

01560

DECISION



J. V. [unclear] Present
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-187750

DATE: February 25, 1977

MATTER OF: Industrial Boiler Co.

DIGEST:

1. While GAO will consider protests involving subcontracts under limited circumstances 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 restrictiveness of prime contract 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.

The General Services Administration, Public Buildings Service (GSA), issued invitation for bids (IFB) No. GS-00B-02624 on March 29, 1976, for miscellaneous repairs at the PMDS Depot, Point Pleasant, West Virginia. Lippert & Welch Company, Inc. (L&W), was the successful bidder on the solicitation and the contract was awarded to L&W on July 16, 1976.

The furnishing and installation of a boiler system was included in the requirements of the IFB. Under the terms of the IFB, the contractor was required to submit shop drawings of the proposed boiler system to the contracting officer for approval.

L&W submitted shop drawings to the contracting officer indicating that the boiler system would be supplied by Industrial Boiler Co. (Industrial). The Industrial boiler was rejected by the contracting officer because it utilized turbulators in the flue gas passages which was precluded by paragraph 3.6 of section 1560 of the specifications.

Industrial has protested the rejection of its boiler system by GSA contending that such rejection was arbitrary and was not based on sound engineering principles and that the specification as written was restrictive of competition.

B-187750

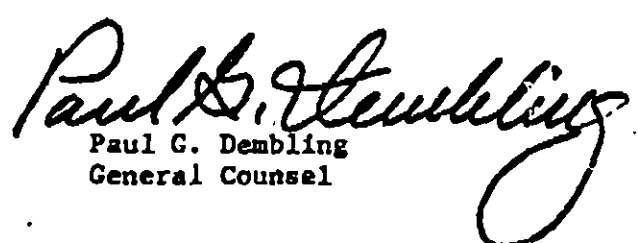
Regarding the first allegation that the rejection of Industrial's boiler system was arbitrary, it should be noted that Industrial is a prospective subcontractor. While our Office will consider protests involving subcontracts, we will do so only in limited circumstances, as set out in our decision in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. In that decision we stated:

"* * * 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 * * * 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. * * *"

In this case, the selection of the subcontractor was the choice of the prime contractor. The Government's only involvement was to determine whether the equipment offered by the prospective subcontractor conformed with the specifications. Thus, the Government's approval was directed not to the selection of the subcontractor, but to its equipment. There has been no showing of fraud or bad faith on the part of the agency, but merely a difference of technical opinion between the agency and Industrial. In that connection, the prime contractor has stated that GSA acted properly and that the equipment should not be used. Since review by our Office of this matter invites us to become 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 _____; Flair Manufacturing Corp., B-187870, December 14, 1976, 76-2 CPD 486.

Industrial's protest against the alleged restrictiveness of the specifications is ordinarily the kind of subcontractor protest our Office would consider on the merits, since the Government is responsible for the specifications contained in L&W's prime contract. California Microwave, Inc., 54 Comp. Gen. 231 (1974), 74-2 CPD 181. However, Industrial's protest against the specifications is untimely under section 20.2(b)(1) of the Bid Protest Procedures, 4 C.F.R. part 20 (1976), 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. Lyco-ZF, *supra*; Flair Manufacturing Corp., *supra*.

Accordingly, the protest of Industrial will not be considered on the merits.


Paul G. Dembling
General Counsel