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DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20540**

FILE: B-189942

DATE: February 1, 1978

MATTER OF: Fein-Marquart Associates, Inc.

DIGEST:

1. Under GAO Bid Protest Procedures, 4 C.F.R. § 20.2 (b)(2) (1977), protest concerning proper awardee and subcontractor terms of contract awarded on June 28 is untimely where protester acquiesced in method of award until August 5 when its subcontract negotiation with awardee broke down.
2. Protester has burden of affirmatively proving its case; where, as here, only available evidence-- concerning alleged agreement to designate protester as required subcontractor and failure of prime contractor to negotiate subcontract as allegedly agreed-- is conflicting statements of protester and contracting agency, we do not believe protester has met burden of affirmatively proving its case.
3. Protest by potential subcontractor against selection of another party by prime contractor will not be considered, since protest does not fall within any of stated exceptions of Optimum Systems, Inc., 54 Comp. Gen. 707 (1965), 75-1 CPD 166, under which GAO considers subcontractor protests.

Fein-Marquart Associates, Inc. (F-M), protests award of a contract (No. 68-01-4643) to Cryptanalytic Computer Sciences, Inc. (CCSI), pursuant to request for proposals (RFP) No. WA 76-D316, issued by the Environmental Protection Agency (EPA) on August 17, 1976, as a total small business set-aside. F-M requests that the contract be rescinded.

EPA issued the RFP to 31 sources and received only two proposals, one of which was from a Joint Venture (CCSI/F-M). The proposal called for the refinement, verification and implementation of the Substructural Analysis Method (SAM) for Early-Warning Toxicity Prediction. Subsequent to an evaluation, EPA determined to award a contract to the Joint Venture. However, the contracting officer, during negotiations, became concerned with the following:

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"1. To which principal would EPA have recourse if performance was not successfully completed.

"2. Accomplishment of tasks was not defined as to scope and extension for each party.

"3. There was no precise definition as to what the roles of the principals would be in preparing, reviewing, concurring and approving report format and content."

Consequently, the contracting officer determined that it would be in the Government's best interest to negotiate and award the contract to CCSI as the prime and F-M as the approved subcontractor.

F-M contends that it acquiesced in the prime-subcontractor arrangement in order that an award would be made. Moreover, F-M alleges that there was an "explicit understanding and agreement among all present [CCSI, EPA and F-M] that the contract would incorporate the necessity of the subcontractual effort by [F-M], and that the subcontract would contain all of the terms and conditions in the joint venture agreement." We note that there was no written confirmation of this agreement. On June 28, 1977, contract No. 68-01-4643 was issued to CCSI and F-M was not named as a required subcontractor. Instead, F-M was listed as an approved subcontractor (ARTICLE XIX - Subcontract Consent) and its principals (Drs. Fein and Marquart) were listed as key personnel (ARTICLE XVIII - Identification Of Key Personnel And Notification Of Change).

F-M argues that once the contract was issued to CCSI it "refused to negotiate a subcontract containing the terms of the joint venture, as agreed * * *." In addition, F-M contends that during this time it was encouraged by CCSI to proceed with the work. On August 5, 1977, F-M maintains that it was finally forced to withdraw as a subcontractor and advised EPA of this situation, requesting that the contract be rescinded and resolicited. A meeting between F-M and the contracting officer was held on August 11, 1977, during which F-M requested, in the alternative, rescission and resolicitation, modification (F-M designated prime with CCSI as subcontractor) or award to F-M. Each request was rejected and F-M was so notified on August 12, 1977.

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F-M states that its "protest was based primarily upon the illegality of the [CCSI-EPA] contract." Essentially, F-M's protest is presented in the alternative, i.e. (1) the prime contract could only have been awarded to CCSI and F-M as in the original RFP, or (2) F-M should have been designated the required subcontractor rather than an approved subcontractor and EPA's failure to do so prevented F-M from receiving the subcontract, and (3) the Lefkowitz group should not have been given a subcontract in lieu of award to F-M.

With reference to the first issue, alleging that the award of the prime contract was improper, our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1977), require bid protests to be "filed not later than 10 [working] days after the basis for protest is known * * *." Rather than protesting the June 28 award of the contract to CCSI, F-M acquiesced in the prime-subcontractor arrangement in lieu of award to the Joint Venture until August 5 when negotiations with CCSI broke down. Accordingly, issue number 1 is untimely and not for consideration on the merits.

Issue number 2 involves EPA's failure to designate F-M as a "required" subcontractor and the failure of CCSI to negotiate the subcontract as allegedly agreed. We noted above that there was no written confirmation of the alleged agreement. Moreover, EPA has denied that such an agreement ever existed. Where, as here, conflicting statements of the protester and the contracting agency constitute the only available evidence, we do not believe that the protester has met the burden of affirmatively proving its case. Marotta Scientific Controls, Inc., B-188129, October 11, 1977, 77-2 CPD 280.

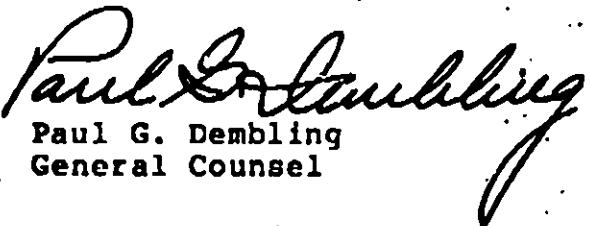
Issue number 3 is concerned with the failure of F-M to receive a subcontract and the award of a subcontract to the Lefkowitz group. Our Office will consider subcontract protests only in limited circumstances as set forth in Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. These circumstances are: (1) where the prime contractor is acting as the purchasing agent of the Government; (2) where the active or direct participation of the Government in the selection

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of a subcontractor has the net effect of causing or controlling the rejection or selection of potential subcontractors, or of significantly limiting subcontractor sources; (3) where fraud or bad faith in the approval of the subcontract award by the Government is shown; (4) where the subcontract award is "for" the Government; or (5) where a Federal agency entitled to the same requests an advance decision.

In this case, it is clear that the selection of the subcontractor was the choice of the prime contractor, not the Government. Contra: Ultraviolet Purification Systems, Inc., B-185179, July 15, 1976, 76-2 CPD 46. Since none of the bases under which we will consider subcontract protests has been alleged or shown to exist in the instant case, we decline to consider the merits of issue number 3.

Accordingly, F-M's protest is dismissed.


Paul G. Dembling
General Counsel