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*Shirley*

**DECISION**



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

**FILE: B-190384**

**DATE: February 13, 1978**

**MATTER OF: Astrocom Electronics, Incorporated**

**DIGEST:**

1. Protest alleging that procuring activity should not have procured cord assemblies on sole-source basis, contract price was unreasonably high, and procuring activity arbitrarily refused to waive first article approval requirement for protester in connection with another procurement action, which was filed several months after protester learned of sole-source negotiations, contract price was published in Commerce Business Daily, and protester received notice of award requiring first article approval is untimely under 4 C.F.R. § 20.2(b)(2) (1977) and not for consideration on merits.
2. Waiver of first article testing is matter within discretion of procuring activity and will not be questioned by GAO absent clear showing that decision was arbitrary or capricious. Where prospective contractor provided cord assemblies under five previous contracts essentially same as those specified and supplied similar items under other contracts, we cannot find clear showing that waiver of first article testing requirement was arbitrary or capricious. Similarly, subsequent waivers of first article testing requirement after prospective contractor had furnished over 1,000 cord assemblies meeting current specifications was not unreasonable.
3. Reasonableness of first article approval testing procedures employed by procuring activity after award is matter of contract administration and not for resolution under Bid Protest Procedures which are reserved for considering whether award, or proposed award, of contract complies with statutory, regulatory, or other legal requirements.

Astrocom Electronics, Incorporated (Astrocom), protests four procurements by the Defense Logistics Agency (DLA) involving cord assembly CX-8650, which are considered below.

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On April 21, 1977, DLA issued request for proposals (RFP) DSA 400-77-R-2234 for the procurement of 5,000 cord assemblies. The RFP was issued pursuant to 10 U.S.C. § 2304(a)(2) (1970), as implemented by section 3-202 of the Armed Services Procurement Regulation (ASPR) (1976 ed.), which provides that contracts may be negotiated if the public exigency will not permit the delay incident to advertising.

With regard to the public exigency justification, DLA reports two suppliers of the cord assemblies had defaulted in making timely delivery. One of the suppliers had encountered technical problems, and the contracting officer did not anticipate that the technical problems would be solved in the near future. Consequently, DLA had an urgent need for the cord assemblies to avoid an out-of-stock position.

The contracting officer estimated that 150 days would be required for first article testing, and an additional 30 days would be required for the review and approval of the first article test reports. The contracting officer concluded that a 180-day delay in the production of the cord assemblies to provide for first article testing and approval should be avoided if possible by awarding the contract to an offeror which would furnish the units at a reasonable price and which was eligible for waiver of the first article testing requirement.

DLA states that the subject RFP required that the cord assemblies be produced in accordance with revision "C" of MIL-C-003885. This was the first procurement under the "C" revision. The "C" revision made no significant changes in the cord assembly. According to DLA, Hiltronics Corporation (Hiltronics) had provided cord assemblies in accordance with revision "B" of MIL-C-003885 under five previous contracts, and it had provided similar items under other contracts. Hiltronics' quality history file contained no unsatisfactory material reports. Accordingly, negotiations were held exclusively with Hiltronics. The contracting officer waived the first article testing requirement. Hiltronics' offered price was considered reasonable and award was made to that firm on April 25, 1975. Delivery has been completed.

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Astrocom protests the sole-source award to Hiltronics. More specifically, it contends that it could have provided the specified cord assemblies on a timely basis if DLA had solicited its offer. Astrocom admits that it was aware of the sole-source negotiations with Hiltronics, and allegedly DLA informed Astrocom that it could not make an offer because it was not an approved source. Since Astrocom did not protest the sole-source award to either DLA or our Office until approximately 5 months after it learned of the negotiations with Hiltronics, its protest is untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1977), which provide in pertinent part as follows:

"(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In any case, a protest will be considered if filed with the General Accounting Office within the time limits prescribed in paragraph (b).

\* \* \* \* \*

"(2) In cases other than those covered in subparagraph (1) bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

Astrocom also protests that the contract price was unreasonably high. Notice of award to hiltronics, including the number of units procured and the total contract price, was published in the Commerce Business Daily (CBD) on

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May 16, 1977. In Rescom Incorporated, B-184634, September 10, 1975, 75-2 CPD 142, we held that publication of award notice in the CBD is constructive notice of the basis of the protest. Consequently, a protest filed more than 10 working days after publication of the award in the CBD is untimely under our Bid Protest Procedures, specifically 4 C.F.R. § 20.2(b)(2). In the instant case, Astrocom did not protest the alleged unreasonableness of the contract price until approximately 5 months after the award notice had been published in the CBD. Accordingly, its protest concerning this matter is untimely and not for consideration on the merits.

