

DECISION



11,143 Proc I
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-194494

DATE: August 15, 1979

MATTER OF: Motorola, Inc.

CNG00219

DIGEST:

Under Optimum Systems., Inc., 54 Comp. Gen. 767 (1975), protest against award of subcontract is dismissed as record does not establish Government activity participated in subcontractor selection and subcontract award was not made "for" the Government since prime contractor held neither management contract nor operated GOCO plant for Government.

Motorola, Inc., has protested the rejection of its bid under invitation for bids No. MI-78-010 issued by DeLeuw, Cather/Parsons (DCP). DCP holds contract No. DOT-FR-76048 with the Federal Railroad Administration (FRA) for architect-engineering services for the Northeast Corridor Improvement Project. AGC00213

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The IFB in question was for the supply of maintenance of way radios for the project. Motorola's low bid was rejected as nonresponsive and the subcontract awarded to RCA, Mobile Communications Systems.

The first question to be resolved is whether this subcontract protest is of the type over which our Office will exercise jurisdiction under the standards set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

In Optimum Systems, our Office held that we would entertain protests concerning the award of subcontracts by prime contractors only under certain clearly delineated circumstances including, among others, where the Government so actively participates in the subcontractor selection

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process as to effectively cause or control the selection, or significantly limit subcontractor award sources, and where the subcontract award is "for" an agency of the Federal Government.

Motorola contends that this subcontract award falls under either of these categories.

Regarding the active participation by the Government in the subcontractor selection process, Motorola argues that FRA did much more than merely consent to the subcontract award. Motorola states that FRA concurred in DCP's advance procurement plan, observed the prebid conference, approved DCP procurement procedures, consented to the award to RCA, reviewed the procurement after bids were submitted, and assumed authorship of the Government's and DCP's position regarding Motorola's bid.

From the record before our Office, it appears FRA did not become involved in the matter until DCP evaluated the bids and sent Motorola the notice of the rejection of its bid whereupon Motorola protested to the FRA. FRA denied the protest and Motorola protested to our Office. The actions of FRA prior to the submission of bids did not involve the selection of the awardee and our Office has held that the approval of a proposed subcontract award does not constitute sufficient involvement to invoke our Office's jurisdiction. Pen Foam Insulation Co., B-192764, September 26, 1978, 78-2 CPD 233. The only review of the bids by FRA was following the protest by Motorola. Further, the fact that the FRA responded to our Office following Motorola's protest here does not confer jurisdiction under Optimum Systems, Inc., supra.

With respect to the other category, Motorola argues that the procurement was "for" an agency of the Government by placing reliance on our decision in Midwest Tele Communications Corporation, B-184323, February 9, 1976, 76-1 CPD 81.

Midwest, *supra*, involved the award of a contract by a contractor-operator of a Government-owned plant for a closed circuit television system to be installed in the plant. We found that our Office had jurisdiction over the protest notwithstanding that the Government had played no direct part in the subcontracting action because it was a subcontract award made "for" the Government. We observed that the system was to be installed in the Government-owned plant and that the invitation for bids stated "This equipment will become the property of the United States Government upon delivery."

Motorola contends that the award was "for" the Government because the radios are for installation in Government equipment and that upon delivery by the system vendor, title will vest in the Government. Motorola further states that the fact that the invitation did not contain a clause similar to the one in Midwest should not be determinative because the title will ultimately vest in the Government.

However, we do not find Midwest controlling here. In Midwest, as noted above, the prime contractor was managing a Government-owned, contractor-operated (GOCO) plant. Also, in 49 Comp. Gen. 668 (1970), cited as authority in Midwest, the subcontract award was made by a prime contractor under a GOCO-type arrangement. These type contractors, along with the Department of Energy (DOE) (formerly Atomic Energy Commission and Energy Resources Development Administration), prime management contractors who operate and manage DOE facilities, were the contractors which could make award "for" the Government, as that term was used in Optimum Systems, Inc. We do not find the architect-engineering contract held by DCP to involve the same contractual relations as those in the GOCO and management contract situations so as to invoke the jurisdiction of our Office.

Accordingly, the protest is dismissed.

Harry R. Van Cleave

for Milton J. Socolar
General Counsel