TERRY

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Whittaker Technical Products, Inc.

File: B-239428

Date: August 29, 1990

Paul Shnitzer, Esq., and Robert T. Ebert, Esq., Crowell & Moring, for the protester.
Max Solis, for BST Systems, Inc., an interested party.
Brian A. Darst, Esq., Department of the Navy, for the agency.
Anne B. Perry, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO participated in the preparation of the decision.

DIGEST

Agency decision not to waive first article testing requirement for protester, a current producer of certain batteries and cells being procured for use on deep submergence rescue vehicles, was reasonable where the protester's products have never successfully completed first article testing and problems have arisen during performance by the protester's products which raise doubt as to whether they can perform in accordance with the specifications.

DECISION

Whittaker Technical Products, Inc. protests the award of a contract to BST Systems, Inc. under request for proposals (RFP) No. N00024-90-R-4019(Q), issued by the Department of the Navy for silver-zinc batteries and cells used to provide electric power for deep submergence rescue vehicles. Whittaker alleges that the Navy improperly made award to other than the lowest priced, technically acceptable, responsible offeror because it did not waive a first article testing requirement for Whittaker, and unreasonably did so for BST.

We deny the protest.

The RFP, issued on October 4, 1989, provided that contracts would be awarded on an individual lot basis, each lot consisting of a different type of battery or cell. Lot 1

consisted of four silver-zinc batteries to be used in deep submergence rescue vehicles 1 and 2 (DSRV), with each DSRV battery containing 76 cells. Lot 2 consisted of 150 silver-zinc cells for nuclear reactor vehicle 1 (NR-1). Lot 3 consisted of 410 silver-zinc cells for deep submergence vehicles 3 and 4 (DSV).1/ In addition to the cells and batteries, the RFP included, among other items, requirements for spare cells, sample cells, interim repair parts, intercell connectors, engineering services, and associated data.

The solicitation also contained a first article test requirement for each lot, to verify conformance of the batteries and cells to the specifications before commencing production. The RFP provided for waiver of the first article test requirement if supplies identical or substantially identical to those called for in the schedule had been furnished by the offeror, or if the items had previously successfully completed first article test procedures.

Offerors were required to submit an offer which included the costs of first article testing, offer A, and were permitted to submit a second offer, offer B, at a price which excluded the cost of first article testing if the offeror believed it qualified for waiver. The RFP provided that award would be made on each lot to the offeror which submitted the lowest aggregate price for all of that lot's requirements. Under the solicitation, the low offeror would either be determined on the basis of offer A, or on the basis of offer B, if offer B was submitted by an offeror that the Navy determined to be eligible for first article waiver.

Whittaker and BST submitted the only proposals, and both submitted two offers, one including the cost of first article testing and the other excluding it. Whittaker requested waiver of first article testing for all three lots on the ground that its batteries had a proven field performance, citing previous contracts. None of these previous contracts was performed pursuant to a solicitations under which a first article test had been successfully conducted. BST requested a waiver of first article testing for lots 1 and 3, the DSRV and DSV batteries, respectively, on the basis that it had successfully completed first article testing for these items.

1/ The Navy procures battery cells for the DSV and NR-1 vehicles and assembles the batteries itself. Due to the size and complexity of the DSRV battery, however, the manufacturer assembles these cells into batteries.

The contracting officer authorized a waiver of first article testing for BST on lots 1 and 3 based on previous successful first article testing and performance data. The contracting officer did not waive first article testing for Whittaker for any of the lots, on the grounds that Whittaker had not successfully completed first article testing with regard to any of the three items, and because the agency's experience with recently manufactured Whittaker batteries and cells was less than satisfactory or inconclusive.

After accounting for each offeror's eligibility for waiver of the first article testing requirements, the contracting officer determined that BST offered the lowest price proposal for each lot and awarded BST the contract on April 18, 1990. Whittaker filed a protest in our Office on April 26 challenging the award on the basis that the Navy unreasonably refused to grant Whittaker a waiver of first article testing requirements and improperly granted such waiver to BST. Specifically, the protester contends that it has manufactured NR-1 cells for "decades," it has supplied these batteries to the Navy in the recent past and they have performed flawlessly, consistently surviving the performance guarantee period required under the contracts, thus there have been no performance problems sufficient to justify refusal of a waiver of first article testing.

The Federal Acquisition Regulation (FAR) states that first article testing may be appropriate in a number of situations including where a contractor has not previously furnished a product to the government and where the product acquired under a previous contract developed a problem during its life. FAR § 9.303.

An agency decision to waive or not to waive first article testing for a particular offeror is subject to question only where it is shown to be unreasonable. Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579. 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, requiring a clear showing of an abuse of discretion. Engineered Air Sys., Inc., B-237214, Jan. 25, 1990, 90-1 CPD ¶ 107; Comdyne I, Inc., B-232574, Dec. 21, 1988, 88-2 CPD ¶ 611.

