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DECISION



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

FILE: B-189551

DATE: April 17, 1978

**MATTER OF: American Satellite Corporation
(Reconsideration)**

DIGEST:

1. Request for reconsideration is denied where protester fails to demonstrate error of fact or law in prior decision concluding that prospective subcontractor was not interested party.
2. In determining whether protester (prospective subcontractor) is an interested party, we examine degree to which asserted interest is both established and direct. Where there is an intermediate party of greater interest, protester generally is too remote to establish interest. Copy of letter sent to procuring agency supporting protest by prospective subcontractor submitted by prime offeror proposing to use another subcontractor which only tenuously establishes link between prime and protester is too speculative to constitute an affirmative expression of interest and acquiescence in protest.
3. Citation of decision involving complaint under grant in support of determination under bid protest that protester (prospective subcontractor) is not interested party is not inappropriate where rationale of decisions is identical.

The American Satellite Corporation (Amsat) has requested reconsideration of our decision in American Satellite Corporation, B-189551, March 6, 1978, in which we determined Amsat not to be an "interested party" under section 20.1(a) of our Bid Protest Procedures, 4 C.F.R. § 20.1(a) (1976), incident to Amsat's protest under a National Aeronautics and Space Administration (NASA) solicitation for communications services.

B-189551

We will recount the facts underlying our prior decision to the extent needed for clarity. The record showed that NASA sought proposals from a number of international record carriers (IRC's) for satellite communications services from a mid-Pacific point to the Goddard Space Flight Center (GSFC) in Greenbelt, Maryland, via Hawaii, with terrestrial service limited to local interconnections between stations. The Hawaiian Telephone Company (Hawtel) enjoyed a competitive advantage because of the proximity of its Sunset Beach ground station to the NASA Hawaiian facility.

Hawtel declined to provide a reasonable quote to Amsat for access to the Sunset Beach station, thereby forcing Amsat to propose more costly communications routings to its IRC's. Hawtel justified its action on the basis that it was competing for the same NASA service in conjunction with its role as a subcontractor to the awardee, American Telephone & Telegraph (AT&T). Amsat was the proposed subcontractor in three proposals submitted by two IRC's.

Amsat contended in its protest that Hawtel's refusal to provide Amsat access to the Sunset Beach station was a violation of Hawtel's obligations as a common carrier and denied NASA the opportunity to receive truly competitive proposals. Amsat argued that an award by NASA in these circumstances would be contrary to NASA's obligation to make award based on competition. Western Union International (WUI), an IRC which considered Amsat as a prospective subcontractor but elected to use another firm in its proposal, sent us a copy of its letter to NASA supporting Amsat's protest. Neither of the IRC's actually proposing to use Amsat as a subcontractor commented to this Office on the protest.

B-189551

We saw Amsat's protest as involving essentially two major issues: (1) the propriety of Hawtel's actions under the Federal Communications Act of 1934, as amended, and (2) the nature and extent of NASA's obligation to obtain competition in the acquisition of services from a regulated industry. The protester, other parties and our Office all agreed that consideration of the first question was the responsibility of the Federal Communications Commission and not this Office.

We held Amsat not to be an "interested party" within the meaning of our Bid Protest Procedures, 4 C.F.R. § 20.1(a) (1976), with respect to the question of NASA's obligation to obtain competition. We considered that Amsat's protest pertained to the degree of competition for the prime contract award and held that the legitimate direct interests in the prime contract award were adequately protected by limiting the class of parties eligible to seek review by this Office to prime offerors, citing our decision in Hydro-Clear Corporation, B-189486, February 7, 1978, 78-1 CPD 103. Since no offeror had protested directly to this Office, we declined to consider the matter on the merits.

Amsat contends that our determination that it was not an interested party was based upon errors of law and is inconsistent with prior decisions of this Office. Amsat argues that it qualifies as an interested party under our decision in Elec-Trol, Inc., 56 Comp. Gen. 729, 77-1 CPD 441 (1977), in which we reaffirmed:

"* * * the right of a subcontractor to protest a prime contract award where the subcontractor's financial or other interest is evident from the fact that the protester is listed as a proposed subcontractor and the potential prime contractor acquiesces in the protest."

We stated in our initial decision that the copy of a letter submitted by WUI supporting Amsat's protest did not alter our conclusion that Amsat was not an interested party since it was not a direct protest to this Office. Amsat argues that this statement

B-189551

establishes a new requirement--that an acquiescing prime offeror must complain directly to this Office by filing a direct protest--and suggests that this requirement makes any protest by a subcontractor a nullity. Amsat also objects to our reliance on Hydro-Clear Corporation, supra, since that decision concerned a complaint under a grant-in-aid rather than a bid protest. For the reasons stated below, we do not agree with Amsat's assessment of our previous decision.

