

Proc II

DECISION



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

9637

FILE: B-193180

DATE: March 23, 1979

MATTER OF: BEI Electronics, Inc.

DLG 01381

DIGEST:

1. Waiver of first article approval testing requirement is matter within the discretion of procuring agency and will not be questioned by GAO without showing that decision was arbitrary or capricious. Agency's decision not to waive first article approval testing for incumbent contractor is not arbitrary or capricious where solicitation contains a more stringent testing specification than previous year's contract and only vendor of essential ingredient in required item has had break in production that can reasonably be considered to have effect on manufacturing processes.
2. Bidder's potential eligibility for waiver of first article testing does not preclude addition of evaluation factor for such testing to bid absent determination that waiver will be granted.

BEI Electronics, Inc., Defense Products Division, (BEI) protests the proposed contract award to MB ^{CNG 00291} Associates (MBA) under invitation for bids (IFB) N00019-78-B-0006 for 50,000 MJU-8/B decoy flares issued by the Department of the Navy, Naval Air Systems Command (NAVAIR). BEI the incumbent contractor, maintains that NAVAIR has improperly refused to waive first article preproduction testing for it. BEI argues that NAVAIR's actions are unreasonable and contrary to the solicitation. The solicitation provided that in the event NAVAIR elected to conduct first article approval testing, the bid would be evaluated by adding \$12,485 to the bid price whereas no adjustment would be made to each

[REFUSAL TO WAIVE FIRST ARTICLE PREPRODUCTION TESTING]
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bid qualifying for waiver. BEI would be the low evaluated bidder if first article testing were waived for it.

The solicitation was issued on June 21, 1978, and bid opening occurred on August 15, 1978. By letters dated October 11, 1978, the Navy requested that the bidders extend their bids because the Navy was still conducting an evaluation of the need for first article testing. BEI protested on October 12, 1978, objecting to NAVAIR's delay in awarding it the contract and requesting us to direct NAVAIR either to award it the contract or to cancel the solicitation and resolicit bids. Subsequently, NAVAIR determined that it would require first article testing for both BEI and MBA.

The material facts are not in dispute. BEI was the contractor under the prior year's contract for production of 4,000 MJU-8/B decoy flares. That contract required flares to be subjected to first article approval testing in accordance with Purchase Description AS-2627, Revision A, that examined, among other things, the flares' infrared static and air stream output. NAVAIR then twice revised the testing specification. Revision B increased the static and airstream output requirements. Revision C incorporated a longer wavelength spectra band in addition to the spectra band required in Revision B and increased the infrared output test grain sample size for first article approvals from twenty to fifty units.

According to NAVAIR, the changes to the testing specification were made after NAVAIR received complaints from the fleet that all decoy flares were not performing satisfactorily in actual use. NAVAIR also reports that it made an additional change to the Purchase Description, which is not apparent on the record because the change constituted classified information.

BEI's flares under the prior contract initially failed first article approval testing in May 1978 but passed the testing in August 1978 after BEI made certain adjustments in burning rate. BEI claims that as a result of these changes, the flares satisfy the requirements

of both Revision A and the static and airstream requirements of Revision C. BEI delivered the 4,000 flares to NAVAIR on September 19, 1978; to date, NAVAIR reports, only 336 flares have been used.

On August 18, 1978, a fire and explosion occurred in the screening room of Hart Metals, one of BEI's suppliers and the only known producer of atomized magnesium, an important ingredient of decoy flares.

In October 1978, BEI received a purchase order for the manufacture of 200 MJU-8/B decoy flares. We have been advised that BEI delivered these items to the Navy testing facility at China Lake, California, on October 31, 1978, where they are being used for various missile testing.

