

DOCUMENT RESUME

02717 - [A1872919]

[Unduly Restrictive Solicitation]. B-186854. June 29, 1977. 10 pp.

Decision re: Aul Instruments, Inc.; Boonton Electronics Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Hewlett-Packard, Inc.; Department of the Navy: Navy Ships Parts Control Center, Mechanicsburg, PA.

Authority: B-185000 (1976). B-166092 (1969). B-183514 (1976). B-186057 (1976). B-180608 (1974). B-179762 (1974). B-178718 (1974). B-166620 (1969). B-186839 (1977). 51 Comp. Gen. 583. 55 Comp. Gen. 648. 53 Comp. Gen. 632. 49 Comp. Gen. 374. 55 Comp. Gen. 1160. 55 Comp. Gen. 1166. P.P.R. 1-2.204-4. A.S.P.R. 1-1206.1(a). A.S.P.R. 2-204.4. A.S.P.R. 3-501(b)(3). A.S.P.R. 1-109.3. Department of Defense Instruction 5126.3 (1961).

Protesters alleged that solicitation by the Navy for signal generators which contained a "brand name or equal" clause was unduly restrictive of competition, and questioned other requirements. The clause was found to be properly included and an ASPR deviation was neither prejudicial nor a major policy matter. The protest was denied. (HTW)

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DECISION



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

FILE: B-186854

DATE: June 29, 1977

MATTER OF: Aul Instruments, Inc.
Boonton Electronics Corporation

DIGEST:

1. Procuring activity's determination of its minimum needs will not be disturbed absent demonstration that determination lacked reasonable basis.
2. Brand name or equal clause is properly included in negotiated solicitation where specifications adequate for competition are not available because agency has neither expertise nor time to generate them.
3. Requirement for samples to be submitted with offer on brand name or equal negotiated procurement is proper where purpose is to enable Government to determine that product offered will meet specifications and Government otherwise is not able to make such determination.
4. Authorized deviation from ASPR bid sample provision obtained after issuance of solicitation but before closing date for receipt of initial proposals was not prejudicial since all potential offerors were able to submit proposals on basis of sample provision as ultimately approved.
5. ASPR deviation not published in Federal Register is effective as to protester since protester knew of deviation well in advance of closing date for receipt of initial proposals.
6. ASPR deviation authorized for limited time on experimental basis is not considered major policy matter requiring approval by Assistant Secretary of Defense for Installations and Logistics and is matter within cognizance of Department of Defense.

Aul Instruments, Inc. (Aul) and Boonton Electronics Corporation (Boonton) have protested the award to Hewlett-Packard, Incorporated (HP) under solicitation No. N00104-76-R-WM66 issued by the Navy Ships Parts Control Center (SPCC). Briefly, the RFP, issued June 10, 1976, called for signal generators, HP 6840B or equal, and provided for the submission of bid samples. The specified item is a general purpose test unit

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used to insure the operational readiness of a number of prime electronic systems aboard submarines, ships and aircraft. According to the Navy, manufacturers of some of these prime systems have utilized the brand name HP model in the development and production of their equipment and have recommended that model as being the only signal generator suitable for supporting their prime systems completely. The Navy states, however, that in order to obtain possible competition and at the same time to assure that the item would be functionally equal to the brand name item, the subject solicitation was issued with a brand name or equal clause and a requirement for bid samples. The RFP was amended a number of times, ultimately requiring proposals to be submitted by January 5, 1977. On that date only Hewlett-Packard submitted a proposal and on February 4, 1977, award was made to that firm.

Soon after the solicitation was issued both Aul and Boonton protested to the Navy alleging that the specifications were unduly restrictive of competition. Aul also protested to this Office by letter dated June 24, 1976, while Boonton did not protest formally until January 24, 1977. For purposes of clarity each protest will be considered separately.

