

**DECISION**

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

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**FILE:** B-210747**DATE:** October 25, 1983**MATTER OF:** Lunn Industries, Inc.**DIGEST:**

1. Protest against sole-source award is denied. The record indicates that the items ordered were urgently needed and the agency reasonably determined that the awardee was the only firm qualified for waiver of first article testing requirements at the time the requirement was issued.
2. First article testing is designed to insure that the contractor can furnish a product that is satisfactory for its intended use. Agency denial of waiver of first article testing to firm which never has produced solicited item directly to the government without being under the administration of an intervening contractor is reasonable because agency did not have assurance that firm previously had furnished acceptable product to government.
3. Protester's remedies with respect to its contention that the government is estopped to deny the existence of a contract and its claim for expenses incurred in anticipation of contract performance should be pursued under the Contract Disputes Act of 1978, 41 U.S.C. § 601, et seq. (Supp. III, 1979).

Lunn Industries, Inc. (Lunn), protests the award of contract No. N00104-83-C-5912, issued by the Navy to Fibco Plastics, Inc. (Fibco). The contract is for an interim buy of 26 radomes, which are plastic coverings protecting the radar of Terrier Missile fire control systems. Lunn contends that the Navy improperly eliminated Lunn from the competition by refusing to grant it a waiver of first article testing, which resulted in an improper sole-source award to Fibco. Lunn further objects to the first article waiver to Fibco. Lunn also contends that it was "notified" that it had received the contract and expended \$50,000 based upon this notice and seeks these costs plus proposal preparation costs.

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We deny the protest and claims.

Initially the Navy contracting department received purchase requests for a quantity of 48 radomes. After review of its existing stock, the buyer determined, with the contracting officer's concurrence, that a critical stock shortage existed which required two procurement actions. One was this interim acquisition, by negotiation, for 26 units representing the urgent portion of the overall requirement for 48 units needed to satisfy back orders and quarterly demands. This interim buy was to be limited to previous manufacturers waived for first article testing. The remaining 22 units are to be acquired by formal advertising with requirements for first article tests.

The Navy's determination to negotiate the interim buy was based on its review of production leadtime of 420 days for initial delivery of three units and 600 days to complete delivery under a formally advertised solicitation which would include first article testing.

On December 9, 1982, the Navy initiated oral negotiations with both Lunn and Fibco because the Navy technical department had advised that only these firms were previous producers eligible for waiver of first article testing. Quotes were received by telephone and Lunn submitted the low best and final price quote of \$240,370, with Fibco offering a price of \$293,694.44 for the 26 units. The Navy determined that Lunn's price was reasonable and on January 26, 1983, the contracting officer and buyer approved an award to Lunn.

On January 28, 1983, the buyer telephoned Lunn, advising that an offer of award to Lunn had been drafted and was ready for transmission. A Lunn official advised that transmission would have to be made by mailgram because Lunn had no telex facilities. The Navy reports the buyer advised Lunn that the information was unofficial and no contract would exist until Lunn's unconditional acceptance of the award offer was sent to the Navy. Although the mailgram was prepared and delivered for transmission, it was never sent to Lunn.

On January 31, 1983, Fibco challenged Lunn's eligibility for award, arguing Lunn had not undergone the tests for permitting waiver of first article testing. The contracting officer withdrew the mailgram from the transmission office and, upon inquiry from Lunn, advised Lunn that the acquisition was under further evaluation. The Navy engineers reversed their prior determination and advised, for the

first time, that Lunn was not eligible for waiver of first article testing. The Navy reports the engineers concluded the Navy waiver approval was for repair of radomes, but not manufacture of radomes. The Navy further advises that the available data showed that the Lunn subcontracting work on radomes for a Sperry Corporation contract with the Navy was limited to three units which were not adequately tested because tests specifically applicable to the radome were not performed. The Navy states that it previously negotiated with Lunn on the basis of the prior erroneous advice from its engineers.

Since Fibco was now the only supplier for which first article testing was waived and which could meet the time constraints of the urgent interim requirement, award was made to Fibco on February 7, 1983.

Lunn questions the Navy's decision to award sole source to Fibco and argues that first article testing should have been waived for Lunn or Lunn given an opportunity to perform such tests.

