



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

B-176647

November 21, 1972

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Dear Mr. Sampson:

We refer to the administrative reports dated October 25 and September 15, 1972, regarding the cancellation of Federal Supply Service (FSS) invitation for bids (IFB) FPNHO-K-28592-A-5-17-72 and the resolicitation under IFB FPNHO-K-28592-RA-10-18-72 for manual typewriters during the current fiscal year.

For the reasons hereinafter stated, it is our opinion that no "cogent and compelling reason" existed to justify cancellation of the original IFB.

Incremental prices were solicited for eight different typewriter sizes, plus repair parts and attachments, for 11 different geographical zones. Bids were received and opened May 24, 1972, from Adler Business Machines, Inc., Facit-Odhner, Inc., Olivetti Corporation of America (Olivetti), Olympia USA, Inc. (Olympia), Remington Rand Office Machines, Inc., Division of Sperry Rand Corporation (Remington), and Royal Typewriter Company Division, Litton Business Systems, Inc. (Royal). It is our understanding that the foregoing list of bidders represents almost total participation of the available competition.

The abstract of bids indicates that Olivetti was low on all increments and zones for size 1. Olympia was low on all increments and zones for sizes 2, 3, 4, 6 and 8. For size 5, Remington was low on all increments and all zones, except on the first increment of zone 11 for which Royal was the low bidder.

Paragraph 8(a), Bid Sample Requirements, provided, in part:

"Samples will be evaluated to determine compliance with all characteristics listed below:

"Typing pressure - (with touch control in different positions), key movement, size of keyboard, size of keys, key separation, typing speed, clear legible printing workmanship, suitability of materials used, design and construction."

As pertinent, paragraphs (b) and (c) of section 7 of the Special Provisions provided:

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"(b) Failure of samples to conform to all such characteristics will require rejection of the bid. * * *

"(c) Products delivered under any resulting contract shall strictly comply with the approved sample as to the subjective characteristics listed for examination and shall conform to the specifications as to all other characteristics."

The Purchase Description, as pertinent, required the following:

* * * The typewriters shall be new, modern, current models intended for business and commercial purposes.

* * * * *

"The typewriter shall be of the following minimum overall dimensions: Chassis width 13 inches (excluding carriage); chassis depth 13 inches; height to top of carriage (excluding levers, paper supports, etc.), 7-1/2 inches.

* * * * *

"The typewriter shall have a minimum clearance of 5-1/4 inches between the lowest point of the carriage assembly when extended and the surface on which the machine rests. This clearance requirement may be met by the use of a riser device which becomes an integral part of the machine by fastening to the base and which does not detract from the appearance or affect the useability of the machine. The riser height shall not exceed 1 inch.

* * * * *

"The pressure required to operate the typewriter shall not be so excessive as to cause fatigue, and shall be varied in accordance with standard requirements (less resistance or tension for outer keys and more for inner keys)."

Bid samples were evaluated for conformance with the characteristics listed in the IFB, except the variant key pressure requirement. With respect to the latter aspect, the technical report stated:

"NOTE: The typing pressure required to operate all samples checked was considered to be satisfactory. This report does not include an evaluation of the parenthetical requirement (less resistance or tension for outer keys and more for inner keys) since there is no test method prescribed for this requirement, nor is there a method available that we are aware of that will satisfy this requirement and give reproducible results."

On the basis of the remaining characteristics, compliance was cited for the Olympia, Remington and Royal sizes 1 and 2, as well as the Olympia and Royal sizes 3, 4, 5 and 6.

As to the noncompliant products, noncompliance was due either to the failure to meet the requirement for a minimum clearance of $5\frac{1}{4}$ inches between the lowest point of the carriage assembly and the surface upon which it rests or the use of a riser exceeding 1 inch. As a corollary, noncompliance was noted in continuity in speed and accuracy at the 40-60 word per minute range due to vibration of the typewriter. However, in the instances in which this occurred, it was noted that the riser height exceeded 1 inch and adversely affected both the appearance and stability of the typewriter, presumably causing the excessive vibrations.

