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DECISION

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

FILE: B-192256 DATE: November 14, 1978

MATTER OF: Advani Engineering Company

DIGEST:

Contracting agency has responsibility for determining whether first article approval 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.

On February 15, 1978, the U.S. Army Armament Materiel Readiness Command (AARCOM) issued invitation for bids (IFB) DAAA09-78-B-6211 for the procurement of 1,092 low voltage automotive test sets. The test sets were to be produced in accordance with MIL.SPEC. MIL-T-10308E, dated February 7, 1977, as modified by changes set forth in section "F" of the IFB. The IFB invited bids on the basis of with and without first article approval. Bids were opened on March 16, 1978, with the following results:

Bidder	Unit Prices	
	With First Article Approval	Without First Article Approval
A&M Instrument, Incorporated	$274	$241
Advani Engineering Company	229	---
Bayshore Systems Corporation	231	217
Hydraulic Technology, Incorporated	333	336
Numax Electronics, Incorporated	230	225
RONAC Corporation	243	240

After bid opening, the contracting officer asked AARCOM's Quality Assurance Directorate (Quality Assurance) whether first article approval could be waived for any of the bidders. Quality Assurance initially advised that first article approval was required of all bidders. Quality Assurance was then asked if first article approval could be waived for the immediate past producer of the test sets, Numax Electronics, Incorporated (Numax). Numax had satisfactorily produced 1,770 test sets under contract DAAA09-76-C-6323. Numax completed performance in March 1977. Quality Assurance subsequently determined that first article approval could be waived only for Numax.

Advani Engineering Company (Advani) protested the decision to waive first article approval for Numax. Advani contended that MIL-T-10308E modified the test sets to such a degree that first article approval should be required of all bidders. A&M Instrument, Incorporated (A&M), also notified the contracting officer that it intended to protest any award to Numax based on the waiver of first article approval.

As a result of the protests and recent changes in the specifications, Quality Assurance was asked to review its determination to waive first article approval for Numax. The review was conducted by a different engineer, who decided that first article approval should be required of all bidders. The review encompassed specification changes which had been made over several past procurements. The contracting officer informed Advani and A&M that first article approval would not be waived for any bidder. Consequently, their protests were considered to be resolved.

After learning that first article approval would be required, Numax protested to the contracting officer, contending that the test sets involved in the instant procurement were essentially the same test sets which it had produced. Therefore, it should be eligible for a waiver of first article approval.

Quality Assurance was requested to prepare a paragraph-by-paragraph response to Numax's protest. In so doing, Quality Assurance reversed itself again and determined that first article approval could be waived for Numax. This decision and supporting rationale were prepared by the engineer who made the initial determination that Numax should not be subject to first article approval.

AARCOM's legal counsel pointed out the inconsistencies in the positions taken by Quality Assurance regarding the waiver of first article approval and requested that Quality Assurance provide a final decision on the matter. As its final decision, Quality Assurance determined that first article approval could be waived only for Numax. A&M and Advani were informed that the resolution of their protests was in error, and that first article approval would be waived for Numax.

Advani subsequently filed a protest with our Office regarding the waiver of first article approval. More specifically, Advani protests as follows:

1. The case leakage requirement was increased to prevent leakage of rain water into the test sets.

2. The complete reversal of components (referred to as a mirror image) is a drastic configuration change which can produce a totally different temperature pattern throughout the test sets cabinets. A cooling fan is now mandatory. The temperature rise of 50 degrees Fahrenheit is now applicable to the interior walls of the test sets. Prior designs which did not include such a temperature requirement have resulted in scorched equipment and injury to operators.

3. The load division test now includes a 10-minute stability requirement for voltage drop.

4. The low temperature effect calls for maintaining an accuracy of 1 percent whereas the previous specifications called for 2-percent accuracy.

5. The resistive load unit design has been revised from 15.0 volts to 12.0 volts which entails a redesign of the load bank resisters and a configuration change. Moreover, the resistive load unit must now meet load requirements in both ascending and descending order.

6. The current specifications also provide that the load bank switch will not open during operational testing which is essential to the stable functioning of the test sets.

7. Waiver of first article approval for Numax would provide Numax with an unfair price advantage.

8. Numax is not eligible for waiver of first article approval because it has not produced the test sets for the Government for over a year.

In summary, Advani asserts that AARCOM's decision is erroneous as is evidenced by a series of reversals of its position. Further, Advani contends in substance that significant configuration changes and an increase in performance requirements necessitate first article approval for all bidders.

AARCOM has advised that award has been held in abeyance pending the resolution of the instant protest. Moreover, AARCOM maintains that the decision not to waive first article approval was based on the review of several procurements under revision "D" of MIL-T-10308, which was issued in 1969. Although a number of changes had been made to revision "D," the Quality Assurance review overlooked the fact that nearly all the changes were required by section "F" of contract DAAA09-76-C-6323, which Numax satisfactorily performed. Revision "E" of MIL-T-10308 incorporates

the changes which had been made in section "F" of Numax's contract. In other words, the test sets satisfactorily produced by Numax were almost identical to the test sets called for by the IFB involved in the instant protest. The configuration has been changed to require a mirror image positioning of components, and no new quality tests have been specified, although some minor changes have been made in existing tests. Further, several tests were deleted from the requirements of MIL-T-10308E, and tolerances in several areas have been relaxed. Also, there have been no significant changes to production or quality processes under the present procurement.

With regard to Advani's specific grounds of protest, AARCOM states that the more stringent spray test for case leakage should present no problems if the test set configuration conforms to specifications. The mirror image requirement for positioning of components should pose no difficulty, and the requirements for a cooling fan will insure that the temperature specifications will be met. Numax's test sets which were produced under a prior contract were equipped with a cooling fan. The 10-minute stability requirement was specified in MIL-T-10308D, and it was carried over to MIL-T-10308E. Thus, it is not a new and more exacting requirement. Also, the change in the restrictive load unit design from 15.0 volts to 12.0 volts should not impose a design problem to an electrical engineer. Further, the resistive load unit of Numax's test sets had to meet the load requirements in both ascending and decending order as will the test sets produced in accordance with MIL-T-10308E. It was implicit in Numax's contract that the circuit breaker would not open during operational testing or normal operations. MIL-T-10308E simply makes explicit what was implicit. AARCOM summarizes its position by stating that none of the changes required by the current IFB were significant enough to warrant first article approval by Numax.

Our Office has consistently held that contracting agencies are vested with the responsibility of determining the amount of testing which is necessary to assure compliance with specifications. The waiver of first article testing is also a matter of administrative discretion, which we will not question unless there is a clear showing that the waiver was arbitrary or capricious. Moreover, Armed Services Procurement Regulation (ASPR) § 1-1903(a) (1976 ed.) specifically provides that where supplies identical to or similar to those called for have been previously furnished and have been accepted by the Government, first article approval may be waived for the prior producer. We have also held that waiver of requirements for preliminary samples and testing does not, as a matter of law, constitute a proscribed preference or unfair action by the Government. Maxx International Corporation, B-192034, September 22, 1978, 78-2 CPD 219.

As noted, Advani alleges that Numax is ineligible for waiver of first article approval because Numax has not produced test sets for the Government for over a year. We find no support for such contention in either ASPR or in decisions of our Office. Besides, Numax produced test sets as a subcontractor as late as the second quarter of 1978.

Based on the foregoing, it is our opinion that Advani has failed to show that the waiver of first article approval for Numax was arbitrary or capricious. Consequently, the protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States