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**DECISION**



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

FILE: B-203156

DATE: December 14, 1981

MATTER OF: TM Systems, Inc.

**DIGEST:**

1. The decision whether to waive a first article requirement is within the contracting agency's discretion, and thus the presence in the IFB of a clause making waiver available does not confer a right to waiver on any particular bidder. Therefore, a firm's argument that it would have structured its bid differently had it known it would not receive the waiver does not provide a basis for viewing the agency's decision not to waive the requirement as improper.
2. The manner in which a firm chooses to prepare its bid is a matter of its own business judgment, for which the Government is not responsible.
3. Army regulation that states that first article testing generally should not be waived for follow-on production by a former producer whenever there has been a "lengthy delay \* \* \* of production (normally 1 year or more)" does not impose a definitive responsibility criterion, because it does not set out a standard that must be met as a prerequisite to award.
4. Even though an IFB requires a bidder seeking waiver of first article testing to submit evidence of prior Government approval with the bid, failure to do so does not preclude waiver since the decision whether to waive such testing relates to the bidder's responsibility, which may be demonstrated after bid opening.

TM Systems, Inc. protests the Army's award of a contract for analog digital converters to Sentinel Electronics, Inc. under invitation for bids (IFB) No. DAAK80-81-B-0039. TM essentially complains that the Army acted improperly in deciding to deny it a waiver of first article testing and to permit waiver for Sentinel. TM further asserts that the solicitation was misleading and contained defective specifications, and therefore urges that it be canceled in any event. We deny the protest.

The IFB required the successful bidder to supply 57 analog digital converters (with an option for an additional 57 units), and to complete first article testing and approval of three units. The IFB also provided for the waiver of the first article requirement as follows:

"The Government reserves the right with respect to offerors who offer products previously accepted or tested by the Government, to waive the requirement for First Article tests. Offerors who offer such products and wish to rely on such previous acceptance or test must furnish, with their offers, evidence that prior Government acceptance or approval is applicable to the product(s) proposed to be furnished \* \* \*."

Bidders could bid on the basis of first article approval, waiver of first article approval, or both.

Only TM and Sentinel submitted bids, offering the following prices on the basis of first article testing and waiver of testing:

	<u>Waiver</u>	<u>First Article Testing</u>
Sentinel	\$353,400	\$373,400
TM	\$367,536	\$396,522

TM submitted evidence of prior Government approval (under contract No. DAAB07-76-C-0045). Sentinel, which currently was producing the same items under another contract (DAAK80-80-C-0008), did not furnish similar evidence because it had not yet obtained first article approval under its contract.

After bid opening, the contracting officer requested the project engineer at the user activity to evaluate TM's request for waiver. On April 28, the engineer responded that TM did not qualify for first article waiver because it had not produced the item in more than a year. There was a question whether components acquired for this contract would have the same characteristics as the components used under TM's previous contract because several years had elapsed since TM last produced the item. Moreover, since TM no longer produced the converters, the project engineer concluded that resuming production would require significant efforts which, in many respects, would resemble starting production for the first time. Therefore, the activity determined that it could not risk waiving the first article requirement for TM.

Three days after the contracting officer received the user activity's evaluation of TM, Sentinel obtained first article approval under its other contract, whereupon the Army considered Sentinel eligible for first article waiver. The Army proposes to make an award to Sentinel and to waive the first article requirement.

First, we find no basis for disagreeing with the Army's decision not to grant a waiver to TM. The first article waiver clause does not commit the Government to a waiver; it reserves to the Government the right to waive the requirement at its discretion. Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139. In this regard, while TM suggests that it would have structured its bid differently had it known it would not receive the waiver, that does not provide any basis for viewing the agency's action as improper. See BEI Electronics, Inc., 58 Comp. Gen. 340 (1979), 79-1 CPD 202. The manner in which TM chose to prepare its bid was an exercise of its own business judgment for which the Government cannot be held responsible. In submitting a bid, TM ran the risk that a waiver would not be issued, and it was TM's responsibility to factor that risk into its bid prices.

Here, the Army has made out a plausible case for not granting the waiver to TM. Moreover, the Army's decision was based in part on Army Regulation 702-9, paragraph 1-8b (March 1977), which states as follows:

"A complete product assurance testing sequence [including first article testing] \* \* \* applies to follow-on production of materiel that is being produced \* \* \* by a former producer whenever there has been a lengthy delay or interruption of production (normally 1 year or more) \* \* \*."

