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DECISION



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

FILE: B-218156 **DATE:** May 14, 1985

MATTER OF: Steam Specialties Company, Inc.

DIGEST:

The decision whether to waive first article testing is within the contracting officer's discretion, and GAO will not substitute its judgment, particularly when there is no evidence that the protester has been treated unfairly. Nevertheless, when a waiver is unsupported by the record, GAO will ask the agency's technical experts to review the matter.

Steam Specialties Company, Inc., protests the proposed award of a contract by the Defense Construction Supply Center (DCSC), Columbus, Ohio, a field activity of the Defense Logistics Agency (DLA), to P.J. Hydraulics. The contract is for the production of blow valves to be used on boilers aboard ships. Steam Specialties contends that the contracting officer improperly waived the first article testing requirement on behalf of Hydraulics.

Because the record does not support the waiver, we sustain the protest and recommend that the agency's technical experts reexamine the matter.

The solicitation, No. DLA700-84-B-0830, was issued as a small business set-aside on September 24, 1984. It called for a quantity of 111 1-1/2-inch monel (nickel and copper) valves; these were required to be able to withstand a nominal working gage pressure of 1,500 pounds per square inch (psi) in accord with the applicable military specification and drawings.

The solicitation contains a first article testing provision that requires the successful contractor to deliver one unit to the Naval Ships System Engineering

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Station, Philadelphia, Pennsylvania, within 180 days of award. The solicitation states, however, that:

"The Government reserves the right to waive the requirement for first article testing and approval. Offerors who have submitted a first article which was similar to the item called for by this solicitation and secured approval under a prior Government contract must attach the following information to their offer. Identify Government agency (including address) approving the test report including contract number and data and attach two copies of Government Agency approving first article."

The solicitation further provides that offers for which first article testing is not waived will be evaluated by adding \$40,000 to them; this is the estimated cost that the government will incur in performing the tests.

Four bids were received in response to this solicitation. Hydraulics' unit price was \$1,580 for a total of \$175,380, and Steam Specialties' unit price was \$1,590 for a total of \$176,490. Both of these bids were exclusive of any cost for first article testing. The other two bids were significantly higher.

Steam Specialties and Hydraulics each requested waiver of the first article testing requirement. Steam Specialties had attached to its bid a list of four different DLA contracts for 1,500-psi valves under which first article testing had either been passed or waived. Hydraulics, in its bid, merely stated that per a particular Naval Sea Systems Command (NAVSEA) letter its design had passed first article testing.

Steam Specialties protests that this letter and the associated documents relied on by the contracting officer refer only to a 600-psi valve manufactured by Hydraulics, and that the firm's 1,500-psi valve has never passed or been recommended for a waiver of first article testing. Steam Specialties therefore contends that Hydraulics' bid

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must be evaluated by adding the \$40,000 to it, in which case Steam Specialties will be the low bidder.

In our opinion, the following chronology of the contracting officer's actions supports Steam Specialties' allegations.

Initially, the contracting officer, in reliance on a recommendation from DCSC's quality Assurance Division, only waived the requirement for Steam Specialties. However, upon review of Hydraulics' bid, he contacted NAVSEA, which orally approved a waiver for Hydraulics, based upon the letter cited in its bid. Relying on this conversation, on October 29, 1984, the contracting officer added Hydraulics to the list of companies for which first article testing could be waived.

The letter cited by Hydraulics is dated September 17, 1984. It is an internal memorandum from the Commander, NAVSEA, to the Commanding Officer of the Navy Ships Parts Control Center concerning reviews performed on both 600- and 1,500-psi blow valves manufactured by Hydraulics. In it NAVSEA recommended approval of the waiver of first article testing for the 600-psi valve, but merely stated that questions and comments concerning the 1,500-psi valve had been resolved.

Upon receiving a copy of this memorandum, the contracting officer reconsidered his decision to waive the testing requirement for Hydraulics' 1,500-psi valve. The record indicates that this conclusion was based on two factors: first, NAVSEA had not indicated whether the valves conformed to the applicable military specification; and, second, and more importantly, since the pressure rating for the valve described in the subject solicitation was significantly greater than 600 psi, a separate test of the 1,500-psi valve normally would be required.

The contracting officer then sought additional information from NAVSEA, which forwarded three other letters to the DCSC. All referred to reviews of drawings or results of tests conducted by private entities on valves manufactured by Hydraulics.

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The first, dated July 6, 1981, was from the Commander, NAVSEA, to the Commander, DCSC. It concerned a review of drawings of Hydraulics' valves, both 600 and 1,500 psi. It stated that with a few exceptions, the valves generally complied with design and material specifications. The letter concluded that the information provided therein should not be construed as an automatic waiver of first article testing, but rather that any such decision should be made on a case-by-case basis.

The second letter, dated October 16, 1981, was from NAVSEA to Hydraulics; it primarily concerned the results of shock and vibration tests required by the military specification. Based on the completion of these tests and pending correction of design deficiencies enumerated in the July 6 letter, NAVSEA stated that the valves would meet the requirements of a DCSC drawing issued on January 16, 1981. This letter also stated that it should not be interpreted as a waiver of first article testing for existing or future contracts.

The third letter, dated January 6, 1984, was also from the Commander, NAVSEA, to the Commanding Officer of the Navy Ships Parts Control Center. It concerned a review of a drawing of a valve manufactured by Hydraulics that was similar to valves that had failed tests under high temperature and high pressure conditions until they were substantially redesigned by the manufacturer. The letter concluded: "Due to past testings and experience with monel blow valve[s], NAVSEA will not consider granting waiver of first article testing."

