The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Airline Instruments, Inc.

File: B-223742

Date: November 17, 1986

DIGEST

General Accounting Office recommends that contracting agency waive requirement for first article tests for prior producer of aluminum frame folding cots where agency determination not to waive was based on extended break in production combined with changes to specifications since then, and record does not establish that agency considered lack of complexity of cots, apparent insignificance of changes or fact that since its last full cot contract firm has furnished satisfactory cot components that include those changes.

DECISION

Airline Instruments, Inc., protests the rejection of its bid under Defense Logistics Agency (DLA) invitation for bids (IFB) No. DLA400-86-B-3691, for a quantity of aluminum frame folding cots. DLA rejected Airline's bid because Airline did not state a price for furnishing a first article test report or indicate that it would be furnished at no charge, and because DLA determined that the report requirement could not be waived. Airline was the low bidder and therefore would have received the award had the waiver been granted.

We sustain the protest.

The IFB solicited bids for a total of 71,500 aluminum folding cots, constructed in accordance with Federal Specification AA-C-5716, to be delivered to seven different locations. The IFB advised that first article/preproduction approval and a first article test report were required unless waived. The IFB contained a line item in which bidders were either to enter their charge for the first article test report or indicate that it would be provided at no cost, and cautioned that failure to price the report or indicate that there would be no charge might result in rejection of the bid. DLA, however, reserved the right to waive the report requirement where DLA had previously accepted identical or similar

products from the bidder. Firms requesting waiver of the report requirement were required to list prior contracts which they believed showed that first article testing was not necessary.

In its request for waiver of the report requirement, Airline listed seven prior DLA contracts covering the period from January 1982 through March 1986 under which Airline had delivered either completed cots or provided parts. Airline made no entry in the test report line item.

The contracting activity's Directorate of Quality Assurance recommended to the contracting officer that the first article test requirement not be waived for Airline. The Directorate noted that Airline last supplied complete cots in 1982, under the first of the seven contracts Airline listed in its bid, and there had been changes to the specifications in the interim. In response to a further inquiry from the contracting officer, the Directorate stated that:

> "Mandatory and alternate value engineering change proposals have been incorporated pertaining to allowable materials and methods of manufacture. Item history reveals a trend of several requests for specification deviation/waiver on individual contracts. Requirement of first article is at the discretion of this office if the manufacturing processes could vary and affect the product."

DLA contends that its decision was reasonable because of the length of time since Airline had last produced complete cots, citing Amplitronics, Inc., B-209339, Mar. 1, 1983, 83-1 C.P.D. ¶ 210.

Airline contends that DLA's refusal to waive first article testing was unreasonable. In this respect, Airline asserts that DLA should have considered the nature of the product and the significance of the changes to the specifications in reaching its decision. Airline argues that cots are not a complex product and that the changes either have been trivial or are of a nature that could not be demonstrated in first article testing. Airline also notes that several of the changes affected only components which Airline has delivered since the specifications were changed, and states that the deviations to which the Directorate refers primarily have had to do with the type of snap used on the retaining strap that holds a folded cot in position, which Airline suggests is a trivial matter. Airline contends that DLA therefore should have waived first article testing.

A contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to assure product compliance with the specifications. Lunn Industries, Inc., B-210747, Oct. 25, 1983, 83-2 C.P.D. ¶ 491; EDMAC Associates, Inc., B-200358, Sept. 1, 1981, 81-2 C.P.D. ¶ 193. The determination of whether an offeror qualifies for waiver of first article testing is within the discretion of the contracting agency, and we will not overturn an agency's decision unless it was arbitrary or capricious. Caelter Industries, Inc., 64 Comp. Gen. 507 (1985), 85-1 C.P.D. ¶ 522; Steam Specialities Company, Inc., B-218156, May 14, 1985, 85-1 C.P.D. ¶ 541.

