

**DECISION**

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

60307 099421

FILE: B-183995

DATE: December 17, 1975

MATTER OF: Oven Industries, Inc.

**DIGEST:**

1. Since protester did not protest failure of solicitation to require first article testing and approval for first-time manufacturers and lack of evaluation factors other than price before the closing date for receipt of proposals, those portions of its protest are untimely and will not be considered on the merits, even though the agency chose to consider and deny the untimely protest.
2. Where contracting officer cannot determine that there would be reasonable competition to justify small business set-aside since only one small business has offered on previous solicitations, protester's allegation that agency discriminated against small business in making award to affiliate of large business must be denied.

Oven Industries, Inc. has protested the award of a contract to Ovenaire, a division of Walter Kidde Company, Inc., by the Defense Electronics Supply Center (DESC) under solicitation DSA 900-75-R-3090. The solicitation called for proposals on five incremental quantities of Stock Number 599-00-772-5689, Crystal Unit, Quartz, Burroughs (92379) P/N CE 78827. No requirement was included for First Article testing. Inspection and acceptance were to be at destination. No portion of the procurement was set aside for small business.

Prior to September 1969 this item had been procured by formal advertising; however, it is reported that the item has been procured since that time by negotiation because of what has been termed a "cataloging error" by DESC Directorate of Technical Operations. Future procurements, we are advised, will be made by formal advertising.

In response to the solicitation, two offers were received:

Quantity	50-100	100-249	250-499	500-999	1000-1500
OVEN INDUSTRIES	\$73.83	\$67.60	\$60.14	\$54.42	\$49.10
OVENAIRE	63.86	59.13	55.26	51.65	49.59

Neither offeror took any exceptions to the solicitation terms and conditions. Negotiations were conducted with both offerors who were informed that the inspection and acceptance point was being changed to origin rather than destination. Oven Industries did not revise its offer, while Ovenaire increased its price in two areas. The final offers were:

Quantity	50-100	100-249	250-499	500-999	1000-1500
OVEN INDUSTRIES	\$73.83	\$67.60	\$60.14	\$54.42	\$49.10
OVENAIRE	63.86	59.13	56.85	53.65	49.59

Award was made to Ovenaire for 500 units at a unit price of \$53.65 and a total price of \$26,825.00. Ovenaire's contract includes the solicitation requirement that delivery be made within 200 days after the effective date of award. Oven Industries had offered to deliver within 154 days after the date of award, earlier than that required by the solicitation.

The protester had to submit first articles for testing and approval when it was awarded its first contract for this item in 1966. It is discriminatory, the protester argues, that a similar requirement was not placed upon Ovenaire, since this is that company's first contract for this item. The agency's position is that first article approval is no longer necessary to obtain an acceptable product.

The omission of the requirement for First Article testing was certainly known to protester prior to the closing date for receipt of proposals, since the requirement would have been included in the solicitation if the agency had intended that it be conducted. Armed Services Procurement Regulation (ASPR) § 1-1903 (1975 ed.). Section 20.2(a) of our Interim Bid Protest Procedures, which were in effect at that time, provided:

"\* \* \* Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. \* \* \*"

Since Oven Industries did not protest this alleged deficiency in the solicitation before the closing date for receipt of proposals, its protest is untimely, and, therefore, will not be considered on its merits by this Office even though DESC chose to deny the untimely protest. MKS Instruments, B-183388, May 29, 1975, 75-1 CPD 327.

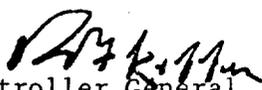
Oven Industries next asserts that the small difference between the unit price offered by it (\$54.42) and the price offered by Ovenaire (\$53.65) does not justify the award to Ovenaire, in view of the fact that the latter firm has not previously made this item. As we observed above, this procurement was negotiated rather than formally advertised only as the result of administrative error. Offerors were called upon to furnish supplies conforming to certain well-established specifications: technical proposals were not required and there were no degrees of technical merit. Under these circumstances, competition was limited to price and upon that basis Ovenaire was the successful offeror. The protester suggests that the difference in price is more than offset by the costs of evaluating a first-time producer. The solicitation did not provide that the evaluation would include such costs (which DESC states do not exist) and the protester's suggestion that they be included is untimely, being raised after the closing date for receipt of proposals.

Finally, Oven Industries maintains that DESC discriminated against small business in the award to Ovenaire, an affiliate of a large business. ASPR § 1-706.5(a)(1)(1975 ed.) provides:

"\* \* \* the entire amount of an individual procurement \* \* \* shall be set aside for exclusive small business participation \* \* \* if the contracting officer determines that there is reasonable expectation that offers will be obtained from a sufficient number of small business concerns so that awards will be made at reasonable prices. \* \* \*"

It has been reported that Oven Industries has been the only small business to bid on this item in recent years. Accordingly, this procurement could have not been set aside exclusively for small business participation. The record, then, does not exhibit any basis on which we can determine that DESC discriminated against small business in this procurement.

In view of the foregoing, the protest is denied.

  
Deputy Comptroller General  
of the United States