

DECISION



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

60631

FILE: B-183947

DATE: March 11, 1976

MATTER OF: Inflated Products Company, Inc.

98493

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DIGEST:

1. Although protest against validity of scrap and waste factors contained in RFP filed after closing date for receipt of best and final offers is untimely under our bid protest procedures then in effect, protest will be considered on merits since it raises issue significant to procurement practices or procedures in that allegation relates to basic principle of competitive system.
2. Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case.
3. Since, contrary to protester's contention, quantity estimates in RFP were not substantially overstated, there is no evidence that other offeror knew protester's original price before it submitted best and final offer and determination not to obtain cost and pricing DD form 633 was in accordance with regulations, claim for proposal preparation costs will not be considered.

This is a protest by Inflated Products Company, Inc. (IPI), against the award of a contract to the Brunswick Corporation (Brunswick), under request for proposals (RFP) No. DAAK01-75-R-2048, issued by the Department of the Army, Troop Support Command (TROSCOM), St. Louis, Missouri. The RFP called for offers on

quantities of camouflage screening support systems, camouflage screening systems (lightweight, radar scattering), and camouflage screening systems (lightweight, radar transparent).

The RFP was amended five times; however, only amendment No. 0002 dated January 22, 1975, is pertinent to this protest. Amendment No. 0002 advised that the modified Production Plan included in the RFP was "for informational purposes only" and it also revised the Bill of Material, Table XIII of the Production Plan. The Production Plan had been developed by Brunswick, the incumbent contractor, based on production data experience in producing the radar camouflage modules prior to the issuance of the RFP. Amendment No. 0002 also required each offeror to submit its own production plan in order to determine how Government-furnished property as provided for in the RFP would be utilized. Only two firms, IPI and Brunswick, submitted offers. The proposal submitted by IPI was low with a total price of \$43,356,320.24, f.o.b. destination. Brunswick's offer was \$45,876,385, f.o.b. origin. The transportation costs for the Brunswick proposal were estimated at \$389,249. After review and evaluation of initial proposals, oral discussions were conducted with IPI and Brunswick throughout the period of February 25, 1975, through April 28, 1975. This also included discussions during the preaward survey of IPI from April 6-11, 1975. The discussions with IPI included consideration of allegations that the color coating scrap allowances as included in the RFP Production Plan were incorrect and misleading. On May 5, 1975, IPI's final offer of \$42,750,845.60, f.o.b. destination, and Brunswick's final offer of \$38,792,133.22, f.o.b. destination, were received.

On May 9, 1975, the contracting officer received a telegram from IPI protesting the award of the contract and contending that the scrap and waste factors included in the RFP Production Plan were grossly overstated and purposely misleading. A similar protest was received in our Office on May 22, 1975. Award was made to Brunswick on June 20, 1975, pursuant to ASPR § 2-407.8(b)(ii) (1974 ed.).

It is the contention of the procuring activity that the protest is untimely and, therefore, not for consideration on the merits.

Section 20.2(a) of our Interim Bid Protest Procedures and Standards (Procedures), 4 C.F.R. part 20 (1974), then in effect, provided in pertinent part that: "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals." The scrap

rate which IPI is protesting was included in the RFP when it was issued on November 13, 1974, and was also the subject of negotiations with IPI during its preaward survey. In order to be timely, the protest should have been filed prior to the date for receipt of best and final offers, which was May 5, 1975, and was not filed until thereafter.

However, counsel for the protester argues that if the protest is in fact untimely, it should be considered under one of the exceptions to the timeliness rule as provided for in section 20.2(b) of our Interim Bid Protest Procedures, supra, namely that it is a significant issue. In this connection, IPI contends that because the agency pointed out during negotiations that its scrap and waste factors were substantially below those in the RFP Production Plan it placed great emphasis upon the RFP estimates, which were grossly overstated and misleading, and that reliance upon the estimates resulted in an overstatement of its offer by more than \$4 million.

