

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

50836

FILE: B-181913

DATE: June 27, 1975

97141

MATTER OF: Piasecki Aircraft Corporation

DIGEST:

1. Decision to negotiate sole-source contract for urgent requirements was justified since award to bidder who did not qualify for first article testing waiver would not have met agency needs for urgent delivery and record shows that only one firm qualified for waiver. However, D&F supporting negotiated procurement should have cited 10 U. S. C. 2304(a)(10), not (a)(2), since latter exception only authorizes negotiation under urgent circumstances where procedural aspects of advertised procurement would constitute undue delay, which is not the case here.
2. Although agency did not fully consider protester's prior experience in determining its qualification for waiver of first article testing in connection with procurement, record fails to show that consideration of protester's prior performance would have qualified protester for waiver and therefore agency's determination was, in final analysis, proper.
3. Contention by disappointed bidder that propriety of waiver of first article testing approval to competing bidder was questionable is untimely under 4 C. F. R. 20.2(a) and will not be considered, as contention was first raised more than a month after protester's receipt of administrative report which disclosed waiver.
4. Allegation that alleged improper sole-source award gave awardee undue competitive advantage on subsequent advertised procurement for same articles is without merit since any advantage resulting from prior award is the type of commercial advantage normally enjoyed by suppliers who are producing item under other contract at time of bidding.

This protest has been filed by the Piasecki Aircraft Corporation (Piasecki) against the action of the Navy in awarding an allegedly improper sole-source negotiated contract, No. N00383-74-C-4977, to Kings Point Manufacturing Company, Incorporated. Piasecki also protests award of a subsequent contract to Kings Point under invitation for bids (IFB) No. N00383-74-B-0748, since it believes Kings Point enjoyed an improper competitive advantage by virtue of the previous award of the sole-source contract.

The item being procured in both instances by the Naval Supply Systems Command is the Aero-26C tow target. It appears that in approximately June 1974, the Navy realized that it had an urgent need for these items, resulting from an increased usage of targets. The record indicates that part of this urgency resulted from use of the Aero-26C target in place of the larger TDU-27 target, which was to have been furnished under a contract between the Navy and Piasecki but was terminated for default.

As a result, the Navy decided to procure a quantity of Aero-26C targets as quickly as possible, and determined that the most expeditious manner of procurement would be a sole-source contract for targets negotiated only with Kings Point. Accordingly, on June 5, 1974, the contracting officer made the following determination and findings:

"Upon the basis of the facts recited below, the proposed contract may be negotiated without formal advertising pursuant to the authority of 10 USC 2304(a)(2) as implemented by paragraph 3-202 of the Armed Services Procurement Regulation.

"FINDINGS

"1. The proposed contract provides for the furnishing of 687 each, Target, Radar, NAVORDSYSCOM (10001) P/N 57A97D2-1. The item is intended for use in air to air gunnery training and is of the reflective type for use with Radar Fire Control Systems. The technical specifications provide for first article approval - Government testing requirements. The system stock is zero with 440 backorders on hand and increased usage anticipated.

"2. Limitation of solicitation will facilitate expeditious award and delivery since a mandatory first article test program will not be required of the source listed herein because the proposed contractor has delivered this item on four previous contracts within the past five years. It is estimated that 90 days reduction in lead time will be effected through negotiation in lieu of formal advertising.

"DETERMINATION

"The use of a negotiated contract, without formal advertising, is justified because the public exigency will not permit the delay incident to formal advertising."

The negotiated contract was awarded to Kings Point on July 31, 1974, for 571 targets at a unit price of \$175 each, with the applicable first

article test requirements waived in their entirety. Pursuant to this contract, 200 targets were to be delivered within 180 days after the date of the contract, with the balance due within 210 days after date of contract.

