

**DECISION**

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

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**FILE:** B-215349                      **DATE:** November 8, 1984  
**MATTER OF:** Yardney Battery Division, Yardney  
Electrical Corporation

**DIGEST:**

1. When an agency amends a solicitation in response to a protest to it concerning government-furnished material, but the amendment is allegedly ambiguous and subjective, the protester has a new basis for protest to the agency. Deletion of the provision in its entirety by another amendment leaves the protester in the same position as it was before the initial protest, and a protest to GAO filed within 10 days after issuance of the later amendment is timely.
2. When an agency amends a solicitation without responding to a protest to it requesting inclusion of a provision permitting waiver of first article testing, issuance of the amendment is adverse to the protester's interest, and any subsequent protest to GAO must be filed within 10 days.
3. Although cost of government-furnished material generally should be considered in evaluating prices, when contracting agency is primarily concerned with obtaining best possible product (batteries), not necessarily the one using the least amount of government-furnished material (silver), and when material will be reclaimed almost in its entirety, decision neither to limit amount nor to evaluate its cost is reasonable.
4. Exception permitting consideration of untimely protests is used sparingly, and generally only when GAO is considering a case of first impression. A protest involving an allegedly improper refusal to waive first article testing does not fall within this exception, since GAO has already held

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that waiver is a matter of agency discretion, which is not abused by refusal to waive when testing is more stringent than in the past.

Yardney Battery Division, Yardney Electrical Corporation, protests the proposed award of a contract for silver-zinc batteries and cells under a two-step formally advertised procurement by the Naval Sea Systems Command. We deny the protest in part and dismiss the remainder.

Under the first-step request for technical proposals (RFTP), No. N00024-83-R-4335(Q), Yardney was one of three manufacturers whose designs were found technically acceptable. Under the second-step invitation for bids (IFB), No. N00024-84-B-4346, BST Systems, Inc. was the low bidder for Lot 1, covering batteries and cells for deep submergence rescue vehicles. Yardney was the low bidder for Lots 2, 3, and 4, so only the award for Lot 1 is at issue here.

Since Yardney's protest is directed to alleged specification deficiencies that affect all lots, it is questionable whether Yardney may accept awards on Lots 2-4, and at the same time protest Lot 1 only. Nevertheless, we will consider the protest because of the novel issue raised with regard to the furnished silver.

The firm's first basis of protest is the Navy's decision to furnish silver at no cost to the successful contractor in the amount required by the battery design proposed in step one. The batteries must meet performance specifications, and all parties agree that different designs will require different amounts of silver. Yardney argues that in order to treat bidders equally, the Navy must either (1) limit the amount of silver to be furnished and require the contractor to obtain additional amounts from commercial sources or (2) consider the cost of silver in evaluating bid prices.

Yardney's second basis of protest is the Navy's allegedly improper refusal to include a provision permitting waiver of first article testing, for which Yardney believes it qualifies, in the IFB. In the absence of a waiver, bidders must include the cost of such testing in their prices. Yardney also alleges that the Navy failed to inform bidders of the precise cost of such

testing, to be performed at a government facility. Yardney seeks cancellation and resolicitation with the alleged improprieties corrected.

A threshold issue is the timeliness of both bases of protest. Although this was a two-step procurement, the RFTP, issued July 23, 1983, included an informational IFB. After the IFB was formally issued on April 10, 1984, Yardney took the following actions:

--on April 24, wrote the Navy identifying eight "areas of discrepancy/concern that require clarification," including government-furnished silver and first article testing;

--on May 15, formally protested to the Navy regarding silver;

--on May 25, protested to our Office regarding silver, incorporating its letter of May 15;

--on June 8, filed a supplemental protest regarding first article testing with our Office.

Bid opening, originally set for April 26, 1984, was extended three times by amendment and finally occurred on May 30, 1984.

The Navy argues that Yardney's letter of April 24, 1984, was too vague to constitute a protest but that, in any event, Yardney should have known the basis for its protest regarding government-furnished silver when it received the RFTP, since it was clear from the attached IFB that amounts would not be limited and that the cost to the government would not be evaluated.

The Navy concludes that Yardney should have protested regarding silver no later than September 9, 1983, the closing date for receipt of technical proposals, in accord with the deadlines established by our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), and our decisions regarding alleged improprieties in the first step of two-step procurements, for example, Educational Technology & Services, Inc., B-211231, Apr. 22, 1983, 83-1 CPD ¶ 449.

Yardney, on the other hand, insists that its letter of April 24, 1984, was a timely protest to the Navy. The firm argues that since this letter, as well as the later one regarding silver, was submitted to the Navy before bid opening, this basis of protest meets all procedural requirements. A protest on the informational IFB, Yardney asserts, was not required and would have been premature.

We find that Yardney's letter of April 24, 1984, was a valid protest to the Navy regarding government-furnished silver. On page 4 of that letter, the firm pointed out that in an earlier procurement, one of its competitors had, without penalty, requested 41 percent more silver than Yardney. Yardney concluded that it "again protested" the elimination of the cost of silver as an evaluation criterion.

Yardney's concerns about silver were addressed by the Navy in Amendment 002, issued May 2, 1984. By this amendment, the Navy added a provision to Evaluation Factors for Award, stating that bidders who requested silver in amounts significantly in excess of that determined to be required for battery manufacture might be rejected as non-responsive. In its letter to the Navy of May 15, 1984, Yardney objected to this provision as ambiguous and subjective. When the provision was deleted in its entirety by Amendment 004, issued May 21, 1984, Yardney was in the same position it had been before filing its protest to the Navy. Since its May 25, 1984, protest to our Office on this basis was filed within 10 working days of the issuance of Amendment 004, we will consider it on the merits.

