12859 PL-1

DECISION

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

FILE: B-196833 DATE: February 14, 1980

MATTER OF: MEML/Tamam DLG03911

DIGEST:

[Protest concerning award of subcontract is dismissed since protester has not shown that Government was involved in selection of subcontractor, other than to approve selection, neither bad faith nor fraud have been shown, and subcontract award was not "for" the Government.]

MEML/Tamam has protested the award of a CNG00103 subcontract to Dyneteria, Inc. (Dyneteria), for food services to the OVDA airbase construction site in Israel. The subcontract was awarded by Negev Airbase DLG03912 Constructors (NAC), the prime contractor for construction of the airbase, under a contract awarded by the United States Army, Corps of Engineers (Corps). AGC00306

MEML/Tamam was the low bidder, but NAC determined it to be nonresponsible. The Corps has subcontractor approval rights in its prime contract with NAC, so NAC submitted its choice of Dyneteria for approval, with the nonresponsibility finding on the protester. The Corps approved award to Dyneteria. MEML/Tamam argues that the finding of nonresponsibility was arbitrary and not based on fact, and that the Corps accepted the finding without properly investigating the basis for it.

MEML/Tamam also filed suit in the District Court of Tel Aviv, Israel (Civil File No. 2467179), on DLG03914 November 19, 1979. The court issued a temporary restraining order on that day. On December 4, 1979, the court issued an order dissolving the restraining order and holding that MEML/Tamam did not have a substantive right to award of the contract, but that it

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might have a remedy in the form of damages. The court retained jurisdiction for resolution of that matter.

For the following reasons, the protest is dismissed.

NAC argues that, since the issues have been decided by a court of competent jurisdiction and that court has not expressed an interest in our opinion, in accordance with our policy we should not consider the protest. 4 C.F.R. § 20.10 (1979). MEML/Tamam argues that we should consider the protest because the Israeli Court did not have jurisdiction over the Corps, and alleged action by the Corps is the subject of the protest. However, even assuming arguendo that MEML/Tamam's argument is correct, the protest is dismissed for other reasons.

Our Office will consider protests concerning the award of subcontracts only in limited circumstances set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Those circumstances are: (1) where the prime contractor is acting as the purchasing agency of the Government; (2) where the active or direct participation of the Government in the selection 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. Mere approval by the Government of the subcontract, absent a showing of fraud or bad faith in the approval, is not sufficient Government involvement to invoke our review. Id.

MEML/Tamam argues that the Corps directly or indirectly participated in selecting Dyneteria for award of the subcontract.

First, the Corps disapproved NAC's initial request to award to the third low bidder, Campco-Pacific, after NAC had initially determined that Dyneteria and MEML/Tamam were nonresponsible. This had the effect of directing award to Dyneteria, the protester asserts. The record shows that the Corps refused to approve award to Campco-Pacific because NAC had not adequately supported the nonresponsibility findings on the two low bidders. This falls within the mere Government approval or disapproval of subcontract awards, which under Optimum Systems, Inc., supra, is not sufficient to invoke our review.

MEML/Tamam also cites "circumstantial evidence" which, it argues, shows Corps involvement, notwithstanding the Corps' "innocent explanations" and "stone-walling." The "circumstantial evidence" cited by the protester involves nothing more than a series of speculative and totally unsupported suppositions concerning a number of events, and in no way shows that the Corps was involved in the subcontractor selection, other than to approve it. In each instance the Corps has provided a reasonable explanation which MEML/Taman has offered no evidence to rebut.

Finally, MEML/Tamam refers to a letter of November 6, 1979, from NAC to the Corps which states "* * * [i]n accordance with our oral instructions, please be advised that Dyneteria, Inc. * * * has withdrawn all protests concerning the food service solicitation issued by NAC." The protester states that the phrase oral instructions "could indicate more involvement than merely approving the contract." The Corps has provided the following explanation. Dyneteria had protested the subcontract solicitation on other grounds. When NAC advised the Corps that it wanted to make award to Dyneteria, the Corps told NAC that it would not approve any award while a protest was pending. The Corps then suggested that NAC might ask Dyneteria to withdraw its protest to resolve this problem. This clearly does not indicate Corps involvement beyond approval.

The protester also states "we suggest that bad faith may be implied from the circumstances." This

falls far short of the showing of bad faith required to invoke our review of the Corps' approval.

The protester also makes an unsupported allegation that a retired Army member, now employed by Dyneteria, had contact with the Corps in violation of 18 U.S.C. § 281 (1976). MEML/Tamam states that the Justice Department no longer prosecutes such violations because the penal provisions have been repealed, and that we should investigate the matter. Aside from the fact that the allegation is unsupported, and has been denied by the Corps and Dyneteria, our Office does not investigate allegations of criminal misconduct.

MEML/Tamam also argues that this contract is "for" the Government because the prime contract is a cost-type contract and any increased costs will be passed on to the Government. Therefore, the protester contends, this situation is like that involved in a Government-owned-contractor-operated (GOCO) plant where the prime contractor is a manager for the Government. This argument is unpersuasive. To be considered a subcontract "for" the Government, under Optimum Systems, Inc., the prime contract must involve the contractor actually managing a Government facility. See, e.g., Motorola, Inc., B-194491, August 15, 1979, 79-2 CPD 124. Here, the prime contract is for the construction (not operation) of an Israeli (not U.S. Government) airbase.

Finally, the protester notes that the agreement between the United States and Israel underlying the construction of the airbase requires that all work be performed in accordance with pertinent U.S. laws and regulations including Department of Defense contracting and fiscal procedures. The protester argues that this means that all protections, including our Bid Protest Procedures, must be available. That clause, however, cannot give a potential subcontractor any greater protection than it would have when a prime contract is performed in the United States. Therefore, MEML/Tamam must still show that the conditions specified in Optimum Systems, Inc., are present before our Office will review the matter.

Protest dismissed.

Nancy D. Van Cleve
for Milton J. Socolar
General Counsel