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DECISION

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

10,118

FILE: B-193878

DATE: May 10, 1979

MATTER OF: Bogue Electric Manufacturing Co.

DIGEST:

Procuring activity's decision concerning waiver of first article testing will be overturned only where there is clear showing that decision was arbitrary or capricious. Decision not to grant waiver of first article approval for protester whose first article produced under previous contract had not received final technical approval by procuring activity at time of award and decision to waive first article testing for recent supplier of articles incorporating item involved are sustained.

The Department of the Army (Army) issued a solicitation for the procurement of 300 stator generators and 150 rotor generators. Section D3. of the solicitation provided as follows:

"WAIVER OF FIRST ARTICLE APPROVAL - CONTRACTOR TESTING

"The contracting officer may waive the requirement for first article testing if an offeror has produced an acceptable model. Consideration for waiver will include evaluation of quality history on produced and delivered models, evaluation of the offeror's present facilities, and availability of an acceptable sample. Offerors who claim qualification for such waiver shall indicate below the monetary amount by which their offer shall be reduced.

"a. Date and contract number(s) under which prior accepted model(s) was (were) produced.

"b. Reduction in offer price if first article testing is waived.

<u>ITEM NUMBER</u>	<u>UNIT PRICE REDUCTION</u>	<u>TOTAL AMOUNT OF REDUCTION"</u>
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Bids were opened on December 8, 1978. The awardee, J.R. Hollingsworth Co. (Hollingsworth), requested waiver of first article approval for both stator and rotor generators. The protester, Bogue Electric Manufacturing Co. (Bogue), requested waiver of first article approval for only rotor generators. The bids were evaluated and the procuring activity determined that Bogue was ineligible for waiver of first article approval; however, the procuring activity decided to waive first article approval for Hollingsworth as requested. Hollingsworth's bid with first article approval waived was determined to be low. A contract for both types of generators was awarded to that firm on December 21, 1978.

Bogue filed a protest alleging in substance as follows:

1. Bogue was the low bidder regardless of whether first article approval was waived.
2. Bogue originally designed and produced the 3KW, 60HZ generator for the Army Corps of Engineers.
3. Bogue is currently manufacturing rotor generators for the Army under contract DAAK01-78-C-1239. Government inspectors have initially approved first article tests. The test report has been submitted to the procuring activity for final approval.
4. The generators supplied by Hollingsworth have never received first article approval, since approval was based on an end item, and the rotor generators were only a component of the end item.

5. Hollingsworth has never manufactured rotor generators. The rotor generators, which Hollingsworth supplied to the Army, were manufactured by another firm under subcontract. The first article waiver clause required production of an acceptable model and the waiver determination was to be based in part on the availability of an acceptable sample. Further, there is no assurance that rotor generators produced by Hollingsworth will be compatible with generators already in use.

With regard to Bogue's protest, the Army has responded:

1. The decision to waive first article approval for Hollingsworth's generators was based on a contract which Hollingsworth satisfactorily completed in May 1978. Under the contract, Hollingsworth was required to supply both stator and rotor generators as components of the end item which was subjected to first article testing. With first article approval waived, Hollingsworth became the low bidder for both items. Hollingsworth is required by the terms of its contract to produce essentially an identical item.

2. Bogue was not eligible for waiver of first article approval for two reasons. First, the preliminary approval granted for Bogue's rotor generators by Government quality assurance personnel involved only legibility, reproducibility and format. The technical aspects of Bogue's first article report were not reviewed until after December 21, 1978, the day Bogue's first article report was received and the contract was awarded to Hollingsworth. Second, Bogue did not note in its bid or previous bids that it designed and produced generators for the Army. If Bogue had noted this fact, Bogue would not have been eligible for waiver of first article approval, since Bogue designed and produced generators for the Army under a procurement action which was at least 14 years old and the specifications used by Bogue have been amended 20 times.

3. The fact that Hollingsworth did not actually produce the generators required under a prior contract is irrelevant.

The Army correctly points out that we have consistently held that the decision to waive first article testing is a matter of administrative discretion, which will not be disturbed where there is a reasonable basis for the decision. Ainslie Corporation, B-187429, B-187559, December 21, 1976, 76-2 CPD 513. More specifically, the contracting officer's decision concerning the waiver of first article testing will only be overturned where there is a clear showing that the decision was arbitrary or capricious. Aero Products Research, Inc., B-191544, September 7, 1978, 78-2 CPD 176; Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139.

In the instant case, we do not view the waiver or first article approval for Hollingsworth as being arbitrary or capricious. According to the terms of the waiver of first article testing clause quoted above, the item for which testing may be waived is to be one which the offeror has "produced." Literally, the quoted portion contemplates that the offeror will have manufactured the article for which waiver is sought. However, the contractor changes clause (13), as modified by paragraph "e" of the waiver clause, is not so restrictive. The contractor changes clause, as modified, contemplates that, where first article testing is waived, the contractor will provide from the "source of supply (whether a subcontractor or vendor to a subcontractor)" that furnished the previously accepted article. Therefore, despite the limiting language in the waiver of first article testing clause, the solicitation apparently contemplated waiver of testing for articles which the offeror supplied and had been accepted by the Government, notwithstanding a subcontractor was the source of supply. However, we are recommending to the Secretary of the Army that the waiver clause be modified before further use in order that the intention of the contracting agency will be perfectly clear in the future.

Although the item offered by Hollingsworth under the immediate solicitation may have been only a component of the article approved under the prior contract, it was not unreasonable for the contracting officer to consider the component equally acceptable for waiver of testing, since the whole is the sum of the parts and, if the whole is acceptable, it is a fair inference that the parts would be equally acceptable. While Bogue has suggested that the component may not be compatible with other equipment, the contracting officer has indicated that the contract provides for tests to prove that it is.

Further, we cannot fault the contracting officer for refusing to waive first article approval for Bogue. At the time it was determined that Bogue was ineligible for waiver, Bogue's rotor generator had not received final first article approval. Although a first article test report had been approved by the quality assurance representative prior to the award date, the contracting officer has indicated that the approval was limited. The technical evaluation of the report was not completed until January 22, 1979, a month after award to Hollingsworth.

Accordingly, the protest is denied.

R. F. Kettner

Deputy Comptroller General
of the United States