



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

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B-177476

May 14, 1973

Lutz

Lutz Superdyne, Inc.
P.O. Box 15
Guttenberg, New Jersey 07093

Attention: Mr. Oscar O. Epstein
President

Gentlemen:

Reference is made to your letter of February 8, 1973, and prior correspondence, protesting against any award being made under solicitation No. FPNGG-C-19367-N-11-22-72, issued by the General Services Administration (GSA).

The solicitation resulted from the cancellation of two prior solicitations, FPNGG-F-19367-A-7-6-72 and FPNGG-C-19367-RA-10-19-72. The solicitations covered the requirements of the Federal Supply Schedule for drafting and precision instruments for the period November 1, 1972, or date of award, to October 31, 1973, on an f.o.b. destination basis. In response to the original solicitation, FPNGG-F-19367-A-7-6-72, 16 bids were received. After the bids were opened, the contracting officer was notified by the Inventory Management Office that an error had been made in the preparation of the solicitation in that it did not reflect the correct quantities for the various delivery destinations. Based on this information the contracting officer determined it would be in the best interest of the Government to "no award" the entire solicitation. The revised solicitation (FPNGG-C-19367-RA-10-19-72) was issued on September 29, 1972. On October 19, 1972, the 12 bids received in response to the September 29, 1972, solicitation were opened. Subsequent to this opening, GSA conducted a price analysis to determine if the bids were reasonable. This analysis indicated that during the period from October 1971 to September 1972 there was a 2-percent increase in the price of plastics and metals and a 28-percent increase in packaging, packing and transportation costs. GSA determined that an increase exceeding 30 percent of the current contract price would be excessive.

Based on the above analysis, GSA rejected 53 of the 158 items bid as being priced excessively. All of the remaining items were awarded with the exception of 10 items. As a result of the above, a determination was made excessive pricing, small business set-aside, a determination was made

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by the contracting officer to withdraw this restriction. Therefore, a statement was prepared by the contracting officer and approved by a Small Business Administration (SBA) representative. However, during this period of time, the existing contract expired and a determination was made under 41 U.S.C. 252(c)(14) to negotiate for these supplies and, therefore, on November 8, 1972, the third solicitation (FPHGG-C-19367-N-11-22-72) was issued. Thereafter, you protested and while your protest was pending before this Office, GSA made the requisite determinations and made award of the items on March 19, 1973, based on urgency.

First, you protest the withdrawal of the small business set-aside determination. In this regard, it is noted that section 1-1.706-3(b) of the Federal Procurement Regulations provides as follows:

(b) If, prior to the award of a contract involving an individual or class set-aside for small business, the contracting officer considers the procurement of the set-aside portion from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), the contracting officer may withdraw either a joint or a unilateral set-aside determination. * * *

From the record before this Office, it appears that the appropriate determination required by the above regulation was made by the contracting officer and concurred in by the SBA representative. Our Office has held that a small business set-aside may be withdrawn if the prices are found to be unreasonable and that the administrative discretion in this area is broad and will not be questioned by our Office in the absence of a clear showing of abuse of such discretion. 49 Comp. Gen. 740 (1970) and B-169073, March 25, 1970.

Second, you question the propriety of the cancellation of the first two solicitations after the bids were opened and prices revealed. Section 20.2(a) of the Interim Bid Protest Procedures and Standards provides that "* * * bid protests shall be filed not later than 5 [working] days after the basis for protest is known or should have been known, whichever is earlier." As the first solicitation was "not awarded" on September 14, 1972, resolicited on September 29, 1972, with bids being opened on October 19, 1972, and your protest was not filed in this Office until November 17, 1972, it was untimely.

Concerning the second solicitation which was canceled after bids were opened due to the excessive prices received on 53 items, FPR sec. 1-2.404-1(b)(5) allows an invitation for bids to be canceled when the bids received are unreasonable. In B-172714, August 24, 1971, we held that whether a bid is unreasonable is a determination to be made by the contracting

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activity and our Office will not interfere absent a showing that the determination was arrived at arbitrarily, capriciously or in bad faith.

The abstract of bids from the second solicitation shows the following prices received, the prior contract price and the percentage of increase for items 132-135 and 137-140:

<u>Item No.</u>	<u>Low Bid</u>	<u>Prior Contract</u>	<u>Percent Increase</u>
132	\$3.80	\$1.87	+103.2%
133	3.00	1.42	+111.2%
134	2.85	1.23	+131.7%
135	2.10	1.06	+98.1%
137	0.127	0.097	+30.9%
138	0.169	0.129	+31.0%
139	0.245	0.169	+44.9%
140	0.30	0.209	+43.5%

You state that the prices were increased because in the past you had sold the items to GSA below cost. Further, you state that the prices are still substantially below those paid by private purchasers.

While the above may be the reason for the increases, we believe GSA was still acting within its administrative discretion to reject the prices as unreasonable. Nothing in the record shows that GSA was aware that contractors were selling to the Government at unprofitable prices. On the basis of the prior year's contract prices, GSA could reasonably conclude that the increased prices were unreasonable.

Accordingly, your protest is denied.

Sincerely yours,

Paul G. Dombing

For the Comptroller General
of the United States