

**DECISION**



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

FILE: B-185403

DATE: April 29, 1976

MATTER OF: International Computaprint Corporation

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99001

**DIGEST:**

1. Pilot patent production demonstration contained in IFB and administered to bidder to ascertain technical capability constitutes specific and objective responsibility criterion and, therefore, GAO will review contracting officer's affirmative responsibility determination to see if criterion has been met.
2. Where bidder never successfully passes demonstration required by IFB to establish technical ability to perform in responsible manner--a specific and objective responsibility criterion contained in solicitation--GAO finds there was no reasonable basis upon which contracting officer could find bidder responsible.
3. Solicitation should be canceled and requirement resolicited where (1) low bidder found to be responsible by agency is ineligible for award because bidder failed to comply with specific and objective responsibility criterion in IFB; and (2) only other bidder's price is almost \$8 million higher than that of low bidder. Also, determination that low bidder was responsible shows that specific and objective criterion was unnecessary.

On May 1, 1975, the Department of Commerce (Commerce) issued invitation for bids (IFB) No. 6-36976 for the preparation of patent data for patent full text data bases.

Under the resulting contract, the contractor will be furnished approximately 1,540 approved patents per week which are to be converted into machine language on magnetic computer tape. Several different types of tapes are to be produced for various uses. Master tapes are to be prepared containing the full text of the approved patents which will be available for distribution to industry desiring to store current patent information on computers.

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A second type of tape required will be used by the Government Printing Office on its Linatron machine to print the Official Gazette of the United States Patent and Trademark Office. Other types of tapes required are for reissues, defensive publications, designs and plants. An index to the Official Gazette is to be prepared also by the contractor.

Bids were received in response to the IFB from International Computaprint Corporation (ICC), the incumbent contractor, and Informatics, Inc. (Informatics). The low bid of \$9,947,224 for the 2-year contract period (1 year plus a 1-year option) was submitted by Informatics. ICC's bid was \$17,829,317.

Since the low bid of Informatics was considered to be responsive to the IFB, the contracting officer proceeded to determine the responsibility of Informatics. The contracting officer subsequently has made an affirmative determination of Informatics' responsibility. That determination has been protested to our Office by ICC.

Regarding protests against a contracting officer's affirmative determination of a bidder's responsibility, our Office has held that we will not review such matters except where there are allegations that the contracting officer's actions in finding a bidder responsible are tantamount to fraud or the solicitation contains specific and objective responsibility criteria which allegedly have not been met. Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376; and Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; reconsidered at 54 Comp. Gen. 715 (1975), 75-1 CPD 138. This policy was adopted by our Office because normally responsibility determinations are based in large measure on the general business judgment of the contracting officer, and being subjective are not readily susceptible to reasoned review. Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64, and Keco Industries v. United States, 428 F.2d 1233, 1240 (192 Ct. Cl. 773). However, in situations where the question of responsibility revolves around a bidder's meeting or failing to meet certain specific and objective responsibility criteria expressed in the solicitation, our Office will review, to the extent possible, the determinations of the contracting officer to

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see if the specified responsibility criteria have been met.  
See Yardney, supra.

A principal ground of ICC's protest is that Informatics failed to pass the pilot patent production demonstration (PPPD) contained in the IFB and, therefore, there was no basis on which the contracting officer could make the determination that Informatics was a responsible bidder.

ICC contends that the PPPD constitutes a specific and objective responsibility criterion and, under the Yardney and Data Test cases, our Office can and should review the results of the PPPD to ascertain if the criterion has been applied as required and met by Informatics. Commerce, the contracting officer, and Informatics take the opposite position, arguing that the PPPD was not a specific and objective responsibility criterion and that passage of the PPPD was not a requirement for an affirmative responsibility determination by the contracting officer. Accordingly, our Office should not review the contracting officer's determination because the exceptions to our general policy enunciated in Yardney and Data Test are not applicable to the instant IFB.

