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DECISION



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

FILE: B-189176

DATE: November 3, 1977

MATTER OF: Mars Signal Light Company

DIGEST:

1. Claim for monetary losses allegedly sustained because of asserted improper agency approval of competitors' first article test reports is denied since first article testing requirements involves administration of contract and is a matter between contractors and agency and confers no enforceable rights on contractors' competitors.
2. Waiver of first article testing is not improper where bidder previously furnished and Government accepted identical or similar item, notwithstanding assertion that original approvals of first article test reports were improper.

Mars Signal Light Company (Mars) has filed two claims aggregating \$732,275.88 for losses it allegedly incurred as a result of assertedly invalid first article approvals granted by the Defense Logistics Agency (DLA), Defense General Supply Center (DGSC), Richmond, Virginia, to two of Mars competitors. The basis for the claims is that, had the first article approvals not been granted, Mars would have (1) received various contracts for the items covered by the approvals, (2) made a profit on each item, (3) realized savings through bulk buying, and (4) increased its commercial business, which also would have been profitable.

The first claim involves DGSC approval of first article test reports submitted by Julian A. McDermott Corporation (McDermott) and Federal Sign and Signal Corporation (Federal) in 1972 and 1973, respectively, in accordance with contracts awarded to these firms for certain 14-volt and 28-volt direct current rotating warning lights for use on emergency, security, utility or maintenance vehicles and subsequent first article test waivers granted to McDermott and Federal whenever requested in connection with other contracts, for the lights covered by the approvals, awarded during the period 1973-1976.

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The second claim involves contracts awarded to Federal by DGSC from December 30, 1969, to June 4, 1975, for an electric motor operated vehicular siren, first article test report approval for which was granted by DGSC on April 21, 1970. Mars asserts that McDermott's and Federal's first article test reports should not have been approved because the reports did not show compliance with various specification requirements, and that since the original approvals were improperly given, the subsequent waivers were also improper.

We are aware of no basis on which these claims may be allowed. The contractual requirement to submit an acceptable first article test report involves administration of the contract which is a matter solely between the Government and the contractor, and which confers no rights on competitors of the contractor. See, e.g., Colorguard Corporation, B-189893, October 4, 1977, 77-2 CPD ____; Dempster Dumpster Systems, B-186678, June 30, 1976, 76-1 CPD 429; Edward E. Davis Contracting, Incorporated, B-179719 - B-179720, January 29, 1974, 74-1 CPD 37. Thus, even if it was improper for the contracting officer to accept the first article test reports, those approvals do not give rise to any legally enforceable rights in Mars.

Secondly, assuming the law did recognize such rights in Mars, the claim could not be honored because it is too speculative, since there has been no showing that Mars in fact would have been awarded the contracts to which it alludes.

Thirdly, even if Mars is correct with respect to the initial approvals of the first article test reports, it does not follow that the subsequent waivers of first article tests were improper. The Armed Services Procurement Regulation (1976 ed.) provides in section 1-1903(a) that:

"/t/h/ solicitation for a fixed-price type contract which is to contain a requirement for first article approval shall inform bidders or offerors that where supplies identical or similar to those called for have been previously furnished by the bidder or offeror and have been accepted by the Government, the requirement for first article approval may be waived by the Government. * * *" (Emphasis added.)

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DLA reports that solicitations issued by DGSC for fixed-price type contracts which require first article approval contain a provision almost identical to that quoted above. The provision predicates waiver of first article approval not on prior first article tests but on the prior acceptance by the Government of identical or similar supplies. DLA further reports that first article testing was waived for McDermott and Federal because they had furnished and the Government had accepted identical items under the contracts awarded in 1972 and 1973. Thus, the waivers appear to be consistent with the regulations and solicitation provisions. See Boston Pneumatics, Inc., 56 Comp. Gen. 689 (1977), 77-1 CPD 416.

Under certain limited circumstances, the law will recognize the validity of a claim filed against the Government by an unsuccessful bidder or offeror. Where it is shown that a bid or proposal was not fairly or properly considered for award because of subjective bad faith or actions contrary to law or regulation on the part of procuring officials, or that there was no reasonable basis for the agency's action, bid or proposal preparation expenses may be awarded. Keco Industries, Inc. v. United States, 492 F. 2d 1200 (Ct. Cl. 1974); The McCarty Corporation v. United States, 499 F. 2d 633 (Ct. Cl. 1974); Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219; T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. However, there is no evidence of record that Mars is entitled to bid preparation costs. In fact, it is not even clear from the record that Mars submitted bids for any or all of the contracts awarded to McDermott and Federal. Moreover, while a valid claim may result in the award of the costs of preparing a bid or proposal, loss of anticipated profits and other speculative damages such as those claimed by Mars are uniformly held not to be compensable. See Keco Industries v. United States, *supra*; Keco Industries, Inc. v. United States, 428 F. 2d 1233 (Ct. Cl. 1970); Heyer Products Company v. United States, 140 F. Supp. 405 (Ct. Cl. 1956); Machinery Associates, Inc., B-184476, November 18, 1975, 75-2 CPD 323.

The claim is denied.

Acting Comptroller General
of the United States