

DOCUMENT RESUME

03286 - [A2273397]

[Protest to Navy Refusal to Waive First Article Testing].
B-188902. August 10, 1977. 6 pp. + 2 enclosures (2 pp.).

Decision re: Wil-Jo Mfg. Co.; by Robert P. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Department of the Navy: Naval Air
Systems Command.

Authority: A.S.P.R. 2-405. A.S.P.R. 1-902(b) (iv). A.S.P.R.
2-406.3(a) (3). B-186395 (1977). B-183730 (1976). B-181913
(1975). B-170542 (1970). B-185498 (1976). 46 Comp. Gen. 123.
46 Comp. Gen. 127. 53 Comp. Gen. 502.

The protester to a Navy contract award to any company
other than itself asserted that first article testing should
have been waived, thus making it low responsible bidder. Such a
waiver is considered to be within the discretion of the
procuring agency when the decision is not shown to be arbitrary.
Downward correction of an obvious bid mistake displacing the
apparent low bidder was not permitted since the intended total
bid could not be ascertained solely from bid documents. (HTW)

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Richard Martin
Proc. I.



DECISION

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

FILE: B-188902

DATE: August 10, 1977

MATTER OF: Wil-Jo Manufacturing Co.

DIGEST:

1. Waiver of first article testing requirement is matter within the discretion of procuring agency and will not be questioned by GAO absent showing that decision was arbitrary or capricious. Agency's decision to require first article testing is not arbitrary or capricious where supported by record showing protester's most recent relevant experience was seven years ago, protester's production facilities have since been moved and significant differences between required item and similar item previously manufactured by protester.
2. Downward correction of obvious bid mistake displacing apparent low bidder will not be permitted where intended total bid cannot be ascertained solely from bid documents.

Wil-Jo Manufacturing Company (Wil-Jo) protests award of a contract to any company other than itself under invitation for bids (IFB) No. N00019-76-B-0019 issued by the Naval Air Systems Command, Department of the Navy (Navy). The IFB solicited bids for the production and delivery of MK-80 warhead assemblies for the Shrike missile and related first article testing.

The three lowest of the five bids received were:

Engineering Research, Inc.	\$ 768,725.00
ATI Industries	777,656.00
Wil-Jo	1,537,725.00

Engineering Research, Inc. (ERI) was found to be nonresponsible as a result of a pre-award survey of its facilities and other commitments. This determination was

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affirmed by the Small Business Administration when it refused to issue a Certificate of Competency. ERI protested this determination to this Office but has since withdrawn its protest.

The Wil-Jo price was derived by adding the \$768,862.50 quoted for the Item 1 hardware and an identical figure it inserted in Item 2 for the first article approval test. The space for the cumulative total price for all items was left blank. The IFB required insertion of the words "at no cost" for any item for which no price would be charged. The Navy reasoned that moving the Item 2 price to the space for the cumulative total would leave Item 2 blank and not responsive to the IFB requirements whereas the blank cumulative total space could be cured as a minor informality under the Armed Services Procurement Regulation (ASPR) § 2-405. Wil-Jo made no attempt to correct the apparent clerical error and contends that if the Navy had waived first article approval test as it should have done, the error would have been of no consequence.

Wil-Jo asserts that the waiver of first article testing for Wil-Jo while requiring it for ERI would require adding \$5,000 to ERI's price for evaluation purposes. This, in turn, would result in Wil-Jo being the lowest responsive and responsible bidder thereby entitling Wil-Jo to award of the contract. Wil-Jo contends that the Navy was arbitrary and capricious in refusing to waive first article testing in spite of the Wil-Jo's long and successful experience in producing similar Shrike missile warheads. A stated Navy policy of requiring first article testing of any supplier out of production for a year or more is objected to by Wil-Jo on the ground that it is not mandated by ASPR and, in any event, should have been set forth in the IFB. Wil-Jo submits that the establishment of any such time limitation which, if exceeded, automatically requires first article approval test is arbitrary and that a specific and technical analysis should be made to determine the effect of the passage of time on the bidder's ability to produce satisfactory items. It further submits that such an analysis would have shown that Wil-Jo is extremely well qualified and that first article testing was unnecessary. Wil-Jo also contends that requiring first article testing in this case is contrary to the provisions of ASPR § 1-1902(b)(iv) which state:

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"Except in unusual procurements, first article approval tests shall not be required in contracts:

† * * * *

"(iv) for supplies covered by complete and detailed technical specifications, unless the technical or performance requirements are so novel or exacting that it cannot reasonably be anticipated that such supplies will meet the technical or performance requirements without first article approval."

The solicitation set forth the following criteria for the waiver of first article test approval:

"Where supplies identical or similar to those called for in the schedule have been previously furnished by offeror or quoter and have been accepted by the Government, the requirement for first article approval may be waived by the Government."

The IFB also stated that if the Government conducts the first article approval tests, each quotation would be evaluated by adding \$5,000 thereto for the estimate cost to the Government of conducting such tests.

Clause D-3(b) of the IFB which is quoted in part above, further states that if the bidder previously furnished and had accepted identical or similar supplies, the bidder should identify such previous contracts. Wil-Jo listed three contracts, one of which involved the MK-18 trainer warhead and two of which involved the MK-52/68 warheads. None of these is identical to the MK-80 warhead required and all three contracts had been completed seven years ago. However, after bid opening Wil-Jo provided the Navy with a listing of 10 additional Shrike warhead contracts, one of which was completed within the last two years. The Navy points out that this contract was for the refurbishment of six MK-52 warheads for a total price of \$900 and could not reasonably serve as a basis upon which first article test could be waived for a production contract.

