

DECISION



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

FILE: B-185468

DATE: May 12, 1976

MATTER OF: Hy-Gain Electronics Corporation

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DIGEST:

December 24, 1975, definitization of letter contract awarded on September 8, 1975 (which limited Government's obligation to \$954,000 even though \$2,385,000 had been committed for 15,000 units) did not amount to second award. Therefore, protest against sole-source award filed more than 10 working days after protester was aware of award of letter contract and reason for sole source is untimely and prior decision is affirmed.

This is a reconsideration of our decision in the matter of Hy-Gain Electronics Corporation, B-185468, April 13, 1976. In that decision, we stated that Hy-Gain's protest against a sole-source award, which was filed on December 4, 1975, was untimely under our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), since it was not filed within 10 working days after the date when Hy-Gain, by its own admission, was advised in a telephone conversation with the contracting officer of the basis for the award to Lapointe Industries, Inc. (Lapointe).

Hy-Gain does not question the fact that an award was made to Lapointe for 15,000 antennas on September 8, 1975, nor does it question the fact that it was aware of this information on November 11, 1975. Hy-Gain does, however, contend that the September 8 award was a letter contract for a "mere" \$945,000, and that it was only after the filing of the protest that the Government incurred a contractual obligation (December 24, 1975) for an additional \$1,331,000. In the protester's words, "This is so because there was no separate offer and acceptance involved in connection with the definitized or binding second contract entered into on December 24, 1975, following the written protest."

In support of its contention that there were in fact two contracts awarded to Lapointe, i.e., one for \$954,000 on September 8 and another for the balance of the \$2,385,000 contract that was definitized on December 24, 1975, Hy-Gain cites a memorandum

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to the Chief of Staff, United States Army Electronics Command, Fort Monmouth, New Jersey, dated August 26, 1975, from the Director of Procurement and Production, requesting an approval to issue a letter contract. The purpose of the subject memorandum was to "receive approval of the Commanding General or its Deputy to issue a letter contract to LaPointe Industries, Inc., for 15,000 each Antenna AS-1729/VRC and Ancillary Items in an amount not to exceed \$954,000.00 which is 40% of the estimated definitized contract amount \$2,385,000.00."

However, contrary to the arguments made by Hy-Gain, we believe that there was only one award made to Lapointe. That award was made by letter contract on September 8, 1975. Subsequent definitization of the contract did not amount to an additional award. In this regard, we think that Armed Services Procurement Regulation (ASPR) § 3-408 (1975 ed.) is helpful. Therein, a letter contract is defined as "a written preliminary contractual instrument which authorizes immediate commencement of manufacture of supplies, or performance of services, including, but not limited to, preproduction planning and a procurement of necessary materials." The section also provides that a letter contract may be used if national defense interests demand that the contractor be given a binding commitment so that the work can commence immediately, and negotiation of a definitive contract in sufficient time to meet the program need is not possible.

Subsection (c)(4) of ASPR § 3-408 (1975 ed.) further provides:

"The maximum liability of the Government stated in the letter contract will be the amount estimated to be necessary to cover the contractor's requirements for funds prior to definitization, but this amount shall not exceed 50 percent (50%) of the total estimated cost of the procurement unless advance approval is obtained from the official authorizing the letter contract."

Moreover, subsection (c)(5) states that the total estimated cost shall not exceed funds available for obligation and commitment in the appropriation allotment account.

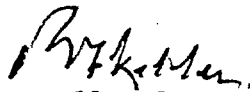
In this regard, we note that tab "A" to the memorandum of August 26, 1975, noted above, indicates in paragraph 11 that \$2,385,000 had been committed for the contract; however, only \$954,000, or the amount of the letter contract, would be obligated. The fact that only \$945,000 would be obligated is

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consistent with subsection (c)(4) of ASPR § 3-408, as stated above, which limits obligation to 50 percent or less than the total amount committed to the contract. As noted above, the definitization of the 15,000-unit contract with Lapointe only established the precise amount of the contract and did not amount to an additional award action.

As indicated in our original decision, Hy-Gain's protest was against a sole-source award of contract DAAB07-76-C-0085, and that occurred on September 8, 1975. Since on November 11, 1975, Hy-Gain was aware of the award of the 15,000-unit contract to Lapointe on a sole-source basis and the reasons therefor, even though it did not know of the precise dollar amount of the award, Hy-Gain's protest to our Office filed on December 4, 1975, was untimely.

Accordingly, our decision is affirmed.


Deputy Comptroller General
of the United States