While the cost of government-furnished equipment (GFE) and materials generally should be considered in the evaluation of offers, cf. D-K Associates, Inc., 62 Comp. Gen. 129 (1983), 83-1 CPD ¶ 55 (change in amount of available GFE justifies cancellation of solicitation), we find that in this case the Navy reasonably determined that silver should neither be limited in amount nor evaluated as to cost. The Navy persuasively argues that to limit silver would also limit competition to battery designs using relatively small amounts of silver and would be tantamount to an endorsement of Yardney's design. Clearly, this would defeat the purpose of the two step procurement where, in the first step, the Navy sought a variety of battery designs. It also might result in offers for batteries with less capacity since, according

to the Navy, ampere-hour output is directly related to silver content. The Navy states that it wished to obtain the best possible battery, not necessarily the one using the least silver.

In addition, it does not appear that a limit on government-furnished silver would achieve any real savings, since that which the Navy furnishes to contractors is reclaimed from used batteries at a government facility in Colts Neck, New Jersey, and costs far less than the current market price--\$1.56 versus \$7.25 a troy ounce. If bidders were required to obtain additional silver from commercial sources, their bids obviously would be higher to cover the cost. The record indicates that in the past, more than 98 percent of the silver furnished to Navy contractors has been reclaimed, and Yardney has offered no evidence that the silver to be furnished under this contract would not also be recovered almost in its entirety. In addition, the Navy requires contractors to account strictly for all silver furnished and to return any surplus.

As for Yardney's alternate approach, i.e., considering the cost of government-furnished silver in evaluating bid prices, in this case there would be no impact on the proposed awards. The Navy has hypothetically evaluated bids by calculating the amount of silver required for the batteries proposed by BST and Yardney, then multiplying this amount by \$1.56 a troy ounce. Under this scheme, BST's adjusted bid for Lot 1 would be \$1,150,342, while Yardney's would be \$1,208,650. Similarly, there would be no change in the ranking of bidders for Lots 2, 3, and 4, for which Yardney would remain low. We therefore cannot conclude that Yardney was prejudiced by the Navy's failure to evaluate the cost of government-furnished silver, and its protest on this basis is denied.

The informational IFB did not include a first article testing requirement, so Yardney could not have sought a waiver provision until after the actual IFB was issued. In its letter of April 24, 1984, to the Navy, however, Yardney suggested that waiver of first article testing would be in the best interest of the government from an economic point of view. The Navy points out that Yardney did not argue that a waiver provision was legally required. The Navy therefore argues that this second basis of protest is untimely under section 21.2(b)(1) of our Procedures because, disregarding the letter of

April 24, 1984, the protest was not filed until after bid opening, when Yardney apparently learned that even if the cost of silver were evaluated, BST would be the low bidder for Lot 1.

Yardney, on the other hand, insists that its initial letter was a timely protest to the Navy. Yardney states that it waited for a response and that it regarded bid opening without the addition of a waiver provision to the solicitation as initial adverse agency action on this second basis of protest. Yardney concludes that under section 21.2(a) of our Procedures, its protest on first article testing, filed with our Office within 10 days after bid opening, also is timely.

We agree with the Navy that the portion of Yardney's letter of April 24, 1984, concerning first article testing was almost too vague to constitute a protest. If, however, we regard it as one, we must also consider the Navy's issuance of Amendment 002 as initial adverse agency action. Although the amendment listed contact points where bidders could obtain quotations for first article testing, it did not satisfy Yardney's demand for a provision permitting waiver of such testing. Thus, the Navy's issuance of the amendment was adverse to Yardney's interests.

Under the rule announced in Informatics, Inc., 58 Comp. Gen. 750 (1979), 79-2 CPD ¶ 159, aff'd on reconsideration, Dec. 3, 1979, 79-2 CPD ¶ 387, Yardney had only 10 working days after it knew or should have known of the substance of Amendment 002 to protest to our Office regarding first article testing. See also American Marine Decking Systems, Inc., B-197987, Sept. 22, 1980, 80-2 CPD ¶ 217 (initial adverse agency action occurs when contracting agency issues amendment only partially correcting alleged solicitation defects and not satisfying demands of protester, and protest filed with GAO more than 10 days after protester received amendment is untimely).

Yardney states that it received Amendment 002 on May 10, 1984. As noted above, however, we did not receive the firm's protest seeking a provision permitting waiver of first article testing until June 8, 1984.

Yardney's protest on this basis is therefore untimely.

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Finally, Yardney argues that the issue is significant to the procurement process and therefore qualifies for consideration under section 21.2(c) of our Procedures. We use this exception sparingly, and generally only when we are considering a case of first impression. See Detroit Broach and Machine, B-213643, Jan. 5, 1984, 84-1 CPD ¶ 55. We do not believe it is applicable here, since we have previously stated that the waiver of first article testing is a matter of agency discretion, which is not abused by a refusal to waive when, as here, testing is more stringent than in the past. BEI Electronics, Inc., 58 Comp. Gen. 340 (1979), 79-1 CPD ¶ 202.

The protest is denied in part and dismissed in part.

*for*   
Comptroller General  
of the United States