The Navy issued the advertised solicitation on June 11, 1974, for alternate stepladder quantities of 1093, 696, and 524 targets. The IFB required first article approval tests unless waiver thereof was appropriate. The delivery schedules for all stepladder quantities were to be reduced by 135 days if first article tests were not required. On July 18, 1974, the bid opening date, four bids were received, and Kings Point was low at \$179.90 per unit based on first article waiver. Piasecki was third low, with a unit price of \$283.33 based on first article waiver and a unit price of \$287.21 based on compliance with the first article requirements. Award was made to Kings Point on September 30, 1974.

The basis of Piasecki's protest against award under both procurements stems from what it considers the inappropriate sole-source contract award to Kings Point. While not disputing the urgency of the solicitation, Piasecki argues that it was competitive with Kings Point and should have been considered for the urgent award. The Navy, however, contends that Kings Point was the only source with which it could have negotiated, as the circumstances dictated expeditious delivery and as Kings Point was the only manufacturer it knew of who qualified for waiver of the first article requirements on the basis of recent manufacturing efforts. The Navy believes that a contract at that time with a firm other than Kings Point would have required first article testing, and a "consequent, unsatisfactory extended delivery schedule."

Piasecki argues that the Navy's analysis is incorrect, as Piasecki had allegedly proven its qualifications and thus would also have been eligible for first article waiver. Specifically, the protester points out that in March 1974, its TDU-27 target passed first article testing by the Navy. It argues that the TDU-27 is essentially the same target as the Aero-26C except for being slightly larger, and that the firm's qualification on the TDU-27 should have sufficed for waiver of first article testing on the Aero-26C. Also, Piasecki contends that it produced and delivered the Aero-26C target in 1966 under contract No. N00383-67-C-2416 with the Navy and has therefore demonstrated its ability to satisfactorily produce this item. Although it appears that the Navy may not have taken either circumstance into consideration in making its determination to award the sole-source contract, it reports that neither event would have changed its decision. It informs this Office that the testing of the TDU-27 does not suffice for testing of the Aero-26C target because of significant differences in material and stitching. Also, it notes that Piasecki's 1966 contract efforts are inapposite because

that contract did not contain either the performance or first article test requirements contained in the current specification. As no similar contract had been awarded to Piasecki for eight years, the Navy believes this lapse of time, in the circumstances, would have necessitated first article testing. Finally, although Piasecki has recently been terminated for default under its TDU-27 contract and has moved its facilities and personnel, the Navy and Piasecki disagree on what effect, if any, these circumstances would have on waiver of first article requirements regarding Piasecki.

The contracting officer's D&F cited 10 U. S. C. § 2304(a)(2) (1970), as implemented by Armed Services Procurement Regulation § 3-202.2 (1974 ed.), as authority to negotiate the initial contract. These provisions authorize negotiation rather than formal advertising where the public exigency will not permit the delay incident to advertising. In determining the propriety of a proposed award under a sole-source solicitation, the standard to be applied is one of reasonableness and unless it is shown that the contracting officer acted without a reasonable basis, we will not question the proposed award. North Electric Company, B-182248, March 12, 1975; B-175953, July 21, 1972; 44 Comp. Gen. 590, 593 (1965).

Initially, Piasecki questions the Navy's choice of the negotiated contract in question over the IFB issued on June 12, 1974, for procurement of these urgently needed targets. In our opinion, the Navy's decision to negotiate the contract for these urgent requirements was not improper. The negotiated contract assured the Navy of the most favorable delivery terms, while the IFB required first article testing prior to delivery unless a waiver was authorized in the case of a prior producer. Since the record indicates the Navy needed delivery as soon as possible, we believe that use of negotiating authority was proper under the circumstances. However, we do not believe that the Navy reliance on 10 U. S. C. § 2304(a)(2) (1970) for negotiation is correct, since that provision authorizes negotiation only where the timely delivery of urgently needed supplies or services would be precluded by the delay attendant to the preparation and distribution of an IFB and the opening of bids in response thereto. Hughes Aircraft Company, 53 Comp. Gen. 670, 673 (1974). This is not the case here. Rather, we believe the negotiated procurement was more properly authorized by 10 U. S. C. § 2304(a)(10) (1970), as implemented by ASPR § 3-210.2(i) (1974 ed.), on the grounds of impracticability of obtaining competition. While in view of the above we do not consider this deficiency to be prejudicial to Piasecki, we have advised the appropriate officials of our views on this matter.

