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

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RELEASED

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Dear Senator Tower:

This is in reply to your letter of August 24, 1971, in which you requested the General Accounting Office to review complaints made by Mr. Emanuel Rohan, Vice President, Arrow Food Products, Inc., Dallas, Texas, regarding the bid solicitation procedures followed by the Defense Personnel Support Center, Defense Supply Agency, Philadelphia, Pennsylvania, in procuring food items.

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Mr. Rohan's letter and enclosures, which were included with your letter, identified what he believed to be problem areas relating to the Agency's bid solicitation and evaluation procedures. In these problem areas were the practices of (1) conducting telephone negotiations for the award of the small business set-aside portions of contract requirements and (2) requesting bidders to submit quotations on both a free-on-board (f.o.b.)-origin and an f.o.b.-destination basis. He also implied that, in the award of set-aside portions of contracts for food items, preferential treatment was being accorded to a particular firm that was represented in bidding by a brokerage firm.

Mr. Rohan included a copy of solicitation number DSA13H-72-B-0220, issued on July 19, 1971, for the purchase of 43,080 cases of 1-pound cans of ground black pepper (516,960 cans, packed 12 in a case), as a representative example of the problems encountered by his firm.

We reviewed the applicable sections of the Armed Services Procurement Regulation (ASPR) and the Agency's bid solicitation and evaluation procedures. We also held discussions with Agency personnel and examined all contracts awarded by the Agency during fiscal years 1969, 1970, and 1971 for the purchase of 1-pound cans of ground black pepper.

NEGOTIATIONS FOR SET-ASIDE PORTIONS TO SMALL BUSINESS

In accordance with congressional legislation designed to give preference to small business firms in Government

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procurement, portions of procurements can be set aside for exclusive small business participations. The problem stated by Arrow relates to negotiations conducted after the award price of the portion of a non-set-aside solicitation that is open to bidding by all firms, big and small, has been determined. Arrow contends that the set-aside portion should be awarded, without conducting further negotiations, to the lowest small business bidder whose bid falls within 120 percent of the unit price at which a non-set-aside award is made. It is Arrow's opinion that conducting telephone negotiations in order, beginning with the lowest small business bid submitted on the non-set-aside portion, is not a true method of advertising.

ASPR 1-706.6(c)(1) provides that, in an advertised procurement involving partial set-asides for small business, negotiations for award of the set-aside portion be conducted only with small business firms which have submitted responsive bids on the non-set-aside portion at a unit price within 130 percent (represents a recent increase, effective September 1, 1970, above the 120 percent referred to by Arrow) of the highest unit price at which an award is made on the non-set-aside portion. This means that negotiations will be conducted only with those small business firms whose bids do not exceed the unit price on the non-set-aside award by more than 30 percent. It provides also that negotiations with such firms be in the order of their bids on the non-set-aside portion, beginning with the lowest responsive bid.

In addition, ASPR 1-706.6(d)(1) requires that the set-aside portion, in all instances, be procured by negotiations and that award be made at the highest unit price awarded on the non-set-aside portion.

We found that set-aside negotiations, oral or written, were not negotiations in the conventional sense but were merely a practical means for fairly providing small business firms with the opportunity to either meet or reject the competitively determined price of the non-set-aside portion. When a small business firm has bid higher than the subsequently

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determined highest award price on the non-set-aside portion, the firm may not want to lower its price.

REQUIREMENT FOR SUBMISSION OF BIDS  
ON BOTH AN F.O.B.-ORIGIN AND  
F.O.B.-DESTINATION BASIS

Arrow questioned the Center's requesting bidders to submit quotations on both an f.o.b.-origin and an f.o.b.-destination basis. It contended that the Government did not obtain lower freight rates on a Government bill of lading than did a contractor on a commercial bill of lading.

Agency officials informed us that the basic objective of soliciting bids on both an f.o.b.-origin and an f.o.b.-destination basis was to obtain the lowest delivered cost to the Government. Section 22, part 1, of the Interstate Commerce Act allows surface carriers to offer preferential rates to the United States for its movement of property. Such preferential rates do not apply to contractor shipments made under fixed-price f.o.b.-destination contracts. Government officials stated that they used the preferential rates offered by surface carriers in evaluating quotations received from bidders.

ASPR 19-104.2 provides that, when it is anticipated that a contract will require no shipment which will equal or exceed 20,000 pounds for delivery to a single destination, procurement be on an f.o.b.-destination basis. When it is anticipated, however, that a contract will require one or more shipments of 20,000 pounds or more to any single destination, procurement shall be on the basis of f.o.b. origin or f.o.b. destination, whichever is more advantageous to the Government.

Agency officials informed us, and our review confirmed, that all shipments of black pepper called for under contracts awarded during fiscal years 1969, 1970, and 1971 were estimated to exceed 20,000 pounds. They also stated that the solicitations permitted bidders to submit quotations on the basis of (1) f.o.b. origin, (2) f.o.b. destination, or

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(3) both. It appears to be more advantageous to the bidder to bid both ways because the Government may be able to obtain a more favorable freight rate than that available to the bidder.

We believe that, since the shipments met the size criteria for consideration of surface-transportation economies, the availability of preferential rates on f.o.b.-origin shipments made it incumbent on contracting officials to solicit on both an f.o.b.-origin and an f.o.b.-destination basis.

PREFERENTIAL TREATMENT  
IN AWARDS FOR FOOD ITEMS

Arrow has stated that, for the past 10 years, a New York City firm continually has been awarded the set-aside portions of solicitations issued for procuring food items. Arrow has stated also that this firm does not bid directly on these solicitations but is represented by a New York City brokerage firm.

Our review of all solicitations for black pepper issued during fiscal years 1969, 1970, and 1971 showed that there were nine solicitations which provided for partial set-asides for small business firms. Seven of these set-asides were awarded to Gel-Spice Co., Inc., through its sales representative, Robbins Sales Co., Inc. In each case Robbins Sales Co., Inc., was the lowest responsive small business bidder and in each case it accepted the set-aside portions of these solicitations at the same prices as the award prices of the non-set-aside portions.

The two remaining set-asides were dissolved because the two small businesses submitting responsive bids--Gel-Spice and Arrow--refused to accept the set-aside portions of the solicitations. We found that Robbins and Gel-Spice satisfied the small business classification criteria as prescribed in part 7 of ASPR.

We believe that no preferential treatment was shown to any bidder on these nine solicitations.

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In conclusion we found that the practices followed by the Agency in soliciting and evaluating bids for the procurement of black pepper were in accord with policies and procedures prescribed by the Defense procurement regulations for protecting the interests of both the Government and the supplier.

Sincerely yours,

  
Deputy Comptroller General  
of the United States

The Honorable John G. Tower  
United States Senate