Boonton Protest

Boonton alleges that the solicitation is unduly restrictive of competition in that "no generator in the world will meet the salient characteristics of this solicitation except the Hewlett-Packard Model 8640B." Boonton further maintains that the agency has not demonstrated that all of the salient characteristics listed in the solicitation are required to meet all of the Navy's intended applications. Although Navy has characterized Boonton's protest as untimely, it concludes that the protest should be considered. Under the circumstances we will consider the protest on its merits without regard to its timeliness.

With regard to Boonton's assertion that the specifications are unduly restrictive and that "the quality and characteristics of this specification do not accurately reflect the real needs of the Navy," we point out that our Office has long recognized the discretion vested in procuring activities to draft specifications reflective of their minimum needs. See Digital Equipment Corporation, B-186814, January 14, 1976, 76-1 CPD 21. Consequently, we will not disturb a procuring activity's determination of minimum needs unless it is clearly shown to be without a reasonable basis. See Microcom Corporation, B-188057, November 8, 1976, 76-2 CPD 385. Boonton's allegations must be considered against this standard.

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Boonton first charges that paragraph 2.2.1 of the salient characteristics is unduly restrictive of competition. That paragraph provides:

"2.2.1 Display Resolution. The frequency indication display resolution shall be at least 5 Hz for output frequencies to 10 MHz and 100 Hz for output frequencies between 100 MHz and 512 MHz. (Unlocked)."

Boonton argues that only the HP 8640B can meet this specification.

We have previously held that where the legitimate needs of the Government can only be satisfied by a single source, the law does not require that these needs be compromised in order to obtain competition. Manufacturing Data Systems Incorporated, B-180608, June 28, 1974, 74-1 CPD 348. Boonton argues, however, that while the specification calls out a 5 Hz resolution in the unlocked phase, the actual operating phase is the locked phase in which the resolution of the HP 8640B is reduced to 500 Hz, as opposed to Boonton's Model 102D whose locked phase resolution is 100 Hz. In Boonton's view, the requirement for 5 Hz resolution in the unlocked mode is without a reasonable basis since the display resolution requirements should be stated for the phase-lock mode, the phase used under actual operating conditions.

It is reported, however, that the Navy has an actual requirement for 5 Hz display resolution in the unlocked phase for the proper alignment of the AN/BRD-7 system. We are further informed that the signal generator is also used in the unlocked phase for various test procedures involving this classified system. In view of this, we have no basis to object to the particular salient characteristic challenged by Boonton.

Boonton also questions the requirement in paragraph 5.6 of the salient characteristics calling for an FM annunciator:

"5.6 FM Annunciator. An annunciator shall be provided to indicate when the peak deviation limits are exceeded in either the internal or external FM mode."

Boonton indicates that the annunciator is required on the HP 8640B because the deviation of that instrument is severely limited at lower carrier frequencies. The Boonton instrument, according to the protester, is not so severely limited. The maximum allowable

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deviation at 10 MHz for the HP 8640B is 10 kHz, or less than 1 percent distortion, while the Boonton instrument can be frequency deviated by 100 kHz. Boonton concludes that "everybody is restricted from bidding because of the FM annunciator requirement, but, in truth, under actual operating conditions the 8640B is worse than the competition."

Paragraph 5.6 requires an annunciator regardless of the actual maximum allowable deviation. SPCC maintains that the FM annunciator is required to show that the deviation limits will not be exceeded, thereby eliminating unwanted distortion and possible damage to the equipment. While Boonton may question the performance of the HP 8640B in comparison to its own instrument it has not shown that the Navy's basis for requiring the FM annunciator is unreasonable.

Boonton also challenges the following requirement in paragraph 3.1:

"3.1 Subharmonic and Nonharmonic Spurious.
Excluding frequencies within 15 kHz of the carrier, all spurious shall be more than 30 dB below the carrier."

SPCC reports that a signal with all spurious 90 dB below the carrier is required for the calibration and alignment of receivers with closely spaced channels such as the AN/ARC-143 and AN/ARC-159. While Boonton has questioned the Navy requirement on the basis that most manufacturers of narrow-channel receivers do not routinely make these measurements except on a sample basis, Boonton has not shown that the requirement is unreasonable.