Therefore, the threshold question presented by the protest is whether the PPPD constituted a specific and objective responsibility criterion.

In the IFB, section "E" of part II - Additional Solicitation Instructions and Conditions, entitled "Determination of a Prospective Contractor's Responsibility," contained the procedures and standards which would be employed by the contracting officer to determine a prospective contractor's responsibility. Section E(2)(d), which explained the PPPD, reads as follows:

"(d) A pilot patent production demonstration shall be accomplished by the prospective contractor (as defined under b, above) to establish his technical ability to perform the work in a

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responsible manner. The procedure for the demonstration is as follows:

"Not less than 700 patented files have been identified for the purpose of selecting files to be used for this pilot patent production demonstration. These 700 patent numbers have been listed with the appropriate letter (M, E, C, or O) added to the patent number. None of these 700 patents is among the 100+ patents used for the preparation of Exhibit 1.

"The list of not less than 700 patent numbers is deposited with the contracting officer (Department of Commerce's Procurement Division), assigned to and responsible for this procurement. He will be furnished with a list of patented files signed out for study by all bidders (or anyone else) and will eliminate from the 700+ list any patented file(s) studied by any bidder.

"From the remaining patented files on the list, the contracting officer will have 100 'M' files, 50 'E' files, 25 'C' files, and 25 'O' files randomly selected for the pilot patent production demonstration. No P & TM Office employee will participate in the final selection of these 200 patented files.

"The prospective contractor shall be notified three weeks in advance of actual file availability. He shall be given 200 patent application files (actually patented files) and shall produce magnetic tape items 1, 2, 3, 4, 5, and 53. These patent files will be produced, delivered, and inspected in accordance with Contract Article 2 and Article 8 provisions set forth under Part I - Special Provisions Contract, except that all samples for inspection may

be 100 percent of the pilot. The prospective contractor must include complex work units encountered in the demonstration patented files. (See Reference 5 in Part III - Additional Technical Specifications and References.)

"The prospective contractor's attention is especially drawn to the rejection/reinspection procedures of Contract Article 8, wherein, for example, for any rejected portion of item 1, the contractor is given the 'error rate' and must 'rework' the entire rejected portion for resubmission of the replacement item 1. He is not given a copy of the original inspection list with errors marked thereon.

"In addition, the contracting officer may grant up to an additional seven calendar days for a second resubmission if the first submission and then the first resubmission gave substantial evidence to the government of technical understanding and capability.

"Up to two 25 patent Linotron test tapes and up to two 25 patent item 1 test tapes will be permitted during the pilot demonstration or related resubmission period(s).

"Failure to meet acceptance requirements upon initial inspection (or with only one resubmission in seven calendar days) may be deemed cause for a determination that the respective contractor is non-responsible for not demonstrating adequate technical capability to process and make timely deliveries of acceptable work for all products required at 1540 patent files per contract week (every other week).

"All costs associated with the pilot patent production demonstration of the prospective bidder's capability will be at the expense of the bidder, except those costs incurred for the GPO Linotron processing and the P & TM Office quality assurance inspection." (Double underscoring supplied.)

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The contracting officer, in support of his position that the PPPD did not constitute a specific and objective responsibility criterion, made the following comments in the report of the Commerce Department in response to the protest:

"We do not concur that under this solicitation, the 'question of responsibility revolves around the bidder's meeting or failing to meet certain specific and objective responsibility criteria expressed in the solicitation.' The intent of the PPPD was to simulate to the most practical extent processing conditions which would be applicable to actual contract performance, in recognition that the PPPD was a pilot operation intended to be accomplished by the prospective contractor 'to establish his technical ability to perform the work in a responsible manner.' \* \* \* Furthermore, the prospective contractor's failure to meet acceptance requirements, \* \* \* 'may be deemed cause for a determination that the (prospective) contractor is non-responsible . . .'  
(Stress added.) Under the expressed language, such determination by the Contracting Officer is permissive, not obligatory, and intends that the Contracting Officer take into account all relevant considerations."

