

DOCUMENT RESUME

03862 - [A2733958]

[Protests by Prospective First-Tier and Second-Tier Subcontractors]. B-189505. September 26, 1977. 3 pp.

Decision re: Compuguard Corp.; Truland Corp.; by Milton Socolar (for Paul G. Dambling, General Counsel).

Issue Area: Federal Procurement of Goods and Services (1900).  
Contact: Office of the General Counsel: Procurement Law I.  
Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of Health, Education, and Welfare; Turner Construction Corp.

Authority: 54 Comp. Gen. 767. B-188220 (1977). B-183648 (1975). B-187750 (1977). B-188037 (1977). 4 C.F.R. 20.2(b)(1).

The protesters objected to the rejection by the prime contractor of Truland Corporation's offer to perform certain subcontract work under a Government contract. The protests of the potential subcontractors against the rejection by the prime contractor was not considered since the protests did not fall within any of the exceptions under which such protests are considered. The protests against the allegedly restrictive specifications in the prime contract were not considered on their merits since they were not filed prior to bid opening on the prime contract. (Author/SC)

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

*J. Coburn*  
PH I

DECISION

FILE: B-189505

DATE: September 26, 1977

MATTER OF: Truland Corporation; Compuguard Corporation

DIGEST:

1. Protests by potential first- and second-tier subcontractors against rejection of first-tier subcontractor's offer by prime contractor under NEW contract will not be considered, since protests do not fall within any of stated exceptions of Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, under which GAO considers protests of subcontract awards.
2. Protests by prospective first- and second-tier subcontractors against allegedly restrictive specifications in prime contract will not be considered on their merits, since they were not filed prior to bid opening on prime contract.

Truland Corporation (Truland) and Compuguard Corporation (Compuguard) protest the rejection of Truland's offer to perform certain subcontract work by Turner Construction Corporation (Turner), the prime contractor under contract 3301 C with the Department of Health, Education, and Welfare (HEW) for the NIEHS-Research Triangle Park Facilities project in North Carolina. Compuguard would have been Truland's major subcontractor for the project.

The protesters argue that Turner improperly determined that Truland's offer did not comply with a number of specifications, particularly a Government-imposed specification which limited the subcontract award to a source that could both manufacture and install the requirement. In this connection, Turner's letter of rejection to Truland stated that the "Architect/Engineer, Federal Using Agency, and the Construction Manager reviewed Truland's bid and found it nonresponsive."

The protesters also contend that the specification referenced above was unduly restrictive.

Concerning Turner's rejection of Truland's offer, in our decision in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, we held that we would only consider protests concerning the award of subcontracts by prime contractors in certain circumstances. Basically,

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these circumstances fall into five categories: (1) where the prime contractor is acting as purchasing agent of the Government; (2) where the Government's active or direct participation in the selection of the subcontractor has the net effect of causing or controlling the rejection or selection of a potential subcontractor, or has significantly limited subcontract sources; (3) where fraud or bad faith in Government approval of the subcontract award or proposed award is shown; (4) where the subcontract award is "for" an agency of the Federal Government, and (5) where the question concerning the award of a subcontract is submitted by an official of a Federal agency entitled to advance decisions from our Office.

We afforded the protesters the opportunity to submit their views whether the rejection of Truland's offer fell within one of the five situations enumerated. They responded by alleging that Turner's role in the project "includes the entering into subcontracts as an agent of" HEW, and that the preparation of the subject specification "involved significant HEW participation."

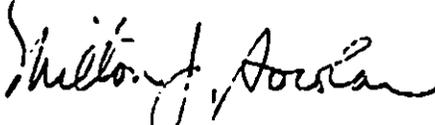
The protesters are apparently arguing that the matter falls within either the first, second, or perhaps the fourth circumstance described in Optimum Systems, Inc., *supra*. In regard to the second, notwithstanding that HEW was responsible for a specification to which Truland allegedly did not comply, or the language in Turner's letter of rejection of Truland's offer, the protesters have not established that the procuring agency caused or controlled Truland's rejection. See Sargent Industries, B-188220, February 23, 1977, 77-1 CPD 133; PSC Technology, Inc., B-183648, May 27, 1975, 75-1 CPD 316. Concerning the first and fourth situations, Turner's contract with HEW clearly provides that such contract "shall not be construed as creating any contractual relationship between any [sub]contractor and the Government;" thus, Turner was not acting as a Government purchasing agent, nor was the subcontract to be awarded "for" HEW. In view thereof, we will not consider the rejection of Truland's proposal.

The protests that the specification was unnecessarily restrictive are ordinarily the kind of subcontractor protests our Office would consider on the merits, since, as noted above, the Government was primarily responsible for the inclusion of such specification in Turner's prime contract. Industrial Boiler Co., B-187750, February 25, 1977, 77-1 CPD 142. However, the protests on that issue are untimely under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), since they involve alleged improprieties apparent

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prior to bid opening under the prime contract but were not filed before that date. Industrial Boiler Co., supra; Lyco-ZF, 3-188037, January 17, 1977, 77-1 CPD 36.

Accordingly, the protests will not be considered on their merits.

*for*   
Paul G. Dembling  
General Counsel