Next Boonton questions the requirements for a modulation source and an automatic reset on the basis that these features are optional features--convenient, but not necessary for accurate measurement. The Navy has responded that the modulation source eliminates the need for an additional piece of test equipment in the laboratory. Also we are told that the reverse power protection facilitates operator usage by eliminating requirement for fuse replacement. The automatic reset saves manhours and eliminates the need to stock replacement parts. We can only conclude that while Boonton disputes the necessity of the disputed features, it has not shown this requirement to be unreasonable. See Particle Data, Inc.; Coulter Electronics, Inc., B-179762, B-178718, May 15, 1974, 74-1 CPD 257.

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We agree with Boonton with respect to paragraph 5.2 of the salient characteristics which states:

"5.2 Annunciator. A front panel indicator will show whenever the AM depth and RF level are set in such a manner that the maximum peak power output of the instrument is exceeded."

Boonton informs us that it handles this problem with a red scale marking on the output meter and that only the HP 8740B uses an annunciator. The Navy admits that there are several ways of implementing this requirement. In light of this statement we find it difficult to understand why the strict requirement for an annunciator was listed as a salient characteristic. We recommend that future solicitations identify only what SPCC considers actually essential to its needs with respect to the AM annunciator.

Finally, with regard to Boonton's general allegation that "the Navy has not demonstrated that the salient characteristics of this solicitation are required to meet all their applications," we point out that the Navy has never said that each of its systems requires all of the features listed as salient characteristics; rather, the salient characteristics represent the known features which would make the general purpose signal generator capable of functioning in support of the Navy's highly complex prime electronic systems. The Navy indicates that it does not have the time and resources to conduct detailed performance and environmental tests on each prime system in order to determine the minimum specifications for that system, and to combine these minimum needs in order to define the minimum specifications for the general purpose generator. Such a course of action is not feasible in Navy's view and there is nothing on the record to indicate that such a view is unreasonable.

Accordingly, this protest is denied.

Aul Protest

Aul alleges: (1) that the use of the brand name or equal clause where adequate specifications exist is unduly restrictive of competition; and (2) that the particular bid sample clause requirement is unsupported by a properly authorized deviation from the Armed Services Procurement Regulation (ASPR). Aul originally protested also that the agency included the wrong "brand name or equal" clause in the solicitation and that the agency was improperly using a correction of patent and latent defects clause, but these issues were rendered moot by subsequent solicitation amendments.

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Aul argues in the first instance that the use of the brand name or equal clause in the solicitation is unduly restrictive of competition because adequate specifications exist for signal generator test equipment. Aul points out that ASPR § 1-1206.1(a) cautions that the brand name or equal "technique should be used only when an adequate specification or more detailed description cannot feasibly be made available by means other than reverse engineering (see 1-304) in time for the procurement under consideration." Aul's position is that adequate specifications do exist--in fact, Aul notes, the original specifications were 20 pages in length and incorporated at least 8 military standards and specifications. Furthermore, Aul maintains that there was adequate time for the specifications to be upgraded since they were published originally a month before the procurement was initiated. Consequently, citing 49 Comp. Gen. 274 (1969), Aul concludes that since adequate specifications exist, the use of a brand name or equal clause is improper.

SPCC has responded that the Navy has many prime electronic systems which must be supported by a general purpose signal generator. It states that in order to develop a detailed specification for a general purpose signal generator suitable for the support of numerous prime electronic systems detailed performance and environmental tests must be performed on each prime system so as to determine the minimum combined specification requirements for all prime systems. More specifically, SPCC cites frequency setting accuracy and harmonics and spectral purity as examples of requirements which cannot be delineated in a detailed test equipment specification without an extensive test program for which time and resources are unavailable.

SPCC also states that the manufacturer/s of some of the prime electronic systems utilized the HP 8640B in the development and production of their systems and have recommended the HP 8640B as being the only signal generator suitable for prime system support. The agency feels compelled, therefore, to procure the HP 8640B or equal for the support of its requirements. SPCC states that it amended the solicitation to revise the listing of salient characteristics in the hope that some competition might become possible.

