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**DECISION**



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

**FILE:** B-216133, B-216778 **DATE:** March 22, 1985

**MATTER OF:** Patterson Pump Company

**DIGEST:**

1. Protest is timely where it was filed at GAO within 10 working days after protester learned of agency's rejection of its timely-filed, agency-level protest.
2. Protest against rejection of a bid is not academic even though agency canceled solicitation and resolicited its requirement after deleting a descriptive data requirement. Deletion of the requirement did not result from any change in the government's substantive requirements, and agency had no compelling reason for cancellation unless the rejection of the protester's bid was proper.
3. Protester's bid was responsive where the descriptive data submitted with its bid did not qualify its obligation to furnish the equipment described in the IFB. Rejection of the bid was not justified since the information the agency desired was neither specified in the IFB nor necessary to evaluate bids.

Patterson Pump Company (Patterson) protests the rejection of its bid to furnish electric motor-driven vertical storm water pumps under invitation for bids (IFB) No. DACW27-84-B-0058 issued by the Corps of Engineers. Patterson complains that the Corps acted arbitrarily in rejecting its bid as nonresponsive. The protester also contends that the Corps improperly resolicited its requirement before its protest was resolved.

We sustain the protest.

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The IFB required that offerors furnish "outline drawings of pumps & motors & typical performance curves with the bid." Patterson furnished performance curves showing, among other things: the amount of water that could be pumped per minute (flow rate), pump efficiency, and power required to drive the pump. Patterson proposed a 5,000 horsepower (hp) motor to drive its pumps. However, when the Corps made its own computation of the power required to achieve pump performance as depicted on the flow rate curve, it concluded that 5,000 hp would be inadequate because it would not leave a 10 percent power margin required by the IFB.

According to Patterson, the Corps acted arbitrarily because it based its calculations on an incorrect flow rate of 400,000 gallons per minute rather than on the IFB requirement for 370,000 gallons per minute. Patterson also asserts that the evaluation methodology the Corps used was not specified in the IFB.

Before reaching these issues, however, we consider contentions raised by the Corps that the protest is untimely and academic. According to the agency, the protest is untimely since it was not received in our Office within 10 working days after Patterson was notified of the rejection of its bid and the cancellation of the IFB. Further, the Corps states that the protest is academic because the IFB was canceled after all 10 bids were rejected, nine as nonresponsive and the highest as unreasonable in price. The Corps also indicates that it believes the protest is academic because it has resolicited its requirement after deleting the descriptive data requirements.

Concerning the timeliness of Patterson's protest, we point out that Patterson learned of the agency's decision to reject its bid and to resolicit the requirement in a letter from the Corps dated July 17. Patterson protested telegraphically to the Corps on July 20.<sup>1/</sup> The Corps did

<sup>1/</sup> The Corps' attempts to characterize Patterson's July 20 protest as an "interim appeal," citing our decision in Photica, Inc., B-210677, Mar. 16, 1983, 83-1 CPD 269. Patterson's intent to protest was clear; in its July 20 telegram it stated that it was protesting the disallowance of its bid. Moreover, Photica has no application here. That case concerned appeals to higher authority within the contracting agency following rejection of an agency-level protest, which we held does not toll the time limits for protesting to our Office. Such circumstances are not present in this case.

not indicate to Patterson that its protest was being rejected until it wrote Patterson to that effect August 6. Our Bid Protest Procedures provide that a protest is timely where the same case was initially protested to the contracting activity in a timely fashion (here within 10 working days of Patterson's receipt of the July 17 letter), provided a protest is filed with our Office within 10 working days of the date the protester first knew or should have known that the agency would act adversely on its agency-level protest. 4 C.F.R. part 21 (1984). Patterson's protest to our Office was filed on August 20, within 10 working days of its receipt of the Corps' August 6 letter, and thus is timely. See Instrument Control Service, B-216539, Nov. 6, 1984, 84-2 CPD 507.

We also disagree with the Corps' contention that the protest is academic. A protest challenging the rejection of a bid as nonresponsive may become academic if the protester does not also protest a subsequent agency cancellation of the solicitation, where the reason for cancellation is independent of the basis of protest. See Pepsi-Cola Bottling Co. of Salina, Inc., B-203680, Sept. 11, 1981, 81-2 CPD 237. In this instance, Patterson did protest the cancellation and resolicitation, at least to the extent of objecting to the Corps' decision to proceed with resolicitation in the face of its protest, and the reasons for cancellation are not independent of Patterson's basis for protest.

In this connection, we note that the Corps canceled the IFB and resolicited its requirement once it found that none of the bids received was acceptable. While the Corps subsequently dropped the descriptive data provision, because it concluded that the clause was an obstacle to making award, this action cannot by itself justify the cancellation of the IFB. Cancellation of an IFB after bid opening is proper only for compelling reasons. Cancellation is justified by a need to make changes to a solicitation only where offerors may have been prejudiced by a solicitation defect or when the government's needs cannot be met without making changes to the solicitation. Twehous Excavating Company, Inc., B-208189, Jan. 17, 1983, 83-1 CPD 42. Since the IFB does not appear to have been defective

in a manner that would have restricted the field of competition and since the data requirement did not affect the price or quality of the pumps, we think the Corps, by following the reasoning outlined below, could have made award under the original IFB without prejudice to any of the offerors. The propriety of the cancellation and resolicitation therefore turns solely on the propriety of the rejection of all bids, and of the rejection in particular of Patterson's bid, with the result that Patterson's protest is not academic.