Section 20.2(b) provides that the Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely. As to what constitutes a significant issue, we stated in Fairchild Industries, Inc., B-184655, October 30, 1975, 75-2 CPD 264:

"* * * 'Issues significant to procurement practices or procedures' refers to the presence of a principle of widespread interest and not necessarily to the sum of money involved. 52 Comp. Gen. 20, 23 (1972). There have been instances in which our Office has determined that although a protest was filed untimely, the issue presented was significant to the entire procurement community and therefore was considered on the merits. See, for example, Fiber Materials, Inc., 54 Comp. Gen. 735 (1975), 75-1 CPD 142, where in a research and development procurement individually tailored statements of work for the two offerors in the competitive range precluded one offeror from competing on an equal basis, contrary to the basic principles of the law and regulations governing the conduct of procurements; Willamette-Western Corporation; Pacific Towboat & Salvage Co., 54 Comp. Gen. 375 (1974), 74-2 CPD 259,

where the release of a draft request for proposals to the incumbent contractor 5 months before other competitors received the official RFP resulted in partiality toward the incumbent to the prejudice of competitors, contrary to the concept implicit in negotiated procurements and statutory requirement for maximum competition; and 52 Comp. Gen. 905 (1973), where pursuant to the invitation for bids the addition of a \$1,000 evaluation factor (which equaled nearly 50 percent of the evaluated price) penalized all potential suppliers except the incumbent contractor, thereby precluding effective competition."

Since IPI's allegation is to the effect that it was precluded from competing on an equal basis through purposefully grossly misleading information in the RFP, we believe the issue is significant to procurement practices and procedures within the rationale of the above cases. Therefore, the protest will be considered on the merits.

In addition to counsel's contentions that the scrap and waste factors were incorrect, he also argues that the amount of sheet molding compound (SMC) stated to be 111 pounds per module in the Production Plan was incorrect and that the correct amount was actually slightly greater than 25 pounds per module. According to counsel the scrap and wastage factor was approximately 8 percent rather than the 57 percent stated in the Production Plan. This difference would have amounted to a difference in price of \$320,550. The difference in price between the weight of SMC in the Production Plan and IPI's weight of SMC amounted to \$4,061,232.

The following facts are relevant to the development and accuracy of the Production Plan included in the RFP. On April 6, 1972, the Government awarded a Manufacturing Methods and Techniques (MM&T) contract to Brunswick for the design and development of a manufacturing system for the fabrication of lightweight synthetic camouflage screening systems.

A significant piece of the data developed under the contract was the production plan upon which the protested RFP is based. The initial plan, accepted by the Government in 1972, called for 85.4 linear yards of cerex (also known as base cloth to which is added stainless steel fibers, the source of the screen's radar properties) to produce 53.6 linear yards of camouflage screen. This plan did not require a test after color coating (addition of colored vinyl coatings to the cerex to achieve visual and infrared camouflage characteristics), since it

was not known at the time what effect the color coating would have on the radar properties of the cloth. It was not until August 1973 that it was determined that a test after color coating should be performed.

In February 1974, the Government issued change order No. P00005 that required testing after color coating. At that time, it was the opinion of both the Government and the contractor that the amount of scrap generated by the test would increase the cerex usage from 85 linear yards to approximately 93 linear yards. However, during factfinding and negotiations of the change and documented actual usage, the amount of cerex was changed to 101.3 linear yards.

As stated in a memorandum from the Mobility Equipment Research & Development Center (MERDC) dated August 22, 1975, the basis of the Government's settlement of the change from testing after color coating was an audit and examination of the contractor's records of cerex usage. Quantities of faulty cerex were returned to the vendor and were deleted from the audit.

The MERDC memorandum further stated that the amount of cerex used in the add-on quantities was established with the data used in settling the change for testing after color coating. The scrap determination for the settlement of the test after the color coating changes was based on actual cerex usage during a portion of the production of the radar screens and also the results of an audit of cerex usage since the further completion of 58,600 radar screens. The results of the audit contained in a letter from MERDC dated May 20, 1975, stated:

"Verification has been accomplished for the scrap and waste factors for cloth * * *. The results of the review are as follows:

"a. For the total quantity of 58,600 modules, the amount of Cerex which was required was 5,887,183 linear yards. This is equal to 100.46 linear yards versus 101.3 linear yards that is in the bill of material of ECP 74HE1699.

* * * * *

"c. The referenced ECP had a total scrap and waste factor of 57.6% for the Cerex. The total scrap and waste experienced for the contracts was 79% which is a much higher rate.

* * * * *

"Therefore, the total usage of cloth for the 58,600 is very close to the usage in the updated production plan and the scrap and waste factor of 57.6% is wrong for the updated usage and should have been corrected to 80%. The actual scrap factor for cloth was 79% as stated above."

By letter dated June 24, 1975, counsel states that IPI learned from the Haysite Corporation (Haysite) and the Ferro Corporation (Ferro), both suppliers of SMC material to Brunswick under the earlier contract, that the quantities of SMC may have been overstated by 4 or 5 to 1 in the Production Plan.

