DECISION

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

50708 97269

FILE: B-181732 DATE: May 28,1975

MATTER OF: AMF Incorporated Electrical Products Group

DIGEST:

1. Allegation that inclusion of patent and latent defect clause contravenes full and free competition requirement of 10 U.S.C. § 2305 is without merit because clause lends itself to only one reasonable interpretation--to discover all patent defects and account for them in bid price--and this requirement does not preclude bidders from competing equally on basis of own reasoned judgment.

2. Contrary to allegations that purchase description, drawings and sample are not sufficiently definite and complete to satisfy mandate of 10 U.S.C. § 2305 and ASPR § 1-1201, inclusion of patent and latent defects clause does not constitute admission that specifications are ambiguous. Rather, inclusion is merely acknowledgment that any specification may have defects even though checked by contracting agency technical personnel.

3. Allegations that procuring activity delayed its handling of protest in order to proceed with award under ASPR § 2-407.8(b)(3) (1974 ed.) and that procuring activity did not comply with ASPR provision have no merit since even if this Office had been furnished complete administrative report within time limits provided in Bid Protest Procedures and Standards, it is doubtful that a decision would have been rendered by date upon which award needed to be made; furthermore, receipt by protester of oral, rather than written notice of award as provided by ASPR, has no effect upon legality of award.

4. Contentions that technical data package fails to fall within standards of NAVMAT Notice for utilization of patent and latent defects clause and ASPR § 1-108 or 1-109 was not followed for use of subject clause are not substantiated since use of patent and latent defects clause is authorized in two different situations, and

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this procurement comes within purview of one of these situations and use of clause is authorized by ASPR § 1-108(a)(vii).

5. Contention that activity's failure to disclose known errors in solicitation invalidates IFB is not sustained when IFB included seven changes, deviations and waiver forms detailing patent defects discovered by procuring activity and activity states it possesses no further knowledge of any patent defects.

6. Section 20.9 of Interim Bid Protest Procedures and Standards does not impose time limits within which conference must be either requested or held and we have determined that value of holding conference in this case outweighed possible detrimental effects that delay might have occasioned.

Invitation for bids (IFB) No. N62306-74-B-0141 was issued by the United States Naval Oceanographic Office (NAVOCEANO) on April 26, 1974, for a specified quantity of Mark III Ocean Current Meters. A firm-fixed-price contract was contemplated. The invitation required that the meters were to be manufactured from Government-furnished engineering drawings. The invitation was sent to four companies and was synopsized in the Commerce Business Daily. The synopsis resulted in 51 additional firms requesting copies of the invitation.

Paragraph 30 of the invitation provided that a bidders' conference would be held on May 23, 1974, at NAVOCEANO, Washington, D. C. All Prospective bidders were requested to attend. Government equipment to be furnished under the contract was to be made available for viewing at that time. At the conference, two NAVOCEANO employees answered questions concerning the drawing package and the Government-furnished equipment. The questions and answers were recorded and copies of the transcript were sent to the prospective bidders who attended the conference.

By the time of bid opening on July 8, 1974, only the bid of the L'Garde Products Corporation was received. Award was made to that firm on August 28, 1974, notwithstanding the pendancy of this protest.

By letter dated July 8, 1974, and subsequent correspondence, counsel for AMF Incorporated Electrical Products Group (AMF) protested the award of a contract to any firm under the above-referenced IFB.

Pursuant to section 20.9 of our Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974)), the Department of the Navy requested a conference on the protest. On December 5, 1974, a conference was held with representatives of the Navy and our Office. Both AMF and L'Garde declined our invitation to attend.

