

DOCUMENT RESUME

03013 -- [A2093181]

[Alleged Ambiguities in Solicitation and Bid Evaluation].
B-188469. July 25, 1977. 11 pp.

Decision re: Patty Precision Products Co.; by Robert F. Keller,
Deputy Comptroller General.

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 the Navy; Harvin
Engineering Co., Inc.

Authority: 4 C.F.R. 20.2(b) (1). B-183795 (1975). B-179914
(1974). 48 Comp. Gen. 357. 48 Comp. Gen. 360, 361. A.S.P.R.
7-2003.24(b). A.S.P.R. 7-2003.16.

The second low bidder protested the award of a contract on the basis that the solicitation contained ambiguities and discrepancies, that the low bid was nonresponsive, and that the Navy's method of calculating cost data, which the low bidder omitted from its bid, was defective. Protests regarding the solicitation were untimely. Material omitted by the low bidder did not make its bid nonresponsive. The bid of the proposed awardee would have been low regardless of the method used to calculate the omitted cost data. (Author/SC)

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DECISION

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

FILE: L-188469 DATE: July 25, 1977
MATTER OF: Patty Precision Products Company

DIGEST:

1. Protest alleging improprieties in IFB and discrepancies in Navy-supplied drawings which is first raised some 38 days after bid opening is untimely under GAO Bid Protest Procedures and will not be considered on merits.
2. Although cancellation of IFB after bid opening but prior to award is proper where specifications no longer represent Government's legitimate needs, where, as here, specifications reflect Navy's legitimate needs, no decision has been made as to how changes will be effected, revised drawings for procurement purposes are not available and only minor change is contemplated, cancellation of IFB is unwarranted.
3. Bidder's failure to furnish transportation data in bid does not render bid nonresponsive where Government's estimated weights and dimensions were specifically provided in bid for evaluation purposes in event bidder failed to insert such information.
4. Where protester disputes method used by Navy in calculating estimated transportation costs for bidder which omitted transportation data from bid, it is not necessary for GAO to resolve dispute or make independent determination since under either method such bidder would be low.
5. Since experience and prior satisfactory contract performance in supplying item being procured were not set out in IFB as evaluation factors, they could not be considered in determining otherwise low responsive and responsible bidder.

On November 18, 1976, the Department of the Navy (Navy) issued invitation for bids (IFB) NOO019-77-B-0001 for the procurement of ejector bomb racks, with delivery specified as f.o.b. origin. Destinations were stated for evaluation purposes only. After considering discounts offered, waiver of first article testing and transportation costs, the Navy determined that Marvin Engineering Company, Inc. (Marvin), was the low bidder.

Patty Precision Products Company (Patty), the next low bidder, protests in substance as follows:

1. The "First Article Approval--Government Testing" clause and the "Inspection of First Article" clause in the IFB, when read together, create a material and substantial ambiguity, requiring cancellation of the IFB.
2. The IFB contained conflicting quality assurance requirements. More specifically, document AR-92 was inconsistent with MIL-Q-9858A.
3. The Navy is experiencing difficulties in implementing the quality assurance requirements set out in document AR-92. The Navy even suggested to Patty that AR-92 be eliminated from its current contract for bomb racks. Consequently, the solicitation should be canceled and readvertised with the AR-92 requirements excised.
4. The drawings supplied by the Navy contained substantial discrepancies which prevented full and free competition, requiring cancellation of the IFB.
5. The Navy should have negotiated the procurement of bomb racks since the drawings have not been proven adequate for an advertised procurement. The IFB, then, is additionally defective and should be canceled.
6. A significant change to the specifications for the ejector bomb racks is forthcoming. Consequently, award of the contract for ejector bomb racks built in accordance with current specifications could be quite costly because subsequent changes may have to be made. This is an additional reason for canceling the IFB.
7. Marvin's bid is incomplete and therefore, materially nonresponsive because Marvin did not furnish transportation cost information with its bid as required by the IFB and the Armed Services Procurement Regulation (ASPR). Further, it is impossible to make an equitable evaluation of Marvin's transportation costs unless the Navy's freight experts have peculiar insight into Marvin's calculation of the number of units of each item which will be shipped per truckload. In addition, it is possible that had Marvin furnished the required information it could have supplied inaccurate information which would have adversely affected its bid. Moreover, by supplying Marvin's transportation data, the Navy denies other bidders equal treatment and prevents them from being able to participate freely and fully in competitive bidding.
8. The Navy made mistakes in calculating Marvin's estimated transportation costs in two major respects. First, in some instances, Marvin's freight costs were calculated on truckload shipments which exceeded the capacity of the truck.

