

DECISION



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

Proc II

10,447

FILE: B-194560

DATE: June 15, 1979

MATTER OF: Industrial Coils, Inc.

DLG 01790

DIGEST:

[Protest by prospective second tier subcontractor] which presents no facts showing procurement comes within conditions specified in Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975) will not be considered on merits.

Industrial Coils, Inc. (Industrial Coils) protests award of a contract for magnetic coils to Brown Boveri Corporation (Brown) by Ebasco Services Incorporated (Ebasco), a subcontractor under a Department of Energy prime contract with Princeton University (Princeton). We have concluded, however, that this matter should not be considered on the merits. *CNG 01038*
DLG 01791
CNG 01995

This Office will consider subcontractor complaints in limited circumstances: (1) where the prime contractor is acting as purchasing agent of the Government; (2) in cases 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 Government approval of the subcontract award or proposed award; (4) where the subcontract award is "for" an agency of the Federal Government; and (5) where the questions concerning the awards of subcontracts are submitted by officials of Federal agencies who are entitled to advance decisions from our Office. Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. DOE states that none of these circumstances exists with regard to this procurement.

Industrial Coils contends that: its proposed price was substantially below that of the awardee; the scoring of its proposal was inconsistent with the historical

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preference for firms doing business in economically depressed areas; its technical proposal was at least equal to other offerors and erroneously evaluated; the award to a foreign corporation violates the Buy American Act, 41 U.S.C. § 10a-10d; and its rejection resulted from a predetermined bias against its small business status. The protester contends that notwithstanding our decision in Optimum Systems, supra, we should consider this case because of the erroneous procurement procedures followed.

In our opinion, these facts and arguments are not sufficient to warrant an exception to our general policy of not considering protests from potential subcontractors.


Industrial disagrees with DOE's statement that no fraud or bad faith on the part of the Government procurement officials has been shown. It states that the supporting documentation submitted in connection with its protest clearly demonstrates the procuring officials acted arbitrarily and capriciously in ignoring the lowest bid received and awarding the contract to a foreign company. Industrial, however, has not challenged DOE's statement that neither the selection nor the award was subject to its approval and that it did not participate therein in any manner. Bad faith in the selection process is not enough. Bad faith on the part of the Government procurement officials in approving the sub-contract award must be shown before this Office will decide the protest. Sargent Industries, B-188220, February 23, 1977, 77-1 CPD 133. With regard to the Government procuring personnel, Industrial has shown neither bad faith nor the right to approve or disapprove the selection.

Regarding Industrial's assertions that the evaluation of its proposal was inconsistent with the preference for small business in economically depressed areas, we point out that even in direct unrestricted Federal procurements, it would be improper to evaluate proposals on a basis other than that specified in the solicitation. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10; Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79.

Moreover, the subcontracting practices of Ebasco are subject to the terms and conditions in its contract with Princeton and Princeton's subcontracting practices are, in turn, governed by its prime contract with DOE. Thus, the question in this case whether an award to Brown violates the Buy American Act obligations of either Ebasco or Princeton is a matter of contract administration and not for resolution under the bid protest functions of this Office. 4 C.F.R. part 20 (1978). In any event, the foreign status of the awardee, of itself, does not violate the Act. Lemmon Pharmacal Company, B-186124, August 2, 1976, 76-2 CPD 110.

In support of its contention that this Office should consider the protest on its merits, Industrial cites Hayes International Corporation v. McLucas, 509 F. 2d 247 (5th Cir.) cert. denied, 423 U.S. 864 (1975). In that case, the court held that a disappointed bidder for a prime Government contract had legal standing in court to challenge the award. The standing of a potential second tier subcontractor was not at issue. A second tier subcontractor has no privity with a prime contractor. Undersea Engineering & Construction Corp. v. International Telephone & Telegraph Corp., 429 F. 2d 543 (5th Cir. 1970).

This protest is dismissed.


Milton J. Socolar
General Counsel