We believe that the use of the brand name or equal clause in this solicitation is neither unduly restrictive of competition nor contrary to the requirements of ASPR. The protester is correct in asserting that the brand name or equal clause should only be used where adequate specifications are not available. However, we also believe that the agency has reasonably explained why

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adequate specifications are not available. We do not agree with the protester that a seemingly large number of pages containing salient characteristics necessarily indicates that the specifications are adequate for competition. In this regard we find the protester's reliance on 40 Comp. Gen. 374 (1960) inappropriate. In that decision we indicated that the use of the brand name or equal clause in the solicitation was open to serious question where the justification for the use of the clause was "to permit possible suppliers to understand the concept of a completely packaged power plant" as was currently supplied by the brand name manufacturers. The brand name power plants did not meet the Navy's admittedly extensive specifications in that instance nor was there a list of salient characteristics which informed potential suppliers of the agency's minimum needs. Here the brand name generator was known to meet the agency's needs since it had previously been procured on a sole-source basis. The list of salient characteristics apprised potential suppliers of SPCC's minimum needs. Because we believe that SPCC's explanation as to why it cannot generate adequate specifications is reasonable, we will not object to the use of a brand name or equal clause in the solicitation.

With respect to the bid sample clause, Aul maintains that its use was improper for two reasons. First, Aul argues that the clause properly may be used only in formally advertised procurements. Second, Aul states that even if a bid sample requirement may be imposed in a negotiated procurement, there was inadequate justification for its use in this case.

On the first point, Aul argues that a bid sample clause is required where the full and free discussion which is characteristic of negotiation is missing and that:

"Appended to a negotiated procurement, a bid sample requirement has no purpose other than the elimination of firms which do not have an off-the-shelf model to offer."

The Navy insists that the samples clause is not restricted to formally advertised procurements. It points out that the Uniform Contract Format in ASPR § 3-501(b)(3), Section C(x) contemplates the use of a bid sample clause, and that in any event the bid sample clause was included in the solicitation pursuant to an authorized deviation obtained from the ASPR Committee. In this regard, the record indicates that on July 28, 1976, the ASPR Committee authorized the Navy to use the deviation which it had previously authorized for use by the Air Force on January 3, 1975.

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That deviation enabled the Air Force to use the language in Federal Procurement Regulations (FPR) § 1-2.204-4 as an alternative to that in ASPR § 2-204.4.

The Navy also argues that there are a number of reasons justifying the requirement for a bid sample in this case. The Navy states that the sample requirement was viewed as encouraging competition because it would permit firms which have not offered an item exactly meeting the agency's requirement to modify their commercial item in an attempt to meet Navy requirements. The Navy also states that some of the characteristics of the test equipment could not be adequately described, necessitating the use of a bid sample. The Navy points out, for example, that frequency setting accuracy and harmonic and spectral purity are requirements which cannot be delineated in a detailed test equipment specification without an extensive test program which is currently unavailable, and that examination of a bid sample would permit evaluation of those characteristics.

The use of bid samples is authorized by ASPR § 2-202.4 and has been sanctioned by our Office in those instances where it is determined that the specifications are not sufficiently definite to allow a determination without samples that an item offered will meet the Government's minimum needs. E-166092, April 4, 1969; 51 Comp. Gen. 583 (1972); Boston Pneumatics, Inc., B-185000, May 27, 1976, 76-1 CPD 345. We are not aware of any reason why this rationale should not be regarded as applicable to negotiated procurements as it is to formal advertising. In either case, testing and evaluation of a sample may be necessary to determine compliance with Government requirements; the fact that a negotiated procurement may involve written or oral discussions does not negate the Government's need to examine a sample of the product proposed to be offered. Moreover, we point out that bid sample requirements have been imposed in negotiated procurements. See D. Moody & Company, Inc., 55 Comp. Gen. 648 (1978), 76-1 CPD 16; Comspace Corporation, E-186839, January 24, 1977, 77-1 CPD 46; Tektronix, Inc., 53 Comp. Gen. 832 (1974), 74-1 CPD 107.