First, AMF contends that the patent and latent defect provision of the IFB is ambiguous, unworkable and improper. Further, it is alleged that the inclusion of this provision contravenes 10 U.S.C. § 2305 and decisions of our Office. In support of its contentions, AMF maintains (1) that the requirement for a prebid review of the drawings constitutes an admission on the part of the Government that the drawings are unsatisfactory; (2) that the bidder at his peril was to discover the patent defects and take these into account in his bid; (3) the only inference that can be drawn from the fact that the four companies (including AMF) experienced in the manufacture of current meters did not bid was that the specifications were defective due to the number of undisclosed patent and latent defects; and (4) that, in all likelihood, the net effect of the inclusion of the latent and patent defects clause is that award will go to the least vigilant bidder.

Clause 31 of the IFB provided as follows:

"31. This solicitation contains the Correction of Patent and Latent Defects Clause:

Bidders are advised to:

"(a) be aware of contractor's responsibility thereunder to correct all apparent or 'patent' defects . . . whether or not he reviewed and examined the technical data package and whether or not during that review and examination he discovered all apparent or 'patent' defects;

"(b) be advised that under this clause 'latent' defects will be handled in accordance with this clause and, where corrections are ordered, the changes clause;

"(c) be warned that, because of the contractual liabilities, bidders should make a review and examination of the technical data package for the purpose of determining

"(i) the apparent or 'patent' defects the engineering drawings contain, and

"(ii) the cost and time to correct all apparent or 'patent' defects; and

"(d) be advised to include in the proposed price and delivery terms the estimates of cost and time to correct all apparent or 'patent' defects."

Subsection A of Section J of the special provisions of the IFB contained the referenced patent and latent defects clause as follows:

"SECTION J - SPECIAL PROVISIONS

"A. CORRECTION OF PATENT AND LATENT DEFECTS

"1. The technical data package consists of

"(a) the product description designated in Section F, and,

"(b) the engineering drawings designated in the product description.

"2. For the purpose of contract performance, it is to be considered that equipment manufactured or assembled in accordance with the engineering drawings will meet the requirements of the product description. Therefore, the Contractor is required to perform in accordance with the engineering drawings and in case of conflict between the drawings and the product description, the drawings shall govern. Accordingly, the Contractor is obligated, as an element of contract performance, to find and expose all patent defects in the engineering drawings as revised and corrected hereunder. Furthermore, whether or not he conducted an inspection of the documentation package as he was urged to do in the solicitation for this contract, and whether or not he discovered the patent defect if he did conduct such an inspection, the Contractor shall not be entitled to any compensation over and above the price set forth in the schedule or any extension in the delivery dates therefor because of the accomplishment of these obligations with respect to patent defects.

"3. (a) The engineering drawings, which term includes the documents referenced thereon, are furnished to the Contractor under this clause and no other; however, the engineering drawings are 'Government-furnished data' within the meaning of that term as used in paragraph (b) (1) (iii) of the 'Rights In Technical Data' clause hereof.

"(b) A 'patent defect,' as used in this clause, is any failure (by omission or commission) of an engineering drawing, or document referenced thereon, to depict completely and accurately the equipment described in the product description, which failure could or should be found by a reasonable, diligent inspection of the technical data package by competent engineers or technicians experienced in the field of which the equipment is a part.

"(c) A 'latent defect,' as used in this clause, is any failure (by omission or commission) of an engineering drawing, or document referenced thereon, to depict completely and accurately the equipment described in the product description which is not a 'patent defect.'

"4. (a) The Contractor shall notify the Contracting Officer in writing of each latent defect. Such notification, which shall be given within five days of the discovery of the defect by the Contractor, shall describe the defect and its effect on the balance of the equipment, identify both the particular engineering drawing(s) and the portion(s) of the equipment involved, and explain why the defect is not patent. The Contractor shall supply such additional information supporting the notification as the Contracting Officer may require.

"(b) Upon receipt of such notification, the Contracting Officer may direct the Contractor

"(i) to continue performance with respect to the asserted latent defect in accordance with the engineering drawings;

"(ii) on the basis of the Contracting Officer's determination that the defect is patent and not latent, to revise and correct the defect in the engineering drawing and to perform in accordance with the Contractor's obligations with respect to patent defects; and/or

"(iii) to submit a proposal for correcting such latent defect.

