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DECISION

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

10,138

B-194225
B-194673

FILE:

DATE: May 15, 1979

MATTER OF:

DHC 01565
U. S. Duracon Corporation

DIGEST:

[Protest of Government's Refusal to Issue Letter of Acceptability]

1. Where Government interpretation of specification excludes potential subcontractor from eligibility for subcontract award, General Accounting Office review is appropriate.
2. Protester's contention that its underground heating conduit was not required to meet certain design requirements of specification because product passed independent laboratory performance tests is unreasonable.
3. Unsupported allegations that producers of underground heating conduit systems are falsely certifying their products comply with previously issued "Letters of Acceptability" do not meet protester's burden of proving case.

U. S. Duracon Corporation (USDC), a supplier of underground heat distribution conduit (piping), protests invitations for bids (IFB) N62472-79-B-0098 and N62472-79-13-2319 issued by the Department of the Navy. The former IFB is for the construction of an operations training building at Newport, Rhode Island, and the latter is for repairs to Building 23, Brunswick, Maine. USDC was not a bidder on either project.

The basis for USDC's protest is the Government's refusal to issue it a "Letter of Acceptability" for its piping, a prerequisite to supplying the piping for installation at the construction projects. The letter was denied because USDC's piping did not meet the design requirements of the heating system specifications. USDC,

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however, claims that its piping passed all of the requisite laboratory tests for qualification and thus apparently believes the particular design deficiency is of no consequence. USDC also claims that current suppliers of the piping holding "Letters of Acceptability" based on prior Government reviews and testing, are falsely certifying that their currently available materials meet the specification requirements, in that these materials could not now pass the laboratory tests. In this respect, USDC alleges that the "Letters of Acceptability" were based on testing in which pipe insulation materials containing asbestos was used; that the use of asbestos is no longer permitted, and that the replacement insulation has never been retested.

Since USDC is a potential subcontractor at some indeterminate tier, a threshold question is whether our Office should consider the protest.

In Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, our Office held that as a matter of policy we would entertain protests concerning the award of subcontracts by prime contractors only under certain clearly delineated circumstances, because the award of subcontracts is generally not subject to the statutory and regulatory requirements governing direct procurements by the Federal Government. One of those circumstances is where the Government so actively participates in the subcontractor selection process as to effectively cause or control the selection, or significantly limit subcontractor award sources.

Here, while it is evident that the Navy was involved in the piping evaluation, that involvement was for the purpose of determining whether the piping offered by the prime contractor conformed with the specifications. The Government's evaluation efforts were directed not to selection of the subcontractor, per se, but to whether the piping which the prime contractor was required to furnish for the steam system conformed to the specifications. Presumably any firm whose product conformed to the design requirements and passed the requisite testing would be eligible to receive the letter of acceptability.

Ordinarily this limited Government involvement in the subcontractor selection process would preclude our review under the Optimum Systems standards. However, USDC's quarrel with the agency in this respect seems to center on a disagreement with the agency's interpretation of the specifications. In this circumstance, we believe it appropriate to consider the merits of the protest. See Industrial Boiler, Co., B-187750, February 25, 1977, 77-1 CPD 142.

The relevant portion of the specification of the IFB provides as follows:

"6. Underground Steam and Condensate Piping:

"6.1 Prefabricated system shall be one of the types that has been tested and found acceptable in conformance with the Tri-Service publication 'Procedures for Establishing Acceptability of Heating Distribution Conduit Systems.'

"6.1.1 Drainage and Venting. * * * A one-inch minimum continuous annular air space shall be provided between the outer surface of premolded or preformed pipe insulation and the inner surface of the exterior casing.

"6.2 Letter of Acceptability. For Underground conduit system the [prime] contractor shall submit to the Contracting Officer a copy of a Tri-Service letter of acceptability received by the manufacturer as prescribed in the tri-service publication, 'Procedures for Establishing Acceptability of Underground Heat-Distribution Conduit Systems.' The contractor shall include with the letter of acceptability a complete description of the conduit system referenced therein together with any subsequent approved changes. The contractor shall also certify that all components of the conduit to be installed are identical to those covered by the letter of acceptability." (Emphasis added)

USDC asserts its pipe insulation is of the pre-formed type, yet believes that the one-inch continuous annular air space required by paragraph 6.1.1, supra, is inapplicable since it passed the testing requirements of paragraph 6.2, supra, i.e., it states that "reference to this separate document (the design specification) should not even be made."

We believe USDC's interpretation of the specification is not reasonable, as it would, in effect, convert a clearly delineated design specification to a performance specification. In our view, that result could only be achieved by reading the letter of acceptability portion of the specification out of context, with the result that the design specification would be rendered essentially meaningless. See S. Livingston & Son, Inc., B-193613, March 5, 1979, 79-1 CPD 147. We do not believe a meaningful argument can be made which even suggests that products which deviate from the design specification would be eligible for a letter of acceptability if these products passed the laboratory performance tests.

With reference to the false certifications allegedly being furnished by other suppliers under their existing letters of acceptability, we note that specifications provide for changes to the conduit systems if approved by the Government. Thus a letter of acceptability based on asbestos insulation does not preclude a manufacturer from properly certifying that the components included in the conduit, even if changed, were identical to those covered by the letter of acceptability, so long as the changes had been approved. In this respect, USDC has provided only unsupported allegations that these certifications were falsely made--it has not shown that alleged changes in the materials have been utilized without approval. USDC's generalized and unsupported allegations of the false nature of the certifications being furnished the Government are not sufficient to meet the protester's burden of proving its case. See Ads Audio Visual Production, Inc., et al, B-193248, April 18, 1979.

The protests are denied.


Deputy Comptroller General
of the United States