

DECISION

Enter Proc. II

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

7787

FILE: B-192034

DATE: September 22, 1978

MATTER OF: Homexx International Corporation

DIGEST:

1. 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. Waiver does not constitute preferential treatment or create unfair advantage for prior producer. However, if testing is required, ASPR specifically states that its cost shall be a factor in evaluation of bid.
2. The possibility of a buy-in does not provide a basis upon which an award may be challenged. Rejection of a bid for too low a price requires a determination of nonresponsibility, which in this case has not been made by procuring agency.
3. Allegations of improprieties in past procurements dating back to 1964 are untimely and will not be considered under GAO's bid protest procedures.

Homexx International Corporation (Homexx), the third-low bidder under solicitation No. N00019-78-B-0004, issued by the Naval Air Systems Command (NAVAIR), protests award of a contract for ejector bomb racks and adapter kits to any other firm.

The solicitation was issued May 16, 1978. Immediately before the scheduled bid opening, Homexx protested that the addition of an evaluation factor of \$70,000, the estimated cost of first article testing, to the bid of any firm which had not previously produced these items was arbitrary and capricious. Homexx argued that the evaluation factor discriminated against bidders not currently in production of the end items, particularly small businesses.

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NAVAIR postponed bid opening to consider this protest, then rescheduled it for July 12, 1978. After opening, Homexx additionally protested on grounds that Patty Precision Products Company (Patty), the low bidder, was not financially responsible; and that the bids of both Patty and Marvin Engineering Company, the second-low bidder, were below cost and should be rejected as attempted buy-ins.

While it was not clear from the initial protest, in its comments on the NAVAIR report, counsel for Homexx states that neither the need for first article testing nor the \$70,000 estimate are being questioned. Rather, the basis of protest appears to be that since the evaluation factor had not previously been incorporated in NAVAIR solicitations for similar equipment, and since it was not applied to all bidders in this case, it should not be used at all.

NAVAIR states that in 15 previous procurements, the cost of first article testing was used as an evaluation factor in one case. In the remaining cases, it was not a factor, but this was either because the procurement was noncompetitive or because no prospective contractor qualified for a waiver of first article testing.

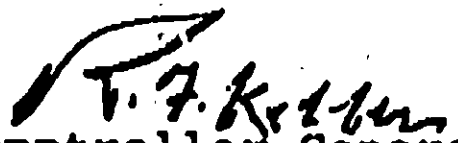
Our Office consistently has held that contracting agencies are vested with the responsibility of determining the amount of testing necessary to assure specification compliance. Modular Devices, Inc., B-182288, August 20, 1975, 75-2 CPD 119. Waiver of first article testing also is a matter of administrative discretion, which we will not question unless there is a clear showing that the waiver was arbitrary or capricious. Armed Services Procurement Regulation (ASPR) § 1-1903(a) (1976 ed.), specifically provides that where supplies identical or similar to those called for have been previously furnished by an offeror and have been accepted by the Government, the requirement for first article approval may be waived. Astrocom Electronics, Incorporated, B-190384, February 13, 1978, 78-1 CPD 122. On the other hand, if it is determined that first article testing is necessary, ASPR § 1-1903(a)(iii) states that the cost to the Government shall be a factor in the evaluation of bids and proposals, to the extent that such cost can be realistically estimated.

In this case, we believe it was within NAVAIR's discretion to determine that first article testing could be waived if similar or identical supplies previously had been furnished by a bidder. We also find that applicable regulations required NAVAIR to consider the cost of such testing in evaluating all other bids. Although we agree with Homexx that this provides an advantage to the incumbent contractor, the Government is not required to equalize such an advantage with regard to all other bidders. Waiver of requirements for preliminary samples and testing does not, as a matter of law, constitute preference or unfair action by the Government. See Keuffel & Esser Company, B-190774, April 13, 1978, 78-1 CPD 281 and cases cited therein.

Neither is the possibility of a buy-in or the submission of a below cost bid a proper basis upon which to challenge the validity of a contract award. Proper rejection of a bid as extremely low requires a determination that the bidder is nonresponsible. Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166. In this case, the NAVAIR report to our Office indicates that any protest on this basis is premature, since a pre-award survey of the low bidder has not yet been completed. Moreover, affirmative determinations of responsibility are not reviewed by our Office unless fraud on the part of procuring officials is shown or failure to meet definitive responsibility criteria is alleged. Id. Neither exception applies here.

Counsel for Homexx has cited a number of other procurements, dating back as far as 1964, in an attempt to show that the Navy has improperly solicited and awarded contracts for bomb racks and rocket launchers. Under our Bid Protest Procedures, 4 C.F.R. 20 (1977), protests with regard to these procurements are clearly untimely, and our decision must be based solely on the facts of the instant case.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States