ICC disputes the contracting officer's interpretation of the penultimate paragraph of the above-quoted portion of the IFB. ICC acknowledges that the paragraph is discretionary, but that the only discretion permitted the contracting officer is that he may determine a bidder nonresponsible on the basis of the initial submission or after only one resubmission without allowing the second resubmission. ICC states that it does not allow the contracting officer the discretion to find a bidder responsible, if it fails to successfully perform the PPPD.

We must agree with ICC's interpretation of the paragraph. We believe the contracting officer had discretion to find a bidder nonresponsible based on the results of the initial submission, and first resubmission without having to allow the bidder to perform a second resubmission. If the interpretation advocated by the contracting officer was the most reasonable, we fail to see the need to discuss in the paragraph the initial submission or first resubmission. If the contracting officer were to retain

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broad discretion regarding a bidder's responsibility, it seems logical that the paragraph would have simply said, "Failure to meet the acceptance requirements of the PPPD may be deemed cause for a determination that the contractor is nonresponsible \* \* \*." Of particular importance, the IFB clearly required accomplishment of the PPPD, including a specified error rate, to establish the prospective contractor's "technical ability to perform in a responsible manner." Therefore, we do not believe the above-discussed paragraph is sufficient to make the PPPD merely a guideline in the determination of a bidder's responsibility, as opposed to a specific and objective criterion which must be met.

In addition to the above, Informatics contends that the following statement contained in amendment 2 to the IFB shows that the contracting officer retained discretion in determining a bidder's responsibility:

"Attention is directed to Page 74, Section C, 'Contract Award or Awards', Page 75, Section D, 'Criteria for Evaluating Price and Other Factors', and Pages 77-85, Section E, 'Determination of a Prospective Contractor's Responsibility'. A high level of confidence that the prospective contractor can achieve the program objectives must be evident. Responsiveness and responsibility of a prospective Contractor or Contractors will be considered as set forth in the above Sections in addition to the mathematical calculations. Therefore, the Government must necessarily exercise some discretion in the determination of responsibility in accordance with the procedures stated above."  
(Emphasis supplied.)

Informatics argues that the final sentence of the above paragraph clearly shows that the passage of the PPPD, within the acceptable error rate, was not a prerequisite to an affirmative determination of responsibility, but that the contracting officer had the discretion to find a bidder responsible notwithstanding a failure of the PPPD as long as the contracting officer was convinced of a particular firm's ability to perform.

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We note that section "E," "Determination of a Prospective Contractor's Responsibility," in addition to describing the PPPD, also contained a list of other factors which would be considered in determining responsibility. These were the more classic types of responsibility criteria such as financial resources, satisfactory past performance, necessary experience, and satisfactory record of integrity. These are the types of criteria which involve the business judgment of the contracting officer, and under Central Metal Products, supra, our Office no longer reviews affirmative determinations based on these criteria.

We believe it is with respect to these types of responsibility factors where "the Government must necessarily exercise some discretion in the determination of responsibility." However, this discretion in no way detracts from the requirement that the PPPD must be accomplished as a measure of the prospective contractor's responsibility. Further, the underscored portions of the paragraph show that responsibility will be determined "as set forth in the above Sections" and "in accordance with the procedures stated above." These procedures included the PPPD and the error rate to be obtained. Accordingly, the paragraph in amendment 2 does not alter our position that the PPPD was a specific and objective responsibility criterion.