With regard to the Navy's specific justification for requiring a bid sample here, the record shows that the sample was requested precisely because SPCC could not draft adequate specifications because of the necessity for conducting detailed performance and environmental tests on each prime system, and therefore could not adequately describe such requirements as frequency setting accuracy and harmonics and spectral purity. Therefore, the only way the Navy could determine whether a particular generator

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could meet the Government's requirements was through inspection of a bid sample. We find no basis to object to the Navy's use of the samples clause.

Aul also challenges the propriety of the ASPR deviation permitting use of the FPR language. First, Aul maintains that the deviation in question was not approved in advance. ASPR § 1-109.3 provides that deviations will not be effected unless approved in advance. Since the solicitation was issued on June 10, 1976, and the ASPR deviation was not obtained until July 28, 1976, the protester argues, in accordance with our opinion in B-166620, July 7, 1969, in which we indicated our objection to a retroactive deviation, that the deviation was improper.

Navy, in turn, argues that the present protest is clearly distinguishable from B-166620, *supra*. In that case award could only be made to the low bidder on a basis contrary to regulation at an 85 percent rate of progress payments. It was suggested, after bid opening, that an award was possible if an approved deviation from the regulatory requirement could be obtained. We held that deviations could not be used to justify improper actions retroactively. The approval of the deviation would have resulted in an award on a basis other than that advertised in the solicitation and would have resulted in prejudice to the other bidders. In the present case, the Navy points out that although the deviation was not obtained until after the solicitation had been issued, all potential offerors were presented with the opportunity to submit a proposal on the same basis as every other potential offeror since the deviation was obtained well in advance of the closing date for receipt of initial proposals.

We agree with the agency's position. While Navy could have obtained the deviation prior to issuing the solicitation, we perceive nothing prejudicial to the protesters since once the deviation was obtained all potential offerors had equal opportunity to compete. In the present situation, there is no apparent prejudice to other potential offerors and, although Aul argues that the bid sample authorized by the deviation was a sign of favoritism toward Hewlett-Packard, the record establishes only that the sample requirement represented the Navy's means of acquiring an acceptable product. Consequently, although the deviation was authorized after the issuance of the solicitation we do not find the deviation improper.

Aul next argues that the deviation is not binding since it was not published in any manner. Aul maintains that a failure to publish the deviation in the Federal Register deprives the deviation of legal effect except to the extent that an individual had actual knowledge of it.

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We need not decide whether the authorized deviation was required to be published in order to be binding on the protester. The protester had actual knowledge of the deviation well in advance of the closing date for receipt of proposals. No action was taken on the deviation until well after protester had learned of it and had ample opportunity to argue its impropriety both with the Navy and before this Office. Consequently, there was no apparent prejudice to the protester, and we cannot conclude that absence of publication operated to invalidate the procurement. See Starline, Incorporated, 55 Comp. Gen. 1160, 1166 (1976), 76-1 CPD 385.

Aul's third allegation with respect to the deviation is that it is one involving a major policy matter and as such was required by Department of Defense Instruction 5126.3 (1961) to be approved by the Assistant Secretary of Defense for Installations and Logistics. Aul argues that since the deviation in question was originally authorized for use by the Air Force and was subsequently extended to other departments within the Department of Defense (DOD), its extension to the Navy in effect represented an ASPR amendment requiring approval by the Assistant Secretary and publication in the Federal Register.

We see nothing in the record which suggests that the ASPR Committee deemed this deviation a major policy matter. The original deviation as authorized was viewed in effect as an experiment which was to run through December 31, 1976. It appears that the ASPR Committee merely extended the "experiment" to the Navy (and, subsequently, other DOD agencies). In any event, we believe this is a matter within the cognizance of DOD rather than our Office.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States