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DECISION



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

FILE: B-201807

DATE: August 25, 1981

MATTER OF: F.E.E. Industries, Inc.

DIGEST:

Proposal was properly rejected because it did not satisfy requirements of solicitation. To extent that protest objects to solicitation requirements after closing date of solicitation, it is untimely under 4 C.F.R. § 21.2(b)(1) (1981) and will not be considered on merits.

F.E.E. Industries, Inc. (FEE), protests the award of a contract to Gould, Inc., on essentially a sole-source basis, under request for proposals (RFP) No. DAAH01-81-R-A163 issued by the Army for certain power supplies. FEE contends that the sole-source award to Gould was not justified because FEE could also satisfy the Army's requirements.

We conclude that FEE's protest is untimely in part and otherwise without merit.

The RFP stated that the procurement was restricted to Gould because Gould was the only known prior producer with an approved first article and the delivery requirements would not provide adequate time for sources without a previously approved first article to compete. The RFP also stated that any source not solicited could furnish acceptable proof of prior first article approval.

FEE visited the contracting office to convince the Army of FEE's capabilities and, while there, obtained a copy of the RFP from the Army and later submitted a proposal prior to the initial closing date. In its proposal and by this protest, FEE attempts to convince the Army that it could meet the delivery requirements even with necessary first article testing because FEE has the experience and expertise to do the work. Upon receipt of FEE's proposal, the Army contracting officer

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verified (1) the need for first article testing from FEE, which did not have a previously approved first article, and (2) the estimated time required to conduct first article testing to the Army's satisfaction. In the Army's view, first article testing was essential and adequate time was not available for testing to the Army's satisfaction. Therefore, the Army rejected FEE's proposal.

FEE contends that its proposal was improperly rejected without fair consideration resulting in an unjustified sole-source award to Gould. FEE states that there was no reason to suspect that its qualifications, as stated in its proposal, would not be considered.

In reply, the Army explains that FEE's proposal was considered, but the urgency of the requirement, the time required to deliver the item based on its procurement history, and the solicitation's warning provide a reasonable basis for the Army's determination to reject FEE's proposal and award to the only known source with an approved first article, Gould.

In our view, the terms of the RFP clearly excluded FEE from the competition. While FEE contends its protest does not concern the terms of the RFP, we do not find that the Army's furnishing a copy of the RFP to FEE or FEE's oral presentation in advance of its proposal constructively altered the terms of the RFP. Prior to the initial closing date, therefore, FEE should have known from the RFP that its proposal would not be considered except to ascertain whether it had previously obtained first article approval. Thus, to the extent that FEE's protest concerns an alleged impropriety, which was or should have been apparent from the RFP, FEE's protest is untimely and will not be considered on the merits, since it was not filed prior to the RFP's initial closing date. 4 C.F.R. § 21.2(b)(1) (1981); Computer Sharing Services, Inc., B-200772, November 18, 1980, 80-2 CPD 372.

Further, we need not consider whether FEE could have met the delivery requirements, including time for first article testing, as FEE proposed, because FEE's

approach was excluded by the terms of the RFP requiring a previously approved first article and FEE did not timely protest the apparent alleged solicitation impropriety.

Under the limitations of the RFP, only proposals from sources with approved first articles would be considered for award. The Army was obligated to consider FEE's proposal to the extent that it presented information regarding an approved first article. The record shows that FEE does not have an approved first article. Accordingly, FEE's proposal was properly rejected.

Protest dismissed in part and denied in part.


Acting Comptroller General
of the United States