Before the evaluation had been completed, Royal protested the award to our Office on May 25, 1972, B-176045. Royal alleged that it had submitted the only sample conforming to all of the requirements of the IFB, particularly carriage height, riser height and pressure requirement, and was therefore the sole responsive bidder. However, our file on the matter was closed on July 27, 1972, without further action upon advice from FSS that the IFB had been canceled on July 11, 1972, because the purchase description was deemed to be deficient.

By telefax of July 28, 1972, Olympia protested the cancellation to our Office contending that no cogent or compelling reason existed to reject all bids. Olympia points to the extent of competition as evidence that no prospective bidder was induced to forego bidding because of the advertised requirements. It is averred that any resolicitation will prompt bids on identical products and will constitute an auction since bid prices have been exposed. Finally, it is contended that the requirements in question are minor and may be waived pursuant to Federal Procurement Regulations (FPR) 1-2.405.

In response, Royal reiterated its contentions stated in B-176045, supra. Also, by letter of September 27, 1972, Royal further contended that there are two methods available to measure the key pressure requirement: The Chatelan scale model 25 which uses a static approach and dynamic methods instruments used by Royal's reliability engineering laboratory.

Olivetti has urged that the cancellation be sustained because the requirement for variant key pressure is ambiguous and restricts competition. Olivetti also alleges that the minimum carriage clearance of $5\frac{1}{4}$ inches necessitated the use of a riser which impacted upon the bid price, therefore prohibiting waiver of noncompliance with the requirement as a minor deviation. It further contends that this requirement was an unnecessary restriction of competition.

In the report dated September 15, 1972, GSA represents the key pressure requirement as affecting both price and quality, which cannot be waived as a minor deviation. Further, GSA views this requirement as restricting competition because it believes only Royal incorporates the desired feature in its typewriter. GSA concludes that the foregoing constitute a cogent and compelling reason to reject all bids and readvertise.

Therefore, on September 15, 1972, GSA resolicited its requirement in IFB FPNHO-K-28592-RA-10-18-72. The variant key pressure requirement was deleted and the height requirement was modified as follows:

"The typewriter shall be of the following minimum overall dimensions: * * * height to the top of carriage (excluding levers, paper supports, etc.), $7\frac{1}{4}$ inches.

* * * * *

"Sizes 1 through 4 shall have a minimum clearance of $4\frac{1}{4}$ inches between the lowest point of the moveable carriage assembly when extended and the surface in which the machine rests."

This invitation was opened on October 18, 1972, and bids were received from the same parties that participated in the first solicitation. Moreover, it is our understanding that, except for Olivetti, all bidders offered the same models as offered previously. We have been informed that Olivetti bid a new model which became commercially available in the interim between the two bid openings.

While the bids submitted on resolicitation evidence reductions in prices and the relative competitive standings have been changed, our inquiry concerning the cancellation of the original IFB must be confined to whether cogent and compelling reasons existed at the time to justify the rejection of all bids thereunder. The hindsight afforded by the exposure of the new bids does not control that inquiry.

The authority to cancel an invitation after bids are opened is contained in FPR 1-2.404-1 as follows:

"(a) Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

"(b) Invitations for bids may be cancelled after opening but prior to award, and all bids rejected, where such action is consistent with 1-2.404-1(a) and the contracting officer determines in writing that cancellation is in the best interest of the Government for reasons such as the following:

"(1) Inadequate, ambiguous, or otherwise deficient specifications were cited in the invitation for bids."

In this case, FPR 1-2.404-1(b)(1) was cited as authority for the cancellation action.

While we recognize that the contracting officer is afforded broad authority to reject all bids and readvertise and ordinarily we will not question such action, we believe the cancellation of the IFB and readvertisement in this instance was not based on a "compelling reason." As stated in The Massman Construction Co. v. United States, 102 Ct. Cl. 699, 719 (1945):

"To have a set of bids discarded after they are opened and each bidder has learned his competitor's prices is a serious matter, and it should not be permitted except for cogent reasons."

