

DECISION



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

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FILE: B-185058

DATE: September 27, 1976

MATTER OF: Inflated Products Co., Inc., and Brunswick Corporation--Request for Reconsideration

DIGEST:

1. Where request for reconsideration raises issues regarding legality of proposed award, merits will be considered, notwithstanding possible untimeliness under Bid Protest Procedures, to provide further guidance to agency in connection with its prior request for advance decision.
2. Prior decision and recommendation contained therein affirmed since request for reconsideration has not demonstrated that prior decision contained material errors of fact or law. Although that decision was premised upon assumption that protester's alternate bid was low by reason of offer of accelerated delivery schedule, which is challenged, bid is low in any event.

Counsel for Inflated Products Co., Inc. (IPI), has requested reconsideration of our decision in Inflated Products Co., Inc., and Brunswick Corporation, B-185058, August 9, 1976, 76-2 CPD 135, wherein we denied IPI's protest under invitation for bids (IFB) No. DAAK01-75-B-2145, issued by the United States Army Troop Support Command (TROSCOM), St. Louis, Missouri, for expandable and multipurpose shelters. We held that IPI's bid, as modified by an August 22, 1975, telex, was ambiguous and that under one reasonable interpretation of the telex, Brunswick was the low bidder. In this connection, it was reported by TROSCOM that when IPI's bid is evaluated on the basis that the telex modification applies to its total prices, Brunswick's alternative bid is low by over \$200,000. The procuring activity also reported that it would accept Brunswick's alternative bid which offered reduced prices for an accelerated delivery schedule and waiver of the testing requirements. Accordingly, we concluded that IPI's bid must be rejected as nonresponsive and that an award to Brunswick would be proper if its bid was still available for acceptance and the contracting officer determined that Brunswick is a responsive and responsible bidder and that its price is reasonable.

In its request for reconsideration, counsel for IPI contends that TROSCOM improperly considered Brunswick's reduced prices for accelerated delivery under the IFB's evaluation for award criteria and that Brunswick's offer of an accelerated delivery schedule is ambiguous. TROSCOM and counsel for Brunswick take the position that

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With regard to the timeliness question, since the issues raised by IPI in its request for reconsideration concern the question of the legality of any award to Brunswick, we believe it is necessary to consider these issues to provide further guidance to the Army in connection with its prior request for an advance decision on the merits of the IPI protest. Such a position is consistent with our August 9, 1976, decision wherein we stated:

"* * * in view of the Army's request for our decision regarding the legality of a proposed award to IPI, our Office will consider the merits of the protest under 31 U.S.C. § 74 (1970), notwithstanding the possible untimeliness of certain issues raised. The matter will be treated as a request from the department head under 31 U.S.C. § 74 * * *."

While counsel for IPI sets forth several arguments in support of its contention that Brunswick is not the low responsive bidder because its offer of reduced prices for accelerated delivery cannot be accepted, we believe that resolution of this issue is not necessary for the following reason. By letter dated August 31, 1976 (received in our Office on September 7, 1976), the Army advises that without consideration of Brunswick's accelerated delivery prices its bid price with waiver of preproduction model (PPM) and initial production testing (IPT) and inclusive of transportation charges is approximately \$45,000 lower than IPI's evaluated bid, exclusive of transportation charges. Subsequent to receipt of this letter, the Army advised that the difference is approximately \$35,000 rather than the \$45,000 stated in the letter. Brunswick's bid evaluated on such basis is \$5,578,497.86, whereas IPI's bid is \$5,614,402.93.

By letter dated September 16, 1976, IPI's counsel disputes the foregoing evaluation. It is contended that IPI's evaluated price, assuming that the modifying telex referred to the total prices, would be \$5,413,076, and that Brunswick's bid should be evaluated at \$5,613,000, on the basis of waiver of first article testing only. It is therefore contended that the Army's position that Brunswick is the low bidder in any event is erroneous.

From our examination of the record, we believe the Army is correct. Counsel's statement of IPI's evaluated price is understated by \$206,740, which by the terms of section D-9, Evaluation of Initial Production Testing, of the IFB is required to be added to IPI's bid price. The above price is overstated by \$5,413.07, which represents a 1/10 of 1-percent discount. With these adjustments, IPI's evaluated price is \$5,614,402.93, exclusive of transportation charges. Counsel's statement of Brunswick's

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evaluated price is also in error as it is not based upon the waiver of both preproduction model and initial production testing requirements, which the Army reports Brunswick is eligible for under the terms of the IFB and which will be waived. On this basis, Brunswick's evaluated price (\$5,578,497.86) is approximately \$35,000 less than IPI's, exclusive of transportation charges, albeit, by a different amount than stated in our decision.

In addition, it has been argued that our conclusion that the telegraphic modification was ambiguous is erroneous since Armed Services Procurement (ASPR) § 7-2003.29 (1975 ed.) provides, among other things, that telegraphic bids must include unit prices, and that the terms of the solicitation provide that in the case of any discrepancy between the unit and extended prices, the unit price shall govern.

Aside from the fact that the cited ASPR section was not included in the solicitation, we do not believe the requirement therein for the statement of unit prices can be relied upon where, as here, the price stated could reasonably refer to either the unit or total price. Further, the solicitation provision referred to does not apply where there is no discrepancy between unit and extended prices, but rather no indication as to which was intended.

Since no material errors of fact or law have been demonstrated in the request for reconsideration, the decision of August 9, 1976, is affirmed.

R. F. K. Miller
Deputy Comptroller General
of the United States