

DECISION



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

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FILE: B-185178

DATE: July 15, 1976

MATTER OF: Ultraviolet Purification Systems, Inc.

DIGEST:

1. Where Government was integrally involved in approving "equal" equipment of prospective subcontractor, jurisdiction will be exercised to consider merits of protest against award of subcontract.
2. Invitation specifications did not provide for evaluation of equipment on basis of operation and maintenance costs and thus those factors were not for consideration in selecting equipment.
3. Requirement that "All equipment furnished by Contractor shall be stock models for which parts are readily available" is more reasonably construed to mean that end products must be stock models rather than components or parts of equipment which are merely required to be "readily available."
4. Contention that manufacture of system being procured by Government will violate patents of protester will not be considered, since exclusive remedy of aggrieved party is action in Court of Claims against Government for damages.
5. Allegation that private parties may have violated protester's patents or proprietary information raises questions dealing with dispute solely between private parties and is not for GAO consideration.
6. Allegation that Government disclosed proprietary information to private party is matter for courts as contract has been substantially performed.

7. Where specification calling for "light sensing" display is silent as to how nonfunctioning of ultraviolet lamps is to be communicated to display "light sensing" by process accomplished by electrical sensing would not be unreasonable.

Ultraviolet Purification Systems, Inc. (Ultraviolet), protests the award and the approval by the Government of the subcontractor's design for the system being procured from the Aquafine Corporation (Aquafine) by the prime contractor, the Carvel Company (Carvel), under prime contract No. 14-16-0005-6013, awarded by the Fish and Wildlife Service (Service), Department of the Interior. Since the protest presents a question regarding the propriety of a subcontract award by a Government prime contractor, it is necessary to first determine whether our Office will exercise jurisdiction so as to rule on the merits of the protest.

Our Office has consistently recognized that the contracting practices and procedures employed by prime contractors--who are normally acting merely as independent contractors--in the award of subcontracts are generally not subject to the statutory and regulatory requirements governing direct procurements of the Federal Government. 49 Comp. Gen. 668 (1970). While we have enunciated this general rule, we have stated that we will consider such protests under certain limited circumstances: (1) where the prime contractor is acting as the purchasing agent of the Government; (2) 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; (3) where fraud or bad faith in the approval of the subcontract award by the Government is shown; (4) where the subcontract award is "for" the Government; or (5) where a Federal agency entitled to the same requests an advance decision. Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

The pertinent facts necessary to the resolution of the jurisdictional issue are as follows. Invitation for bids No. FWS5-636 was issued by the Service on April 9, 1975, for the construction of a reinforced concrete, insulated, preengineered metal structure containing water filtering and purification units with the necessary piping, valves, metering, control, and monitoring equipment for the Green Lake National Fish Hatchery. Bids were opened on May 16, and the contract was awarded to Carvel on May 29, 1975.

Prior to the award to Carvel, a representative of Aquafine-- on or about May 8--met with the design engineer of the Service working on this procurement and presented for approval its preliminary design for the ultraviolet system called for under invitation FWS5-636. The engineer did not approve the design. On May 15, Aquafine sent a telegram to all potential bidders increasing the price of its system by approximately \$100,000 and stating that after a clarification of the specification by the Department of the Interior its system met the Service's requirements. Several bidders called the Service engineer to ask if this statement was true and were told that it was not. At the post-award June 5 pre-construction conference, Carvel submitted to the Service for approval data regarding the Aquafine system. However, the submittals were considered incomplete and were rejected. Resubmissions of data continued off and on for the next several months until the Aquafine system was finally found acceptable by the Service on October 17. During this time period, Carvel threatened to stop work and to institute proceedings against the Service unless the system was approved.

The provisions in the prime contract dealing with the system procured under the subcontract were set forth in pertinent part as follows. The Technical Specifications provided:

"SECTION 8 - UV PURIFICATION UNITS

"8.01 General - The Contractor shall furnish and install five (5) 3000 g.p.m. UV purification units complete with free standing ballast enclosures, ballasts and wiring as manufactured by Ultra Violet Purification Systems, Inc. or approved equal at the locations shown on the drawings." (Emphasis supplied.)

Paragraph 8 of the Special Conditions provided:

"Prior to installation of any equipment, the successful bidder shall submit to the Government Engineer, for approval, manufacturers' literature and design data in five (5) copies fully describing any equipment as specified or not specified which he proposes to install. Only equipment approved in writing by the Engineer or specified by the drawings or technical specifications shall be installed."