Second, the freight rates used by the Navy were not the rates required by ASPR. Consequently, Marvin's estimated transportation costs are \$23,316.78, or slightly more than \$10,000 higher than the Navy's estimate.

9. Even if Marvin's bid is considered to be responsive and its substantial omissions are considered to be minor discrepancies, Marvin has never manufactured and supplied the Navy with the ejector bomb racks as specified in the IFB, as Patty is presently doing in a satisfactory manner under other Navy contracts. Patty's experience and the quality items it has manufactured and supplied the Government should override the insignificant difference between Patty's bid price and Marvin's, and award should be made to Patty.

The Navy states that the alleged ambiguities in the IFB (allegations 1 and 2 above) and the alleged discrepancy in the Navy's drawings (allegation 3 above) were or should have been known to Patty prior to bid opening. Therefore, Patty's protest regarding these matters, which was not filed until after bid opening, is untimely.

The alleged deficiencies in the IFB (allegations 1 and 2 above) should have been apparent after a careful reading of the IFB, that is, prior to bid opening. While these allegations were not made until 38 days after bid opening supposedly on the basis that they were latent, the argumentation in this regard does not convince us that there is any reason why the alleged deficiencies were not just as apparent prior to bid opening. Consequently, these matters will not be considered on the merits. In this connection, GAO's Bid Protest Procedures, namely 4 C.F.R. § 20.2(b)(1) (1977), provide in pertinent part that:

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

The Navy also states that since Patty has failed to make timely deliveries of bomb racks under its current contract, it suggested to Patty, in an attempt to expedite deliveries, that the quality assurance requirements of document AR-92 be eliminated from its contract. The Navy, however, is reportedly unaware of any inherent problems with AR-92, is not experiencing any difficulty in its implementation, and does not intend to modify current contracts or the contract awarded under the solicitation involved in the instant protest because of any difficulty presented by AR-92. Based on the record before us, we have no basis for questioning the Navy's position here. Consequently, we cannot find that the solicitation should be canceled because it contains defective quality assurance requirements (allegation 3 above).

With regard to the alleged deficiencies in the Navy's drawings (allegation 4 above), Patty states as follows:

"* * * such ambiguity results not so much from the material lists of the drawings in question but from the notes on such drawings. These notes, intended to explain and clarify such bill of materials, in fact create latent ambiguities with respect thereto. Thus, the reasonable interpretation of the bill of materials with the applicable notes requires a note to specifically identify if certain materials, e.g., cables, must be supplied under a particular configuration (see Notes 12, 13 and 14 on Drawings 291AS100 and 292AS100).

"When Note 4 of the drawings did not identify the specific configuration for which the corresponding bill of material items was required, the reasonable interpretation of Note 4 was that the items, or in this case cables, were required in all instances. This, in fact, was how Patty bid the procurement. Only after bidding was it called to Patty's attention that the drawing should be construed without taking into account Notes 12, 13 and 14, i.e., that the Navy's requirement was for fewer cables than Patty bid. The approximately \$70,000 addition to bid price caused by this ambiguity alone is sufficient to render Patty low bidder.

"It is true that on an earlier contract Patty produced models of the bomb rack providing only one set of cables per bomb rack. Notes 13 and 14, which establish a pattern for clarification, were not on the earlier drawings. An intervening second contract for bomb racks was awarded with identical notes as now under consideration. These include Notes 13 and 14, which specifically identify required components. Note 4, however, remained as on the first contract. After the first buy, the Government was on notice of the reasonable interpretation of the drawing notes. Had the Government wanted only one set of cables, Note 4 would have been changed to correspond to Notes 12, 13 and 14. Since Note 4 of the second solicitation was not changed, Patty bid on the basis of providing two sets of cables. Patty in fact received award of that contract. The third solicitation, i.e., that now under consideration, contained notes identical to those on the second solicitation. Patty consistently interpreted the notes as it had on the second solicitation and bid on the basis of providing twice the number of cables that the Navy now says is required.

"The Government's treatment of the notes on the second contract was reasonable ground for Patty to consider two sets of cable as specifically being required. Patty did so consider and bid two solicitations in such manner.

* * * * *

"In view of Notes 4, 12, 13, and 14 on the applicable drawing, is one set of cables required or are two sets of cables required?"

