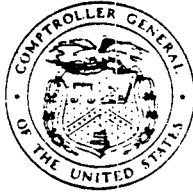


DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

40388

FILE: B-179719 - B-179720

DATE: January 29, 1974

MATTER OF: Edward E. Davis Contracting, Incorporated

DIGEST: Protest by unsuccessful bidder that successful bidder not performing contract in accordance with specifications denied since matter involves contract administration functions within responsibility of contracting agency which are not for resolution under GAO bid protest procedures. Protestant's request for "lost" profits denied since profits may not be recovered in absence of a contract. Keco Industries, Inc. v. United States, 428 F. 2d 1233 (Ct. Cl. 1970) and Heyer Products Company, Inc. v. United States, 135 Ct. Cl. 63 (1956).

The foregoing concern, an unsuccessful bidder, has contended that the incumbent contractor under contract No. F08651-73-C-0193 (0193) has deviated from strict compliance with certain specification requirements in the course of contract performance, and has raised similar objections relative to contract No. F08651-73-C-0551 (0551).

Contract No. 0193 was awarded November 10, 1972, to Howard Ferriell & Sons, Incorporated (Ferriell), for estimated requirements for interior painting and floor finishing in family quarters in the Capehart, Ben's Lake, Wherry, Georgia Avenue, and Plew Residential Park Housing Areas, Eglin Air Force Base, Florida.

It is alleged that the incumbent contractor on contract 0193 has been applying paint by airless spray whereas the contract requires that all coats of paint be applied by brush only, with the exception that interior latex-base paint may be applied by roller. A request is made for a certified list of houses painted since June 30, 1973, and that a representative of this Office inspect the units which have allegedly been spray-painted in derogation of the contractual provisions. In addition, it is requested that the contract be declared null and void because the unsuccessful bidder would have bid a lower price had he been apprised that spray painting would be permitted. Finally, our advice is requested as to the method by which the unsuccessful bidder may recover profits allegedly due.

The contracting agency reports that on August 6, 1973, Ferriell was detected spraying latex paint in the quarters at 401 Wakulla; that the work was rejected and required to be repainted using brushes and rollers as specified by the contract; and that the contractor was advised that a recurrence would result in action for violation of contractual obligations. The contracting agency states that the contract administrator has made several on-site visits during the course of contract performance but that no other known violations of the contractual provisions have been detected.

In this connection, it is reported that Ferriell did in fact perform a demonstration for the Civil Engineer of airless spray application in hard to brush paint areas; that the Civil Engineer agreed that the procedure was effective for such areas; and that provisions for the utilization of airless spray would be included in the specifications of the IFB for the soon to be advertised calendar year 1974 contract. However, it is stated that under the existing contract, the airless spray method would not be permitted.

Contract 0551 was awarded on June 27, 1973 to Floyd and Hobbs Painting Contractors, Incorporated (Floyd and Hobbs) and required the successful bidder to furnish all paint, labor, materials, and equipment, and to perform all operations necessary for the exterior painting of 53 buildings in the Wherry Housing Area at Eglin Air Force Base.

It is contended that Floyd and Hobbs is being permitted to utilize a sandblasting process to remove existing paint from metal gravel stops in derogation of the contract's requirement for removal of existing paint from the gravel stops by scraping or by the application of a liquid paint remover. It is further alleged that the overhang and exposed eaves on the buildings are being spray-painted in violation of the contract provision requiring that all primer and finish paint be applied by brush or roller. Also alleged is noncompliance with the provision requiring the application of exterior wood primer paint prior to the application of exterior latex paint. It is contended that contract 0551 should be cancelled and readvertised with revised specifications so that the unsuccessful bidder may submit a new bid on the basis of the purportedly relaxed requirements, and our advice is requested as to the method by which the bidder may file a claim

for anticipated lost profits. The bidder requests that this Office determine the correctness of its allegations by independent investigation.

With regard to sandblasting of the metal gravel stops, the contracting agency concedes that the contractor was permitted to remove paint therefrom by sandblasting; that such permission was due largely to a misunderstanding of the specification requirements on the part of the Government technical personnel; and has since been corrected.

With regard to the utilization of spray paint, the record states that on August 21, 1973, Floyd and Hobbs' request to spray the gables and cornices was denied. Thereafter, on September 25, 1973, the contractor was observed using spray equipment to paint the gable and cornice on the South end of 20 Choctaw Drive. By letter of September 28, 1973, the contractor was notified of the violation and informed that the subject work was required to be repainted by brush before it would be accepted.

The record indicates that the work being performed under contract 0551 is inspected at least once daily and usually more often; that the inspection is performed by a resident of the Wherry Housing Area, situated near the site of the work; and that his inspections have not revealed any instances in which a coat of primer has been omitted. Accordingly, it is reported that the inspector's log and/or inspection reports indicate the dates upon which the required primer was applied to the various buildings. Inasmuch as the contract requires the primer to be of a tint distinguishable from that of the second coat, it is stated that the primer is readily detectable.

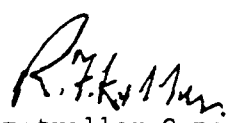
Essentially the request for action by this Office is based upon the question of the contractor's compliance with the contract provisions. These contentions do not necessarily relate to the legality of the award process, which it is our function to consider in resolving bid protests, but rather are properly for resolution by the contracting agency during the course of contract administration. Accordingly, the request for relief by this Office must be denied. We will, however, give appropriate attention to the matters raised in the correspondence for possible consideration in our review of agency operations performed pursuant to our audit responsibilities to Congress.

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Concerning the request for advice as to the method by which lost profits may be recovered, there is no legal basis for allowing lost profits to an unsuccessful bidder. See Keco Industries, Inc. v. United States, 428 F. 2d 1233 (Ct. Cl. 1970) and Heyer Products Company, Inc. v. United States, 135 Ct. Cl. 63, 69 (1956).

With regard to the request for a certified list of houses painted by Ferriell since June 30, such request should be directed to the contracting agency inasmuch as that information appears to be within its control.

Deputy


Comptroller General
of the United States