

DECISION



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

FILE: B-213233

DATE: December 20, 1983

MATTER OF: Baird Corporation

DIGEST:

1. The decision whether to waive a first article testing requirement is a matter within the contracting agency's discretion. Contracting officer's decision to waive first article testing will not be disturbed in the absence of a showing that it was arbitrary, capricious, or unreasonable.
2. Waiver of first article testing requirement is not shown to be arbitrary, capricious, or unreasonable where waiver was based upon fact that firm had produced first articles under earlier contract, first articles had passed substantially all first article tests required under earlier contract and were expected to pass remaining tests within a matter of weeks after waiver determination was made, and contracting agency had been supplied similar items by firm under previous contracts.

Baird Corporation (Baird) protests award of a contract (contract No. DAAB07-83-C-E169) by the United States Army Communications-Electronics Command (the Army) to Numax Corporation (Numax) pursuant to request for proposals (RFP) No. DAAB07-83-E-E309. Baird contends that the contracting officer improperly waived first article testing of Numax's product and awarded the contract, which calls for Numax to deliver 543 drivers' viewers, AN/VVS-2(V)1A (devices which enable tank drivers to see at night), in spite of the RFP's statement that the award would only be made to a contractor which was eligible for first article waiver at the time of award.

Subsequent to filing the protest in our Office, Baird filed an action in the United States District Court for the District of Columbia (Civil Action No. 83-3149) seeking injunctive relief pending resolution of this matter by the District Court or our Office. By order of November 10, 1983, the District Court granted Baird's motion for a

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preliminary injunction, thereby preventing further performance by Numax under the contract. The District Court also indicated its desire to have our Office issue this decision on the merits of Baird's protest.

The protest is denied.

The RFP, as initially issued on August 26, 1983, stated, "This solicitation is otherwise restricted to previous producers." According to the contracting officer, this restriction was imposed because production leadtime for a current or previous producer was expected to be 5 to 6 months while a new producer could be expected to have a production leadtime of about 10 months due to the extra time required to complete first article testing. By letter of August 29, Numax expressed concern about the restriction to previous producers only since Numax would not be eligible for award under such a restriction and stated that it had produced and delivered over 20,000 night vision sights of similar complexity on other contracts. Numax also indicated that it was currently undergoing first article testing and had diligently accelerated all activities related to first article testing of the exact same driver's viewer (AN/VVS-2(V)1A) under a contract (contract No. DAAB07-83-C-E031) Numax currently had with the Army. Numax stated that it would complete first article testing of the driver's viewer under that contract in time to be of significant value to the Army on future acquisitions of that product. Therefore, Numax suggested that the restriction in the present RFP be changed to allow Numax's participation (by specifically naming Numax as an eligible contractor). The contracting officer apparently agreed with Numax that the RFP was overly restrictive and determined that it would be in the best interest of the government to increase competition on this procurement. Accordingly, on August 30, the RFP was amended and the restrictive paragraph was changed to read, "This solicitation is otherwise restricted to contractors who will be eligible for First Article waiver at time of award."

On September 19, the date set for receipt of proposals, it was determined that Numax's offered price of \$949,707 was the lowest of the three offers received while Baird's offered price of \$1,139,214 was second low. After

determining that Numax was otherwise responsible, the contracting officer determined that Numax was eligible for waiver of first article testing, in part, because first article testing of Numax's driver's viewer under contract No. DAAB07-83-C-E031 had been substantially completed and Numax's product had passed all of the completed tests. Accordingly, the contracting officer granted Numax a first article waiver on September 26 and awarded it the contract on September 29.

The sole issue presented for our resolution is whether the contracting officer acted reasonably and in accord with the terms of this solicitation when she waived the first article testing requirement and awarded to Numax. We conclude that Numax was eligible for waiver at the time of award.