Accordingly, we find that accomplishment of the PPPD within the stated parameters did constitute a specific and objective responsibility criterion meeting the standards of the Yardney and Data Test cases. We reach this decision taking into consideration the entire tone of the IFB which stressed the need of Commerce for a responsible contractor able to meet the rigid specifications for the timely and accurate production of tapes containing the approved patents. The concern of Commerce for satisfactory performance under the contract is exemplified by the fact that the IFB contemplated the possibility of two separate awards to different contractors for alternate week production to assure a responsible contractor would be available, if one contractor experienced difficulty in performance. This alternative method of award, when read in conjunction with the detailed statement of the PPPD, would or should have led reasonable prospective bidders to expect that compliance with the PPPD was a prerequisite to award.

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Therefore, as we find that the PPPD is a specific and objective criterion in determining a bidder's responsibility, we will review the record to ascertain if the criterion was applied and met.

ICC's protest alleges that the PPPD was neither applied-- because deviations were granted to Informatics during the conduct of the demonstration by the contracting officer--nor met because Informatics failed to perform the PPPD within the acceptable error rate. Because of our discussion below, we find it unnecessary to discuss the allegation that the contracting officer did not apply the PPPD.

With regard to whether the criterion was met by Informatics, the record before our Office, including the technical evaluation committee's report, shows that while Informatics' performance on the PPPD continued to improve from the initial submission through the two resubmissions, the firm never successfully accomplished the minimum error rate contained in the IFB.

The contracting officer argues that he and the technical evaluation committee were convinced by the efforts of Informatics under the PPPD that the firm possesses the technical capability to perform the contract notwithstanding the failure to pass the PPPD. In this regard, we observe again that the contracting officer determined Informatics to be a responsible prospective contractor. While demonstrating the requisite technical capability to perform would be a proper basis for an affirmative determination of responsibility in the normal situation, this is not so here, where there has been no compliance with a specific and objective responsibility criterion stated in the IFB. Therefore, there was no reasonable basis for the contracting officer to find Informatics responsible. See Data Test Corporation, supra (1974).

In reaching the above conclusion, we recognize that the IFB did not explicitly provide that failure to pass the PPPD was fatal to any finding that Informatics was responsible. We believe this lack of explicitness, however, does not overcome the reasonable construction of the IFB provisions discussed above.

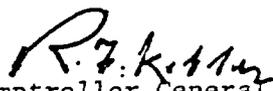
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With this in mind, the affirmative determination of Informatics' responsibility by the contracting officer and the position of the procuring activity has the effect of waiving the requirement for passage of the PPPD, and convinces us that passage was an unnecessary requirement of the Government. We do not believe it is fair to have an IFB which, upon examination, at the very least, gives the impression that passage of the PPPD was a specific responsibility criterion if such result was not intended by the procuring activity. For the procuring activity to construe, after the bid opening, that the PPPD was not a specific responsibility criterion was prejudicial to any bidder who bid under the IFB as issued or to any prospective bidders who failed to bid because of doubts as to their ability to comply with the literal requirements of the PPPD.

Further, the Government is now presented with the situation of having a low bidder, which it deems capable of complying with the performance requirements of the solicitation, ineligible for award because the responsibility determination was not made in accordance with the IFB. Therefore, the Government is faced with the possibility of making an award to a bidder whose bid price is almost \$8 million over the low bid of a bidder who has been determined to be responsible absent literal compliance with an unnecessary requirement. We believe such an award would be prejudicial to the Government from a cost standpoint.

Accordingly, we believe the IFB as drawn was unduly restrictive of competition and did not permit the full and free competition contemplated by the procurement statute, 41 U.S.C. § 253 (1970) and implementing regulations. Therefore, the IFB should be canceled and a resolicitation issued which accurately expresses the minimum needs of the Government. Data Test Corporation, supra, (1975). However, taking into consideration the urgent need for continuing services of a responsible contractor by the Patent and Trademark Office, our Office would have no objection to the Commerce Department entering into negotiations with ICC and Informatics and any other firm which can timely demonstrate the requisite technical capability.

Because of the above holding, there is no need to consider the other contentions advanced by ICC which allegedly preclude an award to Informatics.

  
Deputy Comptroller General  
of the United States