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W. W. Thompson
Proc I

DECISION



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

FILE: B-190682

DATE: December 8, 1977

**MATTER OF: William M. Bailey Company, Industrial Products
Division**

DIGEST:

1. While GAO will consider protests involving sub-contracts under limited circumstance stated in Optimum Systems, Inc., protest will not be considered where selection of subcontractor was choice of prime contractor and Government's approval was directed not to selection of subcontractor, but to its compliance with specifications and review of action would result in GAO involvement in contract administration.
2. Protest by prospective subcontractor against alleged restrictive specifications is untimely under section 20.2(b)(1) of Bid Protest Procedures because protest of improprieties apparent prior to bid opening was not filed prior to bid opening.

By letter filed in our Office November 15, 1977, the William M. Bailey Company, Industrial Products Division (Bailey), protests its rejection as a subcontractor under Department of the Army contract No. DACW33-77-C-0034, awarded to Hanover Contracting Company, Inc., for construction of the Saxonville Local Protection Project.

According to Bailey, it was rejected solely because it does not meet the specification requiring that the manufacturer of sluice gates have 5 years' experience in the manufacture of similar gates. Bailey argues that it is otherwise responsible, and that the specification is unreasonable and unnecessarily restrictive.

Our Office will consider subcontract protests only in limited circumstances as set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. The circumstances are: (1) where the prime contractor is acting as the purchasing agent 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

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is "for" the Government; or (5) where a Federal agency entitled to the same requests an advance decision. In Optimum Systems, it was stated further:

"However, where the only Government involvement in the subcontractor selection process is its approval of the subcontract award or proposed award (to be contrasted with the circumstances set out above where direct or active Government participation in or limitation of subcontractor selection existed), we will only review the agency's approval action if fraud or bad faith is shown. * * *"
Id. at 774.

In this case, the selection of the subcontractor was the choice of the prime contractor subject to Government approval. The specifications included the requirement that:

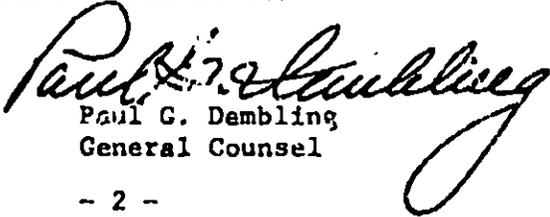
"The sluice gates and flap gates shall be a product of a reliable manufacturer who can show at least 5 years of successful experience in the manufacture of similar gates."

The Corps refused to approve a subcontract award to Bailey because it determined that Bailey did not meet this requirement.

Based upon the above circumstances, the Government's approval was directed not to the selection of the subcontractor, but to the determination that the firm have at least 5 years' experience in the design and manufacture of the equipment. Since neither fraud nor bad faith has been alleged or demonstrated in connection with the Government's determination concerning Bailey's compliance with the specifications and review of this action would result in our becoming involved in contract administration, this is not the type of subcontract protest where we will assume jurisdiction. Lyco-ZF, B-188037, January 17, 1977, 77-1 CPD 36; Flair Manufacturing Corp., B-187870, December 14, 1976, 76-2 CPD 486.

Bailey's protest concerning the alleged restrictiveness of the specification is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), because the protest of improprieties apparent prior to bid opening was not filed in our Office prior to the opening of bids for the prime contract. See Midwest Tele-Communications Corporation, B-184323, February 9, 1976, 76-1 CPD 81.

Accordingly, Bailey's protest is dismissed.


Paul G. Dembling
General Counsel