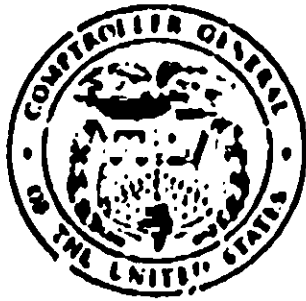


5939

J. Brennan
Proc II

DECISION



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

FILE: B-190464

DATE: April 4, 1978

MATTER OF: United Lighting and Ceiling Corporation

DIGEST:

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 evaluation efforts were directed not to selection of subcontractor, but to whether equipment which the prime contractor was required to furnish would meet contract specifications, and review of action would result in GAO involvement in contract administration.

United Lighting and Ceiling Corporation (United) protests the proposed substitution of a subcontractor other than itself for supplying luminaires (light fixtures) under a prime contract for building systems for the Social Security Administration buildings in Baltimore and Woodlawn, Maryland. Contract GS-00B-02839 was awarded by the General Services Administration (GSA) for these systems on June 29, 1976 to the joint venture of United States Steel, American Bridge Division; Owens Corning Fiberglass Corporation; and Wolff & Munier (OCF). United maintains that but for the improper evaluation of its fixtures by GSA prior to the award of the prime contract OCF would not now be attempting to switch fixture subcontractors and insists that the fixture which the new prospective subcontractor intends to supply does not meet the contract requirements.

Since United is a prospective subcontractor we must analyze the circumstances of this procurement in order to determine whether it is for our consideration under the criteria set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. The relevant criterion provides for our review of a subcontractor protest 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. However, where the only Government involvement is its approval of the proposed subcontract award that approval will only be reviewed if fraud or bad faith is shown. Optimum Systems, Inc., supra.

The prime contract for a building system, including structural framing, heating, ventilation and air conditioning, electrical distribution, finished floor, and ceiling and space dividers as well as luminaires, was awarded pursuant to two-step formal advertising. The step one request for technical proposals (RFTP) specifies the various subsystems to be procured in terms of performance criteria for the elements making up the subsystem. Section 4 of the RFTP pertains to luminaires and provides that proposed luminaires must meet specified performance standards in seven categories.

The category most significant to the protest is illumination under which luminaires are required to provide a minimum of 60 equivalent spherical illumination (ESI) footcandles and possess a visual comfort probability (VCP) of at least 70. Calculations based on data submitted by the offerors were used to determine the acceptability of the technical proposals while final acceptance under the contract was to be based on calculations involving photometric data derived from sample fixtures as well as from production run fixtures.

The technical proposal submitted by OCF initially proposed a fixture by United with two alternative lamps; a 3300 lumen lamp or a 3450 lumen lamp. Extensive evaluation of the OCF proposal followed during which time several versions of the fixture were proposed and rejected by GSA (GSA's evaluation was conducted by its lighting consultant). It was during this period that OCF submitted erroneous data regarding the 3300 lumen lamp which was not detected by GSA evaluators. This data along with some last minute revisions in the calculations by GSA because of problems related to interference with the proposed fixtures by building columns, according to United, caused OCF to include the United 3300 lumen fixture rather than the 3450 fixture in its final technical proposal.

On March 30, 1976 the step two invitation for bids was issued to the three firms, including OCF, whose technical proposals were deemed acceptable. According to a complex evaluation scheme in the invitation which includes a factor for the cost of relamping the fixtures OCF's bid was low by nearly 4 million dollars and OCF received the award.

Although several sets of calculations were submitted to GSA by OCF for final contract approval of its proposed fixture that data did not satisfy the agency. Finally, GSA itself tested a prototype fixture, which according to the laboratory retained by the agency, did not meet the performance criteria set forth in the contract. At this time OCF submitted a request for approval of a contract modification to permit the substitution of United's 3300 lumen fixture with a 3450 lumen fixture also made by United. This proposal was likewise rejected because GSA found the data submitted inadequate.

Later a meeting was held between representatives of United, OCF and GSA to attempt to settle the problems that were encountered in attaining approval for the fixture. After the meeting GSA representatives remained unconvinced as to the acceptability of the United fixture. Shortly thereafter OCF submitted another request for a contract modification this time for the substitution of United's 3300 lumen fixture with a 3300 model made by Edison Price Lighting, Inc. This request is currently being evaluated.

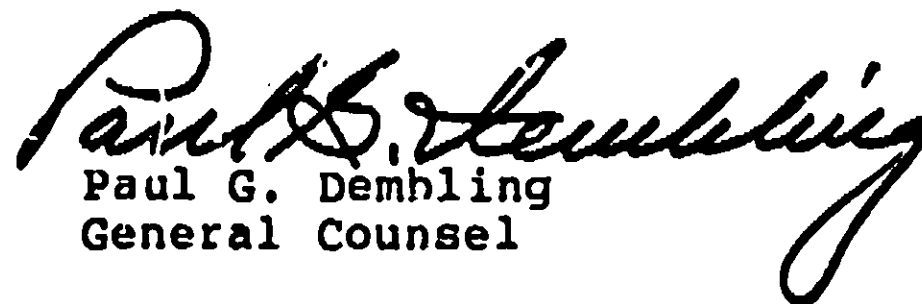
The prime contract contains no provision limiting or restricting the contractor's choice of subcontractors. There is also no subcontract approval clause. However, if the prime contractor wishes to change the system which was approved in its technical proposal a contract modification must be accepted by GSA.

It is evident that GSA was extensively involved in the technical aspects of the evaluation of the luminaires. However, GSA's involvement was for the purpose of determining whether the equipment offered by the prime contractor conformed with the specifications. Thus, the Government's evaluation efforts were directed not to the selection of the subcontractor, but to whether the equipment which the prime contractor was required to furnish would meet the contract specifications.

United attempts to cast doubt on GSA's good faith by alleging that the agency more critically evaluated its fixture after GSA was threatened with a protest from another supplier in late 1976 or early 1977. Not only is this contention, which was first raised in United's February 9, 1978 comments to GSA's report submitted in connection with this protest, untimely raised, it is not supported by the record which contains evidence of rather consistent critical evaluation of the Universal Fixture from early 1976 through 1977. OCF has not complained of GSA's actions in this regard.

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. Industrial Boiler Co., B-187750, February 25, 1977, 77-7 CPD 142. Lyco-ZF, B-188037, January 17, 1977 77-1 CPD 36; Flair Manufacturing Corp., B-187870, December 14, 1976, 76-2 CPD 486.

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


Paul G. Dembling
General Counsel