On these facts, BEI alleges that the contracting officer's refusal to waive first article approval testing with respect to it in accordance with Section D-3 of the solicitation, "Waiver of First Article Approval," is improper because BEI was in production on the MJU-8/B decoy flare under the prior year's contract. BEI claims that NAVAIR's refusal to exercise waiver of first article approval testing for it constitutes an improper change in the IFB's evaluation scheme. BEI's argument is that as the only incumbent contractor providing the identical product to the Government, it was the only prospective contractor who could benefit from the waiver provision and thus reasonably anticipated NAVAIR would waive first article approval testing for it and priced its bid accordingly. BEI also claims NAVAIR improperly evaluated its bid because the language of Section D-3(c) of the solicitation gives it an absolute entitlement to have its bid evaluated without the addition of first article testing costs regardless of whether NAVAIR actually conducts the testing. Lastly, BEI claims that there is no reasonable basis for NAVAIR's refusing to waive first article approval testing for it because its flares made to the same manufacturing specification as would be required under this contract passed first article testing under the prior year's contract; that under that contract its flares passed production lot testing, and the 200 flares delivered to the China Lake facility have performed satisfactorily.

Section D-3 of the solicitation provides:

* * * * *

"(b) 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. * * *

"(c) If the Government determines that offeror or quoter is eligible to have the first article approval tests waived, the offer or quotation will be evaluated excluding first article approval. The Government reserves the right to make an award excluding first article approval. * * *"

Defense Acquisition Regulation (DAR) Part 19 (1976 ed.) explains the purpose of first article testing and presents the factors to be considered by the procuring agency in determining whether first article testing is required. In particular, DAR 1-1902 provides:

"(a) A requirement for first article approval is designed to assure that the contractor can furnish a product that is satisfactory for its intended use and, therefore, minimizes risks for both the contractor and the Government. In determining whether first article approval is to be required, consideration shall be given to increased cost and time of delivery by reason of the test, the risk to the Government of foregoing such tests, and the availability to the Government of other less costly methods of achieving the desired quality. First article approval tests are particularly appropriate when:

- (i) the interest of the Government requires assurance that a product is satisfactory for its intended use when the product-

- (A) has not been previously furnished by the contractor to the Government; or
- (B) has been previously furnished by the contractor to the Government but there have been subsequent changes in processes or specifications, or production has been discontinued for an extended period of time; or
- (C) is described by a performance specification; * * *."

"(b) 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." * * *

At the outset, we disagree that NAVAIR's refusal to waive first article approval testing constituted an improper change in the IFB evaluation scheme. While BEI implies that it relied on the presence of the waiver clause in the IFB to submit a higher bid than it would have had the IFB not contained the clause, in Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139, we explained this type of clause:

"does no more than reserve to the Government the right to waive first article testing for any bidder found to be qualified for such a waiver. While prior acceptance by the Government of identical or similar supplies is a requirement for first article waiver, we do not believe that acceptance automatically requires the Government to waive first article testing * * *."

Our determination in Libby Welding Company, supra, was upheld in Libby Welding Co. v. United States, 444 F. Supp. 987 (D.D.C. 1977). Thus, the mere presence of the clause, which clearly states that the requirement for first article approval may (but not will) be waived, conferred no special rights on BEI nor did it provide BEI with a reasonable basis to maximize its bid price in certain expectation that NAVAIR would exercise waiver. See Met-Pro Water Treatment Corporation, 54 Comp. Gen. 39, 43 (1974), 74-2 CPD 29. It follows that a bidder's potential eligibility for waiver does not preclude the addition of the stated evaluation factor for first article testing absent a determination that the waiver in fact will be granted. Moreover, we do not believe NAVAIR departed from the stated evaluation scheme in the IFB. While it is true that DAR 1-1903(b) (1976 ed.) prohibits use of a waiver of first article approval testing clause when it is known that first article approval would be required of all bidders, the record clearly reveals NAVAIR did not decide against exercising waiver until October 17, 1978, over two months after bid opening. The record further shows that the contracting officer included the clause in the solicitation in June based on the possibility that BEI might qualify for waiver but that changes in the specification and disruption of a subcontractor's production led NAVAIR's technical personnel to recommend first article testing be conducted. Accordingly, the inclusion of the clause in the IFB for the purposes of bid evaluation was not improper.

