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**DECISION**



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

FILE: B-194872

DATE: September 24, 1979

MATTER OF: Wilco Electric, Inc. *DLG 01841*

*[Protest of Agency's Refusal to Waive First Article Testing Requirement]*

DIGEST:

*The* Waiver of first article approval testing requirement is a matter within discretion of procuring agency and will not be questioned by <sup>the</sup> General Accounting Office in absence of showing that <sup>this</sup> decision was arbitrary or capricious.

*The* Agency's decision not to waive first article approval testing <sup>was</sup> not arbitrary or capricious where record indicated that firm had not produced <sup>the</sup> item <sup>being protested</sup> for over 2 years and agency considered this to be excessive lapse in production.

*The protest was denied.*

Wilco Electric, Inc. (Wilco), protests the proposed contract award to any firm other than itself under invitation for bids (IFB) DAAK01-79-B-4193, issued by the United States Army Troop Support and *AGC00917* Aviation Materiel Readiness Command (TSARCOM) for 150 generator sets. Wilco contends that the contracting officer has arbitrarily and capriciously refused to waive first article testing for its firm. Wilco would be the low evaluated bidder if first article testing were waived.

The IFB was issued on February 23, 1979, and bids were opened on April 23, 1979. The two low bids were as follows:

	<u>Wilco</u>	<u>Libby Welding</u>
Total Without Waiver	\$758,700	\$744,490
Total With Waiver	713,700	744,490*

\* Waiver not offered by bidder.

*007070*

Wilco contends that the contracting officer should have waived first article testing with respect to its firm in accordance with paragraph D-6, "Waiver of First Article Testing - Contractor Testing," added by amendment 0002, which provides:

"The Contracting Officer may waive the requirement for first article testing if an offeror has previously produced an acceptable model. Consideration for waiver will include evaluation of quality history on produced and delivered models, evaluation of the offeror's present facilities, and availability of an acceptable sample. Offerors who claim qualification for such waiver shall indicate below the monetary amount by which their offer shall be reduced."

Wilco states that its firm had produced the identical item under contract DSA400-75-C-5068 awarded October 6, 1976, and completed March 28, 1977. Wilco also lists several contracts for subassemblies which it states belong to the identical end item and indicates that one of these contracts was completed as recently as June 9, 1978. Under these circumstances, Wilco contends that the contracting officer should have waived the requirement for first article testing.

On May 1, 1979, the contracting officer requested the Directorate for Product Assurance to review and evaluate Wilco's request for waiver based upon successful completion of first article tests for generator sets purchased under Defense General Supply Center contract DSA400-75-C-5068. The product Assurance office recommended that Wilco be denied the waiver because the firm had not produced the generator sets since March 1977.

Defense Acquisition Regulation (DAR), part 19 covers first article testing and lists the factors to be considered by the procuring agency in determining whether first article testing is required. DAR § 1-1902 (1976 ed.) provides:

"(a) \* \* \* First Article approval tests are particularly appropriate when:

(1) the interest of the Government requires assurance that a product is satisfactory for its intended use when the product--

"(A) has not been previously furnished by the contractor to the Government; or

"(B) has been previously furnished by the contractor to the Government but there have been subsequent changes in processes or specifications, or production has been discontinued for an extended period of time; or

"(C) is described by a performance specification; \* \* \*."

In accordance with United States Army Materiel Development and Readiness Command Regulation (DARCOMR) 700-34 and Army Regulation (AR) 702-9, the contracting officer determined there had been an excessive lapse in production and, therefore, "a complete product assurance test program, including First Article Testing, applies." AR 702-9 requires first article testing whenever there has been a lengthy delay or interruption of production (normally 1 year or more).

Concerning Wilco's contention that its completion of contracts for major subassemblies belonging to the identical end item, as recently as June 9, 1978, should have qualified it for first article waiver, the Army takes the position that all of these contracts, except

one, had excessive lapses in production (21-30 months) and were all for production of component parts and not the end item itself. The Army states that production of component parts does not assure the ability to produce an acceptable end item.

