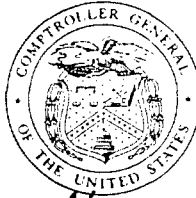


13490 ^{Transp} Mr. Lieberman

DECISION



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

[Protest of Navy Contract Award]

FILE: B-195746

DATE: April 21, 1980

MATTER OF: Creative Electric, Inc. ✓

DIGEST:

1. Agency is not required to provide for waiver of first article testing when solicitation is for item with substantial specifications and requirements changes from that previously supplied and first article approval was required of all bidders.
2. Protest that IFB failed to include various required information is denied where such information is, in fact, provided in IFB.
3. Allegation of improper cancellation of predecessor solicitation which occurred more than a year prior to filing of protest is untimely and not for consideration on merits.

Creative Electric, Inc. (Creative) protests the award of a contract by the Navy under invitation for bids (IFB) No. N00612-79-B-0047 to Nuclear Research Corporation. The contract is for 174 Radiac Computer-Indicators and three first articles. The IFB in question was issued June 29, 1979. A prior IFB for similar items had been canceled on April 17, 1978.

The prior IFB contained a provision permitting waiver of first article testing. There was no such waiver provision in the current IFB. The bid opening was 2 p.m. on August 13, 1979. Creative filed its protest with the General Accounting Office (GAO) on this date.

As its bases for protest Creative asserts that:
(1) the solicitation does not provide for a waiver of first article testing as required by Defense Acquisition Regulation (DAR) § 1-1903(a)(1976);
(2) first article testing costs are not stated as

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an evaluation factor; (3) the solicitation does not indicate which tests the first article will be subjected to; (4) the extent of first article testing required by the contractor is not clear; (5) there is "no documented record to support the contracting officer's determination to acquire unlimited rights" in the technical data as specified by the solicitation; and (6) its protest to the agency of May 1, 1978, regarding the cancellation of the original solicitation has been ignored. We find no merit to this protest.

In response to the protester's first allegation that the solicitation fails to provide, as required, for waiver of first article testing, the Navy asserts that the controlling regulation is DAR § 1-1903(b), rather than DAR § 1-1903(a), as stated by the protester. DAR § 1-1903(a) provides, in relevant part, that:

"The solicitation for a fixed-price type contract which is to contain a requirement for first article approval shall inform bidders or offerors that where supplies identical or similar to those called for have been previously furnished by the bidder or offeror and have been accepted by the Government, the requirement for first article approval may be waived by the Government."

However, DAR § 1-1903(b) provides that:

"(b) When it is known that first article approval will be required of all bidders or offerors, the provisions of (a) above will not apply."

In this instance, although some of the bidders had previously supplied similar equipment, the agency determined that specification changes mandated first article testing. Accordingly, the IFB, under the heading "Waiver of First Article Approval," indicated that:

"There shall be no Waiver of First Article approval or testing or Contract Data Items for this contract, due to the change in performance requirements and test specifications."

Thus, it is clear that the Navy's position is correct, and the first article waiver provisions are inapplicable. In any case, even if these provisions had been applicable, the protester's argument is based on an erroneous presumption. The waiver of first article testing is not mandated or "called for" by the DAR provision cited by the protester; rather it is discretionary on the part of the soliciting agency. See BEI Electronic, Inc., 58 Comp. Gen. 340 (1979), 79-1 CPD 202.

The protester's second allegation, that the solicitation fails to state that the cost of testing will be a factor in the evaluation of offers, as allegedly required under DAR § 1-1903 (a)(iii) is similarly inapposite. This provision does not apply to the IFB for the same reason, i.e., there is no waiver of first article testing for any of the bidders. Thus, since all bidders would be subject to the first article test requirements, the costs for those tests would be equally applicable to all bidders and the provision of an evaluation factor would serve no useful purpose.

The protester's third and fourth allegations are similar as they relate to the Navy's failure to specify the tests to which the first article will be subjected. In this respect, we point out that under the inspection and acceptance clause of this IFB, preliminary first article testing is to be performed at the contractor's plant, with final inspection to be performed by the Navy at destination. We also note that the first article clause provides that the first article will not be delivered until it "has been fully tested by the contractor * * * to determine compliance with all * * * requirements and preliminarily accepted by the Government Inspector." In addition, the "Quality Assurance"

portion of the IFB, particularly paragraphs 4.3 and 4.3.1, provides extensive references to the testing required.

For example, section 4.3 provides that first article inspection "shall consist of the examination and testing necessary to determine compliance with the requirements * * * of this specification and MIL-E-16400, using the examination and tests of MIL-E-16400 listed in paragraph 4.3.1 of this specification." Paragraph 4.3.1 provides a complete list of specifications for the testing required. Accordingly, we believe the protester's allegations are misplaced since the information he asserts is lacking is, in fact, provided in the IFB.

The protester's next assertion is that the contract provides for the acquisition of unlimited rights in technical data without a documented finding of fact to support this requirement. The protester's factual assertion is not substantiated by the record. An appropriate determination and finding as required under DAR § 9-202.2 was made in support of this requirement, a copy of which was provided to the protester and included in the record submitted to GAO.

The protester's final allegation is that the original cancellation was effected in order to avoid making an award to Creative. This aspect of the protest is untimely since, while the protester did initially file a protest with the agency, that protest was denied by the agency by letter dated May 8, 1978. Thus, contrary to Creative's allegation, its protest was not ignored by the Navy. Creative did not protest to GAO at that time, and more than a year elapsed before this protest was filed. This portion of the protest is untimely and therefore will not be considered on the merits. 4 C.F.R. § 20.2 (a)(1980).

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States