Moreover, Patty states that it was not required to seek clarification of the Navy's drawings because the discrepancies in the drawings were not patent. The cases cited by Patty in support of this proposition deal with the interpretation of specifications in connection with disputes arising out of the performance of contracts and not the timeliness of protests under GAO's Bid Protest Procedures, 4 C.F.R. part 20 (1977).

With regard to Patty's allegations concerning the Navy's drawings, the Navy states that Patty supplied ejector bomb racks under a contract let in 1974. The contract was amended to require that the bomb racks be built in accordance with a revision to the drawings which, contrary to Patty's contention, contained notes 4, 12, 13, and 14, i.e., essentially the same drawings involved in the instant protest. Under this contract, Patty delivered none of the subject cables.

The Navy goes on to state that Patty was also awarded a contract in 1976 for ejector bomb racks. However, no cost or pricing data was solicited or obtained from Patty; therefore, the Navy has no way of knowing how Patty interpreted the drawings, since Patty's offer did not contain a pricing breakdown. Also, no deliveries have been made under the contract; consequently, the Navy does not know even at this late date how many, if any cables Patty intends to supply. The Navy, then, is not on notice of how Patty interpreted the drawings under this contract.

Finally, the Navy states that the drawings in all three procurements are clear and unambiguous. Moreover, if an ambiguity exists, it would be clearly patent and not latent. Accordingly, Patty should have brought the alleged ambiguity to the attention of the Navy prior to bid opening.

Based on the comments submitted by the Navy, Patty, and our review of the drawings, we conclude that an ambiguity is apparent on the face of the drawings. For example, note 4 of the drawings provides that, without exception, cables (i.e., a CBU firing harness assembly) shall be provided with each ejector bomb rack. The bill of materials, however, indicates that no such cables are required for certain configurations of the bomb racks. Since the ambiguity should have been known to Patty prior to bid opening and Patty did not protest the ambiguity until some 38 days after bid opening, its protest is untimely. See 4 C.F.R. § 20.2(b)(1) (1977), quoted above.

Patty also alleges that the Navy should have negotiated the procurement of bomb racks since the drawings have not been proven adequate for advertised procurement. The IFB, then, is additionally defective and should be canceled (allegation 5 above).

B-188469

The record shows that the alleged defect in the IFB was or should have been known to Patty prior to bid opening on January 19, 1977; however, Patty did not protest this matter until June 24, 1977, or more than 5 months after bid opening. Accordingly, we find that this aspect of Patty's protest is clearly untimely under 4 C.F.R. § 20.2(b)(1) (1977), quoted above.

As noted, Patty asserts that the IFB should be canceled because the bomb rack specifications are in the process of being revised (allegation 6 above). In this regard, the Navy states that it has approved certain changes in the specifications. However, the revised drawings are not available for procurement purposes, and the Navy has not decided whether it will change existing contracts or modify the bomb racks in-house. In addition, the contemplated change is minor; it will cost only an estimated \$37 per rack for material.

Cancellation of an IFB after bid opening but prior to award is proper where the specifications no longer represent the Government's legitimate needs. Cottrell Engineering Corporation, B-183795, September 22, 1975, 75-2 CPD 165. However, it is our opinion that where, as here, the specifications reflect the Government's legitimate needs, no decision has been made as to how changes will be effected, revised drawings for procurement purposes are not available, and only a minor change is contemplated, cancellation of the IFB is not required.

Patty first raised the issue of Marvin's omission of its transportation cost information (allegation 6 above) with the Navy. In reply, the Navy stated that although Marvin did not provide the requested transportation data, Marvin's transportation costs could be calculated from other information provided in its bid. Further, it was stated that the Navy's purpose in requesting transportation data was to relieve it of the administrative burden of calculating such costs for each bid. Accordingly, the Navy treated Marvin's omission as a minor discrepancy which may be waived.

In its submittal to our Office, the Navy stated a similar position as follows--

"The first issue focuses on the fact that the low bidder, Marvin Engineering Co., Inc., did not fill in the IFB Section D-5 entitled 'Evaluation of Transportation Costs (F.O.B. Origin Bid or Proposal) (1974 Oct) (NAVAIR 7-2003.24)'

* * * * *

"Clause D-5 set forth below:

'' (NAVAIR 7-2003.24) (1974 OCT)
OFFEROR MUST FURNISH THE INFORMATION CHECKED
BELOW

X Exterior Shipping Containers. Indicate the total number of loaded shipping containers involved: _____ . Indicate the total number of loaded shipping containers that can be loaded in or on: a standard 40'6" railcar _____ ; a standard 40' truck _____ .

