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**DECISION**



20764

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

*Boyle*

FILE: B-204463

DATE: February 8, 1982

MATTER OF: Drexel Industries, Inc.

**DIGEST:**

Protest against contracting officer's determination to waive first article testing is denied because the protester has not shown that the determination was arbitrary or capricious. The record shows that waiver was based on (1) the advice of technical personnel that the awardee had successfully completed first article testing on a similar (but smaller capacity) truck and (2) in 1968, the awardee passed first article testing on the same capacity and type truck now being procured.

Drexel Industries, Inc. (Drexel), protests the award of a contract to Pettibone Corporation under invitation for bids (IFB) No. DLA700-81-B-0821 issued by the Defense Logistics Agency (DLA) for 12 explosion-proof, 6,000-pound capacity, forklift trucks. Drexel contends that it is entitled to award because DLA should not have waived first article testing for Pettibone and DLA should have waived such testing for Drexel, making Drexel the low bidder. We deny Drexel's protest because DLA's waiver of first article testing for Pettibone was not shown to be arbitrary or capricious; thus, Pettibone was the low bidder.

Pettibone's bid price for all items totaled \$458,498, including \$30,000 for first article testing. Drexel's bid price for all items totaled \$474,740, including \$21,000 for first article testing. Thus, Drexel would be entitled to award as the low bidder only if DLA refused to waive first article testing for Pettibone but waived it for Drexel.

DLA evaluated the low bid submitted by Pettibone and determined that, under Defense Acquisition Regulation (DAR) § 1-1903(a) (1976 ed.), first article

testing should be waived because (1) Pettibone passed first article testing of its 4,000-pound, explosion-proof truck, which DLA's technical personnel considered substantially similar to the item being procured and (2) in 1968, Pettibone passed first article testing of its 6,000-pound, explosion-proof truck, which was substantially similar to the item being procured. Thus, DLA determined that, with the waiver of first article testing for Pettibone, Pettibone was the low bidder whether or not first article testing was waived for Drexel, so DLA did not consider the propriety of waiving first article testing for Drexel.

Drexel contends that DLA's waiver determination is arbitrary because Pettibone's 4,000-pound truck is not substantially similar to the item being procured. Drexel contends that the contracting officer overrelied on DLA's technical personnel in making the waiver determination. Drexel contends that DLA's technical personnel made a recommendation without adequate information regarding the features of Pettibone's 4,000-pound truck and the item being procured. In Drexel's view, the 50-percent difference in capacity (4,000- versus 6,000-pound capacity) is evidence that the two items are not substantially similar. This is because, while the common components on both trucks are satisfactory for 4,000-pound loads, they cannot handle the 50-percent greater load. Drexel points to nine specific instances where the Pettibone 6,000-pound truck cannot pass tests which the Pettibone 4,000-pound truck passed. For example, Drexel states that the heavier truck without an upgraded motor, electrical system, and drive system cannot meet the acceleration test. Drexel also states that the heavier truck requires upgraded brakes, linkage, and steering to pass stopping distance tests.

Drexel does not comment on the other basis upon which waiver was granted, the fact that in 1968 Pettibone passed first article testing of its 6,000-pound truck.

Pettibone states that its 6,000-pound trucks passed many first article testings, including the 1968 successful test of its explosion-proof truck. Pettibone indicates that its current model has solid-state control to provide

a better product than the one tested in 1968. Pettibone states that it is the primary source of explosion-proof-type vehicles for the Federal Government.

Our Office has held that waiver of first article testing for a particular bidder is essentially an administrative determination which will not be disturbed unless it is clearly shown to be arbitrary or capricious. See, e.g., Morse Diving Equipment Company, Inc., B-195289.2, January 18, 1980, 80-1 CPD 57; Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121. From the IFB and DAR § 1-1903(a), bidders were informed that the contracting officer may waive the requirement for first article testing where supplies identical or similar to those specified in the IFB have been previously furnished by the bidder and have been accepted by the Government.

Here, the record shows that the contracting officer's determination was supported by DLA's technical personnel, who considered that the 4,000-pound truck was similar to the 6,000-pound truck. Further, their opinion was subsequently confirmed after considering Drexel's evidence. In addition, the contracting officer's determination was based on Pettibone's successful completion of first article testing in 1968 of its 6,000-pound, explosion-proof truck, which the contracting officer concluded was similar to the item being procured--a basis not challenged by Drexel. Also, we note that the record contains Pettibone's uncontested statements concerning previous delivery of 6,000-pound, explosion-proof trucks to the Government, which could provide a third independent basis to support the waiver determination.

Finally, we are not persuaded by Drexel's argument that components acceptable for the 4,000-pound truck must be upgraded for the heavier truck. Instead, we are persuaded by Pettibone's explanation that the common components are designed to meet the requirements of the heavier truck and could be but have not been downgraded to meet the requirements of the lighter truck. Pettibone's position seems to be supported by the 1968 test results and Pettibone's past deliveries of 6,000-pound, explosion-proof trucks to the Government.

Accordingly, Drexel has not provided a clear showing that the contracting officer's waiver determination was arbitrary or capricious.

In view of this conclusion, Drexel's contentions-- regarding the contracting officer's selection of type III versus type I provisioning (the outcome of which would not have made Drexel the low bidder), whether the contract award was made prior to the resolution of Drexel's protest, and Drexel's entitlement to waiver of first article testing--need not be considered on the merits because the resolution of these contentions would not affect the validity of the award to Pettibone as the low bidder.

We deny the protest in part and dismiss the protest in part.

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