"(c) With respect to (iii) above, each proposed correction shall be submitted to the Contracting Officer within a reasonable time and in accordance with Engineering Change Procedures set forth elsewhere herein. Thereafter, the Contracting Officer shall issue a change order to the engineering drawings and/or to the product description in respect of the latent defect and such equitable adjustment shall be made in the line item price for the equipment and/or in the delivery schedule therefor as is appropriate under the Changes clause.

"5. The Disputes clause of this contract shall apply to disputed questions of fact arising under this clause."

NAVMAT NOTICE 4341 dated March 15, 1974, sets forth, as a policy matter, the situations in which the patent and latent defects clause is to be used and its purpose. The purpose of the clause is to relieve the prospective contractor of certain risks when requested to use Government-furnished technical data. The clause imposes liability for any latent defects upon the Government and imposes liability upon the contractor for those defects in the technical data package which "could or should have been found by a reasonable diligent inspection of the data package by competent personnel experienced in the field of related hardware."

Absent such a clause there would be for consideration the general rule as to contractor liability discussed in B-169838, B-169839, July 28, 1970:

"* * * when the Government requests performance in accordance with Government specifications, there is an implied warranty that if those specifications are followed, a satisfactory product will result. United States v. Spearin, 248 U.S. 132 (1918). However, where there is an apparent conflict between Government drawings and specifications, or when the contractor detects major discrepancies or errors in the Government specifications or drawings, it is incumbent upon the contractor to bring such matters to the attention of the Government, and failure to do so is at his peril.

> But this obligation on the part of the contractor, absent a clear warning in the contract, does not normally require him to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation. WPC Enterprises, Inc. v. United States, 323 F. 2d 874 (1963); Kraus v. United States, 366 F. 2d 975 (1966).
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> "The above decisions recognize that, while the Government impliedly warrants that if its specifications are followed by a contractor a satisfactory product will result, a contractor may nevertheless assume the risk of performance under Government specifications * * *"

The above-quoted decision concerned the inclusion of a clause in an IFB which provided for review of Government-furnished drawings, subsequent to award, "to determine, identify and correct the existence of any omission discrepancy, error, or deficiency in design or technical data which might preclude practical manufacture of the assemblies * * *." In the July 28, 1970, decision we concluded that there was no legal objection to the use of the clause or to the awards which were made to the lowest responsive and responsible bidders. This decision was affirmed upon reconsideration (October 30, 1970).

AMF contends that these decisions do not support the use of the patent and latent defects clause. AMF states "* * * In that case [B-169838, B-169839] the requirement was for post award bidder review of drawings and resolution of discrepancies which was held not to render the IFB defective because the clause did not evidence an admission of unsatisfactory drawings and allowed no more than could be otherwise accomplished under the 'changes' clause. The significant difference between the situation as described in B-169838 and B-169839 and here is in the requirement for prebid review of the drawings which constitutes an admission on the part of the Government of 'unsatisfactory drawings.'" We are not persuaded that a prebid requirement for review of drawings constitutes any more of an admission that the drawings are unsatisfactory than does a postaward requirement. Rather, the Navy acknowledges in both situations that even though checked for accuracy by Navy engineering personnel, there exists a very real possibility of error. See 52 Comp. Gen. 219, at 222 (1972).

With regard to AMF's contention concerning the failure to bid of the three companies experienced in manufacture of current ocean meters, the record is silent. There are other valid business reasons that may have influenced the decisions not to compete. Consequently, the conclusion AMF urges our Office to draw from their failure to bid is merely speculative.

AMF asserts that the effect of the inclusion of the patent and latent defects clause is that award will go to the least vigilant bidder. AMF argues that "The most capable offerors will in all likelihood discover most if not all of the defects they 'conclude' are patent, and perhaps some of the 'latent' ones, and will bid accordingly. Some less capable bidders undoubtedly will not discover all of the 'patent' defects and perhaps none of the otherwise 'latent' defects * * * The net effect in all likelihood is that award will go to the least vigilant bidder with the ultimate contract price paid to such bidder exceeding that which adequate specifications would have brought forth."

