

**DECISION**

24354

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

**FILE:** B-209339**DATE:** March 1, 1983**MATTER OF:** Amplitronics, Inc.**DIGEST:**

1. Agency's decision not to waive the first article testing requirement where the item had not been produced by the firm in more than 3 years, and similar items produced more recently were found to be defective, is not arbitrary or capricious and therefore will not be disturbed by GAO.
2. A contracting agency's administrative decision not to waive the first article testing requirement for a particular firm is not a matter that must be referred to the Small Business Administration under the certificate of competency procedures, since it does not constitute a finding of nonresponsibility.

Amplitronics, Inc. protests the award of a contract to PBR Electronics under invitation for bids (IFB) No. DAAH01-82-B-0351 issued by the U.S. Army Missile Command (MICOM), Redstone Arsenal, Alabama. The contract is for 807 digital relay assemblies, an item used in the HAWK Missile System.

Amplitronics and PBR were two among a total of 15 concerns bidding for this award. Of the 15 firms only Amplitronics and PBR had previously produced the item being procured. Each firm requested waiver of the first article testing requirement based on prior production experience, and submitted two bid prices, one if testing was required and one if it was waived. Only PBR was granted a waiver, and since the firm's bid based on waiver was low, PBR was awarded the contract. Amplitronics contends that it should have been granted waiver also, in which case it would have been the lowest bidder. Amplitronics protests that MICOM's denial of Amplitronics' request for waiver of first article testing was arbitrary and capricious. Amplitronics also protests that before

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B-209339

MICOM denied the request for waiver the agency should have referred the matter to the Small Business Administration under the procedures for certificates of competency. We deny the protest.

Amplitronics asserts that, because it has satisfactorily produced the identical item for Redstone Arsenal in the past and has produced similar items in the more recent past, it has adequately demonstrated its capability to produce the item and thus satisfies the intent of the first article requirement.

First article testing is designed to insure that the contractor can furnish a product that is satisfactory for its intended use. Defense Acquisition Regulation (DAR) § 1-1902 (1976 ed.). We have held that the decision to waive a first article testing requirement is an administrative one which our Office will not disturb unless it is clearly arbitrary or capricious. Southwest Truck Body Co., B-207558, August 10, 1982, 82-2 CPD 125.

We see no legal basis to question MICOM's determination here. The procurement regulations at DAR § 1-1902(a) provide that first article tests are "particularly appropriate" for a former producer of an item where production has been discontinued for an "extended period of time," which Army Regulation (AR) 702-9, § 1-8b (March 1977), defines as normally 1 year or more. The last occasion on which Amplitronics produced the identical item being procured was approximately 3 years ago. In our decision Wilco Electric, Inc., B-194872, September 24, 1979, 79-2 CPD 218, we upheld an agency's decision not to waive first article testing where the record indicated that the firm had not produced the item for more than 2 years and the agency considered this to be an excessive lapse in production. In another decision, Kan-Du tool & Instrument Corp., B-204396, May 17, 1982, 82-1 CPD 462, we upheld that the contracting agency's decision not to waive first article testing was supported by the fact that there had been a lapse in the production of the identical item of approximately 4 years.

B-209339

Amplitronics asserts that, notwithstanding this 3-year lapse, the fact that it more recently has produced similar items for Redstone Arsenal should weigh heavily in its favor with regard to the first article requirement. MICOM states, however, that Amplitronics had a poor quality history on these similar items, many of which were found to have defects and were rejected by Redstone Arsenal during the inspection phase. While Amplitronics disputes the allegations of defectiveness and claims that the rejections were erroneous, that dispute is for resolution under the Disputes clause of Amplitronics' contract. The firm's contentions do not provide a basis for concluding that the agency is acting improperly in refusing to grant a waiver of first article testing in the procurement now in issue prior to the resolution of the dispute. See Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139. We note here that MICOM reports that the digital relay assembly is essential to the HAWK Missile System, and that substantial hardship would be caused in the event of the item's failure.

Amplitronics also contends that MICOM should have referred the matter to the Small Business Administration under the certificate of competency procedures before denying the request for waiver of the first article testing requirement. There is no legal merit to Amplitronics' position.

Pursuant to the certificate of competency procedures, the matter of a small business firm's responsibility is referred to the Small Business Administration for certification as to the firm's ability to perform if awarded the contract. 15 U.S.C. § 637(b)(7)(A) (Supp. IV 1980); DAR § 1-705.4.

No determination was made or contemplated by MICOM with respect to Amplitronics' responsibility. However, MICOM merely denied Amplitronics' request for waiver of the first article testing requirement. This does not constitute a determination that the firm is not responsible, that is, that it cannot perform the contract. See 42 Comp. Gen. 717, 721 (1963). Rather, it merely is an administrative decision that even though the firm may well be capable of meeting its

B-209339

obligations if awarded the contract, and thus is a responsible concern in that regard, it is worth the increased costs and delivery delays attendant to testing to insure that the first article actually does reflect a production item that meets the Government's needs. See DAR § 1-1902 (a). (The testing requirement also benefits the contractor to a degree in that the firm generally does not have to acquire material and components until the first article is approved, so that its financial risk is minimized. See DAR § 1-1902(c).) The certificate of competency procedures are not intended to preempt a contracting agency's administrative discretion, and the technical judgment inherent in the exercise of that discretion, with respect to whether the agency should risk contract performance without first article testing.

Under the circumstances, the first article testing requirement was not arbitrary or capricious as applied to Amplitronics. The protest is denied.

*for* Milton J. Fowler  
Comptroller General  
of the United States