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McConnell

DECISION



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

FILE: B-204172

DATE: February 3, 1982

MATTER OF: Hart Precision Products, Inc.

DIGEST:

1. A contracting officer's decision to deny a request for waiver of first article testing is essentially an administrative one which will not be disturbed unless the decision is shown to be arbitrary or capricious.
2. The denial of a request for waiver of a first article testing requirement is not arbitrary or capricious where prior first article approval under another contract is shown to be based on the waiver of certain test requirements which still appear to be valid.

Hart Precision Products, Inc. (Hart), protests the award of a contract to Teledyne Republic Manufacturing (Teledyne) under solicitation No. DAAE07-81-B-0010 issued by the Department of the Army, U.S. Army Tank-Automotive Command. Hart seeks a waiver of first article testing and award of the Army contract.

We deny the protest. We also deny Hart's requests for alternative relief.

The solicitation, issued on February 2, 1981, requested bids for 227 hydraulic relief valves for use on self-propelled Howitzer vehicles. It required the bidder to include the cost of first article testing in the bid price and to state that cost separately in the schedule. The solicitation also provided for waiver of first article testing, at the discretion of the contracting officer, where the bidder had tested and received approval for the same item under a prior contract. In the event a waiver was granted, the price bid was to be reduced by the amount stated by the bidder as the cost of first article testing.

Hart bid \$20,775.04, designating \$9,200 as the cost of first article testing, and requested a test waiver. Teledyne bid \$15,349.74 and cited \$7,500 of that bid as the cost of first article testing. Teledyne did not request a waiver. With its bid, Hart included documentation showing that the Department of Defense, Defense Logistics Agency (DLA), had granted first article approval of its hydraulic relief valve on February 17, 1981, under a DLA contract awarded Hart on June 14, 1978.

The contracting officer forwarded Hart's request for a waiver to the Directorate for Product Assurance which recommended against granting a waiver to Hart because "[i]t has been three years since the contractor performed a First Article Test on subject item * * *." Following the recommendation, the contracting officer awarded the contract to Teledyne on May 15, 1981.

Hart requested reevaluation of its bid within four days of contract award, pointing out that it had received first article approval of its relief valve in February 1981, not in 1978. The contracting officer then resubmitted Hart's waiver request to the technical directorate which advised him that Hart should have been granted a waiver.

Despite the revised recommendation, the contracting officer concluded that the earlier denial of Hart's request for a waiver was proper. He based his decision on test delays and the subsequent waiver of a required leakage test associated with Hart's first article approval under the DLA contract.

A contracting officer's decision to seek further product assurance by denying a request for waiver of first article testing is essentially an administrative one which this Office will not disturb unless it is clearly arbitrary or capricious. Morse Diving Equipment Company, Inc., B-195289.2, January 18, 1980, 80-1 CPD 57. The record here does not indicate nor does Hart contend that performance of the leakage test which was waived under the DLA contract is unnecessary for this procurement. Hart argues instead that the contracting officer's denial of its waiver request is arbitrary because test delays in its 1978 DLA contract were the fault of the testing laboratory with which Hart contracted. In this regard, the record suggests that DLA ultimately waived the leakage test in recognition

of Hart's difficulties with the testing laboratory, the costs incurred by Hart in attempting to get the tests completed, and the ensuing 18-month delinquency.

We disagree with Hart's contention. Defense Acquisition Regulation § 1-1902(a) provides that the purpose of first article testing is to assure product satisfaction and to minimize risks. Thus, we believe a contracting officer is free to require further first article testing where the circumstances indicate such tests are reasonably required. See Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139. Given the circumstances under which the waiver of the leakage test was granted, we believe the contracting officer here was reasonable in concluding that further testing was necessary regarding the performance of Hart's product. We therefore find no merit to this portion of the protest.

Alternative Relief

Hart believes that the \$7,500 price bid for first article testing by Teledyne somehow has been adopted by the Government as the reasonable value of that item. Hart believes that the testing cannot be completed at that price without a relaxation of the specifications. Hart therefore concludes that it is entitled to have its prior contract price increased by \$1,700 (the difference between its present \$9,200 bid and the \$7,500 Teledyne bid), presumably because the cost of testing to specification can only be accomplished for \$9,200. With that \$1,700 contract adjustment, Hart asserts its present first article bid price can be reduced to \$7,500, making it, not Teledyne, the low bidder, entitling Hart to the award. As a further alternative, Hart requests \$10,000 in damages to reimburse it for lost profits on the current solicitation and amortization of its original first article costs, plus legal fees. Hart further requests the contract awarded to Teledyne be canceled and that the requirement be resolicited.

We find no merit to any of these requests because:

1. The \$7,500 Teledyne bid was its own estimate of the costs involved and cannot reasonably be attributed to the Government under the conditions Hart suggests.

2. The \$1,700 difference in the bids therefore bears absolutely no relationship to Hart's legal entitlement to a price increase in its prior contract.
3. Hart could not reduce its bid price by \$1,700 after bid opening even if it somehow managed to obtain a price increase in its prior contract.
4. The legal basis for a breach of contract claim has not been shown.
5. Having concluded that award to Teledyne was proper, we find no basis to recommend termination and resolicitation.

The protest is denied.

Milton J. Fowler

Acting Comptroller General
of the United States

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