We agree with AMF's general observation that not all contractors possess equal technical capabilities. A firm with superior technical capability may well discover defects in the specifications that would go undetected by less capable concerns. Even assuming this to be true, it would be impossible, from a practical viewpoint, to establish different standards of accountability to compensate for varying levels of ability. The only workable common standard is the test of reasonableness. Under this approach, each firm must employ its best judgment in characterizing as patent or latent any defects it discovers. The judgment must be predicated upon a standard of reasonableness. While technical ability is certainly a consideration, in a formally advertised procurement, it is not overriding. The problem of unequal technical abilities is inherent in all competitive procurements, but is not so prejudicial as to preclude the full and free competition consistent with the procurement, as required by 10 U.S.C. § 2305(a) (1970).

It may be presumed that only relatively skilled and experienced firms will be competing for such complex items as here. Even when the patent and latent defects clause is not used, when a contractor discovers a patent defect, he must bring it to the attention of the Government. This is implicit in the definition of a patent defect, i.e., a defect that should have been discovered by a reasonable, diligent inspection of the technical data package by one experienced in the field. That is not to say that the possibility does not exist that a change order may be issued where there are two reasonable interpretations that may be presumed in resolving and pricing a patent defect discovered in the specifications, and the one chosen is not eventually accepted by the Government. It does seem the intent of the Navy to receive, as

nearly as possible, an accurate estimate of the total cost of the meters. In so doing, the Navy is calling upon the best engineering efforts of the commercial sector to review its technical work package. In our view, this approach is reasonable.

In the present situation, if the contractor fails to take into account any patent defects in his bid price, this failure will defeat his claim for an increase in contract price. Consequently, any bidder under the IFB in question must bear the risk of possible miscalculation of his bid due to failure to discover all patent defects. We do not believe that the use of the clause places the contractor in a better position to successfully argue that a defect is latent, rather than patent. Nor do we see any basis for concluding that the use of the clause rewards less diligent bidders because, under the clause, they will not be permitted to partake of the fruits of their lack of diligence in the form of contract changes. See in this regard, B-169838, B-169839, October 30, 1970. Additionally, AMF presented no evidence to substantiate its assertion that the terms of the clause are ambiguous or unworkable.

AMF's next contention is that the inclusion of the clause in the IFB contravenes 10 U.S.C. § 2305 and decisions of our Office. In addition, AMF contends that the purchase description, drawings, and sample or previous prototype do not meet the standards of the above-referenced statute or of ASPR § 1-1201 (1974 ed.).

Section 2305(a) of 10 U.S.C. (1970) provides that whenever formal advertising is required, the specifications and invitations for bids shall permit full and free competition as is consistent with the procurement of the property needed by the agency concerned. In addition, 10 U.S.C. § 2305(b) provides that "The specifications in invitations for bids * * * must be sufficiently descriptive in language and attachments, to permit full and free competition." Consistent with this statutory direction, ASPR § 1-1201 (1974 ed.) provides in pertinent part:

> "Plans, drawings, specifications or purchase descriptions for procurements should state only the actual minimum needs of the Government and describe the supplies and services in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers."