X Carload or Truckload. Indicate the total number of carloads or truckloads involved: _____ .

"Although Marvin Engineering did not fill in the requested information, this does not render the bid as non-responsive. The numbers requested can be calculated by the application of elementary mathematics to other information contained within the four corners of Marvin Engineering's bid.

"Clause D-2 entitled 'Guaranteed Maximum Shipping Weights and Dimensions (ASPR 7-2003.16)' * * * was included in the IFB and provides as follows:

"Each bid (or proposal) will be evaluated to the destination specified by adding to the f.o.b. origin price all transportation costs to said destination. The guaranteed maximum shipping weights and dimensions of the supplies are required for determination of transportation costs. The bidder (or offeror) is requested to state as part of his offer the weights and dimensions. If separate containers are to be banded and/or skidded into single shipping unit, details must be described. If delivered supplies exceed the guaranteed maximum shipping weights or dimensions, the contract price shall be reduced by an amount equal to the difference between the transportation costs computed for evaluation purposes based on bidder's (or offeror's) guaranteed maximum shipping weights or dimensions and the transportation costs that should have been used for bid (or proposal) evaluation purposes based on correct shipping data.

<u>Item</u>	<u>Max. Shpg. Wt. per Ctnr. (Lbs.)</u>	<u>No. of Items per Ctnr</u>	<u>Type of Ctnr. (fiber, wood, bbl., etc.)</u>	<u>Size of Ctnr. (inches) (L x W x H)</u>	<u>Shpg. Character (KD, Set-Up, Nested, etc.)</u>
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

"If the bidder (or offeror) fails to state his guaranteed maximum shipping weight and dimensions for the supplies as requested, the Government will use the estimated weights and dimensions below for evaluation; and the Contractor agrees this will be the basis for any reduction in contract prices as provided in this clause. The Government's estimated weights (and dimensions, if applicable) are as follows:

<u>0001</u>	<u>480</u>	<u>1</u>	<u>Wood</u>	<u>168" X 24" X 24"</u>	<u>Set-Up</u>
<u>0002</u>	<u>230</u>	<u>1</u>	<u>Wood</u>	<u>84" X 24" X 24"</u>	<u>Set-Up "</u>

"Marvin Engineering did not elect to specify maximum shipping weights and dimensions. Therefore, as provided in the aforementioned clause, the weight and dimensions to be used for evaluation were specified in the solicitation itself. Logically, since on the face of the bid we know how many bomb racks are to be delivered, the number of items per carton, and the overall dimensions and loaded weight of a container, it is a simple matter to calculate the information requested in Clause D-2 for a standard 40'6" railcar and 40' truck * * *."

In a case similar to the instant protest, we discussed the propriety of an award to a low bidder which failed to provide guaranteed maximum weights or dimensions in the face of an admonition that bids failing to state the weights and dimensions would be rejected. There, we held in pertinent part that:

"In the present case there is no question as to the bidder's undertaking to meet all requirements of the specifications, including delivery, or as to the price to be paid to it therefor. The only question is as to the determination of whether the bid 'conforms to the invitation and will be the most advantageous to the United States, price and other factors considered,' so as to entitle the bidder to award under the provisions of 10 U.S.C. § 2305(c). Since the shipping weight and dimensions are material only to the determination of the Government's ultimate costs, and their omission therefore actually affects only the determination of whether the bid will be the most advantageous to the United States, we do not believe that the omission should be

regarded as making the bid nonconforming within the meaning of the statutory language unless it clearly precludes the making of that determination with certainty. * * * 48 Comp. Gen. 357, 360, 361 (1968), and cases cited therein.

In the instant case, there is no doubt that Marvin agreed to all of the terms and conditions in the IFB. Moreover, see B-164631, September 13, 1968, holding that a bid failing to include guaranteed shipping weights and dimensions is nevertheless responsive where the invitation specifically states estimated weights and dimensions in the event of a failure by a bidder to insert such information. In this connection, Marvin's estimated transportation costs could be calculated from the Government's estimated weights and dimensions stated in the IFB in Clause D-2, quoted above.

