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DECISION



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

T. Sasso
Proc I

FILE: B-186713

DATE: December 16, 1976

MATTER OF: Chemithon Corporation

DIGEST:

1. Protest questioning contractor's ability to perform is not for consideration by GAO, since it concerns affirmative responsibility determination which as matter of policy is not reviewed except where fraud is alleged or where definitive responsibility criteria have not been applied.
2. Potential second-tier subcontractor's protest that Government's modification of specifications subsequent to award of prime contract so directly involved it in selection of second-tier subcontractor so as to preclude protester from bidding on subcontract does not come within Optimum Systems bounds, since it was action of first-tier subcontractor in not soliciting protester and not revision of specifications that precluded protester from bidding.

By letter dated June 8, 1976, the Chemithon Corporation (Chemithon) protests an award to any other subcontractor for a sewage lift system by Tucci & Sons, Inc. (Tucci), a first-tier subcontractor under prime contract N68248-74-C-5001 awarded by the Department of the Navy to the Willamette-Western Corporation (Willamette).

Chemithon asserts that (1) Willamette's bid was nonresponsive in that Willamette could not have complied with the solicitation's sewage lift system specifications; and (2) Chemithon was denied an opportunity to submit a quotation to Tucci on revised specifications for the sewage lift system (subsequent to the award of the prime contract to Willamette).

With regard to Chemithon's first contention, the ability of a bidder that submits an unrestricted bid to comply with the terms of the contract concerns the matter of bidder responsibility and not bid responsiveness. James E. McFadden, Inc., B-186180, June 17, 1976, 76-1 CPD 393. Thus Chemithon in effect is protesting the Navy's affirmative determination of Willamette's responsibility.

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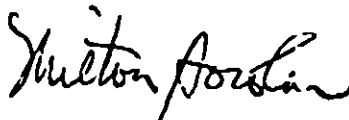
In this regard, it is the policy of our Office not to review such determinations except where fraud is alleged or where definitive responsibility criteria have not been applied. Shiffert Industrial Equipment, Inc., B-185372, January 27, 1976, 76-1 CPD 52.

With regard to Chemithon's second contention, our Office will consider protests against the award of subcontracts by prime contractors (or the award of subcontracts by first-tier subcontractors, see Automatic Laundry Company of Dallas, B-185920, July 13, 1976, 76-2 CPD 38) under the circumstances enumerated in Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. One of the bases in Optimum Systems upon which our Office will consider a protest against the award of a subcontract is 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 a potential subcontractor.

Counsel for Chemithon maintains that by modifying the sewage lift system specifications subsequent to award of a prime contract to Willamette, the Navy so directly participated in the selection of a second-tier subcontractor as to cause Chemithon's rejection as that potential second-tier subcontractor. However, it was not the Navy's revision of the contract specifications, subsequent to the award of the prime contract, that precluded a potential second-tier subcontractor from bidding.

In this regard, Chemithon implicitly acknowledges that it could have complied with the revised specifications by indicating that it would have been the low bidder had it been solicited by Tucci. Thus Chemithon in effect is complaining about the action of Tucci in not soliciting its bid for the revised sewage lift system. Therefore, the situation does not come within the bounds established by Optimum Systems, Incorporated, supra.

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

for 
Paul G. Dembling
General Counsel