The decision to waive or not waive first article testing for a particular bidder is essentially an administrative one which we will not disturb unless it is clearly arbitrary and capricious. Bogue Electric Manufacturing Co., B-193878, May 10, 1979, 79-1 CPD 330; Libby Welding Company, Inc. B-186395, February 25, 1977, 77-1 CPD 139. In the Libby Welding case, in finding that the Government's refusal to waive was not arbitrary, our Office stated:

"The clause does no more than reserve to the Government the right to waive first article testing for any bidder found to be qualified for such a waiver. While prior acceptance by the Government of identical or similar supplies is a requirement for first article waiver, we do not believe that such acceptance automatically requires the Government to waive first article approval testing in all subsequent cases, since there may well be particular facts or circumstances which would warrant a determination not to waive first article testing and the clause itself requires a showing that prior acceptance is 'presently appropriate' as a basis for waiver."

In our opinion the record does not establish that the contracting officer's refusal to waive first article testing for Wilco is arbitrary or capricious. First of all, it is not disputed that Wilco's prior contract for generator sets was completed approximately 2 years ago. With regard to the additional contracts for major subassemblies identified by Wilco in its protest and which it contends help to qualify it for first article waiver, the record indicates that, with the exception of contract DAAK01-78-C-0053, all of these contracts

were completed approximately 2 years ago and the procuring activity considers this an excessive lapse in production. With regard to contract DAAK01-78-C-0053, there has already been a lapse in production of over 12 months. Further, the contracting officer states that all of the contracts listed in the protest letter identify component parts, not end items, and production of component parts does not assure the ability to produce an acceptable end item. In any event, these contracts would not be for consideration since they were not listed in Wilco's bid.

The record does not support Wilco's further contention that the amendment incorporating the waiver clause was issued because the procuring activity determined that Wilco was eligible for the waiver. The amendment was issued because the contracting officer determined that the clause should be included in all solicitations which contain first article provisions (unless it is known that first article approval will be required of all bidders or offerors) so that any contractor who may be eligible for waiver may request such a waiver. Further, the contracting officer reports that in a March 9, 1979, telephone conversation, the president of Wilco was advised and he stated he understood that the incorporation of the waiver clause should not in any way be interpreted as the Government's concurrence that Wilco would obtain a waiver.

The contracting officer states that he is not familiar with Wilco's reference to the "usual unwritten rule" that a waiver request is acceptable if first article tests were completed within 3 years of a bid opening. The contracting officer states that the determination of a contractor's eligibility, insofar as the amount of time lapsed since the item was last produced for the Government is concerned, is based upon guidelines set forth in the DAR, DARCOMR 700-34 and AR 702-9. Other factors considered include: quality history on produced and delivered models, the contractor's present facilities, and availability of an acceptable model.

Wilco states that TSARCOM has in recent months awarded at least one contract (to John R. Hollingsworth Co., contract No. DAAK01-78-C-1823, dated September 29, 1978) for engine generator sets waiving the requirement for first article tests under circumstances identical to those in the present case. Hollingsworth based its request for waiver on a June 10, 1975, contract under which accepted model(s) were produced, while Wilco referenced production under an October 6, 1976, contract.


In response to this contention, the procuring activity states that the items being procured under the Hollingsworth contract were for the Navy and the Air Force and were not the same items being procured under the subject IFB. Since the Navy and the Air Force agreed to waive the first article test, TSARCOM had no objection to the waiver. Further, the Army states the generator sets procured under the Hollingsworth contract were 5 kilowatt, 60 horsepower, which is different from the sets being procured under the subject IFB, which are 10 kilowatt, 400 horsepower.

Wilco also asserts that the generator sets in the Hollingsworth contract and the Wilco bid are both procured to military specification MIL-G-52732 which is a standard specification covering a family of generators with ratings from 0.5 to 10 kilowatts.

The procuring activity reports that although the specification covers a family of generator sets, the detailed requirements for each specific set are different. Further, the Air Force and Navy are not governed by DARCOM and Army regulations.

The Army also disagrees with Wilco's statement that the contracts listed in its May 9, 1979, protest letter demonstrate continuity of production. The most recent contract for generators (not generator sets) listed in Wilco's May 9 letter was for 34 units which in the opinion of the Army does not represent continuous production. It is also reported that if the first article test is waived for Wilco for the subject IFB, 18 tests required by the specification will not be conducted at any time during production.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States