

DECISION



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

*May Archival
Proc H*

7834

FILE: B-191590

DATE: September 26, 1978

MATTER OF: Creative Electric, Inc.

DIGEST:

1. Failure of a solicitation to provide for specific acquisition of unlimited rights in technical data is a "compelling reason" to cancel an IFB after bids are opened where record supports procuring activity's determination that award thereunder to low bidder would not serve actual needs of Government because all cost factors to Government were not provided for in original solicitation.
2. Where Navy met requirements for specific acquisition of unlimited data rights (DAR § 9-202.2(f)(1)) but was unable to determine whether anticipated net savings would exceed acquisition cost of unlimited data rights until after bids were received Navy had adequate justification to solicit for unlimited data rights. Moreover, provision in solicitation for acquisition of unlimited data rights as separate bid item was not objectionable and was consistent with procurement regulation.
3. Protester's contention that second solicitation's specific acquisition of data clause did not meet Government's actual needs involves an alleged impropriety in the solicitation which was apparent prior to bid opening and since protester first raised issue with agency after bid opening it is untimely raised under 4 C.F.R. § 20.2(b)(1) (1977).
4. Neither NRPO Office Instruction 4200.30B nor DAR § 2-407.8(a)(1) require that a written protest be responded to in writing prior to

award and since protest has been decided on its merits protester has not been prejudiced by absence of written agency response to its protest concerning the second solicitation prior to award.

5. Insertion of the term "NET 10 PROXIMO" under the prompt payment discount section or successful bidder's offer means "payment due 10th of next month" and is construed merely as an indication that a discount is not offered rather than as an exception to the IFB.

Creative Electric, Inc. (Creative) protests the cancellation of invitation for bids (IFB) N00123-77-B-0626 issued by the Naval Regional Procurement Office (NRPO) at Long Beach, California and the subsequent award under a second solicitation, IFB N00123-78-B-0663, to the Bendix Corporation (Bendix).

This protest arises out of a two-step formally advertised procurement for automatic anemometer selection switches, a newly-developed item which did not exist in the Navy inventory prior to this procurement. Following technical evaluation of proposals submitted under step one, an invitation was issued to six acceptable firms, including the protester. Creative was the apparent low bidder.

In the course of the pre-award survey, Creative's president informed the pre-award survey team that he planned to complete production of all associated data prior to award of the contract and consequently would deliver substantially all of the data with only limited rights. This position was based on the provision in the solicitation concerning data rights, entitled, "Rights in Technical Data and Computer Software (1974 NOV)" (Defense Acquisition Regulation (DAR) § 7-104.9(a)).

All parties agree that under this clause the Government would acquire unlimited rights only to data developed during the contract period as part of performance under

the contract. Based on this interpretation, the requiring activity concluded that the solicitation did not reflect the Government's minimum needs because in the circumstances it failed to provide for the necessary procurement data package (i.e., unlimited rights in technical data).

Thereafter the solicitation was canceled and a new one was issued reflecting increased quantities required and providing for the specific acquisition of unlimited data rights. Pursuant to DAR § 9-202.2(f)(1) specific acquisition of unlimited data rights may not be effected unless there is a clear need for procurement of the item, an alternative design is unavailable, the data as acquired would enable other competent manufacturers to produce the item without the need for any additional technical data (unless such additional data can be purchased reasonably or is available through other economic means), and the anticipated net savings in procurements would exceed the cost of acquisition.

In this case, the Navy determined that automatic anemometer selection switches would be reprocedured, that because of their function all switches must be identical (alternate design unsuitable), and that purchasing unlimited data rights the switches could be competitively reprocedured from other competent manufacturers without the need for additional technical data. Navy determined that unlimited data rights were necessary to facilitate logistic support of the item and to obtain maximum competition for anticipated follow-on procurements. The Navy could not determine at the time it decided to solicit for unlimited data rights whether the anticipated net savings would exceed the acquisition cost of unlimited data rights but proposed to make that determination after bids were received. Subsequently, Navy determined that a savings would result if unlimited technical data rights were acquired in the initial procurement. Although the protester disagrees with the agency's projected savings it does not contend that the savings would be less than the acquisition cost of the data. In our opinion the Navy had adequate justification for desiring to solicit for unlimited data rights. Moreover, we see no basis to object to the Navy's determination after receipt of bids for the specific acquisition of unlimited data rights that acquisition of such rights would result in a net savings to the Government.

