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DECISION



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

FILE: B-207558 **DATE:** August 10, 1982

MATTER OF: Southwest Truck Body Company

DIGEST:

Waiver of the first article testing requirement is based on administrative discretion and GAO will not disturb an agency's decision to deny waiver unless it is clearly arbitrary or capricious. The agency's decision to require first article testing for items produced for the first time under revised specifications is not arbitrary or capricious since the bidder's ability to perform the contract under the new specifications has never been tested or evaluated.

Southwest Truck Body Company (Southwest) protests the denial to waive first article testing under solicitation No. DAAE07-82-B-5109, issued by the United States Army Tank-Automotive Command (TACOM). Southwest requests a waiver of first article testing and award under the solicitation. We deny the protest.

The solicitation was issued on February 16, 1982, for M720 dolly sets with capacity to lift 3-ton transportable shelters. A requirement for first article testing was included in the solicitation and bidders were requested to quote the cost for support of the testing with the bid price. Southwest's bid was \$7,727 per unit and included a request for waiver of first article testing requirements. Saginaw Products Corporation's (Saginaw) bid was \$7,551.28 per unit and did not include a request for waiver of the testing. Saginaw was the low bidder but Southwest would become the low bidder if the waiver was granted since Southwest's bid price would be reduced by the amount stated as the cost of first article testing.

The solicitation provided that when supplies identical or similar to those being procured have been previously furnished by the bidder and accepted

by the Government, the requirement for first article testing may be waived. Southwest submitted a list of three prior contracts for M720 dolly sets to establish its eligibility for waiver. In addition, Southwest listed a current contract for M720 dolly sets and current contracts for M840 dolly sets, which are of larger capacity than the M720 dolly sets, as further evidence that the first article requirement should have been waived.

TACOM denied the waiver of first article testing because: (a) Southwest's current contract for M720 dolly sets has a first article testing requirement that must be satisfactorily met by Southwest prior to waiver on this solicitation, (b) M720's previously furnished by Southwest were procured under specification "F" as opposed to the new revised specification "G," which includes a new environmental operation requirement, (c) pursuant to DARCOM Regulation 700-34, there has been a lapse of more than 1 year in Southwest's production, and (d) M720 contains many commercial components critical to operation of the vehicle that may or may not be the same as those furnished on a previous Southwest contract and, therefore, may have an adverse impact on serviceability and reliability of the vehicle.

In response, Southwest contends that no new operational requirements have been included in the specification change. Furthermore, Southwest contends that there has been no lengthy delay or interruption in production. Southwest also asserts that the Government has control over the source and design of critical components which are covered by Government design drawings and identified on a qualified products list (QPL). Therefore, Southwest contends that the contracting agency's refusal to waive first article testing is arbitrary and capricious. Finally, Southwest contends that the Government's reliance on the specification change as a basis to deny the waiver is inconsistent with inclusion of the waiver of the first article testing provision in the solicitation since it appears impossible for a current producer to be granted a waiver.

GAO has consistently held that the decision to waive first article testing for a particular bidder is essentially an administrative one which our Office will not disturb unless it is clearly arbitrary or

capricious. Stocker and Yale, Inc., B-207016, July 6, 1982, 82-2 CPD _____. In Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139, we held that when identical or similar supplies have been successfully furnished, the Government may, but is not required to, waive first article testing.

At the outset, we disagree with Southwest's contention that no new operational requirements were included in the specification change. Clearly, the new specification requires that M720 dolly sets operate in temperatures from minus 50 degrees to plus 125 degrees Fahrenheit. We find that Southwest has never produced or tested M720 dolly sets using the new specification. Furthermore, Southwest has not satisfactorily completed first article testing on the current contract for identical M720 dolly sets. We also cannot agree that Southwest's previous successful contracts for M720 dolly sets verify its ability to produce the dolly sets in accordance with the new requirement. Finally, TACOM makes clear that the M840 dolly set does not qualify as a similar vehicle because the M840 has a heavier load capacity and a completely different design package which requires different manufacturing fixtures. Accordingly, we conclude that the contracting officer's decision to deny waiver of first article testing was a reasonable exercise of administrative discretion.

With respect to Southwest's contention that there has not been a lengthy delay in production, the contracting agency determined that 30 months have lapsed since Southwest completed its last contract. However, Southwest contends that only 18 months have lapsed. Army Regulation 702-9 (March 1977) provides that there should be first article testing by a former producer when there has been a lengthy delay or interruption of production-- normally 1 year or more. Although there is dispute about the appropriate measure of the period of interruption, it is clear that more than 1 year has lapsed. Accordingly, we conclude that the contracting agency's decision to deny waiver is consistent with the agency's regulation.

Contrary to Southwest's suggestion that the Government should not be concerned about the source and design of the commercial components of the dolly sets since they are furnished pursuant to QPL's and Government design drawings, TACOM states that there are many commercial components

over which it has no control. Consequently, we cannot conclude that the contracting agency's decision was arbitrary or capricious. See Morse Diving Equipment Company, Inc., B-195289.2, January 18, 1980, 80-1 CPD 57.

In regard to the propriety of including the first article waiver provision in the solicitation when it appears there is no likelihood that a waiver will occur, we have held that the waiver 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. Thus, the inclusion of the waiver clause does not confer an absolute right to have the waiver granted. See Libby Welding Company, *supra*. In any event, the agency's decision to deny a waiver was based on many factors, not only the specification change as suggested by Southwest. We conclude, therefore, that the issuance of the solicitation with the first article waiver provision was appropriate.

The protest is denied.

for *Milton J. Aroslan*
Comptroller General
of the United States