With respect to BEI's contention that NAVAIR has no reasonable basis to refuse waiver of first article approval testing, we consider an agency's determination not to waive first article approval testing to be a matter of administrative discretion which will not be questioned by this Office unless there is a clear showing that the decision was arbitrary or capricious. See Homexx International Corporation, B-192034, September 22, 1978, 78-2 CPD 219. Here, while BEI has presented considerable evidence to demonstrate its eligibility for waiver of first article testing, we believe that NAVAIR's refusal to waive first article approval testing was a reasonable and proper exercise of administrative discretion.

The record indicates that BEI initially failed first article approval testing on the MJU-8/B decoy flare under the prior contract and, further, that decoy flare manufacturers consistently fail initial first article testing. NAVAIR explains that the failures are to be expected in light of the MJU-8/B flare manufacturing process which involves the mixing of atomized magnesium and other highly volatile pyrotechnic ingredients. In this regard, NAVAIR states that the IFB contains a functional specification and that it cannot reasonably be anticipated that the flares will meet the specification's requirements without first article approval:

"* * * the history of decoy flares has clearly shown that the difficulties which surface concerning decoy flares are not minor but would involve the 'guts' of the flares, the IR output which relates to the burning of the flare. In fact, the mixing of the ingredients is an art and not a science. * * * It is impossible to describe in precise detail the exact percentage of each ingredient to be mixed. This is where the art of mixing becomes so important and makes the procurement of decoy flares unusual under ASPR 1-1903(b) because the 'performance requirements are so novel or exacting * * *' (ASPR 1-1902(b) (iv))."

Further, it is undisputed that NAVAIR changed the testing specification after the award of the prior contract to BEI. The increase in test samples from twenty to fifty grains without a corresponding change in the rejection criteria increased the possibility of rejection. However, even assuming that the twenty first article samples that were submitted by BEI for first article approval testing in the prior contract met Revision C's infrared and static output requirements, the critical point is that BEI's flares were never tested to the new and more stringent fifty sample test.

In this respect, BEI contends that the increase of thirty test samples is not significant because its flares have been accepted by NAVAIR after passing

production lot testing and are, along with the 200 flares delivered to the Navy's China Lake facility, being used by NAVAIR. We are not convinced that these events alone require NAVAIR to waive first article approval testing. NAVAIR asserts that the fact that an item satisfies production lot testing does not necessarily mean it would pass first article approval testing, because first article testing in this instance is more extensive and stringent than production lot testing, and is done on a smaller quantity than production lot testing to let the Government know at the earliest time whether a contractor can furnish a product satisfactory for its intended use. In this situation the Government cannot wait until the first production lot has been completed and thus accept the risk of production lot testing failure.

Finally, NAVAIR reports that Hart Metals has not returned to regular production since it suffered the fire and explosion. NAVAIR states that it cannot be certain that Hart's atomized magnesium produced following this break in production will be of the same composition or quality than before. While it is true that DAR Part 19 does not directly address whether a supplier must be requalified in the event of a break in its production, it is not written so narrowly as to preclude NAVAIR from examining Hart's break in production in determining whether to waive first article approval. The purpose of this testing is to show at the earliest possible time that the contractor can produce a satisfactory product. Should a change or disruption occur that can reasonably be considered to have an effect on the manufacturing processes, the regulation states that first article approval tests are particularly appropriate. Since atomized magnesium produced by Hart following the disruption in its production will be used in decoy flares produced under the proposed contract, it is not inappropriate for NAVAIR to want to conduct tests as early as possible to determine if there is a problem with the flare's atomized magnesium or the mixing of their ingredients.

In summary, despite the fact that BEI had recently produced decoy flares that have passed production lot testing and some had actually been successfully used,

we believe that NAVAIR did not act unreasonably in requiring first article approval testing. The regulation governing waiver of first article testing allows the procuring agency discretion in determining whether to exercise waiver but does suggest circumstances when first article approval tests are particularly appropriate. Three such circumstances are present here. The IFB contains a changed testing specification, making it more difficult for contractors to pass first article testing, the IFB uses a functional specification to describe the flare, and there has been a break in production of the only vendor of an essential ingredient which can reasonably be considered to have an adverse effect on the manufacturing process.

On the basis of the above, the protest is denied.


Deputy Comptroller General
of the United States