Piasecki next argues that it should have been permitted to compete with Kings Point for the initial negotiated contract because it also qualified for first article waiver. Pursuant to ASPR § 1-1902 (a) (1974 ed.), a requirement for first article approval is designed to

assure that the contractor can furnish a product that is satisfactory for its intended use. However, such testing generally requires, as in this instance, a significant delay in delivery. This Office has in several instances determined that an urgent procurement can be restricted to proven acceptable suppliers of an item who qualify for waiver of first article testing when the delay attendant to first article testing is unacceptable. Dero Industries, Inc., B-179730, April 3, 1974; B-177674(1), May 11, 1973; B-172958, September 27, 1971. In these situations, the question whether or not to waive the requirement for first article testing is primarily a matter of administrative discretion which will not be overturned by this Office unless clearly unreasonable. B-177873, April 24, 1973; B-170989, B-170990, November 17, 1971. Mere discontinuance of production by a manufacturer for several years does not, as a rule, require adherence to a first article test requirement if other relevant factors justify waiver. B-170542, December 31, 1970.


In deciding whether first article testing may be waived ASPR § 1-1903 (1974 ed.) contemplates that consideration be given where time permits to the desirability of reviewing factors such as a manufacturer's prior production of the same or similar items and the complexity and similarity of the articles' design. For example, see B-170989, B-170990, supra; B-170542, supra; and Dero Industries, Inc., B-179730, supra.

It appears that the Navy's decision to limit negotiations on the sole-source procurement to Kings Point was based upon an examination of available Navy records which reflected that Kings Point was the only Aero-26C producer within the past five years. We are advised that the Navy records beyond that period have been destroyed or are not complete. However, we are inclined to think that the substitution of the 26-C target for the TDU-27, although intended to be a temporary measure, should have caused the procuring activity to consider and evaluate whether the targets are sufficiently similar to permit waiver of first article testing for a manufacturer, such as Piasecki, which had satisfied the testing requirement for the latter item. Although the record submitted by the Navy does not indicate that such a conscious effort was made prior to award of the negotiated procurement, it appears from our development of the protest that there are both material and stitching differences between the 26-C and TDU-27 targets. Furthermore, the 1966 Piasecki contract for the 26-C target did not contain either the performance or first article test requirements currently desired. We, therefore, are unable to conclude in this instance that Piasecki would have been able to adequately establish in the available time frame that the waiver in question was appropriate under ASPR § 1-1903(a) (1974 ed.). Thus, we must conclude that the Navy's decision to negotiate only with Kings Point is, in the final analysis, proper. Furthermore, Piasecki has raised the issue of whether the Kings Point target has, in fact, passed the first article performance tests for the target. However, as this issue

was raised more than a month after receipt by Piasecki of the administrative report, which disclosed the waiver regarding Kings Point, the issue is untimely and will not be considered. 4 C. F. R. § 20. 2(a)(1974).

With respect to the IFB, Piasecki contends that, as a result of the sole-source award, Kings Point was permitted to compute its price on a quantity approximately double that of the other bidders so as to arrive at a lower price per unit. Thus, it is argued that the Government's improper sole-source award also carried over to the IFB. It is the Navy's position that while Kings Point may have enjoyed a competitive advantage on the IFB because of its sole-source award, any advantage was not within the control of the Navy, cannot be charged to any improper action by the contracting officer, and is the type of normal commercial advantage enjoyed by bidders who are in production of an article on which the Government is soliciting additional requirements. Since we have concluded that the sole-source negotiated procurement was not irregular, we agree with the Navy that the advantage enjoyed by Kings Point provides no basis for objecting to the award of the advertised procurement.

Accordingly, the protest is denied.

Deputy 
Comptroller General
of the United States