Upon reviewing these letters, the contracting officer decided that they did not demonstrate that Hydraulics could produce valves that conformed to the military specification; that NAVSEA had never determined that Hydraulics' 1,500-psi valves satisfied the specification; and that NAVSEA had never recommended waiver of the testing requirement.

The contracting officer concluded that the existing record was not sufficient to provide a basis for waiver of first article testing for Hydraulics' 1,500-psi valve. He therefore retracted the initial waiver on December 10, 1984, and asked NAVSEA, by letter dated December 21, 1984, to formally evaluate Hydraulics' request for a waiver.

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NAVSEA responded with a telex, dated February 28, 1985, which stated in full:

"1. P.J. Hydraulics has successfully completed first article testing of 1 1/2 inch 1,500 psi monel boiler blow valve as approved by NAVSEA ltr . . . dated 16 October 1981.

"2. A waiver of first article test was granted to P.J. Hydraulics 1 1/2 inch 600 psi monel boiler blow valves based on successful completion of first article testing noted in paragraph 1 above."

Based solely on this technical advice, the contracting officer again decided to waive the requirement for first article testing for Hydraulics, making that firm the low bidder.

Steam Specialties argues that the decision to waive first article testing for Hydraulics was unreasonable. Such a decision, Steam Specialties contends, should be based either on previous satisfactory completion of first article testing or upon a recommendation from a technical advisor that the requirement should be waived for a specific procurement. Steam Specialties concludes that neither of these criteria has been met in this case.

The decision whether to waive first article testing is essentially an administrative one that we will not disturb unless it is clearly arbitrary or capricious. Aero Tube and Connector Co., B-216280, Dec. 11, 1984, 84-2 CPD ¶ 650. We will not necessarily conclude that such a decision is arbitrary or capricious in the absence of one of the justifications for waiver cited by Steam Specialties. While considerable weight may be afforded to prior test results or to recommendations of technical advisors, the ultimate decision to waive a testing requirement remains within the discretion of the contracting officer. We review such decisions according to the unique circumstances of each individual case, and we require only that they be supported by the record. See Baird Corp., B-213233, Dec. 20, 1983, 84-1 CPD ¶ 8.

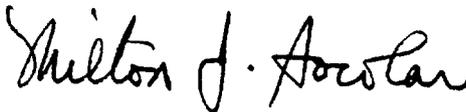
Here, the deliberations undertaken by the contracting officer in considering whether to waive first article testing have been set forth in great detail by the parties to the protest. Communications with the issuing activity's technical advisor, as well as with NAVSEA, all well documented, demonstrate that the contracting officer vacillated concerning Hydraulics' request. Initial uncertainty was followed by preliminary approval of the request in reliance on the informal views of NAVSEA. Subsequently, this approval was retracted because of the contracting officer's reluctance to draw conclusions from the documents forwarded by NAVSEA. Finally, the contracting officer approved waiver in reliance upon a consultative response by NAVSEA--a response based on the same documents that the contracting officer had previously rejected as being insufficient to support a waiver.

After reviewing the entire record, we cannot find that it demonstrates that waiver of first article testing for the 600-psi valve necessarily constitutes a waiver of this requirement for the 1,500-psi valve. We recognize that a test conducted on one product may in certain circumstances satisfy requirements for a similar product. See, e.g., Drexel Industries, Inc., B-204463, Feb. 8, 1982, 82-1 CPD ¶ 108 (tests performed on a 4,000-pound truck satisfy the testing requirements for a 6,000-pound truck where the components used in the lighter truck were designed to meet the requirements for the heavier one). In this case, however, neither similarities nor differences between the two valves have been identified. NAVSEA's brief telex of February 28, 1985, does not conclude that the design and materials of the 600-psi valve are such that they could withstand the stress to which a 1,500-psi valve will be subjected. Moreover, the January 6, 1984, letter which states that valves produced by Hydraulics repeatedly failed high pressure testing before their modification indicates that the ability to withstand high pressure is one of the critical factors in evaluating valves. Therefore, the the question remains whether a valve designed to withstand pressure substantially lower than that required for the one being procured here should be used as a measure of reliability.

Further, the statements made in the documents regarding Hydraulics' 1,500-psi valve are inconclusive as to whether it conforms to the military specification, and the documents generally caution that they should not be construed as constituting a waiver of first article testing for the 1,500-psi valve. In fact, there is no indication that NAVSEA performed any further testing on the 1,500-psi valve after October 1981, when it cautioned that its testing was not to be considered a waiver of first article testing. Finally, none of the parties have denied Steam Specialties' allegation that the only tests of Hydraulics' 1,500-psi valve by NAVSEA were performed in 1976, before formulation of the current military specification.

Considering the deficiencies in the present record, we sustain the protest.

We are, however, reluctant to substitute our judgment for the agency's, particularly where, as here, there is no evidence that the protester has been treated unfairly in the evaluation of its own bid. We therefore recommend that the contracting officer refer the matter to NAVSEA or another appropriate activity, requesting a current determination as to whether first article testing should be waived for Hydraulics' 1,500-psi valve. The contracting officer should then evaluate bids accordingly. See The Analytic Systems Corp., B-218074, Apr. 23, 1985, 85-1 CPD ___.

for 
Comptroller General
of the United States