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While the Navy admits that the MK-52/68 warheads are similar, it contends that there are differences which are significant to the manufacturing process. The Navy asserts that these differences, the fact that Wil-Jo had not actually manufactured the MK-52/68 warheads in significant quantities for seven years and since that time has moved its production facilities, justify its refusal to waive first article approval test for Wil-Jo. The Navy points out that ASPR § 1-1902 states that first article approval tests are particularly appropriate when there have been subsequent changes in processes or specifications or production has been discontinued for an extended period of time. The Navy further contends that the decision not to waive first article approval was within the discretionary authority of the contracting officer and was reasonably based.

The decision whether or not to waive first article testing for a particular bidder is essentially an administrative one which this Office will not disturb unless it is clearly arbitrary or capricious. See Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139; Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121; 46 Comp. Gen. 123, 127 (1966). Pursuant to our review we do not find that the refusal to waive first article testing was arbitrary or capricious. The record indicates that while Wil-Jo had substantial and successful experience in producing Shrike warheads of various types in years past, it had no such relevant production experience in recent years. We have held that ASPR § 1-1900 is not of such a mandatory nature that a procuring agency is required to submit a proposed contractor to first article testing merely because its production has been discontinued for an extended period of time. Piasecki Aircraft Corp., B-181913, June 27, 1975, 75-1 CPD 391, B-170542, December 31, 1970. That is not to say, however, that discontinuance of production is not a significant consideration in determining whether first article testing should be waived. In addition to its extended lapse in the production of Shrike warheads, Wil-Jo has moved its production facilities although it appears that it has retained essentially the same staff, tooling and processes. Further, Wil-Jo has never manufactured the MK-80 warhead but it claims that its experience

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on similar warheads (MK-18 and MK-52/68) reasonably required a waiver of first article testing for the MK-80 warhead. The Navy contends that the MK-18 warhead is used for training purposes only and it required manufacturing processes significantly different from the MK-80. The MK-18 is not filled with explosive material and therefore, the acceptance criteria are not as critical as for the MK-80. While the Navy admits that the MK-52/68 warheads are similar to the MK-80, it maintains that there are differences significant to the manufacturing processes. For example, there are eight dimensional and tolerance differences between the MK-52/68 and the MK-80, and the MK-80 fuze well is approximately four times longer than that of the MK-52/68. There are other differences, the significance of which Wil-Jo challenges but we believe that these differences when added to the other factors considered by the Navy provide a rational basis for its decision not to waive first article testing for Wil-Jo.

Wil-Jo maintains that any decision refusing to waive first article testing is arbitrary in the absence of a qualitative analysis by the Navy of Wil-Jo's present capacity to manufacture successfully the MK-80. The Navy states that such an analysis while appropriate for a determination of responsibility is not required by the regulations prior to a decision regarding the waiver of first article testing. It asserts that such an analysis for first article waiver purposes would delay the determination of the low bidder until after the responsibility determination and lead to responsibility determinations for bidders who are not, in fact, in line for award. The Navy does not dispute that Wil-Jo is a well qualified manufacturer of Shrike warheads but it contends that Wil-Jo's past experience is not sufficiently recent or relevant to the MK-80 to permit, without undue risk, a waiver of first article testing.

We know of no regulatory or other basis for requiring the analysis which Wil-Jo advocates. In any event, it is difficult to see how such an analysis in this case would have changed the results. The record at this time reveals no pertinent information which the Navy did not consider without such an analysis.

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Wil-Jo's insertion of the identical price in Item 2 for first article testing as it quoted for the 2625 warheads in Item 1 is obviously the result of an error. Its removal from Item 2 to the space for the cumulative total price would leave its total price slightly lower than that of ATI. However, Wil-Jo's price would not be a complete price covering the total Navy requirement because it would contain no price or offer for the required first article testing. The record provides no basis for believing that Wil-Jo intended to perform first article testing at no charge. Further, the bid provides no basis for determining at this time what price for first article testing Wil-Jo would have charged or whether Wil-Jo would still have been lower than ATI. Thus, Wil-Jo's bid could not be accepted even if the obvious error were corrected. 53 Comp. Gen. 502; Asphalt Construction, Inc., B-185498, February 9, 1976, 76-1 CPD 82. See also ASPR § 2-406.3(a)(3).

Accordingly, this protest is denied.

Deputy 
Comptroller General
of the United States



Richard Martin
Proc. II

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

IN REPLY
REFER TO: B-188902

August 10, 1977

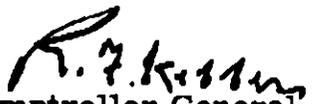
The Honorable George E. Danielson
House of Representatives

Dear Mr. Danielson:

We refer to your letter dated May 2, 1977, expressing interest
in the protest filed by Wil-Jo Manufacturing Company, B-188902.

Enclosed is a copy of our decision of today denying the protest.

Sincerely yours,


Deputy Comptroller General
of the United States

Enclosure



Richard Martin
Proc. II

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

IN REPLY
REFER TO: B-188902

August 10, 1977

The Honorable John H. Rousselot
House of Representatives

Dear Mr. Rousselot:

We refer to your letter dated April 25, 1977, expressing interest
in the protest filed by Wil-Jo Manufacturing Company, B-188902.

Enclosed is a copy of our decision of today denying the protest.

Sincerely yours,

Deputy


Comptroller General
of the United States

Enclosure