC, and an award was made to a firm other than OLC.

NAC canceled its solicitation because that firm considered itself legally bound to Farrell Lines, Inc., under a prior commitment. The Corps advises that the only step available under the circumstances presented by NAC was to request substantiating information from NAC. The Corps did not initially approve NAC's subsequent award to Farrell because sufficient substantiation was not presented. Subsequently, after additional consideration, the Corps ratified the award to Farrell on January 15, 1980.

OLC (1) argues that NAC and ABC are acting in a "purchasing agent type of function" for the Government and makes a general reference to the prime contracts, (2) refers to General Provision 21 of the contracts which requires Government approval prior to subcontract awards, and (3) mentions "the possibility of incompetence, fraud, conspiracy and rigged bids."

The Corps' position is that OLC's protest does not come within the Optimum Systems, Inc., exceptions. More specifically, the Corps argues that neither NAC nor ABC can be characterized as purchasing agents and the Corps did not directly participate in the selection or rejection of any subcontractor. Furthermore, the Corps believes that the record does not support OLC's allegation of fraud.

For the reasons that follow, OLC's protest is dismissed.

In regard to OLC's argument that NAC and ABC are purchasing agents for the Government, we do not agree. A review of the subject contracts does not support OLC's contention that the prime contractors are purchasing agents for the Government. Concerning OLC's reference to the Corps' subcontract approval authority, the exercise of such authority alone, absent fraud or bad faith, is not a basis for our Office to consider the merits of a subcontract protest. As to the ABC cancellation, we note that the Corps did not participate in the selection of any subcontractor but merely refused to approve any selection of a subcontractor on the RFQ initially used. Furthermore, the Corps' action concerning NAC's selection of Farrell did not amount to direct participation in the selection or rejection of the subcontractor. Rather, the Corps' action was based on its conclusion that NAC's existing contractual arrangements with Farrell precluded competition for the transportation services and required NAC's use of Farrell for those services.

With respect to OLC's allegation of fraud or bad faith, we require more than a mere allegation of fraud or an expression of a suspicion of wrongdoing in order for our Office to undertake a review of such charges. Before we will intervene, a protester must submit evidence establishing a prima facie case of fraud or of such willful disregard of the facts or such misconduct as to be tantamount to fraud on the part of contracting officials. Courier - Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323. Generally, a prima facie showing requires the presentation of evidence sufficient to establish the given fact or cause of action if the evidence were to remain uncontradicted or unexplained. An offer to prove a fact, or an allegation of fact, is not "evidence." Duncan Foundry and Machine Works, Inc. v. National Labor Relations Board, 458 F.2d 933 (1972). OLC has not demonstrated nor do the circumstances show any fraud or bad faith on the part of the Corps. For these reasons, we find no basis for asserting jurisdiction here.

The protest is dismissed. However, this matter has been referred to our audit division for whatever action it deems appropriate.

Harry R. Van Cleave

for Milton J. Socolar
General Counsel