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DECISION



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

[Protest of Subcontract Proposal Rejection]

FILE: B-200237

DATE: November 6, 1980

MATTER OF: Reflectone, Inc.

DIGEST:

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

Reflectone, Inc. (Reflectone) (protests the rejection of the proposal it submitted in response to Request for Proposals (RFP) No. 677-80-001-60, issued by International Business Machines Corporation (IBM). IBM is a prime contractor with the Department of the Navy.) We dismiss this protest because Reflectone has not presented sufficient evidence to demonstrate that this is a type of subcontract which our Office will consider.

Our Office (will consider subcontractor protests only in limited circumstances: (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 rejecting or selecting a potential subcontractor, or significantly limiting subcontract sources; (3) where fraud or bad faith is shown in the Government's approval of the subcontract award or proposed award; (4) where the subcontract is "for" an agency of the Government; or (5) where the questions concerning the award of subcontracts are submitted by Federal officials who are entitled to advance decisions by this Office.)
Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

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Reflectone contends that our Office must consider the merits of its protest because IBM acted as a purchasing agent of the Government and the Government's participation in the selection process had the net effect of rejecting or selecting a potential subcontractor.

Reflectone submits that the following facts demonstrate that IBM acted as a purchasing agent for the Government: (1) IBM is to pay the subcontractor upon the Government's acceptance of subcontractor's work product; (2) the terms "Government," "IBM" and "buyer" are used interchangeably in the subcontract procurement materials; (3) the subcontractor is required to negotiate overhead, general and administrative rates with the Government; and (4) the Government is to participate in the testing, inspection and acceptance of the subcontractor's work product.

These facts, however, are not sufficient to support a conclusion that IBM acted as an agent of the Government. To establish an agency relationship between the prime contractor and the Government, it must be shown that the actions of the prime create privity of contract between the subcontractor and the Government, i.e., that the prime contractor's acts will bind the Government directly. Nickel v. Pollia, 179 F. 2d 160 (10th Cir. 1950); Johnson Corporation, B-180591, January 17, 1975, 75-1 CPD 34. Thus we have recognized that where the effect of the prime contractor's transactions legally bind the Government to make payment directly to a third party for supplies or services which it may order from a third party for the account of the Government, such a contractor may be considered an agent of the Government. On the other hand, where the legal effect of the contractor's transactions is to bind itself, rather than the Government, it may not be considered as an agent of the Government. Universal Aircraft Parts, Inc., B-187806, January 11, 1979, 79-1 CPD 14. The existence of a cost reimbursement type contract between the Government and the prime is not itself sufficient to create an agency relationship. 21 Comp. Gen. 682 (1942).

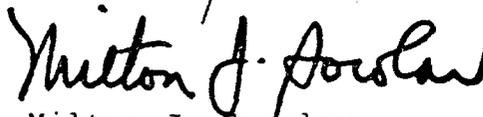
Here, there is no indication that IBM's prime contract contains a provision expressly naming IBM as purchasing agent of the Government, J&A, Inc., B-196137.2, February 20, 1980, 80-1 CPD 146, and Reflectone has offered no evidence that

the subcontract would operate to directly bind the Government. See Magnetic Engineering Associates, Inc., B-191377, June 21, 1978, 78-1 CPD 448. We cannot, therefore, find that IBM acted as a purchasing agent of the Government.

In support of its contention that the Government's involvement was such that it had the net effect of controlling or causing the rejection of Reflectone and the eventual selection of another subcontractor, Reflectone points out that IBM sought Government approval of the subcontract and that the Government recommended that IBM solicit a proposal from Reflectone. We have consistently held that, absent bad faith or fraud on the part of procuring officials of the Government, neither of which is alleged here, Government approval of subcontract award is an insufficient basis upon which to invoke our jurisdiction over the matter. See New Brunswick Scientific Co., B-195454, August 20, 1979, 79-2 CPD 135.

(Finally, IBM itself has indicated that the Government's participation in the subcontractor selection process was essentially limited to authorizing the use of a subcontract for the particular effort involved, providing a list of potential subcontractors, and approving the subcontract after subcontractor selection by IBM.) IBM prepared the solicitation, conducted the competition and selected the subcontractor. According to IBM, selection of the subcontractor was an IBM decision without any Government influence.

(The protest is dismissed.



Milton J. Socolar
General Counsel