



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20541

B-177618

May 14, 1973

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Law Offices
Daniel M. Ross
5530 Wisconsin Avenue
Chevy Chase, Maryland 20015

Attention: Glade F. Flake, Esquire

Gentlemen:

Reference is made to your letter dated March 23, 1973, and prior correspondence, containing the basis of your protest on behalf of Stewart and Stevenson Services, Incorporated (S&S), against an award to any other firm under invitation for bids (IFB) No. N00024-73-B-7206, issued November 8, 1972, by the Naval Ship Systems Command (Navy), Washington, D. C.

The IFB requested bids on an f.o.b. origin basis on quantities of 24 (offer A) and 28 (offer B) main propulsion diesel engines, associated on board repair parts, special tools and engineering services and provided that award would be for one "Offer" only. The IFB provided that the ultimate destination was unknown but that Oakland, California, would be considered the final destination for the purpose of bid evaluation. The transportation data clause found on page 16 of the IFB stated:

TRANSPORTATION DATA: Transportation costs will be a factor in the evaluation of offers. Failure to provide the information required below will result in offer evaluation on the heaviest weight(s) and largest dimensions of any offer submitted, or on the basis of two and one-half times the maximum equipment weight set forth in the specifications, whichever is greater, and TRANSPORTATION COSTS WILL BE EVALUATED ACCORDINGLY.

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The required information referred to above included, in part, the Uniform Freight Classification (UFC) and National Motor Freight Classification (NMFC) rate numbers, maximum unit weight and unit dimensions, of one loaded exterior shipping container, the number of loaded shipping containers and how many containers could be loaded on a standard rail car as well as on a truck whose size the bidder was to supply.

The low bid, both before and after the addition of transportation costs, was found to be submitted by the Caterpillar Tractor Company (Caterpillar). A "Determinations and Findings" was issued February 1, 1973, pursuant to Armed Services Procurement Regulation, (ASPR) 2.407, due to the urgency of obtaining the engines for installation on ships scheduled for overhaul, and a contract was awarded to Caterpillar on February 15, 1973.

On behalf of S&S you contend that the penalty provision specified in the above quoted Transportation Data clause should have been applied to the Caterpillar bid for failure to provide all the information called for therein and that when so applied, S&S displaces Caterpillar as the low bidder. In this connection, you note that the Caterpillar bid did not contain the applicable UFC and NMFC rate numbers and did not specify the location of a private siding or nearest rail terminal from which shipment would be made. Furthermore, you contend that evaluation of Caterpillar's bid must be based upon the cost of shipping one container per truck as it specified a 20' truck and its specified length per container was over 14' each. In addition, you contend that the freight rate used by the procuring activity in evaluating the Caterpillar bid, to support its position that even with addition of the penalty Caterpillar is low, was incorrect in that NMFC 120820, sub 6, (\$4.87 cwt), should have been used and not NMFC 120820, sub 1 and 3, (\$2.75 cwt.). You also contend that the bids were evaluated on a different basis, that is, the Caterpillar bid was evaluated in accordance with the weights and dimensions listed on page 5 of the IFB (those supplied by the procuring activity in the Guaranteed Shipping Weights and Dimension clause), whereas the S&S bid was evaluated in accordance with the data S&S supplied as required by the transportation data clause.

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Concerning the Waukesha Motor Company (Waukesha) bid, you contend that it was nonresponsive because it was not submitted on an f.o.b. origin basis and for failure to complete the IFB's equal opportunity section found in Standard Form 33. Furthermore, you state that even if the Waukesha bid is responsive it is not the low bid and, therefore, not in line for award.

It is reported by the procuring activity that sufficient transportation data was available from the Caterpillar bid and from external sources to enable an evaluation of the bid. In this connection, it is noted that the Transportation Data clause included all the necessary information, except the freight classification numbers, which were readily available from official publications; and that Caterpillar's reference to a 20' truck is not material since under the IFB the Government will select the mode of transportation and a 35'-40' truck is standard and will accommodate two units. Therefore, the procuring activity reports that the omissions in the Caterpillar bid were considered minor and were waived in accordance with ASPR 2-405, which defines a minor informality or irregularity in a bid as a matter of form or an immaterial variation from the exact requirements of the IFB, having no effect or merely a trivial or negligible effect on price, quality, quantity or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of or be otherwise prejudicial to bidders. Consequently, the penalty was not applied in the evaluation. However, it is the procuring activity's position that even when the penalty is applied, using the applicable rates, Caterpillar remains the low bidder.

The paramount issue presented by your protest is whether the penalty provision of the Transportation Data clause quoted above must be applied in evaluating the Caterpillar bid, for without its application Caterpillar is clearly the low bidder. In 42 Comp. Gen. 434 (1963), this Office held that while the requirement to submit transportation data must normally be regarded as material and complied with fully, the failure to submit such data may be waived as a minor informality or irregularity when information furnished by a bidder in lieu of strict compliance with the data requirement, together with in-

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formation already available to the Government, is sufficient to accomplish the same purposes which would be accomplished by strict compliance with the terms of the invitation. The omitted information in that case was the mode of transportation available at the shipping point. The decision recognized that a distinction must be drawn between data which represents a relatively free choice by the bidder and data which the bidder furnishes for "general information and with respect to which there is no need for a bidder to make a choice." Since the Government was to select the mode of transportation, we held that the failure to furnish such information must be waived notwithstanding the statement in the invitation that the failure to furnish the transportation data will result in rejection of the bid. Since the omitted information in Caterpillar's bid, as well as the truck size, is general information with respect to which there is no need for Caterpillar to make a choice, the rationale of the cited case applies and the penalty provision need not be invoked anymore than the deficient bid in the cited case was required to be rejected. Since in the instant case the transportation data was required for the Government to determine the cost of transportation to be borne by it, and since it was possible to make this determination on the basis of the information furnished by Caterpillar and on the basis of other information available to the Government, we would not be justified in objecting to the procuring activity's waiver of any deficiency in Caterpillar's bid. See 48 Comp. Gen. 357 (1968).

We do not agree with your contention that the cited cases are not relevant because the issue involved was responsiveness rather than application of a penalty provision. It is our view that since the purpose for requiring transportation data, that is to determine the ultimate cost to the Government, is the same here as in the cited cases, the difference in the sanction for failing to provide such information is not a relevant distinction.

Furthermore, we note that absent the application of the penalty provision to the Caterpillar bid, it remains the low bid even if the NMFC rate you propose is used. Therefore, we do not believe our resolution of this disputed point is necessary. Since we have concluded that

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Caterpillar was properly determined the low bidder, your protest concerning Waukesha is academic.

Accordingly, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States

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