Baird's position on this protest is best summarized in the following quotation taken from Baird's December 2 comments on the Army's report on this protest. According to Baird:

"The requirement that bidders on Solicitation No. DAAB07-83-R-E309 be eligible for waiver of First Article testing at time of award was a definitive responsibility criterion which had to be met by Numax before the contracting officer could make an affirmative determination that Numax was eligible for award. The words 'eligible for waiver of First Article testing' embody a specific and objective standard which the contracting officer was bound to apply. To qualify for award, bidders had to have (1) previously received First Article approval on a prior contract for the AN/VVS-2(V)1A driver's viewer; or (2) previously furnished the same item to the Army and had it accepted. Contractors have never been found to be eligible for waiver of First Article testing in the absence of one of these two qualifying events."

The decision to waive or not waive first article testing for a particular bidder is essentially an administrative one which we will not disturb unless it is clearly

arbitrary and capricious. See Libby Welding Co., Inc., B-186395, February 25, 1977, 77-1 CPD 139, and cases cited therein. While Baird has made voluminous arguments and cited a great number of our previous decisions in support of its argument that the contracting officer abused her discretion by waiving first article testing for Numax, we remain unconvinced that the decision to waive was arbitrary and capricious in this case.

The Army reports that the contracting officer's determination to waive first article testing for Numax was based upon two key factors. First, Numax's drivers' viewers, AN/VVS-2(V)1A, had been undergoing first article testing under a previously awarded contract administered by the same contracting officer and was "progressing satisfactorily." Second, Numax had provided an item of "similar technical complexity"--the AN/PVS Starlite Scope (a night vision device used primarily on the M-16 rifle)--to the Army under several previous contracts.

We conclude that the contracting officer's decision to waive was well reasoned. As the contracting officer on a previously awarded contract for the same product, the contracting officer knew that Numax's drivers' viewers had been undergoing first article testing for approximately 2 months by the September 19 closing date for the present procurement and that Army technical experts had been closely monitoring Numax's progress under the previously awarded contract. The contracting officer consulted with cognizant Army technical experts on several occasions and learned that Numax's product had passed "the vast majority of the required testing on or about September 19, 1983." According to the contracting officer, based upon the advice of the Army technical experts, only the "Fungus" and "Reliability" tests remained to be completed, and those tests were substantially completed by the closing date for the present RFP. Moreover, Army technical experts advised the contracting officer that there was a low risk of failure on the remaining tests and that all tests would be completed by October 16.

Baird does not dispute the Army's version of the above facts, but contends that, even though first article testing was substantially complete by the date of award, Numax was

not eligible for award under the RFP's own restrictive terms and under Defense Acquisition Regulation (DAR) section 1-1903 (Defense Acquisition Circular No. 76-42, February 26, 1983). Baird believes its interpretation of the RFP is supported by a statement made by the contracting officer on September 15 in response to a Baird request for clarification; the contracting officer replied, in pertinent part, that:

"Award of any contract resulting from this solicitation will only be made to a contractor who is eligible for waiver of First Article Testing at time of award. Since a requirement for First Article Testing is not included in the solicitation, this qualification must have been obtained under some other contract for the AN/VVS-2(V)1A."

Baird also contends that the Army's argument based upon Numax's production of an allegedly similar item, the AN/PVS Starlite Scope, is irrelevant because it was raised after-the-fact by the Army and, in any event, does not present support for waiver because the two products are not really similar.

We do not agree with Baird's interpretation of the RFP. The RFP was restricted to "contractors who will be eligible for First Article waiver at the time of award." (Emphasis added.) The RFP did not define the term "eligible." The contracting officer's September 15 response to Baird's request for clarification basically restated this requirement, but added that "qualification must have been obtained under some other contract for the AN/VVS-2(V)1A." The contracting officer did not further define the term "eligible" as it was used in the RFP nor did she elaborate upon what she meant by the term "qualification." In our opinion, a firm which had produced a similar, though not identical, product under past contracts and which had substantially completed and passed all of the testing necessary to have its first article for this product approved under another contract was eligible for first article waiver as required by the present RFP.

