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

B-156229(2)

MAY 3 1965

H. Sand & Company, Incorporated
c/o Max Greenberg
30 Vesey Street
New York, New York 10007

Attention: Mr. Jerome Reiss

Gentlemen:

Reference is made to your letter of April 16, 1965, and to letters of March 2 and 29, 1965, from H. Sand & Company, protesting against an award to Norair Engineering Corporation under General Services Administration Project No. 49311 for airconditioning at the Bureau of Engraving and Printing.

The invitation (as modified for rebidding) required bidders to list in their bids the names of proposed subcontractors for designated categories of work. Paragraph 2-06B of the specifications defined "subcontractor" as follows:

"b. The term 'subcontractor' for the purposes of this requirement shall mean an individual or firm who performs active duties on the site, involving construction, fabrication, or installation of materials or items of equipment in connection with one or more of the categories of work contained in the list of subcontractors included as a part of the Bid Form and shall not include suppliers of these items unless listed or so stated in the specifications, or unless the supplier and installer are one individual or firm by reason of construction practice."

Bids were opened on February 18, 1965, and five bids were received. Norair Engineering Corporation submitted the lowest base bid, \$5,524,000, while Sand's bid of \$5,535,000 was second low. Prices on deductive alternates were also required from bidders, stating amounts to be deducted from the lump-sum base bid for the omission of various parts of the work. Norair is still low bidder after taking into consideration the amounts quoted for deduction on the alternates General Services Administration proposes to accept for award (Alternates A, B, K and L).

You contend that the proposed subcontractor listed by Norair for the translucent window panel units, Panel Structures, Incorporated, is

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not a subcontractor, that is, an installer of translucent window panels, but is only a manufacturer of these items and qualifies merely as a supplier. You conclude that the Morair bid is nonresponsive to the subcontractor listing requirement of the invitation because paragraph 2-06B of the specifications forbids the listing of a supplier.

The record shows that Panel Structures, Incorporated, has agreed to assume "erection responsibility" for the panel structures. General Services Administration concludes that the subcontractor listing requirement is satisfied if the listed subcontractor undertakes to assume responsibility for the erection or installation work involved, even though the listed subcontractor may not perform such work itself but engages another firm to perform the work under a sub-subcontract.

You contend that paragraph 2-06B of the specifications clearly requires listing of the subcontractor who will actually perform the work of installing the translucent window panel units, and that the interpretation advanced by General Services Administration would render the requirements meaningless, that bid shopping will not be stopped "if the device of using suppliers to do indirectly that which a party is prohibited from doing directly, is permitted."

We do not find it necessary to decide the question whether the mere assumption of contractual responsibility for installation by a supplier or manufacturer of materials or equipment is sufficient to qualify him as a subcontractor under paragraph 2-06B of the specifications. General Services Administration advises us that on this type of installation (windows, window panels, etc.) it is common practice for the fabricator to be responsible for the installation in order to avoid dual responsibility during construction. We note that the aluminum windows are to be installed by the window manufacturer or by a specialty subcontractor under the direct supervision of the manufacturer; specifications, paragraph 18-01. The specifications (paragraph 17-01 d) also require the manufacturer of the translucent window panels either to install or to directly supervise installation of the panels. The manufacturer must, therefore, perform "active duties on the site, involving * * * installation," as is required to qualify as a subcontractor under paragraph 2-06B.

In any event, it seems to us that under the particular requirements of the specifications here involved either the installer of the translucent window panels or their manufacturer could qualify as a subcontractor under paragraph 2-06B of the specifications, whichever assumed contractual responsibility to the prime contractor for the

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installation. We therefore conclude that paragraph 17-01 d of the specifications is "so stated" as to permit Panel Structures, Incorporated, the manufacturer of the panels, to qualify as a subcontractor under paragraph 2-06B of the specifications.

As indicated above, General Services Administration proposes to accept Alternates A, B, K and L with the base bid. You contend that the work which is being deleted under Alternates A and B (airconditioning a new guard locker room, and installing an improved air-conditioning system in the Executive dining room, both in the main building) are integral parts of the air-conditioning system and should remain part of the contract. You advise that GSA could save almost \$100,000 and achieve a better air-conditioning system by accepting Alternate I (deletion of the double glazing in the Annex Building) instead of Alternates A and B. You have been advised of the position of the General Services Administration on this point and in your letter of April 16, 1965, you state as follows:

"With respect to the second major point of the G.S.A. concerning its legal authority to accept or reject Alternate I, we can have no real quarrel. However, we do take exception to the statement that the installation of a dual pane of glass, which is not thermal, will help eliminate condensation which causes a marked reduction of humidity. If there is a necessity for maintaining a level of humidity and to stop its reduction, then the question which emerges is why is the double glazing made part of an Alternate instead of being integrated into the body of the contract. The answer is that the double glazing is not essential and will not have the effect claimed by the G.S.A.

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"When we suggested that Alternate I not be accepted, we were merely noting as experts in the field of air-conditioning that the installation of double glazing is a wasteful pursuit in this contract, and that a saving of approximately \$100,000.00 will allow the Bureau of Engraving and Printing to purchase a great deal of currency paper."

General Services Administration advises that deletion of the double glazing requirement was included as an alternate solely for the purpose of permitting an award to be made in the event that such deletion

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because necessary to bring the contract price within the limits of available funds, and with the intention of reinstating the work as soon as additional funds became available. In any event, you recognize that we would not be legally justified in questioning the administrative judgment on this point.

Accordingly, the protest by H. Sand & Company is denied.

Very truly yours,

Joseph Campbell

Comptroller General
of the United States