In determining whether a protester satisfies the interested party criterion, we examine the degree to which the asserted interest is both established and direct. In making this evaluation, we consider the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. ABC Management Services, Inc., 55 Comp. Gen. 397 (1977), 75-2 CPD 245; Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242. We have considered as too tenuous to constitute interest the mere expectation of employment or of selection as a subcontractor. John S. Connolly, Ph.D, B-188832, B-188846, May 23, 1977, 77-1 CPD 359, aff'd: B-188832, B-188846, July 26, 1977, 77-2 CPD 52; Elec-Trol, Inc., supra. Conversely, we have recognized the right of non-offerors, including subcontractors, to have their protests considered on the merits where there is a possibility that recognizable established interests will be inadequately protected if our bid protest forum is restricted solely to offerors in individual procurements. Abbot Power Corporation, B-186568, December 21, 1976, 76-2 CPD 509; District 2, Marine Engineers Beneficial Association -- Associated Maritime Officers, AFL-CIO, B-181265, November 27, 1974, 74-2 CPD 298; 49 Comp. Gen. 9 (1969).

The party's relationship to the question raised by the protest must be direct. Where there is an intermediate party of greater interest, we generally have considered the protester to be too remote from the cause to establish interest within the meaning of our Bid Protest Procedures, supra. Thus, in Infodata

B-189551

Systems, Inc., B-190479, November 21, 1977, 77-2 CPD 390, we declined to consider the protest of a subcontractor to the second-low bidder based on issues relating to the selection of the prospective awardee because " * * * the bases for Infodata's protest are not specifically related to its qualification as a prospective subcontractor, but are primarily relevant to Value's entitlement to the prime contract award." And in Hydro-Clear Corporation, supra, we considered as too remote the complaint of a prospective subcontractor of an unsuccessful offeror against the responsiveness of the proposed awardee's bid under a grant-in-aid on the basis that it failed to comply with a descriptive literature requirement. We held in the latter case that the legitimate recognizable interests in the prime contract award were adequately protected by limiting the class of parties eligible to request GAO review to the firms that submitted bids, i.e., prospective contractors. On the other hand, we have indicated that we would consider the protest of a potential flooring subcontractor concerning a flooring specification. See Elec-Trol, Inc., supra. And in Educational Projects, Inc., 56 Comp. Gen. 381 (1977), 77-1 CPD 151, we considered a subcontractor protest against the elimination of its prime offeror from the competitive range for reasons of high costs attributable to subcontractor proposals where those costs were a direct result of specifications which clearly favored quality over price.

As we noted in our prior decision, Amsat's protest relates to the degree of competition for the prime contract award, a subject in which Amsat's prime offerors would be intermediate parties of greater interest. Consequently, we considered Amsat as too remote from the subject matter to establish direct interest.

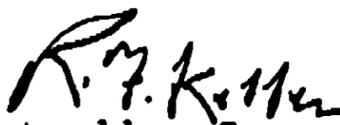
B-189551

Furthermore, we note that WUI's letter in support of Amsat's protest was directed to NASA, with only a copy to this Office, and that the letter itself established only tenuously a link between Amsat and WUI. In this connection, we note that WUI proposed to use another subcontractor; the letter, however, suggests that if Hawtel had provided Amsat a reasonable quote for access to the Sunset Beach station and if WUI had selected Amsat's proposal, then WUI and Amsat might have been able to submit a more competitive proposal to NASA. We regard this as too speculative to constitute an affirmative expression of interest and acquiescence in Amsat's protest.

Furthermore, we do not regard our view of WUI's letter as establishing a new requirement for "direct protest" to this Office by the prime offeror. Rather, we consider it a reflection of the reasonable and existing requirement that the supporting or acquiescing prime offeror have a recognizable direct interest in the outcome of the subcontractor's protest. Cf. Educational Projects, Inc., supra.

Nor do we deem improper or inappropriate the citing of our decision in Hydro-Clear Corporation, supra, in support of our determination that Amsat was not an interested party. Although, as Amsat states, that decision concerned a subcontractor complaint under a grant rather than a bid protest, the rationale of both decisions is identical--in each instance the subcontractor raised issues pertaining to the primary award without the acquiescence or support of a prime with a recognizable direct interest in the outcome of the protest.

For the foregoing reasons, we do not consider that Amsat has established that our decision was either based on an error of law or inconsistent with prior decisions of this Office. We therefore affirm our prior decision.


Deputy Comptroller General
of the United States