Section 1-1903(a) of DAR, cited by Baird, provides that the requirement for first article approval may be waived by

the government where supplies "identical to or similar" to those called for have been previously furnished by the offeror and have been accepted by the government. Even though Numax had not produced in any quantity under the earlier contract for drivers' viewers, Numax had provided first article samples of the "identical" product to the Army for testing and the samples had passed substantially all of the tests required for first article approval under that contract. While the Numax product had not been technically accepted by the government as required under DAR § 1-1903(a), the fact that the Army's technical personnel were quite certain that the first articles would be fully approved and accepted in a matter of weeks was a proper matter for consideration by the contracting officer under DAR § 1-1903(a). When coupled with the contracting officer's consideration of the fact that Numax had supplied "similar" products to the Army, we conclude that the decision to waive was fully in accord with the provisions of DAR § 1-1903(a). In fact, under DAR § 1-1903(a), the contracting officer did not necessarily have to consider both the "identical" and the "similar" items previously furnished since furnishing of either class of product is sufficient to fulfill the DAR requirement.

Baird argues that the contracting officer never really considered Numax's ability to provide a "similar" item--the Starlite Scope--and that this justification for the waiver decision was reported by the Army after-the-fact to bolster an otherwise weak justification based upon Numax's attempt to have its driver's viewer approved. However, even if this is so, and we cannot conclude that it is, prior contracts for the Starlite Scope are in our opinion, sufficient justification for waiver in the present procurement. See Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121. Under DAR § 1-1903(a), the contracting officer could properly have considered earlier contracts to provide a similar item and, even if she did not rely upon this justification, the decision to waive was fully supportable at the time it was made. See Human Sciences Research, Inc.--Reconsideration, B-201956, September 23, 1981, 81-2 CPD 246. Our Office is concerned with whether the waiver was proper and supportable at the time the action was taken, not with whether it was precisely supported by the stated agency justification. Human Sciences Research, Inc.--Reconsideration, supra.

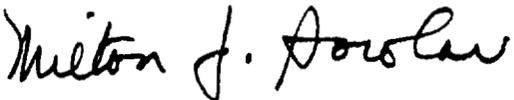
Baird next argues that the Starlite Scope previously supplied by Numax is not similar to the driver's viewer required in this procurement. The record shows, however, that the contracting officer consulted with an Army engineer as to whether the two items were similarly complex. The Army engineer determined that the two items were "high quality complex night vision devices" which were similar in a number of ways. The contracting officer apparently concurred. Baird's disagreement with the Army over this technical evaluation provides no basis for our Office to overrule the contracting officer and the Army expert since we have consistently held that in technical disputes a protester's disagreement with an agency's opinion, even where the protest is supported by expert technical advice, does not invalidate the agency's opinion. See London Fog Company, B-205610, May 4, 1982, 82-1 CPD 418. Accordingly, we conclude that the determination to waive on the basis that Numax had provided similar items in the past was reasonable. See Kan-Du Tool & Instrument Corporation, supra; DAR § 1-1903(a). This is especially so where Numax was so close to final approval of its first article under another contract for the exact same item as required in the present procurement.

In the circumstances presented in this case, we are unable to conclude that the contracting officer's decision to waive first article testing for Numax was arbitrary, capricious, or unreasonable. Accordingly, we conclude that award was properly made to Numax.

Finally, Baird has cited a number of General Accounting Office decisions, including our decision in TM Systems, Inc., B-203156, December 14, 1981, 81-2 CPD 464, which it contends support its position that Numax could not properly be considered for waiver until it had completed first article approval testing or had successfully provided production of the same or similar items in the past. We want to make it clear that today's decision is in no way inconsistent with our prior holdings. While the party which was granted the waiver in many of those decisions had already completed first article testing, or at least completed it before award, we do not believe that that is the only way to qualify for waiver. Each of those cases had to be judged on its

individual circumstances. In the present case, for example, we are of the opinion that substantial completion of all testing was tantamount to acceptance of the first article by the Army which, when combined with prior production of similar items, amounted to a reasonable basis for waiver and, ultimately, award.

Accordingly, the protest is denied.

for 
Comptroller General
of the United States