In this connection, TM contends that the requirements of this regulation should have been reflected in the IFB so that bidders would have been aware of what TM views as analogous to the "evaluation factors" used to determine the awardee. TM further asserts that the regulation established a special standard of responsibility requiring that to be eligible for first article waiver a bidder must have been in production of the product within the previous year, and that as such it should have been included in the IFB as required by Defense Acquisition Regulation (DAR) § 1-903.3 (1976 ed.).

The content of the Army regulation does not establish a true evaluation criterion which must be disclosed to bidders. Rather, it provides guidance with respect to when a bidder should be considered eligible for first article waiver. Such considerations relate to the bidder's responsibility, that is, its capability of meeting contract requirements without first article testing, Bruno-New York Industries Corp., 59 Comp. Gen. 512 (1980), 80-1 CPD 388. There is no requirement that considerations bearing on bidder responsibility be set forth in a solicitation unless they constitute a special standard of responsibility.

Special standards of responsibility, which generally have been characterized by this Office as definitive responsibility criteria, involve specific and objective factors relevant to a proposed contractor's apparent ability to perform all the contract's requirements within the limitations prescribed in the solicitation. Compliance with definitive responsibility criteria is a prerequisite to an award, and thus cannot be waived by the contracting officer. J. Baranello and Sons,

58 Comp. Gen. 509 (1979), 79-1 CPD 322. The Army regulation relied on here, however, does not establish criteria which must be met as a prerequisite to the award of the contract. As indicated, the regulation only establishes guidance for cognizant administrative personnel; it does not mandate either the denial or the issuance of a first article waiver under the enumerated circumstances. The regulation is only an elaboration on the more general product assurance testing guidelines in DAR § 1-1902, which set forth the conditions under which first article approval requirements may be considered to be appropriate.

Second, we also find no merit to TM's arguments regarding the waiver for Sentinel. TM asserts in this regard that it had been advised by the Army early in the procurement process that no first article waivers would be granted, and complains that first article waiver is inappropriate for Sentinel because Sentinel will be unable to provide a component which had been used previously in the converters. TM also objects to the agency's basing the waiver on information submitted after bid opening.

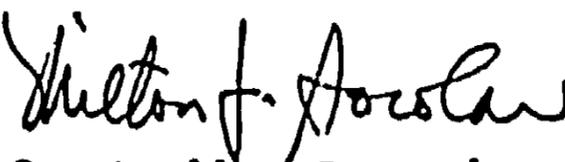
The Army denies that it advised TM that it would not consider waiver of first article testing. It also disagrees with TM's assertion regarding availability of the component. While TM has submitted a letter from a district sales manager of the IFB's suggested source for the component advising that the company no longer makes the component and that "there is none available from the factory," the Army has furnished a copy of a letter from that company's component marketing manager which states that 121 items of the component are available as excess inventory in storehouses. (The Army further reports that only one component per converter is required, and that a maximum of 117 converters could be ordered under the contract.)

On this record, we cannot conclude that the Army actually advised TM that waivers would not be granted nor can we conclude that the Army abused its discretion in deciding that Sentinel was entitled to waiver. The protester has the burden of proving its case, and where, as here, there are conflicting statements and conflicting evidence we cannot say that the protester has met that burden. See Constantine N. Polites & Co., B-198089, June 23, 1981, 81-1 CPD 518.

There is also no legal impediment to the agency's basing its decision to waive first article testing on the basis of information provided after bid opening. Even though an IFB requires a bidder seeking first article waiver to submit evidence of prior Government approval with the bid, failure to do so does not preclude waiver because 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. Bruno-New York Industries Corp., supra.

TM's assertions regarding solicitation deficiencies are based on or related to the arguments we have already considered. One asserted deficiency is that the IFB did not identify a definitive responsibility criterion relating to eligibility for first article waiver. As discussed above, the matter complained of did not involve a definitive criterion and was not required to be so identified in the IFB. Another asserted deficiency is that the technical data package was inadequate because it supposedly identified a component that was no longer available. As also discussed above, we cannot conclude on this record that the component is not available. Although TM asserts that the data package was inadequate for other reasons as well, the record does not establish the validity of that assertion.

The protest is denied.

*for*   
Comptroller General  
of the United States