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DECISION



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

FILE: B-196185

DATE: June 5, 1980

MATTER OF: Bruno-New York Industries Corp.

DIGEST:

1. Information in support of waiver of first article testing may be submitted after bid opening, regardless of IFB provision requiring its submission with bid, because such information relates to bidder's responsibility which may be established after bid opening. Where bidder, prior to award, obtained first article approval for same item under prior contract, agency is not required to evaluate bid on basis of furnishing another first article, and agency should consider prior approval in determining whether to waive first article testing under solicitation which is subject of protest.
2. Where record does not establish that protest of agency's refusal to waive first article testing was filed only to delay award until protester's first article was approved under prior contract for same item, agency is not precluded from considering waiver for protester when first article approval is granted under prior contract while protest is pending.

Protest of Bruno-New York Industries Corporation (Bruno) protests the Army's refusal to waive first article testing and to award Bruno a contract under invitation for bids (IFB) DAAA09-79-B-4822 for 450 ignition test sets used in shop equipment. For the reasons stated below, we recommend that the agency consider waiving first article testing for Bruno.

The IFB, issued on July 26, 1979, by the Army Armament Materiel Readiness Command (Army), required first article testing and approval, but also provided for waiving that requirement where "supplies identical or

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similar to those called for in the schedule have been previously furnished by the offeror and have been accepted by the Government." The IFB permitted bids to be submitted on the basis of first article testing and on the basis of the test being waived. In the event a bidder desired to bid on the basis of a waiver of first article testing the IFB required it to submit with the bid the contract number under which identical or similar supplies were previously accepted by the Government.

Bids were opened on September 14. Bruno bid a unit price of \$319 without first article approval and \$324.10 with such approval, but failed to submit any contract number in support of its claim for waiver. Aul Instruments Inc. bid \$310 without and \$320 with first article approval.

Bruno's eligibility for waiver may hinge upon a prior contract (DAAA09-79-C-4210) which Bruno has with the Army to produce the same item. Although the contract required submission of a first article test report by April 19, 1979, Bruno had not submitted its first article when on September 19 the Army decided to require first article testing for both firms under the subject solicitation. Bruno protested this determination to our Office on September 25. In March while the protest was under consideration, Bruno obtained first article approval.

The Army contends that waiver is not proper since Bruno failed to include the contract number with its bid as required by the IFB. The agency further argues that its determination on September 19 not to waive first article testing for Bruno was proper since at that time the firm had not received first article approval under its prior contract. The Army takes the position that Bruno should not benefit from the delay resulting from its protest. The agency contends that Bruno's protest was filed only to postpone the award until it received first article approval under its prior contract and that the integrity of the competitive bidding system would be damaged if Bruno were permitted to benefit from such a tactic.

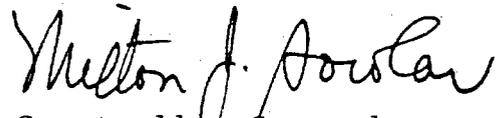
Although the Army argues that Bruno's failure to include the contract number in its bid prevented the

agency from waiving first article testing for Bruno, it is our view that such failure does not preclude waiver since the decision whether to waive first article testing relates to the bidder's responsibility and evidence of bidder responsibility may be submitted after bid opening. See Craig Systems Corporation, B-188495, June 23, 1977, 77-1 CPD 449. Thus, while the contracting officer's determination not to waive first article testing on September 19 was correct, as Bruno had not previously furnished the required items nor had they been accepted by the Government prior to September 19, see Bogue Electric Manufacturing Co., B-193878, May 10, 1979, 79-1 CPD 330, now that Bruno has first article approval, the Army is not legally precluded from evaluating Bruno's bid on the basis of its actual needs. In other words, under the rules governing bid evaluation, the Army is not required to evaluate Bruno's bid solely on the basis of the firm's furnishing a first article, something the Army at this point may not need.

As the decision whether to waive first article testing for a particular bidder is essentially an administrative one we are not recommending that Bruno be granted a waiver under this solicitation. See Wilco Electric, Inc., B-194872, September 24, 1979, 79-2 CPD 218. In light of our conclusion, however, that there is no legal impediment to first article waiver here for Bruno, we are recommending that the Army consider pursuant to the solicitation's "Waiver of First Article Approval" provision the approval of Bruno's first article under contract DAAA09-79-C-4210 in its determination whether to waive first article testing for Bruno under this solicitation.

We take note of the Army's concern over the benefit to Bruno from the delay attendant to its protest. In a variety of circumstances, however, agencies have held up awarding a contract, allowing a particular bidder to qualify for award. See, e.g., Ver-Val Enterprises, Inc., B-198076, March 25, 1980, 80-1 CPD 223; B-178043, July 27, 1973 (where the Army delayed award to permit a bidder to obtain operating authority from a regulatory agency). Although we stated in one case that an undue delay of an award solely for the purpose of permitting a bidder to qualify for waiver of a first article requirement would be questionable, in that same case we denied a protest of the Army's delay in making award and considering of first

article waiver for a bidder which did not request waiver in its bid and which submitted a first article for evaluation after bid opening. See B-175015(1), September 29, 1972. Thus, we think Bruno, reasonably believing it would shortly qualify for first article waiver, could have filed a good faith protest of the Army's intention to make award without regard to the possibility of Bruno's being able to qualify for waiver if award were delayed for a reasonable period of time. While of course the Army was not required to hold up award if its needs did not so permit, we note that the Army has not yet made award, even though the regulations permit an agency to make award notwithstanding a pending protest when its needs so require. See Defense Acquisition Regulation § 2-407.8(b)(3). Thus, under these circumstances, we do not believe there is anything improper with Bruno's benefiting from the situation here.



For the Comptroller General
of the United States