SMC was used by Brunswick to make the batten spreader component of the radar module. The batten spreader was the support system to which color coated cloth was attached. At the beginning of a limited production contract in 1973, batten spreaders were manufactured from chopped fiber glass and a polyester resin sheet molding compound (SMC). The SMC was procured by Brunswick from Haysite. In February 1974, the Government directed Brunswick to stop manufacturing the batten spreaders because of failures during testing. To correct the failures a new spreader was designed which consisted of a hybrid material of chopped and woven roven fiber glass mat and die cut in one piece.

A significant increase in material usage occurred when it was determined that batten spreaders molded in more than one piece could not meet the loading requirements during testing. Additional scrap losses were incurred due to increased quality requirements. MERDC physically measured the scrap due to die cutting which is the majority of the loss. MERDC has advised that there is only a 37-percent yield of good batten spreader material out of the die cutting operations.

The original usage rate for SMC was 24.2 pounds per module. However, due to design change to strengthen the batten spreader engineering change proposal (ECP) No. 74HE1699 increased the amount to 111 pounds per module. This is the amount used in the Production Plan as contained in the RFP.

During 1973, Brunswick decided to invest in facilities to manufacture SMC "in-house" rather than rely on its suppliers. Due to this capability to manufacture SMC and the design changes in the batten spreader, neither Haysite nor Ferro was apprised of the changes in either material quantity or the construction method

required to produce the redesigned batten spreader. Thus, any information given to IPI by Brunswick's former suppliers regarding the quantity of SMC previously used by Brunswick was outdated due to the engineering changes in the batten spreader.

It is clear from the foregoing that the estimates included in the Production Plan were substantially correct. Further, amendment 0002 specifically stated that the information contained in the Production Plan was for informational purposes only. The information was merely to be used as a guideline for the offerors when submitting their offers. It is also noted that apparently the scrap and waste factors would vary depending on the type of production method used. However, the RFP did not require the use of any particular method. This may account for IPI's indication to Government personnel during the preaward survey that it was 96 percent certain that the scrap and waste factor used in its initial proposal was more accurate than Brunswick's. In any event, having exercised its own judgment, IPI submitted a best and final offer using the figures in the Production Plan. Based on our review of the record, we cannot conclude that Brunswick gained an undue competitive advantage or that IPI was improperly misled. The only advantage enjoyed by Brunswick was that of previous experience. In this regard, we have long recognized that certain firms may enjoy a competitive advantage by virtue of their own incumbency. See Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404.

It is our view, however, that where the Government designates an incumbent contractor to furnish data that may be relied on by other bidders or offerors, the Government should exercise the highest standard of care as to the correctness of that data. The Government has the duty to assure, to the extent possible, that the data submitted is in fact correct. While in the present case an audit by MERDC, after the protest, proved that the data included in the Production Plan was substantially correct, such verification should have been made prior to its inclusion in the RFP. By letter dated today we are recommending to the Secretary of the Army that in the future data supplied by an incumbent contractor be verified prior to its inclusion in a solicitation.

Counsel has protested that the contracting officer was arbitrary and capricious when he failed to require that DD Form 633 (Contract Pricing Proposal) be submitted with best and final offers. The contracting agency has indicated that although cost and pricing data on DD form 633 was obtained with the original offers, it was not requested with best and final offers because the competitive situation was considered to meet the requirements of ASPR § 3-807.1(b)(1)(a):
(i) two responsible offerors (ii) who can satisfy the Government's

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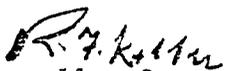
requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting offers responsive to the requirements of the solicitation. Since the determination not to obtain DD form 633 in the circumstances appears to have been in accordance with the regulations, it was proper. B-173523, December 18, 1971.

Counsel has also alleged that perhaps Brunswick was informed of IPI's offer based on the fact that the contracting officer did not request best and final offers until after it was known that IPI was responsible.

There is no evidence of record that Brunswick knew IPI's initial offer. Negotiations and the preaward survey were conducted simultaneously to conserve time in making an award. An unsubstantiated allegation that prices may have been disclosed, even coupled with an opportunity for such conduct, is not sufficient to require an affirmative conclusion. Datawest Corporation, B-180919, January 13, 1975, 75-1 CPD 14. While it is true, as counsel contends, that Brunswick did reduce its offer considerably after IPI was found to be responsible, there is nothing in the record that establishes that the former was related to the latter.

Finally, counsel argues that in the event our Office allows the protested procurement to stand, IPI be awarded proposal preparation costs. Since the record does not show that the procuring activity acted in an arbitrary or capricious manner, IPI's claim for proposal preparation costs will not be considered. See T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

In view of the foregoing, the protest is denied.


Deputy Comptroller General
of the United States