



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: SKIDRIL, Inc.
File: B-241280
Date: January 30, 1991

Richard L. Moorhouse, Esq., Dunnells, Duvall & Porter, for the protester.
Thomas M. Hillin, Esq., Defense Logistics Agency, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The procuring agency reasonably did not waive a first-article test for a protester that had not passed a first-article test for the item in accordance with the solicitation requirements.
2. The procuring agency reasonably waived a first article test for the awardee, which had previously passed the test for the same item and has subsequently been supplying an acceptable product to the agency.

DECISION

SKIDRIL, Inc. protests the award of a contract to Berema, Inc., under request for proposals (RFP) No. DLA700-89-R-2261, issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency, for the procurement of 104 pneumatic drills in accordance with Military Specification MIL-B-734E. SKIDRIL contends that the agency improperly waived the first article test requirement for Berema, but not for SKIDRIL.

We deny the protest.

The RFP provided for a first article test in accordance with MIL-B-734E; this test could be waived in appropriate circumstances. Timely offers were received from only two firms, Berema and the Canadian Commercial Corporation on behalf of SKIDRIL, both of which eventually submitted best and final offers (BAFO). SKIDRIL's BAFO price was \$2,265 per unit, plus \$15,000 for the first article test. Berema's BAFO price was \$2,395 per unit, with no charge for the first

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article test. DCSC waived the first article test for Berema, but not for SKIDRIL. On September 14, the contract was awarded to Berema, as the low responsive and responsible offeror, for a total contract price of \$249,080. SKIDRIL's offered price, including first article testing, was \$250,560.

The first issue is whether the DCSC improperly failed to waive the first article test for SKIDRIL. The protester contends that it is entitled to the waiver of the test requirements for at least two reasons: (1) it had successfully passed a test for the identical item under a 1988 contract with the Canadian Department of National Defense, and (2) it was currently undergoing a first article test on this item under a contract with the United States Tank and Automotive Command (TACOM).

An agency's decision to waive first article testing is largely discretionary and is for the protection and benefit of the government, and will not be disturbed unless shown to be unreasonable. Whittaker Technical Prods., Inc., B-239428, Aug. 29, 1990, 90-2 CPD ¶ 174; Steam Specialties Co., Inc., B-218156, May 14, 1985, 85-1 CPD ¶ 541.

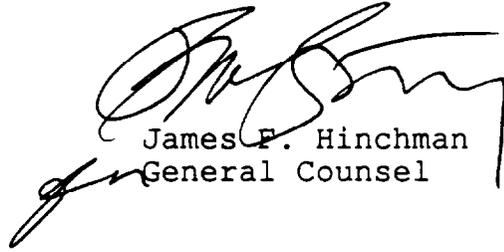
The DCSC maintains that the testing requirement was not waived for SKIDRIL because the protester had neither previously passed a first article test for this item with the agency, nor furnished information (including a test report) required for the evaluation of a prior waiver. Specifically, the record indicates that while SKIDRIL was undergoing first article testing for this item under a TACOM contract, it had not successfully completed this test when the award was made to Berema. Moreover, DCSC was informed that although this item had been supplied to and tested by the Canadian government, the Canadian test did not fully comply with the first article testing requirements of MIL-B-734E. In any case, neither SKIDRIL's proposal, nor its protest, furnished any test results that show compliance with the MIL-B-734E test requirements. While SKIDRIL asserts that this is a commercial item for which first article testing is not ordinarily required, the fact remains that MIL-B-734E and the RFP expressly required such testing. In sum, SKIDRIL has produced no evidence that indicates the agency's decision not to waive the first article test was unreasonable.

SKIDRIL also complains that DCSC improperly waived the first article test for Berema. While SKIDRIL concedes that Berema passed the first article test under a previous contract, it contends that "this test, more than five years old, fails to provide any reasonable support for the Contracting Officer's waiver decision, inasmuch as those 1985 test results arguably are no longer valid." The protester argues that the prior test data is stale due to: (1) the extended passage of time, and (2) significant modification of the specifications.

DCSC maintains that the testing requirement was properly waived for Berema, "based on it successfully passing a [first article test] in 1985 and successfully supplying the item to DCSC since then." This is a reasonable basis upon which to waive a first article test, and there is nothing wrong with a procuring agency taking advantage of the lower price and shorter delivery time, which may result from such a waiver. See Bachan Aerospace Corp., B-227124, Aug. 31, 1987, 87-2 CPD ¶ 210. Given that Berema has been successfully supplying this item since the test, the fact that the test was in 1985 does not indicate that DCSC's grant of the waiver was unreasonable. Cf. Comdyne I, Inc., B-232574, Dec. 21, 1988, 88-2 CPD ¶ 611, cited by the protester, where the agency reasonably declined to waive first article test for a protester because the 9 year old test report submitted in support of the waiver request was for a significantly different product. While SKIDRIL contends that there have been significant changes to MIL-B-734E, particularly the noise level requirements, DCSC asserts that these changes are not so significant as to require retesting.

Based on our review of the record as discussed above, we cannot say that the agency's discretionary decision to waive first article testing for Berema, a successful supplier of this item, was unreasonable. Cf. Steam Specialties Co., B-218156, supra, cited by the protester, where we recommended that the agency reconsider whether to waive a first article test because, unlike here, nothing in the record indicated that a waiver to first article testing should be granted. In any case, since Berema offered to perform the first article test for no charge, SKIDRIL was not prejudiced by DCSC's decision to waive first article testing for Berema, inasmuch as first article testing properly was not waived for SKIDRIL and SKIDRIL's price would not be lower than Berema's even if the first article test was not waived.

The protest is denied.



James F. Hinchman
General Counsel