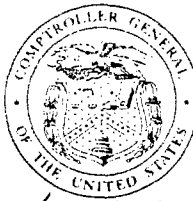


DECISION



13142 *Pogany*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest Alleging Solicitation Requirements Were Improperly Waived]

FILE: B-196089

DATE: March 17, 1980

MATTER OF: Wilson & Hayes, Inc. ✓

DIGEST:

1. Protest concerning propriety of solicitation provision permitting discretionary waiver by agency of first article testing is based on patent solicitation impropriety and must be filed with either GAO or contracting agency prior to bid opening to be considered timely.
2. Contracting agency has responsibility for determining whether first article testing is required and, under applicable regulations, may waive requirement where similar or identical supplies have been previously furnished by bidder and accepted by Government.

Wilson & Hayes, Inc. (Wilson) protests the award of a contract for shipboard berths to Superior Steel Door & Trim Co., Inc. (Superior) under invitation for bids (IFB) No. N00104-79-B-0950, issued by the Navy Ships Parts Control Center (Navy), Mechanicsburg, Pennsylvania. Wilson contends that the contracting officer improperly waived the solicitation's requirements for first article testing and the submission of certain technical data items for Superior. Wilson would have been the low evaluated bidder if these requirements had not been waived.

Section C-54 of the solicitation provided as follows:

"WAIVER OF FIRST ARTICLE TESTING

"There is hereby created an option in the Government to waive the requirement for First Article testing and evaluation. In instances where identical or similar material has been previously tested, evaluated and approved under identical or similar specifications, the requirement for evaluating and testing the First Article may be waived."

~~00 9028~~

111822

* * * *

"PRICE IF FIRST ARTICLE TESTING IS WAIVED _____.
In the event the Government exercises the option
to waive First Article testing, the price given
above will be used in evaluation for award."

The solicitation also contained a provision permitting the Government to waive the submission of certain technical data items for bidders who had previously furnished such data and certify to its currency. Bidders were required to separately indicate the amount to be deducted from their offered unit price if such data requirements were waived.

Bids were opened on August 15, 1979 and the two low bids were as follows:

	Wilson	Superior
Unit Price Without Waivers	\$796.50	\$800.00
Unit Price With Waivers	\$796.50	\$785.00

On August 20, 1979, five days after bid opening, Wilson filed a protest with the Navy objecting to "Clause C-54" on the grounds that by waiving the first article testing requirements, the Navy would place Wilson in an "unfair position", and that therefore award should be made on the "base unit price" without any waivers. Since Superior was in current production of the berths and had previously supplied the technical data required by the IFB, the contracting officer, after denying Wilson's protest, elected to waive the solicitation's first article and data requirements and awarded the contract to Superior as the low evaluated bidder at \$785 per unit. Wilson subsequently filed its protest with our Office.

Wilson's argument is not that Superior was ineligible for waiver of the first article testing and technical data requirements. Rather, Wilson contends that an award should have been made to it at its "base price", because the long term interests of the Government would have been better served by the introduction of a new source for the item.

Wilson states that while "the award [the Navy] made * * * met the various laws and regulations * * * we feel that the contracting officer could have not waived the data requirements and still met the various laws and regulations. By doing so, competition would have been maximized." Wilson also objects to the discretion afforded the contracting officer in deciding whether or not to grant waivers on individual procurements since such decisions vary "depending on who you get as a contracting officer."

To the extent that Wilson is protesting the terms and provisions of the solicitation permitting discretionary waivers of solicitation requirements by the contracting officer, its protest is untimely. Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1979), provides that:

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

Section 20.2(a) of our Bid Protest Procedures urges protesters to seek to resolve their complaints initially with the contracting agency. If a protest is filed initially with the contracting agency, our Office will consider a subsequent protest only if it is filed here within 10 working days of initial adverse agency action and the initial protest to the agency was filed in accordance with our timeliness standards. Wilson's protest of solicitation provisions which explicitly permitted discretionary waivers of selected solicitation requirements is based on an alleged apparent solicitation impropriety. Thus, since Wilson's initial protest to the agency was filed 5 days after bid opening, its subsequent protest to our Office is untimely and not for consideration on the merits.

To the extent that Wilson is protesting the actual exercise of discretion by the contracting officer in electing to waive the requirements for Superior in this procurement, the Navy correctly points out that we have consistently held that the decision to waive a first article testing requirement is a matter of administrative discretion, which will not be disturbed where there is a reasonable basis for the decision. Ainslie Corporation, B-187429, B-187559, December 21, 1976, 76-2 CPD 513. Moreover, Defense Acquisition Regulation (DAR) § 1-1903(a) (1976 ed.) specifically provides that where supplies identical or similar to those called for have been previously furnished and have been accepted by the Government, the requirement for first article approval may be waived by the Government. We believe these principles are equally applicable to waivers of solicitation technical data requirements. See Keuffel & Esser Company, 57 Comp. Gen. 413 (1978), 78-1 CPD 281. The Navy states that Superior qualified for these waivers and there is nothing in the record which indicates otherwise. This aspect of Wilson's protest is denied.

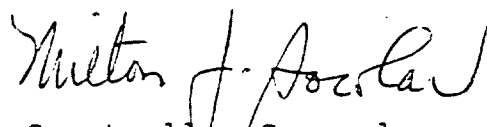
Finally, Wilson also argues that the solicitation improperly failed to include consideration of transportation costs as a basis for award. Section D-19 of the IFB provided:

"NO DESTINATION

" As tentative or general delivery points cannot be established for evaluation of transportation costs, offers will be evaluated without regard to transportation costs."

This ground of protest, as an alleged impropriety in the solicitation, should also have been protested prior to bid opening.

The protest is dismissed in part and denied in part.



FOR THE Comptroller General
of the United States