In our view, the Navy's decision to deny waiver of first article testing was reasonably based on the following three grounds: (1) Whittaker never successfully completed first article testing on these cells; (2) problems have developed

with Whittaker's cells during past performance; and (3) an alternate source, that has successfully completed first article testing, finally has become available.

In particular, the Navy points out that Whittaker has never successfully completed the stringent and more realistic first article tests which were first imposed in 1983. The Navy states that although Whittaker's prior contracts called for first article testing, the Navy waived the tests because of its urgent need to replace batteries which had failed in the field, and for which Whittaker was the only source. The Navy elaborates that Whittaker's only attempt at first article testing for the DSV battery cells under the more stringent procedures resulted in early termination of the tests, at Whittaker's request, because the cells experienced initial failures consisting of unsatisfactory discharge at only approximately 40 percent of the cells' expected lives. Whittaker has never conducted first article testing on its DSRV batteries or NR-1 cells.

Whittaker does not allege that it successfully completed first article testing, rather it argues that its performance history warrants waiver. The Navy states that performance in the field, without failures, does not demonstrate that the batteries will perform adequately when needed. This is because the batteries are a backup source of power that has not yet been called upon to actually perform. The Navy explains that periodic testing in the field is not as rigorous as first article test procedures which are designed to accurately reflect the level of use which would be required if the batteries were needed to actually support the vessels.

In addition, recent tests on the silver-zinc cells used in Whittaker's DSRV and DR-1 batteries demonstrate defects in the batteries and the resulting adverse affects on performance are not known. Specifically, the results of an analysis of the cells by an independent contractor, Westinghouse Electric Corporation, completed on April 30, 1989, revealed high quantities of contaminants, mainly iron, in the zinc; the separator was defective in its silver treatment; and the celgard material was found to be hydrophobic, and it could not be determined whether this was true as manufactured or if it developed during the material's life in the cell.2/

2/ Hydrophobic refers to lacking affinity for water, while the celgard material should be absorbent (1988).

Whittaker contends that the contaminants and other problems revealed in the Westinghouse report have no effect on the performance of the cells; however, there is no proof to support this position, and the fact remains that the cells are noncompliant in these respects. Whittaker raised the possibility in the past that problems with the cells was attributable to an additive, NAVSEC-1, which was required by the specifications, but the Westinghouse report and the Navy's experience with this additive have disproved this theory.

The agency also examined the past performance of the three types of battery cells. Its initial review revealed that a significant number of Whittaker's cells failed to meet the guarantee periods set out in the contracts.3/ The cause of the failures specified by the Navy were that the cells were low capacity or shorted in less than the guaranteed service life of the battery. Whittaker correctly asserts that, in fact, it generally did meet the guarantee requirements of the prior contracts, but the Navy analysis failed to take into account the time that elapsed in dry storage. The Navy argues that notwithstanding the linkage of the dry storage period to the guarantee period, the period of time in dry storage does not affect the performance period.4/ Morever, some of the cells did fail within the total 42-month combined warranty period. Whether or not a significant number of the cells actually failed to satisfy the RFP warranty requirement, it is clear that enough cells developed sufficient problems during the 18-month service period to cause the Navy to doubt the capabilities of these batteries. These doubts were confirmed by the problems encountered during Whittaker's unsuccessful attempt to satisfy first article testing.

The Navy's fundamental concern with Whittaker's product is whether the batteries and cells will perform reliably in the

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3/ The guarantee period establishes the expected service life of the battery and is defined in terms of months of service, number of ampere hours of charge, and maximum allowable number of internal cell shorts. Failure to meet these performance characteristics constitutes failure to meet the guarantee period.

4/ The Navy states that only the organic separator material is subject to degeneration, and only at very high levels of humidity. This effect, however, is eradicated when the product is properly sealed and stored, areas for which Whittaker was responsible under the prior contracts.

fleet once they are activated. Although the batteries have been tested in the field on a bimonthly basis they have never been used as intended, that is, as a back-up source of energy should the primary source fail. The Navy reasonably determined that these bimonthly tests are not an adequate substitute for first article testing because the bimonthly tests only measure the batteries' charge capacities, and not the likelihood that the batteries will experience internal electrical shorts. The Navy reasonably believed that only through the more rigorous tests used in first article approval can the Navy be assured of the batteries' capabilities. The final factor in the Navy's decision is that the Navy now has an alternate source, BST, which has successfully completed first article tests on the DSV and DSRV cells, and therefore the Navy has the time to conduct first article tests on Whittacker's products.

While Whittaker also challenges the Navy's decision to waive first article testing for BST's DSRV batteries, we need not address this issue since even if Whittaker was correct, it would not have been prejudiced by the agency's decision. This is because BST's prices for all cell lots with the cost of first article testing is lower than Whittaker's price for all cell lots including the cost of first article testing, and we have concluded that it was proper for the agency to deny the first article test waiver to Whittaker.

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel