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

B-195035 SEP 25 1979

[Allegation That Subcontract Was Awarded Contractor on Debarred List]

The Honorable George E. Brown, Jr.
Member, United States House of
Representatives
Post Office Box 71
Riverside, California 92502

Is not to be available to public reading

Dear Mr. Brown:

We refer to your letter of August 15, 1979, written on behalf of Mr. Joseph Doyle, in which you request our legal opinion as to whether contractors debarred under the Davis-Bacon Act, 40 U.S.C. § 276a, et seq. (1976), can legally be awarded subcontracts during the period of their debarment.

You state that Mr. Joseph Doyle, who is a business representative for the International Brotherhood of Electrical Workers, Local 1477, has complained to you about the fact that the Cal-Walts firm has been awarded a subcontract to perform electrical work at the Marine Corps Base in 29 Palms, California. The basis of the complaint is that Waldo Slusher, the principal officer of Cal-Walts, is currently on the Davis-Bacon Act debarred bidders list.

Big Four Construction Company, Inc., a.k.a. Big Four Construction Company, a.k.a. Walt's Electric and Waldo F. Slusher, owner, were found to be violators of the Davis-Bacon Act and effective May 2, 1977, declared to be ineligible for a contract award for a period of 3 years. The debarment extends to any firm in which a debarred person or firm has an interest. 40 U.S.C. § 276a-2 (1976). The provision in 40 U.S.C. § 276a-2 (1976) that "No contract shall be awarded" to those listed as violators or to firms in which they have an interest has been interpreted by our Office as meaning that ineligibility does not preclude legitimate subcontracting. 37 Comp. Gen. 544, 546 (1958). In that connection, the language of the statute does not mention subcontracts and ordinarily there is no privity between the Government and the subcontractor.

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Moreover, the list of debarred bidders which we publish is not worded to preclude subcontract arrangements. However, we recognize that in those instances where the subcontractor has a substantial interest in the prime contractor or has resorted to subterfuge or where a prime contract provision requires governmental approval of subcontractors, the subcontractor's ineligibility can be extended to subcontracting. It is our understanding that none of these exceptions exist in the present case. Therefore, the subcontract award to Cal-Walts does not appear to be legally objectionable.

You point out that the Department of Labor (DOL) in the administration of the Service Contract Act, which states at 41 U.S.C. § 354(a) (1976) that "no contract of the United States shall be awarded" to violators of that act, has provided at 29 C.F.R. § 4.188 (1978) that the prohibition applies to an ineligible firm or individual acting in a subcontractor capacity. Under the Service Contract Act, DOL has primary responsibility for interpreting and administering that act. See Digital Equipment Corporation, B-194363, April 23, 1979, 79-1 CPD 283, and Midwest Service and Supply Co. and Midwest Engine Incorporated, B-191554, July 13, 1978, 78-2 CPD 34. Further, the Service Contract Act vests the authority for debarments under that act with DOL. 41 U.S.C. § 354(a). However, the authority for debarment under the Davis-Bacon Act rests with our Office. 40 U.S.C. § 276a-2. For the reasons stated above, we believe that our position under the Davis-Bacon Act is correct, notwithstanding that DOL has taken a different view under the Service Contract Act.

If individuals and firms debarred under the Davis-Bacon Act can legally be awarded subcontracts during the period of their debarment, you ask if the responsible contracting agency can effectively prohibit such participation in subcontracts. In that connection, we have recognized that, while statutory debarment ordinarily does not, per se, preclude legitimate subcontracting with contractors doing business with the United States, it would be permissible for a

contracting agency to include in a Government contract a condition which would preclude subcontracting, subject to the determination and approval by the contracting officer of the subcontractor's qualifications, provided the condition is stated in the agency's solicitation. 37 Comp. Gen., supra.

Defense Acquisition Regulation § 1-603(c) (1976 ed.) provides that, when a debarred concern is proposed as a subcontractor, the contracting officer should decline to consent to subcontracting with the concern in any instance in which consent is required of the Government before the subcontract is placed unless the Secretary or his authorized representative determines the placement to be in the best interest of the Government. See also Federal Procurement Regulations § 1-1.603(e) (1964 ed. amend. 108). This procedure is the only expedient method of which we are aware for precluding persons or firms debarred under the Davis-Bacon Act from subcontracting with Government contractors. As indicated, whether the limiting condition is included in a Government contract is discretionary and not required. Absent a change in the procurement regulations requiring the limiting condition in all Government contracts or an amendment of the Davis-Bacon Act extending debarment to subcontract situations, the prospect of uniform treatment of ineligible firms and individuals in subcontract situations seems remote.

Sincerely yours,

R.F. KELLER

[Deputy] Comptroller General
of the United States