Our Office has held that the contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to assure product compliance with specifications. EDMAC Associates, Inc., B-200358, September 1, 1981, 81-2 CPD 193. Therefore, an agency's decision to waive first article testing will not be questioned unless the waiver is clearly shown to be arbitrary or capricious. Moreover, Defense Acquisition Regulation (DAR) § 1-1903(a) (1976 ed.) specifically provides that the government may waive first article approval requirements for a prior producer which previously has furnished acceptable supplies similar to those required. Advani Engineering Company, B-192256, November 14, 1978, 78-2 CPD 344. The Navy states that Fibco completed first article testing and approval prior to fabrication of the radomes for the Navy in 1973 and specifically refers to a mailgram dated January 24, 1973, which shows the approvals. Further, the Navy reports that, as recently as 1981, the firm has produced radomes for the Navy. Lunn has not refuted these statements and, in our view, has not shown that the Navy's decision to waive testing requirements for the order placed with Fibco was without a reasonable basis.

Lunn also claims that it was entitled to a waiver of first article testing because it can produce an acceptable

product and its record of performance shows it has successfully produced this item for a Navy prime contract.

First article testing is designed to insure that the contractor can furnish a product that is satisfactory for its intended use. DAR § 1-1902 (1976 ed.). Here, the Navy did not accept Lunn's performance under the prime contract as acceptable for waiver purposes. In our view, this was a reasonable determination since the protester has not supplied the item directly to the government without being under the administration of an intervening contractor. Moreover, regardless of whether Lunn was advised of the first article testing requirements during the oral solicitation, in our view, the Navy had the right to require assurance that it would obtain an acceptable product prior to any award. The record indicates that the Navy clearly intended to award the interim buy to a firm which did not require first article testing in order to ensure that it would obtain an acceptable product within the limiting time constraints, and we think this agency action was reasonable. See EDMAC Associates, Inc., supra; McQuiston Associates, B-199013, September 1, 1981, 81-2 CPD 192.

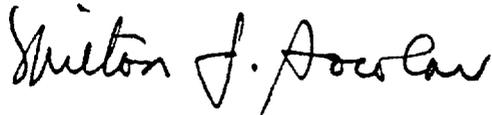
Our Office has recognized that the time of delivery can become controlling in urgent procurements, and we have not objected to a sole-source award to the only offeror qualifying for waiver of first article testing when such a waiver is essential to the fulfillment of required delivery schedules. EDMAC Associates, Inc., supra; T. M. Systems, B-196170, April 8, 1980, 80-1 CPD 261; Modular Devices, Inc., B-182288, August 20, 1975, 75-2 CPD 119. Lunn has not refuted the critical need stated by the Navy as justification for the sole-source award.

Because Lunn did not qualify for waiver of first article testing, Fibco did qualify, and the record provides no basis to question the urgency of the procurement, we believe that the Navy acted reasonably in placing the order with Fibco. While Lunn argues it could have provided an acceptable product which could have been tested within the time constraints involved, the Navy denies this is the case. It has shown that production leadtime and testing requirement considerations did not provide sufficient time to permit Lunn into the competition without a waiver. In the face of these statements by the Navy, we cannot say the protester has proven his case or that the sole-source decision was unreasonable. T. M. Systems, Inc., supra.

Lunn also argues that the Navy awarded it the contract on January 28, 1983. It states that on that date it was given a contract number and told the contract had been awarded to it with written confirmation to follow by telegram on that date. Lunn advises that based on its knowledge of the urgency of the procurement and reliance on the Navy's representation that Lunn would receive the contract, Lunn placed orders for supplies necessary to meet the offered delivery schedule. Lunn claims expenses incurred in anticipation of contract performance.

The protester's remedies with respect to its contention that the government is estopped to deny the existence of a contract and its claim for expenses incurred in anticipation of contract performance should be pursued under the Contract Disputes Act of 1978, 41 U.S.C. § 601, et seq. (Supp. III, 1979). See Automated Business Systems and Services, Inc., B-205422, December 11, 1981, 81-2 CPD 461.

Regarding Lunn's claim for proposal preparation costs, in view of our conclusion that Lunn's protest is without merit, its claim for proposal preparation costs is denied. Armco, Inc., et al., B-210018, 210018.2, May 23, 1983, 83-1 CPD 553.

*for*   
Comptroller General  
of the United States