With regard to the argument concerning the number of units to be shipped per carload or truckload, contrary to Patty's contention, the Navy was not precluded from making the calculation by omission of this information in Marvin's bid and did, in fact, make such calculation pursuant to the following clause of the IFB:

"F.O.B. ORIGIN--CARLOAD AND TRUCKLOAD SHIPMENTS (1968 JUN)
(ASPR 7-2003.24(b))

"The Contractor agrees that shipment shall be made in carload or truckload lots when the quantity to be delivered to any one destination in any delivery period pursuant to the contract schedule of deliveries is sufficient to constitute a carload or truckload shipment, except as may otherwise be permitted or directed, in writing, by the Contracting Officer. For bid (or proposal) evaluation purposes, the agreed weight of a carload or truckload will be the highest applicable minimum weight which will result in the lowest freight rate (or per car charge) on file or published in common carrier tariffs or tenders as of the date of bid opening (or the closing date) specified for receipt of proposals. For purposes of actual delivery, the agreed weight of a carload or truckload will be the highest applicable minimum weight which will result in the lowest freight rate (or per car charge) on file or published as of date of shipment. If the total weight of any schedule quantity to a destination is less than the highest carload/truckload minimum weight used for bid (or proposal) evaluation, the Contractor agrees to ship such schedule quantity in one shipment. The Contractor shall be liable to the Government for any increased costs to the Government resulting from failure to comply with the above requirements."

B-188469

In our opinion, the IFB contemplates the computation of a bidder's estimated transportation costs by the procuring activity where, as here, transportation data is not provided by the bidder. The IFB not only provides the shipping weights and dimensions which will be used when a bidder does not provide them, but it also sets out the delivery schedule and shipping procedures (quoted immediately above) which will result in the lowest transportation costs to the Government. With this information along with the point of origin provided by Marvin, the Navy could and did calculate Marvin's estimated transportation costs. By the terms of the IFB, Marvin would be liable to the Government for any increased transportation costs which may result from exceeding the weights and dimensions stated in the IFB, shipping bomb racks at other than the scheduled delivery times, failing to ship bomb racks in such manner that the weight of any shipment would not be the highest applicable minimum weight which would result in the lowest freight rate in effect at the date of delivery, or by making unnecessary partial shipments.

Furthermore, Marvin's bid was not rendered nonresponsive by the omission of freight classification description information, even though Clause D-3 of the IFB "requested" such information, as the following pertinent part of that clause also provided:

"The Government will use these descriptions as well as other information available to it to determine the classification description most appropriate and advantageous to the Government. Bidder (offeror) understands that shipments on any f.o.b. origin contract awarded, as a result of this solicitation, will be made in conformity with the shipping classification description specified by the Government, which may be different from the classification description furnished below."

Pursuant to this provision, and applicable provisions of ASPR, the Navy contends that it used the most advantageous rates available. Moreover, since Marvin's bid was properly evaluated on the basis stated in the IFB, we need not speculate as to the effect on the evaluation had Marvin furnished inaccurate weight and dimension information.

With regard to allegation 8 above, the Navy admits to having made an error in calculating Marvin's estimated transportation costs; however, the Navy denies that its errors were as extensive as Patty alleges. The Navy also states that it made the same mistake in evaluating Patty's estimated transportation costs. Accordingly, the Navy recalculated the estimated transportation costs for Marvin and Patty. The Navy submits that the final evaluated bids for Marvin and Patty, after taking into account the recalculated estimated transportation costs, are respectively \$3,458,261.42 and \$3,510,180.61.

B-188469

If the Navy's figures are correct, Marvin's bid price is approximately \$52,000 below Patty's. However, Patty contends that Marvin's estimated transportation costs are about \$10,000 higher than the Navy's estimate. Consequently, Marvin's bid price is either approximately \$42,000 or \$52,000 below Patty's bid price, depending on whether Marvin's estimated transportation costs are derived by the method used by Patty or the method used by the Navy.

There is no doubt, then, that Marvin is the low bidder. Accordingly, it is not necessary for GAO to determine whether Patty or the Navy has properly calculated Marvin's estimated transportation costs or to make an independent determination of such costs.

Patty states that it should be awarded the contract because price and other factors, specifically Patty's experience and satisfactory performance in supplying the Navy with ejector bomb racks (allegation 9 above), should be considered in selecting the awardee. In this regard, we note that if any factor other than price is to be considered in determining the low bidder, the IFB must include such factor as an evaluation criterion, so that all bidders can compete on an equal footing. AMF Inc., B-179914, March 26, 1974, 74-1 CPD 144. Since experience and satisfactory contract performance in supplying ejector bomb racks to the Navy were not set out in the IFB as evaluation factors, the Navy could not properly consider these factors in determining the otherwise low responsive and responsible bidder.

Based on the foregoing, the protest is denied.


Deputy Comptroller General
of the United States