As to the method of acquiring unlimited rights in any limited rights technical data the cited regulation allows acquisition either by negotiation with an individual firm or by competition among several. In our opinion, Navy's decision to acquire the data through a competitive process in the initial procurement for the item rather than by negotiation only with the contractor to be selected was appropriate in the circumstances because, when feasible, the competitive process more likely insures that the acquisition is made at a reasonable price.

The question then is whether an existing solicitation properly could be canceled after opening to acquire the data in a competitive manner. In this connection DAR § 2-404.1 generally requires that there be a compelling reason to reject all bids and cancel an invitation after bids are opened. Cancellation is permitted if the invitation does not provide for consideration of all factors of cost to the Government. DAR § 2-404.1 (b)(iv). Inasmuch as the specific acquisition of data is justified we believe it is obvious that all cost factors to the Government were not provided for in the original solicitation and that the cancellation was permissible for that reason.

Creative further argues that while the Navy justified cancellation and resolicitation on the ground that the first solicitation did not meet the Government's minimum needs for full data disclosure, the Navy, in fact, does not view the acquisition of unlimited data rights as a requirement but rather as an "added item that will be procured only if economically justifiable." In this connection we note that under DAR § 9-202.2(f)(1) the acquisition of unlimited rights in technical data is required to be stated in the contract schedule as a separate item and must be separately priced. This methodology does not, in our opinion, lessen the perceived need for the data.

The protester also questions whether the solicitation's specific acquisition of data clause would effect "full data disclosure." However, this question involves an alleged impropriety in the solicitation which was apparent prior to bid opening and therefore should have

been protested to the agency or to this Office prior to bid opening, as provided in our bid protest procedures. See 4 C.F.R. § 20.2(b)(1)(1977). The protester first raised this issue with the agency after bid opening and we therefore consider it untimely raised.

In its protest Creative also alleges that the award to Bendix was illegal because it was made before the agency responded in writing to its protest to the agency concerning the second solicitation. In support of its position the protester refers to Naval Regional Procurement Office Instruction 4200.30B, an internal Navy instruction for handling protests. This instruction and DAR § 2-407.8 (a)(1) require that a written protest be responded to in writing. However, neither the above instruction nor the cited regulation requires that a written response be made prior to award. Moreover, we have denied the protest on its merits and the protester, therefore, was not prejudiced by the absence of a written agency response prior to award.

Finally, the protester questions the responsiveness of Bendix's bid under the second solicitation. Creative suggests that Bendix took exception to the invitation by inserting the term "NET 10 PROXIMO" under the prompt payment discount section of its offer. The Navy has responded as follows:

"The term NET 10 PROXIMO means payment due 10th of the next month. This was interpreted by NRPO as meaning 'No prompt payment discount.' No prompt payment discount is noted on the contract award. The inclusion or exclusion of a prompt payment discount has no impact on the responsiveness of a bid. Solicitation Instruction and Conditions (SF 33A), paragraph 9 merely advises bidders that prompt payment discounts of less than 20 calendar days will not be considered in evaluation of the bid but that said discounts will be taken if payment is made within the discount period."

We agree with the Navy that the insertion of words to the effect that payment is due by the 10th of the next month in the space provided on the Government's Standard Form 33 for indicating any prompt payment discount should be construed merely as an indication that a discount is not offered.

Accordingly, we find no basis to object to the Navy's determination to cancel and readvertise under a revised solicitation.

R. F. Keller.
Acting Comptroller General
of the United States