



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kinross Manufacturing Corporation
File: B-229974
Date: March 9, 1988

DIGEST

Where record shows that prior producer will be performing for the first time a critical and hazardous task which firm previously subcontracted, the General Accounting Office will not question a determination not to waive first article testing requirement.

DECISION

Kinross Manufacturing Corporation protests the award of a contract to TCP-Technical Plastics Corporation under invitation for bids (IFB) No. DAAA09-87-B-0082, issued by the U.S. Army Armament, Munitions and Chemical Command (AMCCOM), Rock Island, Illinois, for the acquisition of 118,320 CXU-4A/B signal cartridges.^{1/}

We deny the protest.

AMCCOM issued the IFB as a total small business set-aside on September 21, 1987. The requirement was solicited on a "with and without first article" basis and bidders were cautioned that their production of similar or identical items would not necessarily mean the first article approval test would be waived.^{2/} The following four bids (unit prices) were received by the bid opening date of November 5:

^{1/} The CXU-4A/B signal cartridge is a plastic container containing four glass vials fill with titanium tetra-chloride. The CXU-4A/B is loaded into the nose cavity of a 500 pound practice bomb. When the bomb is dropped and hits the ground, the glass vials break and the tetrachloride hits the atmosphere creating smoke.

^{2/} Section L-4 of the solicitation.

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<u>Offeror</u>	<u>W/FA</u>	<u>W/Out FA</u>
TPC-Technical Plastics	\$2.92	No bid
Del Manufacturing	3.16	3.16
Kinross Manufacturing	3.3765	2.8765
Pyrotechnics Industries	2.975	No bid

Preaward surveys of Kinross, TPC, and Pyrotechnics were initiated by the agency, but were withdrawn on November 13. Kinross, by letter of November 19 to AMCCOM, expressed its concern at the agency's withdrawal of the preaward survey evaluation and argued that it should be given a waiver of first article because of its earlier production of signal cartridges. On November 30, the agency sent a letter to Kinross informing it of the agency's decision to not waive first article testing for any contractor. The letter further revealed the "with first article" prices of TPC and Pyrotechnics. On December 14, Kinross again wrote to AMCCOM and advised the contracting officer of an apparent mistake in its "with first article" bid which it claims was not noticed until the November 30 letter from AMCCOM was received. Kinross claimed that its "with first article" bid should have been \$2.9265 and attached work papers to verify an addition error. Kinross also reiterated its belief that it was eligible for waiver of first article because it is a prior producer. The agency advised Kinross that correction of its bid would not be pursued. On December 30, award was made to TPC as the lowest responsive bidder on a "with first article" basis. This protest followed on January 12, 1988.

The agency refused to waive first article testing for Kinross because it would be performing a critical and hazardous manufacturing process for the first time, work which it had subcontracted under the prior contract. Also, the agency found there would be a 9-month lapse in production from the end of the prior contract to the start of this contract. The agency was concerned that Kinross would lose technical staff during this time and that the equipment needed for the work might be inadequately maintained and calibrated due to the lack of use. Finally, the agency declined to waive first article because Kinross initially failed to supply a conforming first article under the prior contract.

Specifically, Kinross alleges that AMCCOM's decision to require first article tests for the procurement is not justified because several past producers of the signal cartridges, including Kinross, submitted bids under the subject solicitation. Kinross further contends that AMCCOM improperly disregarded its claim for correction of an apparent mistake in bid. For the reasons stated below, we find Kinross' allegations to be without merit.

A contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to assure product compliance with the specifications. Lunn Industries, Inc., B-210747, Oct. 25, 1983, 83-2 CPD ¶ 491. The determination of whether an offeror qualifies for waiver of first article testing is within the discretion of the contracting agency, and we will not question a determination not to waive first article testing absent bad faith, fraud or a clear showing of an abuse of discretion. Airline Instruments, Inc., B-223742, Nov. 17, 1986, 86-2 CPD ¶ 564.

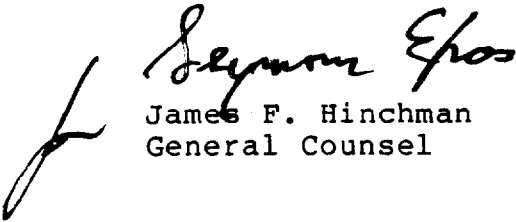
Kinross contends that it has produced signal cartridges under a prior contract and has the capability to perform all aspects of the required assembly and loading of the signal cartridges. AMCCOM acknowledges Kinross' prior contracts for this item. However, the agency reports that under this contract, for the first time, Kinross would be performing the loading of glass vials with titanium tetrachloride, a hazardous substance, which is a critical and hazardous process. Under the prior contract with AMCCOM, Kinross supplied the signal cartridges, but Kinross simply packaged the item, placing loaded glass vials into the plastic containers, attaching labels, and placing them into boxes. Kinross used a subcontractor to perform the critical and hazardous task of loading the glass vials. That subcontractor, the only manufacturer set up to perform this operation, has since gone out of business. Therefore, under the subject solicitation Kinross would have to load the glass vials, a task which it has never before accomplished. Kinross maintains that this is a simple task and that its proposed use of its prior subcontractor's equipment would ensure a safe production of the signal cartridges.^{3/} The use of the prior subcontractor's equipment does not negate the fact that loading the glass vials is a new and hazardous task for which Kinross has no experience. We therefore find reasonable the agency position for declining to waive first article testing.

In any event, we also find reasonable the agency's other bases for requiring first article. First, the agency reports that Kinross will not have produced the article for 9 months and questions whether, without a contract for this period, Kinross will have maintained a technical staff and the critical production and inspection equipment necessary to perform the work. Second, the agency points out that

^{3/} While titanium tetrachloride is not considered lethal upon inhalation, it is toxic and can cause respiratory problems.

Kinross failed its initial first article under the prior contract. We do not find it unreasonable to require a first article for a prior producer, where the product has not been produced for a period of time, raising the concern that the firm has not successfully obtained or maintained an experienced workforce or the specialized equipment, and where the agency received a nonconforming first article initially from the contractor under the prior contract, even though the contractor eventually passed first article. See Honeycomb Company of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579.

With respect to Kinross' claim of an alleged mistake in its "with first article" bid, we note that Kinross' "corrected" price as claimed would be \$2.9265 which means it would still not be in line for award because TPC bid a lower price of \$2.92. Therefore, we will not consider its allegation of an alleged mistake.


James F. Hinchman
General Counsel