The above-cited factual pattern falls within the second exception (compare B-174521, March 24, 1972) set forth in Optimum Systems, Incorporated, supra, in view of the fact that the Service was so integrally involved in approving the "equal" equipment. The actions by the Service--informing Aquafine on numerous occasions of what was in general necessary to submit an acceptable system and permitting resubmittal of technical plans until Aquafine was able to gain Service acceptance for its system--constituted more than a disinterested, arm's length relationship. Accordingly, the protest will be considered on its merits.

The first basis for the Ultraviolet protest stems from the issuance by Aquafine on May 15, 1975, to all bidders for the prime contract, and the actions or lack thereof by the Government when such fact came to its attention, of a telegram which stated:

"DUE TO CLARIFICATION OF TECHNICAL SPECIFICATIONS
BY U.S. DEPARTMENT OF INTERIOR OUR QUOTATION * * *
IS INCREASED TO \$254,000.00 * * * WE CERTIFY AQUA-
FINE EQUIPMENT TO BE 'APPROVED EQUAL' AND TO BE IN
CONFORMANCE WITH ALL APPLICABLE REQUIREMENTS * * *"

Ultraviolet believes that this misrepresentation of the facts was possibly detrimental to bidders bidding only on Ultraviolet equipment (those informed by the Government that the Aquafine equipment had not been approved) inasmuch as Ultraviolet equipment costs would have been higher and that the Government had a duty (which it failed to meet) to advise all bidders that no such approval had been given. In this connection it is also alleged that the Government improperly gave some bidders information (of the lack of approval) regarding the procurement which was not given to other bidders.

While we agree that the telegram at least implicitly misrepresented the true facts as they existed, we do not believe that the Government's failure to advise all bidders of this implicit misrepresentation (it did advise only those who inquired as to the truth of the assertion in the telegram) represents a sufficient basis for upholding the protest. Ultraviolet strongly implies that, in view of a conversation between the Carvel project manager and the Government design engineer (who was responsible for approving any "equal" submission) concerning the May 15 telegram, it would be "logical" to conclude that Carvel was informed of the misrepresentation. Thus, Carvel's bid may not have been influenced by the misrepresentation.

Secondly, not necessarily in the order raised, Ultraviolet contends that the Aquafine system should not have been found acceptable because vis-a-vis the Ultraviolet system the former will cost approximately \$100,000 more for maintenance and operation due to substantially higher energy consumption and to additional component replacement costs. However, the invitation specifications dealing with the ultraviolet system did not provide for evaluation on that basis and, consequently, those factors were not for consideration in selecting equipment.

Thirdly, it is protested that the Aquafine system did not conform to paragraph 8 of the invitation "SPECIAL CONDITIONS," wherein the following was provided:

"All equipment furnished by the Contractor shall be stock models for which parts are readily available and shall be products of reputable manufacturers regularly engaged in the production of these types of equipment."

Ultraviolet contends that the Aquafine ultraviolet purification units are not "stock models." The procurement activity has responded that no manufacturer is regularly engaged in the production of stock models, and that it is only the components of the equipment which must be stock models. However, the above-quoted requirement governs "[a]ll equipment" to be provided under the prime contract and not merely the ultraviolet units. It is the equipment which must be a "stock model," not the components or parts thereof which are merely required to be "readily available." Thus, the more reasonable interpretation would be that the end products are supposed to be the "stock models." While it may be true that neither Ultraviolet nor Aquafine could satisfy the requirement, it is equally true that Aquafine did not and yet received a contract award.

Fourthly and fifthly, Ultraviolet protests two similar matters: the possible or actual violation by Aquafine in its providing the Government with its system of Ultraviolet patents and/or patent applications and the providing to Aquafine by Carvel of information given Carvel by Ultraviolet on a restricted basis. As regards the first contention, 28 U.S.C. § 1498 (1970) prevents Government contractors or subcontractors from being subjected by aggrieved parties to suits for alleged infringement of any patents in providing items to the Government. In such matters, the exclusive remedy of the aggrieved party is an action against the Government in the Court

of Claims for damages. Because it is desirable that all potential companies be permitted to bid on Government contracts, regardless of any possible patent infringements, 46 Comp. Gen. 205 (1966), our Office has concluded that it will not consider protests based solely upon the claim that performance by a contractor will result in patent infringement. Pressure Sensors, Inc., B-184269, July 31, 1975, 75-2 CPD 73; Aeroquip Corporation, B-184598, September 25, 1975, 75-2 CPD 188. As regards any allegations that Aquafine or Carvel as corporate entities has infringed Ultraviolet patents or potential patents, they involve disputes solely between private parties--matters which are beyond the jurisdiction of our Bid Protest Procedures. PSC Technology, Inc., B-183648, May 27, 1975, 75-1 CPD 316.

