



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kemp Industries
File: B-241078.2
Date: February 26, 1991

David B. Harlow for the protester.
Craig E. Hodge, Esq., and Major Norman A. Weeden, Department of the Army, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably declined to waive first article testing on regulator valve and reservoir units to be used on artillery pieces for a firm that had furnished a similar valve that was found to be defective, notwithstanding that the agency granted a waiver of first article testing for the regulator valve and reservoir units on a previous procurement.

DECISION

Kemp Industries protests the award of a contract to H&R Parts Company by the Army Armament, Munitions and Chemical Command, under request for proposals (RFP) No. DAAA09-90-R-0749 for 62 regulator valve and reservoir units to be used on the M109 self-propelled 155 millimeter (mm) howitzer. Kemp challenges the Army's decision not to waive the first article testing requirement under the RFP.

We deny the protest.

The regulator valve and reservoir unit regulates the amount of fluid and provides hydraulic fluid pressure for the system involved in elevating, depressing, and locking the gun tube on the 155 mm howitzer. A defect in this item could affect the accuracy of the artillery piece to the point of proving a hazard to friendly troops.

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Clause L-6 of the RFP advised offerors that a first article approval test was required unless waived. That provision further states:

"The fact that an offeror has previously furnished the item does not necessarily mean the first article will be waived."

The Army received six timely proposals, including those of H&R Parts and Kemp Industries. H&R Parts offered the lowest price that was contingent upon the waiver of first article testing as well as the lowest price without waiver of first article testing. Kemp's price was only lower than H&R Parts' price if first article testing was waived for Kemp but not for H&R Parts. The agency determined that it would be in the best interest of the government to require first article testing for all offerors. Consequently, the Army awarded the contract on August 22 to H&R Parts as the low priced offeror. Kemp protested to our Office on September 10.

We initially dismissed Kemp's protest on October 12 because it appeared to be untimely under our Bid Protest Regulations since it was filed more than 10 days after the protester received notice of the proposed award. 4 C.F.R. § 21.2(a)(2) (1990). In this regard, the agency advised us that the protester received notice of the award by letter dated August 15, yet Kemp did not protest until September 10. However, Kemp has provided un rebutted evidence that it only first became cognizant of its basis for protest on September 4. It was on that date it received information under the Freedom of Information Act that indicated that its request for waiver of first article testing had been denied and that it would have been the low offeror had the waiver been granted. Thus, we consider Kemp's protest to be timely.

Kemp objects to the Army's refusal to waive the first article testing requirement on the ground that the firm is currently producing the same regulator and reservoir valve units under another contract with the Army (No. DAAA09-90-C-0147) where first article testing was waived. The record shows that the contracting officer here was advised by the quality assurance manager that first article testing of the regulator valves could not be waived for Kemp because defects had been discovered in items delivered under contract No. DAAA09-87-C-1233 to supply locking valves for the M109 howitzer. The locking valves similarly control the hydraulic fluid necessary to raise, lower and steady the howitzer's gun tube. Kemp's valves reportedly leaked to the point that they were considered a safety hazard, which resulted in the issuance of

several quality deficiency notices. According to the Army, it had already waived first article testing on Kemp's previous regulator valve and reservoir unit contract when the agency was made aware of deficiencies under the contract for locking valves.

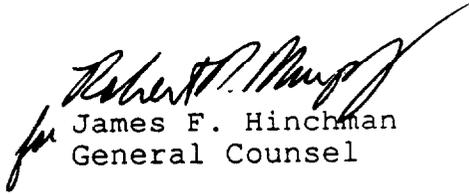
First article testing is for the protection and benefit of the government and a waiver clause does not confer the right to a waiver upon any particular offeror. An agency's decision to waive first article testing is largely discretionary and will not be disturbed unless shown to be unreasonable. SKIDRIL, Inc., B-241280, Jan. 30, 1991, 91-1 CPD ¶ ____; Comdyne I, Inc., B-232574, Dec. 21, 1988, 88-2 CPD ¶ 611.

Kemp argues that the problems with the locking valve may not have been its fault and that the locking valve is a more complicated part than the regulator valve and reservoir unit in question here. The agency maintains that both parts are produced in a similar fashion and perform basically the same function. Kemp has not demonstrated that the problems with the locking valves were not its fault. In response to the Army's shipping the defective valves to Kemp, the firm stated in an April 5, 1991, letter that the package contained no material to prevent damage in shipment, that the firm would not evaluate the valves unless paid by the government, and that the warranty had expired on the parts. In light of past experience with the protester's locking valve and given the Army's broad discretion to require first article testing, we will not question the Army's decision to require first article testing of Kemp's regulator valve and reservoir unit. See Comdyne I, Inc., B-232574, supra.

Although the Army asserts that it was unaware of the defective locking valves when it made the previous award, which included waiving first article testing for the regulator valves and reservoir units, Kemp has provided documentary evidence that first article testing was actually waived on the prior contract for this part in March 1990, close to 2 months after the government's discovery of the defective locking valves. It may be that the Army officials responsible for waiver of first article testing were unaware of the defective valves or their significance to this requirement. In any event, the contemporaneous waiver of first article testing on another contract does not, in itself, render unreasonable the agency's decision here to deny a waiver of first article testing to Kemp. This is particularly so since no deliveries on the previously awarded regulator valve and reservoir units have been made by Kemp to verify the acceptability of the units. Even if the Army erred in previously granting a waiver of

first article testing, it could now reasonably determine that there was sufficient risk that Kemp would produce a nonconforming product, based on Kemp's inadequate performance of the locking valve contract, to require first article testing for this procurement.

We deny the protest.


for James F. Hinchman
General Counsel