The mere utilization in the IFB of inadequate, ambiguous or otherwise deficient specifications is not, itself, a "compelling reason" to cancel an IFB and readvertise. The rejection of all bids after they have been

opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have extended manpower and money in preparation of their bids without the possibility of acceptance. 41 Comp. Gen. 536 (1962). Moreover, as a general proposition, it is our view that cancellation after bids are opened is inappropriate when an award under a solicitation would serve the actual needs of the Government. 49 Comp. Gen. 211 (1969); 48 id. 731 (1969).

As quoted above, paragraph 7 of the Special Provisions required the submission of bid samples to enable GSA to determine the conformance of the offered product to the required specifications, in accordance with FPR 1-2.202-4(a):

"* * * a sample required by the invitation for bids to be furnished by a bidder as a part of his bid to show the characteristics of a product offered in his bid. Such samples will be used only for the purpose of determining the responsiveness of the bid and will not be considered on the issue of a bidder's ability to produce the required items."

The question of responsiveness, in this regard, concerns the determination whether the bid sample indicates conformance with the essential requirements of the invitation. In that connection, we have been advised that there is no standard test method for evaluation of key pressure. As a result, and further because the key pressure requirement is considered to be restrictive, the determination was made to cancel the procurement and resolicit without the requirement for variant key pressure. However, while such requirement might ordinarily affect price and quality of the article being offered and would ordinarily require cancellation of the IFB where a change in the requirement is proposed after the opening of bids, in this case there was no reason to believe that firms other than the original six bidders would bid on the resolicitation or that such bidders would have offered any different equipment if the original specifications had reflected the change. In that regard, we note that bidders had offered the same equipment in prior procurements having the same requirement. Thus, the net effect of the new solicitation was to create an auction atmosphere--a situation where the new bids would constitute responses to the prior exposed bid prices rather than to the change in requirements. We

therefore feel that the key tension requirement in the invitation did not, on the record, constitute a compelling reason for its cancellation.

Concerning Royal's contention that two methods are available to test the variant key pressure requirement, GSA responded by memorandum dated October 20, 1972, from the Acting Commissioner, Standards and Quality Control:

"We do not agree with [the] statement that the Chatelan scale is suitable for measuring the variant typing pressure. The Chatelan scale measures static pressure whereas typing pressure is applied by a striking force. We contend that this pressure can best be determined through a subjective typing evaluation by qualified typists."

Having concluded that the key tension requirement does not constitute a compelling reason to have canceled the IFB, we turn to the Olivetti contention that the minimum height requirement afforded a sufficient reason to cancel because it was restrictive of competition. The record clearly indicates that the only basis relied upon by GSA to cancel the IFB was the key tension requirement. The height requirement was not a factor. Notwithstanding reduction of the minimum height requirement upon readvertisement, it is our understanding that GSA still considers the original height requirement material. Moreover, we have been informed that the reduction in minimum height does not reflect GSA's attitude that a prescribed height is no longer necessary, but rather evidences a change in approach to the height problem. We recognize that ordinarily a change in a material requirement would provide justification for cancellation and readvertisement. However, we believe that the overriding consideration in this case is the integrity of the competitive bidding system. Inasmuch as the typewriters offered under both invitations are the same (except Olivetti, for the reason stated previously), save the need for the risers--low-cost hardware items--and since the typewriters offered under the original IFB would meet the needs of the Government, we believe that the cancellation of the first invitation and the resolicitation would be far more prejudicial to the integrity of the competitive system than awards under the original invitation. In this light, it is our opinion that the minimum height requirement alone did not provide a cogent and compelling reason to cancel the IFB and readvertise.

In the circumstances, we conclude that no "cogent and compelling reason" existed to justify cancellation of the invitation. Therefore,

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it is our recommendation that the original IFB be reinstated, the key tension requirement waived, and award made to the resulting low responsive, responsible bidders.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510. In view thereof, your attention is directed to section 236 of the act which requires that you submit written statements of the action to be taken with respect to the recommendation. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

We would appreciate advice of whatever action is taken on our recommendation.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

The Honorable Arthur F. Sampson
Acting Administrator
General Services Administration