

01592

DECISION



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

J. Cohen
Proc I

FILE: B-187790

DATE: March 8, 1977

MATTER OF: Products Engineering Corporation; Lutz
Superdyne, Inc.

DIGEST:

1. Since protests by unsuccessful bidders to contracting agency that IFB should have required bid samples for certain items were filed after bid opening, subsequent protests to GAO will not be considered.
2. Protests involving affirmative determination of responsibility will not be reviewed.
3. Contention that bidder is not "manufacturer" within purview of Walsh-Healey Act is not for consideration by our Office, since responsibility for applying act's criteria is vested in contracting officer subject to final review by Department of Labor.

Invitation for bids (IFB) No. 2TAP-CS-60841-A-8-13-76 was issued by the General Services Administration (GSA) on July 13, 1976, to solicit bids to furnish 62 items of gauges. Bid samples were required for some but not all of the items. Bids were opened on August 13, and L. A. Spievak Corporation (Spievak) was the low responsive bidder on certain of the items, including a number that did not require the submission of bid samples.

By letter of August 26, Products Engineering Corporation (Products) filed a protest with GSA against any award to Spievak contending, among other things, that bid samples should have been required for all the items on which Spievak was the low bidder; that Spievak would be unable to produce and deliver those items within the time required by the IFB; and that Spievak did not qualify as a manufacturer under the Walsh-Healey Act, 41 U.S.C. § 35 (1970). By letter to GSA dated September 8, Lutz Superdyne, Inc. (Lutz), also protested any award to Spievak on essentially the same bases argued by Products.

GSA denied both protests on November 10 and awarded a contract to Spievak on the following day for 15 items, including 9 which had not required bid samples. Products filed a protest in our Office against GSA's actions on November 11, and Lutz did the same on November 30.

B-187790

In regard to the conventions that bid samples should have been required by the solicitation for all the items on which Spievak was the low bidder, section 20.2 of our Bid Protest Procedures, 4 CFR part 20 (1975), provides in pertinent part:

"(a) * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section * * *

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *."

The absence of a requirement to submit bid samples for the items in question was apparent upon receipt of the IFB. Thus, in order for the protests to our Office on that issue to be considered, the initial protests to the contracting agency had to be filed by August 13, when bids were opened. Products protested to GSA on August 26, and Lutz protested on September 8. In this connection, Products states:

"* * * We did at the time the solicitation was put on the street and prior to bid opening, discuss the bid sample situation with the contracting officer and with other General Services Administration procurement people. We warned at that time what the problems would be and our warnings were ignored. * * *"

However, no protest was in fact filed prior to bid opening even though the requirement for submitting bid samples was not changed. Accordingly, the issue will not be considered on its merits by our Office.

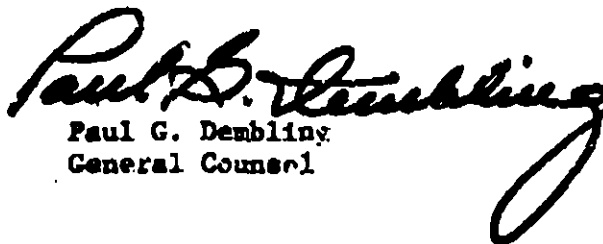
Concerning Spievak's ability to perform the contract, the appropriate contracting officials have determined the firm to be responsible.

B-187790

This Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Although we will consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform.

Finally, in regard to the Walsh-Healey Act, we have on numerous occasions recognized that the responsibility for applying the act's criteria is vested in the contracting officer subject to final review by the Department of Labor. Thus, our Office does not review determinations as to whether particular firms are "manufacturers" within the purview of the act. Products Engineering Corporation, 55 Comp. Gen. 1204 (1976), 76-1 CPD 408.

In view of the above, the protest is denied.


Paul G. Dembliny
General Counsel