In response to Astrocom's inquiry, DLA, by letter dated August 23, 1977, informed Astrocom that Hiltronics did not have an approved first article for cord assemblies procured under revision "C" of MIL-C-003885. DLA subsequently informed Astrocom that it had waived first article testing for Hiltronics. Astrocom protests that Hiltronics does not have to run first article tests. Astrocom contends that the contracting officer arbitrarily waived the first article test requirement for Hiltronics which has never conducted first article tests. The contracting officer's decision was based on the false premise that first article testing would be too time consuming.

DLA states in substance that the purpose of first article testing is to require the contractor to demonstrate that it can produce items which conform to Government specifications. DLA correctly points out that we have consistently held that waiver of first article testing is a matter of administrative discretion which we will not question absent a clear showing that the decision was arbitrary or capricious. See, e.g., Charles J. Dispenza & Associates, B-186133, April 27, 1977, 77-1 CPD 284.

Since Hiltronics had provided cord assemblies under five separate DLA contracts meeting revision "B" of MIL-C-003885, which were essentially the same as revision "C" cord assemblies, and it had also provided similar items to DLA under other contracts, we cannot find a clear showing that the waiver of first article testing for Hiltronics was arbitrary or capricious. Boston Pneumatics, Inc., B-188275, June 9, 1977, 77-1 CPD 416.

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ASPR § 1-1903(a) (1976 ed.), for example, provides in part that:

\*\*\* where supplies identical or similar to those called for have been previously furnished by the \*\*\* offeror and have been accepted by the Government, the requirement for first article approval may be waived by the Government. \*\*\*

RFP DSA 400-77-R-3736 was issued on August 17, 1977, for the procurement of 5,000 revision "C" cord assemblies. Hiltronics and Astrocom submitted offers. Hiltronics' offer, which was conditioned on waiver of first article testing, was lower than Astrocom's, with or without first article testing waived. The contracting officer waived the first article testing requirement for Hiltronics and awarded it the contract on September 6, 1977.

RFP DSA 400-77-R-3937 was issued on September 7, 1977, for the procurement of 6,675 cord assemblies and an additional 6,675 cord assemblies were set aside for labor surplus area concerns. The solicitation specified that the cord assemblies were to be manufactured in accordance with revision "C" of MIL-C-003885. Hiltronics and Astrocom submitted offers. Negotiations were held with both firms, and both firms submitted best and final offers. Hiltronics' best and final offer, which was conditioned on waiver of first article testing, was lower than Astrocom's offer with first article testing waived. The contracting officer again waived the first article testing requirement for Hiltronics and awarded it a contract for the set-aside portion and a contract for the non-set-aside portion.

As noted, Hiltronics had provided revision "B" cord assemblies and similar items under several DLA contracts, and prior to the issuance of RFP DSA 400-77-R-3736 and RFP DSA 400-77-R-3937, Hiltronics had supplied over 1,000 cord assemblies which met revision "C" of MIL-C-003885. Under the circumstances, we cannot fault the contracting officer's decision to waive the first article testing requirement for Hiltronics. Charles J. Dispenza & Associates, supra.

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RFP DSA 400-77-R-2623 was issued on May 23, 1977, for the procurement of 2,089 cord assemblies. The RFP included a requirement for first article approval. Astrocom submitted the low offer and requested waiver of the first article approval requirement.

DLA did not grant Astrocom's request for waiver of first article approval. Astrocom protests DLA's decision.

The notice of award which was mailed to Astrocom on July 22, 1977, stated that first article approval was required. Astrocom knew or should have known the basis of its protest after it received the award notice. However, Astrocom waited for approximately 4 months until it protested DLA's decision. We must conclude, then, that its protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1977), and will not be considered on the merits.

Finally, Astrocom protests that DLA has imposed onerous first article approval testing procedures, which have caused a considerable increase in expenses. i.e., a Government quality assurance representative must be present to witness the tests. The reasonableness of the testing procedures employed by DLA after award to determine if Astrocom's cord assemblies satisfy Government specifications is a matter of contract administration. Matters of contract administration are not for resolution under our Bid Protest Procedures which are reserved for considering whether an award, or proposed award, of a contract complies with statutory, regulatory and other legal requirements. Becker Instruments & Photographic Optics, B-185411, July 14, 1976, 76-2 CPD 43.

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To the extent that the protest has been considered on the merits, it is denied.

*R. Z. Keller*  
~~Deputy~~ Comptroller General  
of the United States