Next, Ultraviolet protests the disclosure of information involving its patents, potential patents, and/or other restricted information by the Government as regards this procurement. From 1972 to the issuance of the procurement, Ultraviolet helped the contracting activity develop the ultraviolet system specifications, with the limitation that the information provided by Ultraviolet for such purpose was not to be divulged beyond the Government. While not specifically pinpointing the precise information disclosed, Ultraviolet states that by a comparison of the specifications to the features outlined in its patent applications the areas and items disclosed which are the proprietary property of Ultraviolet may clearly be discerned. Ultraviolet also believes that some of this information may have been divulged during the process of approving the Aquafine system. The contracting activity states that it has examined the specifications and finds nothing that indicates a violation of any proprietary information. The activity also notes that Ultraviolet alleges no facts to back up its claim that any such information was disclosed during the process leading to the approval of the Aquafine system. We note that, even if the specifications did disclose proprietary information, the possibility exists that by permitting the publication of the specifications and by not protesting against this publication until the time that the Aquafine system was approved, Ultraviolet may have estopped itself from now complaining against any disclosure in the specifications. Notwithstanding, since a contract was awarded Aquafine and has now been substantially--at minimum--completed, we believe the proper forum for a remedy would not be with our Office but rather with the courts. B-152410, June 9, 1964; B-166022, May 22, 1969.

The final bases of the Ultraviolet protest are that the Aquafine system as proposed and approved does not meet the specifications called for in the prime contract. First, it is contended that Aquafine does not meet the "or equal" provisions of Technical Specifications paragraph 8.01 (set forth above) in that its system does not have an in-place cleaning system and in that it has an

inadequate flow rate. The Department of the Interior advises that the system does have an in-place cleaning system (which we note is in the Aquafine drawings, although the cleaning chemical to be used therein is left to a later determination after a water analysis is made) and that the flow rate proposed exceeds that of the Ultraviolet system.

Ultraviolet also speculates that paragraph 8.03 of the technical specifications will not be met if the Aquafine system is used (unless Aquafine violates an Ultraviolet patent) because the Aquafine ultraviolet intensity meter will possibly depend on circuit amplification, photomultiplier tubes, or avalanched-type devices. The contracting activity states that after a careful review of the Aquafine submittal the Aquafine meter was found to fully comply with the specifications without utilizing the prohibited features. The design engineer with whom Ultraviolet developed the ultraviolet system specifications approved the meter.

Further, Ultraviolet contends that paragraph 8.04 of the technical specifications is not met in that the Aquafine system does not provide "a light sensing display" on each unit to indicate the location of any ultraviolet lamp that should go out. Ultraviolet states:

"Aquafine has not offered a light sensing display on each unit to locate the position of the specific lamp which may have failed. Instead, Aquafine has offered a questionable circuit requiring additional electrical components, a special DC power supply which works on the principle of sensing the flow of electricity through a wire rather than the presence or absence of an illuminated ultraviolet lamp.

"The significance of this variation is that additional and unnecessary components are utilized, the original premise of sensing whether or not the ultraviolet lamp is illuminated is by-passed and situations such as short-circuiting of the ultraviolet lamp which would allow current flow without illumination would not record whether or not the lamp is truly on or not. Failure of the DC power supply would result in no indication as to a U-V lamp being out, and the dependency upon thirteen hundred or more indicating pilot lamps also poses considerable problems. A situation whereby condensation could form

between the lamp socket and the lamp itself can cause the ultraviolet lamp to go out and still allow electrical current to flow through the wires thereby providing a false indication that the ultraviolet lamp is on when in fact it is not."

It is the position of the Department of the Interior that either system (Ultraviolet's or Aquafine's) would meet the specifications in that both provide a "light sensing display," i.e., a display to indicate when a tube is not functioning. The Ultraviolet system uses fiber optics which will not glow when the fluorescent lamp is not working. Interior admits that the Aquafine system accomplishes this by sensing the electrical flow through the individual ballasts and tubes, but contends that the problems portrayed by Ultraviolet, while possible, are almost certain never to occur.

Although the specification calls for a "light sensing display," it is silent as to how the nonfunctioning of the ultraviolet lamps is to be communicated to the display. Therefore, "light sensing" by a process accomplished by electrical sensing would not be unreasonable.

While we have recognized the validity of Ultraviolet's protest on one point, it is too late for a recommendation for corrective action on the immediate procurement to be made. However, if it is not the intent of the procuring activity that all equipment be stock models, but only the components, we are suggesting to the Department of the Interior that paragraph 8 of the "SPECIAL CONDITIONS" be clarified before any future utilization.


Deputy Comptroller General
of the United States