AMF contends that as a result of the inclusion of the latent and patent defects clause "bidders * * * cannot bid on any intelligent bases and evaluation of the bids cannot be made on an equal basis." Therefore, AMF concludes that the inclusion of the clause

precludes full and free competition, contrary to 10 U.S.C. § 2305. The issue for consideration "is whether more than one reasonable interpretation could be placed on such a provision in the solicitation thereby giving rise to different interpretations by bidders and resulting failure to bid on a common basis as required by the procurement statute [now 10 U.S.C. § 2305] and regulations." B-169838, B-169839, July 28, 1970. In our view, the language of the patent and latent defects clause is clear and lends itself to only one reasonable interpretation. The clause requires that all bidders assume liability for those technical defects (patent defects) which could or should have been found by a diligent inspection of the data package. The requirement to discover and account for all patent defects in the bid price does not preclude bidders from bidding upon a common basis. In bidding upon any solicitation, including one containing a latent and patent defects clause, a bidder must exercise his judgment and calculate his price upon his own interpretation of the requirements of the specification. This exercise of reasoned judgment is a necessary part of all competitive procurements. As long as the IFB requirements are clear, then bids submitted to that common statement of the Government's needs may be evaluated on a par with each other.

We have reviewed the decisions of our Office cited by AMF in support of its position that the use of such a clause contravenes 10 U.S.C. § 2305. These decisions fail to support AMF's position. AMF contends that 52 Comp. Gen. 219 (1972), upon which the Navy relies to support its use of the clause, is not in point. AMF states "In that case bidders were advised that they would have to bear the cost of technical data changes determined to be essential to the accomplishment of six specified tasks involved in the technical data package. Obviously under such circumstances all bidders were in an equal position. Here, since the bidders themselves had to determine in what areas they would have to bear the cost of defects, they were not all equal, since * * * there was no assurance that the bidders would find all the same latent [patent] defects. Thus, each bidder would be bidding, not on the same specifications, but on the specifications as corrected to eliminate patent defects by each individual bidder."

In 52 Comp. Gen., supra at 222, 223, we stated in pertinent part:

> "* * * Among the 'other things' provided by the 'Production Evaluation Concept' provision, however, is the agreement by the contractor to bear the cost of technical data changes determined to be essential to accomplishment of the following six tasks:
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> * * * * *
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> "The * * * enumerated contractor-assumed responsibilities represent, we think, an admission that no data package or specification can be expected to be totally without defects. Furthermore, all bidders to this invitation can be considered to be sophisticated in the ways of Government procurement and in solving problems encountered in the construction of complicated radio sets so that the special notice provision, coupled with the 'Production Evaluation Concept' provision, serves as adequate notice to them to scrutinize carefully the technical requirements and to price accordingly any significant unknowns for which they will bear the burden of correcting. The contract terms place the responsibility of anticipating such defects on the contractor, not the Government. While these contract terms might not withstand attack if specification defects encountered are substantially greater than could have been contemplated at the time of bidding, we think they are sufficient to reasonably allocate performance risk and to assure competition, particularly in view of the administrative position that no significant design defects exist. See, in this regard, B-165953, October 27, 1969."

While the decision quoted above specifically sets forth the six tasks for which the contractor must bear the cost of technical data changes, the tasks themselves are stated so broadly that the "Production Evaluation Concept" provision is not, in fact, more limited in scope than the patent and latent defect clause. Accordingly, it is our view that 52 Comp. Gen., supra, does support the Navy's position as to the use of the clause.

In support of its contention that the purchase description, drawings and sample do not meet the requirements of the above-referenced statute, AMF states that the drawings have never been used to manufacture parts from the drawings but were generated after the fact. In addition, AMF contends that sections 3.5, 3.6 and 3.8 of the Product Description are unclear and are illustrative of the defects contained in the data package.

With regard to the manufacture of the meter, the fact that an ocean current meter has not been manufactured from the drawings does not per se provide any basis for concluding that the specifications precluded full and free competition contrary to 10 U.S.C. § 2305. Consideration of unimpaired full and free competition concerns, in this case, whether the specifications are sufficiently definite and clear without imposing unnecessarily restrictive requirements so that all bidders can intelligently formulate their bids to the stated minimum requirements. In this regard, we agree with the position of the Navy, as stated in its supplemental report as follows:

> "3. Reference (a), page eight, refers to questions concerning Sections 3.5 and 3.6 of the Product Description. The question concerning the theoretical impossibility of filling the vane follower assembly and compass with any substance which is completely free of bubbles and air pockets is viewed to be primarily a legalistic consideration rather than a practical engineering problem. It is a standard commercial practice to fill compasses and other fluid filled devices utilizing a vacuum chamber to remove residual entrapped gasses. This was explained to the attendees at the bidders conference in general terms, Record of Bid Conference 23 May 1974, page 18, lines 20-25. We disagree with the approach suggested in AMF letter 3 July 1974, as the issue becomes academic if the standard commercial filling procedure is utilized. In addition, any attempt to specify internal pressure would essentially be meaningless since it would not relate to the presence or absence of bubbles in these devices. The other question raised appears again to be an issue of legalistic absolutes: ' . . . . How much dirt and other foreign matter is acceptable; what are the tolerence limits?' Contrary to the inference that the specifications require the recorder be assembled free of dirt and other foreign substances; a careful reading of paragraph 3.8 of the specifications will show all that was requested is that care be exercised to prohibit dirt and other foreign matter from coming in contact with all components of the assembly. This requirement is of course, nothing more than standard commercial practice which should be employed by any qualified bidder. This was further explained by Mr. Kuhn during the briefing portion of the bidders conference and it was noted that

> the grey room techniques currently employed by current meter manufacturers would be satisfactory. The common 'Grey Room' concept was utilized to avoid the requirement for full compliance with Federal Standard 209a which might have unnecessarily prevented smaller companies from bidding and could have resulted in a higher final cost * * *."

Furthermore, AMF states that there are at least two current meters presently available on the market and listed on the Federal Supply Schedule which satisfy the requirements of NAVOCEANO and that it "perceive[s] no valid reason for absence of such an intelligible specification."

The Navy has taken the position that "* * * We have researched, tested and evaluated current meters available on the open market and the GSA schedule including the AMF meter mentioned in reference (a). The decision to design and purchase the Government developed Mark III Current Meter was a result of the fact that the market did not offer a current meter that met all of the requirements of NAVOCEANO."

We stated in Matter of United Paint Manufacturing, Inc., B-181163, June 25, 1974, 74-1 CPD § 343:

> "Our Office has consistently held that the administrative agencies have the primary responsibility for drafting specifications which reflect the minimum needs of the Government, and in the absence of evidence of a lack of a reasonable basis for the action taken we are not required to object to same. B-175942, August 24, 1972; B-174103(1), November 18, 1971."

Since no evidence has been presented that demonstrates the determination of the Navy, in this regard, was unreasonable, we will not question it.

AMF's third contention concerns the Navy's delay in its handling of the protest and its failure to comply with ASPR § 2-407.8(b)(3). AMF notes that its protest was filed on July 8, 1974, and that the Navy did not submit its administrative report until September 4, 1974, with no reason for the delay given. In

addition, AMF points out that after it submitted its comments on the administrative report, NAVOCEANO submitted a supplemental report to the Naval Supply Systems Command, which was not forwarded to our Office until October 30, 1974.

While the Navy failed to furnish us with an administrative report within 20 working days as provided in section 20.5 of our Bid Protest Procedures and Standards (4 C.F.R. part 20.5 (1974)), it has been the consistent position of our Office that such failure does not justify the rejection of the report. However, in the circumstances where the delay appears to be unreasonable, we call such matters to the attention of appropriate agency officials. See Matter of Leasco Information Products, Inc. et al., 53 Comp. Gen. 932 (1974), 74-1 CPD § 314, citing B-177557, July 23, 1973, and B-175854(2), September 1, 1972.

It should be noted that the Navy's administrative report of September 3, 1974, confined itself almost exclusively to the timeliness aspect of AMF's protest. After the Navy was advised by our Office that AMF had protested to GAO prior to the opening of bids and therefore filed a timely protest in accordance with § 20.2(a) of our Bid Protest Procedures and Standards, it became necessary for the Navy to furnish our Office with a supplemental report discussing the substantive issues raised by AMF.