We have upheld determinations to waive first article testing where those determinations reflected a reasonable basis. See, e.g., Caelter Industries, Inc., B-215972, supra (waiver of first article testing for a successor company using the same personnel, engineering designs and equipment as the defunct prior producer); Baird Corp., B-213233, Dec. 20, 1983, 84-1 C.P.D. ¶ 8 (determination to waive first article based on the offeror's prior production of comparable equipment of similar complexity and the agency's reasonable expectation that almost-completed first article tests under another contract would be successful.) However, because the waiver clause does not confer upon offerors any right to a waiver and first article testing is for the protection and benefit of the government, we have generally been more demanding in our assessment of challenges to the denial of a waiver. See, e.g., 43 Comp. Gen. 780 (1964), in which we stated that although it might have been that the facts would have justified a waiver, as contended by the protester, the question before us was whether the determination not to waive "was such an improper exercise of discretion as would justify us in directing cancellation of the contract." 43 Comp. Gen. 780, 783. Implicit in this language is a more stringent standard under which we will not question a determination not to waive first article testing absent bad faith, fraud or a clear showing of an abuse of discretion.

We previously have held that to be sustainable, a contracting officer's discretionary decision must reflect the reasoned judgment of the contracting officer based on the investigation and evaluation of the evidence reasonably available at the time the decision is made. Apex International Management Services, Inc., 60 Comp. Gen. 172 (1981), 81-1 C.P.D. ¶ 24. Although, as DLA points out, paragraph 9.303(b)(2) of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.303(b)(2) (1985), states that testing and approval may be appropriate when the contractor has previously furnished the product but production has been discontinued for an extended

period of time, paragraph 9.304(d) of the FAR, 48 C.F.R. § 9.304(d), provides an exception for "Products covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that it is questionable whether the products would meet the requirements without testing and approval." In our view, these sections of the FAR, read in concert, required that the agency's assessment of the break in Airline's production of cots be balanced by consideration of the complexity of the product and its manufacture and the significance of the changes to the specifications in the interim to avoid the "imposition of unnecessary requirements such as preliminary samples or testing not clearly necessary." 42 Comp. Gen. 717, 721 (1963).

In prior protests in which we have upheld agency determinations not to grant a waiver of first article testing on the basis of a break in production, the record has generally reflected the consideration of additional factors which established the basis for a reasoned decision. For instance, in Amplitronics, Inc., B-209339, supra, which DLA cites in support of its position, there not only was a 3-year break in production, but the parts involved were digital relay assemblies essential to the Hawk missile system and Amplitronics had reportedly recently experienced quality problems with similar products. In TM Systems, Inc., B-203156, Dec. 14, 1981, 81-2 C.P.D. ¶ 464, in addition to a break in production of the analog-digital converters being acquired, there was uncertainty whether the current units were the same as those previously produced and the reasonable expectation that resuming production would require significant efforts, resembling starting production for the first time.

In the present case, however, we find the added circumstances that are present favor the granting of a waiver. In this respect, it appears that two factors underlie DLA's decision not to waive the first article requirement in this case: (1) the break in Airline's production of the cots, and (2) the fact that certain relevant specifications have changed since Airline's last full cot contract. We have examined the specification changes, however, and we find nothing significant. We note particularly that the changes include such things as a relaxation of the packing requirements, the deletion of references to metric measurements, the elimination of several specifications pertaining to paint or painting, the renumbering of some paragraphs, and a revision of the sampling requirements for inspection, none of which appears to have any material effect on the cots or, more importantly, their manufacture by Airline. In sum, the changes "pertaining to allowable materials and methods of

manufacture" on which the Directorate of Quality Assurance relied for its recommendation appear to involve either the relaxation or elimination of requirements, rather than the imposition of stricter specifications, and we share Airline's assessment of the triviality of the type of snap which different vendors might use. Secondly, as stated above, Airline has furnished many cot components in the period since the last full cot contract, including components produced under the changed specifications, and there is no evidence of less than satisfactory performance. Finally, we find nothing in the record which even suggests that these cots are either complex or difficult to manufacture, or involve novel or exacting requirements.

In our judgment, the added considerations present here--the lack of complexity of the cots, Airline's history of satisfactory production, and the lack of significant changes to the specifications--bring the matter within the exception to first article testing provided in FAR § 9-304(d) for "products covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that it is questionable whether the products would meet the requirements without testing and approval." We do not find, however, that DLA weighed all these factors and their applicability under FAR § 9-304(d) in making its determination not to grant Airline a waiver and conclude that DLA abused its discretion in failing to do so.

The protest is sustained. We recommend that DLA grant Airline's request for waiver of first article testing.

for Milton J. Socolar
Comptroller General
of the United States