Nevertheless, the Corps insists that Patterson's bid was properly rejected. The Corps says it was justified in assuming--for the purpose of its computation--that Patterson's pump would deliver 400,000 gallons per minute at the expected operating pressure because Patterson's volume flow rate curve shows that this is what it will deliver. If Patterson intended to deliver only 370,000 gallons per minute, rather than 400,000, it should have drawn its flow rate curve accordingly. To pump 400,000 gallons per minute while allowing a 10 percent power margin requires more than 5,000 hp, the Corps argues.

We find, however, that Patterson is correct in its contention that the Corps improperly based its evaluation on a 400,000 gallon per minute flow rate. The IFB calls for a volume flow rate of 825 cubic feet per second under the conditions in question. The Corps concedes that 825 cubic feet per second is equivalent to approximately 370,000 gallons per minute. The responsiveness of a bid is determined by examining whether the bid is an unequivocal offer to furnish the exact thing called for in the IFB. The Entwistle Co., B-192990, Feb. 15, 1979, 79-1 CPD 112. Since the thing required here is a 370,000 gallon per minute pump, the responsiveness of Patterson's bid should have been judged against that standard. Syntrex Inc.; Managed Information Systems, 63 Comp. Gen. 360 (1984), 84-1 CPD 522.

Moreover, we reject the Corps' assertion that it was incumbent upon Patterson to submit curves that would show 370,000 gallons per minute at the projected flow rate under the required operating conditions rather than the 400,000 gallon rate that Patterson did show. Patterson furnished a flow rate curve that appears to depict the performance of a

pump that can exceed the Corps' needs; Patterson also furnished a power curve depicting anticipated power consumption. Admittedly, Patterson did not include a curve that depicted how the pump would perform at less than full capacity--specifically, at the required flow rate of 370,000 gallons per minute. However, the Corps asked for "typical" performance curves rather than for a set of specific curves or calculations that would have been sufficient to permit the Corps to recreate the bidder's power computations--thus enabling the Corps to precisely verify the adequacy of Patterson's proposed motor. Moreover, the Corps states that "many" of the rejected bids were found to be nonresponsive for "reasons similar to that for which the protester was rejected." This statement of the Corps also suggests, in our view, that other bidders may have reasonably misinterpreted the Corps' requirement for "typical" performance curves. Consequently, it is our view that the Corps failed to comply with Defense Acquisition Regulation (DAR) § 2-202.5(d) (1976 ed.), which requires that an IFB identify not only what literature is to be furnished but why it is required and how it will be used.

We also think it is significant that the Corps, by reissuing the solicitation without requiring descriptive data, has treated the data as unnecessary to its evaluation of bids. We have held that a request for descriptive data that is not actually needed for bid evaluation purposes is informational and that failure to furnish such information does not prevent acceptance of a bid where the bidder would be otherwise bound to perform in accord with the IFB. Sulzer Bros., Inc., and Allis Chalmers Corp., B-188148, Aug. 11, 1977, 77-2 CPD 112.

From this it follows that Patterson's bid was responsive and should have been accepted--since this IFB defect did not restrict competition, as noted above--unless it appears that the data Patterson submitted introduced uncertainty as to whether Patterson intended to be bound to deliver equipment conforming to the IFB. See The Entwistle Co., supra.

Based on our review, Patterson's data depicts a pump that is capable of delivering more water than the Corps requires. Moreover, the record shows that, had the Corps used a 370,000 gallons per minute flow rate, to calculate

required horsepower, it would have calculated a projected power level that would have corresponded to Patterson's power consumption curve and would have been less than 5,000 hp, including the 10 percent margin. This is because, using the Corps' formula, a reduction in the amount of water pumped would be expected to result in a proportional reduction in the amount of power required to drive the pump. Although the predicted power also depends on pump efficiency, there is no indication on Patterson's performance curves, and the Corps does not maintain, that any change in efficiency could be significant. While, therefore, it may be true that Patterson did not submit data that was as complete as the Corps wanted, but did not adequately specify, the data Patterson submitted was consistent with the obligation it was to assume in the event of award, that is, to deliver a 370,000 gallon per minute pumping system, and its bid was responsive.

The protest is sustained.

We recognize that Patterson submitted the third low bid on the original IFB and that the reasons for the rejection of the two lower bids are not clear and may well have been for the same reason that Patterson's bid was rejected. In these circumstances, we think that if otherwise appropriate, the Corps should cancel its resolicitation of this requirement and make award to the low responsive, responsible bidder on the original procurement without regard to the literature submitted.

for *Harry D. Jan Cline*  
 Comptroller General  
 of the United States