

DECISION



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

FILE: B-185890

DATE: June 29, 1976

MATTER OF: Joseph Pollak Corporation

DIGEST:

1. Where bid as submitted is at best ambiguous as to whether it was qualified concerning waiver of first article testing, such bid must be considered as being conditioned on waiver and not for acceptance.
2. Waiver of requirement for first article testing is matter within sound discretion of procuring agency and will not be questioned by GAO absent showing that decision was arbitrary or capricious.
3. Failure or omission of contracting agency to provide interested party copies of protest to our Office, which protest was subsequently withdrawn, does not affect propriety of award.

Joseph Pollak Corporation (Pollak) protests the rejection of its bid by the Defense Supply Agency (DSA). Pollak's bid contained language which the contracting officer interpreted as qualifying its bid on waiver of first article testing. The bid was consequently determined to be nonresponsive when Pollak's request for waiver was denied.

The solicitation was for 25,000 three-lever switches MS-51113 under military specifications MIL-S-11021C. Pollak had produced the switch under a prior specification for over 10 years. However, the new specifications required an endurance test on the interlock lever. The endurance test was included in the new specifications, since DSA had experience with switch failure. First article waiver was denied as Pollak had never submitted an endurance test report under a Government contract.

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In response to the requirement for first article testing Pollak submitted the following:

"ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0005.	FIRST ARTICLE TEST REQUIREMENT CLIN 0005 IDENTIFIES THE FIRST ARTICLE TEST REQUIREMENT INCORPORATED BY PROVISIONS C27 AND C27a OF THE SOLICITATION. THE QUANTITY 1 TE (TEST) SIGNIFIES THE TEST REQUIREMENT. SEE PARA. (A) OF THE FIRST REFERENCED PROVISION FOR THE NUMBER OF UNITS TO BE TESTED. THIS IS NOT AN ADDITIONAL QUANTITY OF SUPPLIES BEING PROCURED (SEE PARA. (e) OF THE SAME PROVISION). OFFEROR WILL ENTER THE TOTAL PRICE FOR THIS REQUIREMENT OR 'NO CHARGE' IN THE 'AMOUNT' COLUMN. IF NEITHER IS INDICATED, THE GOVERNMENT WILL ASSUME THE REQUIREMENT IS OFFERED ON A 'NO CHARGE' BASIS. IN THE EVENT THE FIRST ARTICLE TEST AND APPROVAL REQUIREMENTS ARE WAIVED, AN AWARD WILL NOT BE MADE FOR CLIN 0005."	1	TE	NOT REQUIRED. SEE PAGE 5.	

NOTE: PER SF33A, PARA. 10, PRICES SHOWN BASED ON DELIVERY 230 DAYS AFTER AWARD (WAIVER OF FIRST ARTICLE) AND ON TOTAL OF CLIN 0001-0004 FOR 25,000 SWITCHES. SEE PAGE 2 OF AMENDMENT #4 FOR ACCELERATED DELIVERY PRICING UNDER H11.

The reference to page 5 was a request for waiver of first article testing.

"NOTE: Pollak has previously been on Qualified Parts List QPL-11021-6 dated 27 FEB 1974, Test No. 4827 on Part AR-7. Tested by TACOM in Detroit. Attaching two copies as required. Control test records available."

Based on the phrase "NOT REQUIRED" and the note referenced on page 5, the contracting officer found Pollak's bid to be qualified on waiver of first article testing. Since the request for waiver was denied by DSA's technical personnel, the contracting officer determined Pollak's bid nonresponsive.

Pollak, on the other hand, contends the questioned language does not condition its bid on waiver of first article testing but rather, offers first article approval at no charge if not waived. Alternatively Pollak argues that the contracting officer should have waived the requirement for first article testing.

The presumption that the test requirement is offered on a no charge basis arises only where nothing is indicated in the amount column. Here, Pollak entered in that column "NOT REQUIRED. SEE PAGE 5." This entry read in concert with the language immediately below it, i.e. "(waiver of first article)" creates an ambiguity whether Pollak's bid was conditional upon waiver of first article testing.

Where a bid is subject to two reasonable interpretations, under one of which it would be responsive, and under the other nonresponsive, we have consistently considered the bid nonresponsive. 53 Comp. Gen. 32, 34; id. 320 (1973). While Pollak may have intended to perform the first article test at no charge, a bidder's intention must be determined from the bid itself at the time of bid opening. Abbott Laboratories, B-183799, September 23, 1975, 75-2 CPD 171, and cases cited in text; D. Moody & Co., Inc. et al., 55 Comp. Gen. 1 (1975), 75-2 CPD 1.

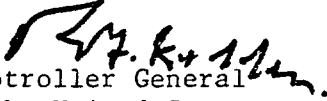
We have held that the question of whether first article testing may be waived is a matter of administrative discretion, which our Office will not disturb unless the determination is clearly shown to be arbitrary or capricious. Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121.

In this regard, the record indicates that although Pollak has produced a similar item for the Government in the past, the specifications now call for an endurance test. The endurance test was added as a result of DSA's experience with switch failure. Pollak never submitted a test report on endurance under a Government contract. Accordingly, we are unable to conclude that the contracting officer acted arbitrarily in relying on the recommendation of DSA's technical personnel not to waive first article testing, and his decision to reject Pollak's bid as nonresponsive.

Pollak's statement that the bid protest procedures of our Office were violated by the contracting agency in failing to provide it with a copy of a protest earlier filed with our Office by DC Electronics under the same procurement appears to be factually correct. Before our Office could fully develop the case, the protest was withdrawn. Therefore, the failure by the procuring agency to furnish Pollak the protest documents does not affect the propriety of the award.

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Accordingly, the protest is denied.


Deputy Comptroller General
of the United States