

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

50782 97195

FILE: B-183793

DATE: June 13, 1975

MATTER OF: Latin American Construction Contractors Association

DIGEST:

Protest by prospective minority subcontractor that Government prime contractor is not complying with its contractual obligation to facilitate subcontract participation of minority business enterprises is a matter for resolution by contracting agency and not GAO since basis of complaint is not appropriate for review by this Office under B-183039, March 19, 1975, 54 Comp. Gen. ____, and there is no allegation and demonstration of fraud or bad faith on agency's part regarding prime contractor's compliance with its contractual requirements.

By telefax of May 19, 1975, and prior correspondence, the Latin American Construction Contractors Association (LACCA) protests, on behalf of Power Electric Contractors, Incorporated (Power), against an award to Reinhold Construction, Incorporated, under invitation for bids (IFB) No. 10-0027-5, issued on February 14, 1975, by the National Aeronautics and Space Administration (NASA). The invitation in question was for phase II construction of the Space Shuttle Landing Facility, John F. Kennedy Space Center, Florida. The contract (No. NAS10-8818) under this IFB was awarded to Reinhold on April 18, 1975.

Power was not a competitor of Reinhold for the award of the prime contract, but rather seeks to participate as an electrical subcontractor for this project. The gravamen of LACCA's protest is that Reinhold allegedly has not and will not properly comply with its contractual requirements regarding minority business opportunity. LACCA specifically points to the requirements of the contract clause set out in Armed Services Procurement Regulation § 7-104.36(b) (1974 ed.), entitled "Minority Business Enterprises Subcontracting Program", whereby the prime contractor agrees to establish and conduct a program which will enable minority business enterprises to be considered fairly as subcontractors and suppliers for work under the Government prime contract.

While the provisions of ASPR apply only to the Department of Defense, ASPR § 1-102 (1974 ed.), Article 7 of Section IV of the IFB contained a similar requirement, obliging the prime contractor to, inter alia, "assure that known minority business enterprises


will have an equitable opportunity to compete for subcontracts, particularly by arranging /the solicitation and attendant requirements/ so as to facilitate the participation of minority business enterprises." LACCA contends that failure by both Reinhold and NASA to assure compliance with this requirement has prevented Power from equitably competing for subcontract work on the project, and therefore dictates that the award to Reinhold be set aside.

As a general rule, the question of a prime contractor's compliance with its contractual obligations is not a matter for consideration by this Office but rather is for resolution by the contracting agency during the course of contract administration. Ralph B. Black Co. et al., B-179831, February 4, 1974; Edward E. Davis Contracting, Incorporated, B-179719, B-179720, January 29, 1974. However, with respect to the procurement of subcontract services and supplies, matters which ordinarily concern prime contract administration may, as a matter of policy, form the basis for review by this Office of the subcontract process or award. Optimum Systems, Incorporated, B-183039, March 19, 1975, 54 Comp. Gen. ___.

In Optimum Systems, we specifically undertook to clarify and redefine our policy concerning the circumstances under which we will consider protests against subcontract awards by Government prime contractors. Chief among those circumstances was a requirement that the Government must have actively or directly participated in the subcontractor selection. However, we also noted in that decision that many matters surrounding subcontract procurement are matters of contract administration which are inappropriate for our consideration. We specifically recognized that a protester's contention that a contractual condition was violated by the prime contractor in making a subcontract award should not per se form a basis for GAO review, absent evidence indicating bad faith or fraud by the agency concerned. See also PSC Technology, Inc., B-183648, May 27, 1975.

In our view, Reinhold's alleged lack of compliance with its contractual obligation to facilitate minority business competition for subcontracts under its prime contract is a matter for resolution by NASA, and not this Office. The basis of LACCA's complaint does not fall within the standards set forth in Optimum Systems for review by GAO, and there has been no allegation and demonstration of fraud or bad faith on NASA's part with respect to Reinhold's compliance with its contractual requirements.

In view of the above, GAO will not pass on the merits of LACCA's protest. However, the correspondence from LACCA will be furnished to the appropriate NASA officials for their consideration.


Deputy Comptroller General
of the United States