

107
DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20546

118859

FILE: B-206953

DATE: July 1, 1982

MATTER OF: S. Kane & Son, Inc.

DIGEST:

Subcontract award by Amtrak under Department of Transportation (DOT) contract does not fall within exceptions set forth in Optimum Systems, Inc., to invoke jurisdiction of GAO since DOT was neither actively involved in subcontractor selection nor was award "for" the Government.

S. Kane & Son, Inc. (Kane), protests the award of a subcontract to I. Alper & Co. (Alper) under invitation for bids (IFB) No. AM-81SLACS5B issued by National Railroad Passenger Corporation (AMTRAK) for roof and parapet rehabilitation work at the 30th Street Station, Philadelphia, Pennsylvania. AMTRAK's solicitation, a small business set-aside, was under authority of a contract with the United States Department of Transportation, Federal Railroad Administration (DOT), to carry out the Northeast Corridor Improvement Project (NECIP).

Kane asserts that Alper is not a small business concern and did not submit a responsive bid because its affirmative action hiring plan and minority business enterprise plans were submitted after bid opening. Further, Kane argues that it should have received the award because Kane submitted proper minority business plans and its price was within 4 percent of Alper's bid price. We dismiss the protest.

Initially, this case requires a determination as to whether this subcontract protest is of the type 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 process as to effectively cause or control the selection, or significantly limits subcontractor award sources, or where the subcontract award is "for" an agency of the Federal Government.

In Blakeslee Prestress, Inc., et al., B-190778, April 17, 1978, 78-1 CPD 297, we took jurisdiction of an Amtrak procurement under the first test stated above where DOT played a significant role in the award of the subcontract. The NECIP Project Director was a DOT employee, the award required DOT's approval because the amount was over \$1,000,000, Amtrak was required to consult with another DOT contractor (the architect-engineer for NECIP), and a committee consisting of representatives of DOT, Amtrak, and the other DOT contractor was responsible for reviewing and approving or disapproving the technical proposals. As an alternative basis of jurisdiction, we stated it appears that under the terms of the Amtrak-DOT contract, Amtrak was acting "for" DOT, the second test of jurisdiction mentioned above.

Here, DOT was not actively or directly involved in the selection of the subcontractor so as to invoke our jurisdiction under the Optimum Systems standard. Amtrak alone drafted the solicitation, evaluated the bids and made the subcontractor selection. Under Amtrak's contract with DOT, DOT approval of the selected subcontractor is required for awards over \$1 million. This contract was below that threshold. Even if the dollar amount of the subcontract exceeded \$1 million, the mere approval by DOT would not be sufficient grounds to invoke our Office's jurisdiction. See Marine Engineers Beneficial Association, B-201391, December 31, 1980, 80-2 CPD 455.

While we stated in the Blakeslee case, supra, as an alternative basis of jurisdiction, that it appeared the contract was made "for" DOT, in a later case we limited the scope of the term "for" as used in Optimum Systems, supra, to the type of contractual relationship found in prime management contracts issued by the Department of Energy and in contracts with prime contractors who operate Government-owned, contractor-operated plants. Motorola, Inc., B-194494, August 15, 1979, 79-2 CPD 124.

Concerning whether this contract was made "for" the Government, the contractual relationship between DOP and Amtrak is not a prime management type and Amtrak, not the Government, holds title to the train station where the work is to be performed and, therefore, it is Amtrak, not the Government, that will directly benefit from the repairs. Compare Midwest Tele Communications Corporation, B-184323, February 9, 1976, 76-1 CPD 81.

Therefore, this is not the type of subcontract protest our Office will entertain jurisdiction of under Optimum Systems.

We dismiss the protest.

Harry R. Van Cleve
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Acting General Counsel