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DECISION



*D. Kellman
Proct*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20547**

FILE: B-177450

DATE: -January 6, 1977

MATTER OF: Consolidated Diesel Electric Company

DIGEST:

Prior consideration of protested award of contract for 200 self-propelled howitzers was unwarranted since information presented on reconsideration shows that procurement involved "dependable undertaking" pursuant to section 22(a) of Foreign Military Sales Act. Temporary use of Army appropriations pending reimbursement does not change essential nature of contract from that of section 22(a) dependable undertaking. Under rationale of Tele-Dynamics, Division of AMBAC Industries (55 Comp. Gen. 674 (1976) and subsequent decisions, jurisdictional basis for considering matter is lacking. Accordingly, prior decision should be disregarded and case is dismissed.

This decision deals with a protest and request for reconsideration by Consolidated Diesel Electric Company (CDEC) involving the award of a contract (No. DAAF03-73-C-0028) for the procurement of 200 self-propelled howitzers (designation M109) under invitation for bids No. DAAF03-72-B-0071, issued by the United States Army Weapons Command, Rock Island, Illinois, to Bowen-McLaughlin-York Company (EMY).

Our Office previously rendered a decision, B-177450, October 30, 1973, stating that we could not conclude that the determination by the Department of the Army (Army) of CDEC's nonresponsibility lacked a reasonable basis, and that in our view the award to EMY was not subject to objection. CDEC, through its counsel, requested reconsideration of this decision and presented substantial additional information in support of its position that the determination of nonresponsibility was incorrect. The Army contested CDEC's position. In addition, the Army's report to our Office dated March 2, 1976, presented evidence that the subject procurement was made to fulfill a foreign military sales transaction between the United States and

B-177450

Iran. The Army expressed the view that in light of a recent decision of our Office (Tele-Dynamics, Division of AMRAC Industries, 55 Comp. Gen. 674, 76-1 CPD 60) we were without jurisdiction to entertain the protest because no appropriated funds were used in this procurement. The March 2, 1976, Army report was the first time this issue had been brought to our Office's attention.

The Army's report indicated that DD Form 1513, Offer and Acceptance, a Foreign Military Sales (FMS) case (designator DA Iran UQT) was accepted by the Government of Iran on February 21, 1972. From the information presented, it appears that this FMS case, for the delivery of 200 M109 self-propelled howitzers, was the basis for the requirements that were awarded on the contract, DAAF03-73-C-0028, which is the subject of the CDEC protest. The transaction represents a cash sale of defense articles pursuant to section 22 of the Foreign Military Sales Act, as amended, 22 U.S.C. § 2762 (Supp. V, 1975). The terms of payment were on the basis of a "dependable undertaking," pursuant to section 22(a), which authorizes the President, without requirement for charge to any appropriation or contract authorization otherwise provided, to enter into contracts or procure defense articles or services for cash sale to a foreign country upon a dependable undertaking by that country to make available in advance sufficient funds to cover payments, damages, and other costs due under the contract.

However, upon further examination of this matter we ascertained that payments to the contractor for the 200 vehicles were initially made from United States Army funds (weapons appropriation 2122033) and that funds furnished by Iran were utilized to reimburse that Army appropriation. Apparently payments by Iran were not made in sufficient time to cover all payments due under the contract, thus necessitating the temporary use of Army funds. As to the effect of this use of Army appropriations we think it is pertinent to note that a report from the Senate Foreign Relations Committee on the Foreign Military Sales Act of 1968 indicated with regard to section 22, as follows:

"This is a substantial repetition of section 523 [originally section 507(b)] of the Foreign Assistance Act which authorizes the Defense Department to enter into procurement contracts on behalf of purchasing countries." (Emphasis added.) S. Rep. No. 132, 90th Cong., 2d Sess. 3 (1968)

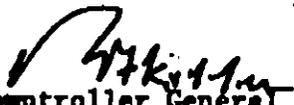
Neither section 507(b) of the Foreign Assistance Act of 1961, Pub. L. No. 87-193, 75 Stat. 437 (September 4, 1961) nor the present section 22(a) require that funds be made available by the purchasing

B-177450

country in advance of all payments and other costs due under the contract. The only requirement is that a "dependable undertaking" for this purpose be entered into. See S. Rep. No. 312, 87th Cong., 1st Sess. 25 (1961). In our view, the incidental and temporary charging of Army appropriations pending reimbursement does not change the essential nature of the subject contract from that of a section 22(a) "dependable undertaking." In addition, we note that to decide otherwise would render our bid protest jurisdiction subject to changing circumstances during the course of contract administration.

In Tele-Dynamics, supra, and subsequent cases, our Office has declined to render a decision in circumstances where, as here, the protest involved a question as to the proper recipient of an award in an FMS procurement of this type. See, in this regard, Cincinnati Electronics Corporation, Inc., et al., B-185842, September 27, 1976, 55 Comp. Gen. _____, 76-2 CPD 286. There is no allegation in this case of any impropriety in the FMS procedures per se which were followed by the Army.

Our earlier consideration of this matter was undertaken on the basis that jurisdiction existed, which was unquestioned at that time. It is now evident that an appropriate jurisdictional basis was and is lacking. Accordingly, we will not give any further consideration to this matter.


Deputy Comptroller General
of the United States