ASPR § 2-407.8(b)(3) (1974 ed.) provides that when a preaward protest has been received, award shall not be made until the matter is resolved, unless the contracting officer determines that the items are urgently required, that delivery or performance will be unduly delayed by failure to make award promptly, or that a prompt award will be otherwise advantageous to the Government. On August 28, 1974, the contracting officer determined that an award of a contract under the IFB in question was advantageous to the Government in order to have the current meter available in time for a comparative analysis of commercially available meters conducted under a separate contract. The meter eventually considered best under this evaluation will be the subject of a large procurement effort. This determination was approved at a higher level than the contracting officer. In accordance with ASPR § 2-407.8(b)(2) (1974 ed.), the Navy notified this Office on the same day of its intention to make award. The findings quoted above are consistent with the delivery schedule contained in section "H" of the IFB which provided for a desired delivery schedule of 120 days and

for a required delivery schedule of 180 days from the effective date of award. The determination to proceed under the foregoing procedures is not subject to question by our Office.

With regard to whether the preparation of the administrative reports was deliberately delayed so that an award could be made under the provisions of ASPR § 2-407.8(b)(3) (1974 ed.), it should be noted that if the Navy had furnished us a complete report within 20 working days (which would have been by August 5, 1974), it is doubtful that our Office would have been able to issue a decision prior to September 6, 1974, the date by which award had to be made. Consequently, we find no basis for concluding that the Navy intentionally delayed the submission of its reports in order to make an award under ASPR § 2-407.8(b)(3) (1974 ed.). Nor do we regard any delay as prejudicial to AMF's protest under the circumstances since the need to proceed with award would have surfaced in any event.

With regard to the Navy's alleged failure to comply with ASPR § 2-407.8(b)(3) (1974 ed.) AMF contends that: "* * * [the Navy] did not 'give written notice of the decision to proceed with the award to the protester.' The only notice that the protester had of the award was by telephone call from the Office of Counsel for Naval Supply Systems Command. No notice was received from the contracting officer." Although the above-referenced ASPR section does provide for written notice, the fact that AMF received oral rather than written notice has no effect upon the legality of the award and in no way prejudiced AMF. See B-177587, April 3, 1973.

AMF's fourth contention is that the technical data package does not meet the standards set forth in the NAVMAT Notice for using the clause. In addition, AMF contends that neither ASPR § 1-108 (1974 ed.), § 1-109 (1974 ed.), nor any other ASPR provision, provides authority for the use of this clause. In support of the first part of its contention, AMF states that:

> "Clearly the NAVMAT NOTICE * * * authorizes the use of the patent defects clause only in those cases involving --
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> "'procurements of equipment developed and only produced previously in Government plants, . . .'"

Since the current meter in question has never been "produced previously in Government plants" AMF argues that the standards for use of the clause, as set forth thereon, have not been met.

Subsection (a) of 7-104.506 Government Responsibility for Technical Data Furnished Contractor for Production Purposes, NAVMAT NOTICE 4341, provides that a correction of patent and latent defects clause shall be utilized as follows:

> "(a) General In certain instances, involving initial competitive procurements, or initial non-competitive procurements of equipment developed and only produced previously in Government plants, the accuracy and adequacy of the related technical package has not been or cannot be firmly established in advance of contracting * * *."

It is our position that the grammatical structure of the phrases in question--"initial competitive procurements, or initial noncompetitive procurements of equipment developed and only produced previously in Government plants"--admits only one interpretation. The use of a comma after the phrase "initial competitive procurements" coupled with the use of the word "or" immediately following this phrase evidences that this phrase is separate from those that follow. The phrase "of equipment developed and only produced previously in Government plants" modifies only the phrase immediately preceding it--"or initial noncompetitive procurements." Consequently, the NAVMAT Notice in question permits using a patent and latent defects clause in the following situations: (1) initial competitive procurements; and (2) initial noncompetitive procurements of equipment developed and only produced previously in Government plants. Since the issuance of the IFB in question was for an initial competitive procurement, the use of the latent and patent defects clause in the IFB was in accord with the NAVMAT Notice.

In addition, AMF contends that the ASPR does not appear to provide any authority for the use of a patent and latent defects clause. If its use is permissible, there is no indication that either ASPR § 1-108 or 1-109 was followed in deviating from ASPR. ASPR § 1-108(a) (1974 ed.) provides that:

"(a) The Departments and their subordinate organizations shall not issue instructions, including directives, regulations, contract forms, contract clauses, policies, or procedures implementing the ASPR or covering the procurement of supplies or services or the administration of contracts for such supplies or services, unless permitted by one of the following and if consistent with (b) below:

* * * * *

"(vii) material determined by the ASPR Committee to be inappropriate for ASPR coverage, but appropriate for inclusion in Departmental publications.

"(b) Instructions issued in accordance with (a) above shall not contain material which duplicates, is inconsistent with, or increases or restricts the use of, any authority contained in this Regulation."

We have been informally advised by the Navy that the above-quoted subsection was utilized as the basis for the use of the patent and latent defects clause contained in the NAVMAT Notice. Consequently, it is our position that the use of the patent and latent defects clause contained in the NAVMAT Notice is authorized by ASPR § 1-108(a) since the Notice comes within the purview of the above-quoted subsection of ASPR § 1-108(a) and is consistent with ASPR § 1-108(b). This is the type of deviation from ASPR permitted by ASPR § 1-109.1(viii). In any event, we iterate that the procuring agency has considerable latitude in formulating the terms of its solicitations and stating its minimum needs.

The fifth contention raised by AMF concerns the failure of the Navy to disclose known errors in the solicitation. AMF contends that "It is obvious that the Naval Oceanographic Office knows of the existence of 'patent' defects in the drawings, and documents referenced therein, of the referenced Solicitation. It should be required to disclose these, as well as all others that a 'diligent' inspection by its own technical people would disclose. Its failure to do so invalidates the Solicitation, as it did in Comp. Gen. Dec., B-148265, supra," (42 Comp. Gen. 17 (1962)). In 42 Comp. Gen., supra, the procuring activity conceded

the existence of errors in the specifications by stating that: "* * * the Contracting Officer intends to point out actual errors contained in the drawings to the low offeror presently under consideration for award."

The IFB under consideration includes seven Changes, Deviation and Waiver Forms detailing patent defects which the Government found. NAVOCEANO states that it possesses no further knowledge of any patent defects remaining in the solicitation. Since it appears that the NAVOCEANO has not failed to disclose any known defects, this situation is distinguishable from 42 Comp. Gen., supra, and does not provide a basis for invalidating the solicitation in question.

Lastly, AMF contends that the Navy's request for a conference was untimely and that the holding of the conference on December 5, 1974, was consequently untimely. Section 20.9 of our Bid Protest Procedures and Standards does not impose a time limit within which a conference must be either requested or held. As stated in Matter of AEL Service Corporation et al., 53 Comp. Gen. 800 (1974), 74-1 CPD § 217:

> "* * * The purpose of a conference is to crystallize the issues before our Office and to afford all interested parties an opportunity to present their views on the merits of the protest. Also, our Office gains further insight, not readily discernible from the record, into significant factors inherent in the particular procurement being protested * * *."

While a request for a conference should be made within a reasonable time after the written record is complete, we believe that the value of holding a conference, as discussed above, oft-times outweighs the possible detrimental effects the delay might occasion. It should be noted that the Navy wanted to submit an additional supplemental report. In the interest of expeditious consideration of the merits of the protest, we suggested the Navy forego such action. The Navy complied with this suggestion.

For the reasons set forth above the protest of AMF is denied.

Deputy Comptroller General
of the United States