

DECISION



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

FILE: B-186061

DATE: August 11, 1976

MATTER OF: Imperial Products Co., Inc.

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098696

DIGEST:

1. Where offeror was advised by letter of January 21 of award to other firm, protest received by GAO on March 10 against permitting firms other than protester to submit offers was untimely as filed more than 10 days after basis of protest became known.
2. Protest against inclusion of provision in solicitation permitting alternate proposals or against ambiguity arising because of that provision and alleged conflict with another provision should have been filed prior to deadline date for receipt of proposals; consequently, one filed after that date is untimely and not for consideration.
3. Where protester was orally advised, as well as by letter of November 14, 1975, that its offer, the only one received, was unreasonably priced and was therefore rejected and where protester participated in reprocurement, protest against determination of unreasonableness of price, filed with GAO on March 10, 1976, is untimely and not for consideration.
4. Where solicitation advised that award might be made on initial proposals, award on such basis was proper where competition was obtained, where no negotiations were conducted, and where award price was reasonable.
5. Where protester was advised by letter of February 17 that its submitted price was unacceptable as excessive and re-solicitation was made telephonically on same date, protest received by GAO on March 10 is untimely and not for consideration; in any event determination of reasonableness of price is function reserved for contracting activity, with certain exceptions not here applicable.
6. GAO cannot object to award made to low offeror submitting reasonable price.

Imperial Products Co., Inc. (Imperial), protests the awards made to firms other than itself under requests for proposals (RFP) Nos. NO0102-76-R-0891, -1006, -1095, and -4714, issued by the Naval Shipyard, Portsmouth, New Hampshire. The Department of the Navy believes the protest, filed by mailgram and received by our Office on March 10, 1976, was filed untimely on solicitations Nos. -0891 and -1006 since Imperial was sent notices of the awards made under these solicitations on January 21 and February 23, 1976, respectively.

RFP No. -0891 was originally issued on October 17, 1975. No offers were received, however, by the October 31 closing date for the receipt of proposals. By telecon on November 3, Imperial asked whether it might still submit a proposal. It was allegedly told that it could. The stated reason for such advice was because the materials were urgently needed and the activity negotiator intended to immediately resolicit the procurement by phone utilizing the same solicitation number. The Imperial proposal, dated November 3, was received by the contracting activity on November 6. At this point two other contractors, who had previously indicated that they would not submit offers due to reasons other than an inability to meet the specification, were again requested to submit proposals. The Babcock & Wilcox Co. was also so requested. A proposal was received telephonically from the latter firm on November 18. Best and final offers were requested telephonically on November 24 to be submitted by December 4. Two offers were received, and on January 20, 1976, it was determined to award contract No. NO0102-76-C-0891 to Babcock & Wilcox for the amount of \$47,268.60. The best and final offer of Imperial totaled \$85,809.52. As stated, Imperial was advised by letter of January 21 that award was made to Babcock & Wilcox and of the contract price.

It is the position of Imperial that the contracting activity told Imperial that because the activity had received no offers by October 31 a late Imperial offer would be accepted since such could be done where only one late offer had been received. It is believed by Imperial that if the contracting activity had planned to resolicit by phone the Imperial offer would have been taken telephonically. It is also believed that Babcock & Wilcox was solicited only after Imperial disclosed that firm to be one of its suppliers during a preaward survey. Thus it is argued, because of the above facts and because of the failure to issue a new solicitation, that the acceptance of an offer other than Imperial's was impermissible. Finally, it is noted

that Imperial was not permitted to offer on the quantities on which Babcock & Wilcox submitted its offer. It is believed that activity regulations required it to be notified of these quantities so that it might submit an offer on them also. In what appears to be the Babcock & Wilcox best and final offer that firm inserted different quantities either by agreeing to supply the quantity desired plus more up to a certain amount or by crossing out the quantity desired and inserting larger quantities. As regards both these issues Imperial believes its protest to be timely as it did not become aware of these facts until its visit to the contracting activity in early March and as its protest was filed within 10 working days of that visit. This it believes to be particularly true as regards the failure of Babcock & Wilcox to date the contract which it signed.

First, it should be noted that the contracting activity would have been derelict in its duty to maximize competition had it accepted the Imperial offer only without attempting to solicit other offerors who might have submitted offers had they known the deadline for submission of offers no longer applied. Further, had the activity not taken advantage of the willingness of Babcock & Wilcox to submit an offer approximately 45 percent less than Imperial's it would not have been making the award most advantageous to the Government.

The first basis of the protest on the solicitation was submitted to our Office untimely and is not for consideration. Imperial complains that no offer but its own should have been considered. However, by letter of January 21 Imperial was advised that not only had another offer been considered but that a contract award had been made to that firm submitting the offer. It thus knew this notwithstanding the use of the same solicitation number. Notwithstanding, Imperial did not protest this matter until March 1976, more than 10 working days after the basis of the protest became known. Consequently, it is untimely under our Bid Protest Procedures. 4 C.F.R. Part 20 (1976).

As regards the second basis, we believe that this issue was also untimely raised. Directly following the pages supplied for the insertion of prices was the following provision:

"THE FOLLOWING APPLIES TO ALL ITEMS EXCEPT 002AJ:

"NOTE: IF QUANTITY REQUESTED IS NOT AVAILABLE OR WITHIN YOUR MINIMUM MILL QUANTITY, PLEASE INDICATE MINIMUM QUANTITY REQUIRED: _____.

"AWARD MAY BE MADE ON THE BASIS OF THAT QUANTITY AND PRICE COMBINATION MOST ADVANTAGEOUS TO THE GOVERNMENT."

It would therefore appear that the solicitation was written in such a manner as to permit an award on quantities at variance with those set forth in the solicitation. The possibility that this could occur was apparent on the face of the solicitation from the beginning, and any objections to it that Imperial might have had should have been raised prior to the submission of offers. As Imperial did not timely raise this issue it also may not be considered under our Bid Protest Procedures. Concerning the contention that the provision--the "Quantity Variation" clause--immediately following the above-cited provision should make the protest timely, we cannot agree. The "Quantity Variation" clause permitted 10 percent variations in the scheduled quantities. If this provision may be read to contradict the above-cited provision, as Imperial would appear to suggest, then the protest concerning the alleged ambiguity created by these two provisions was also untimely raised as it was not filed until after the deadline for the receipt of proposals.

As regards the protest against the failure of Babcock & Wilcox to date the contract, while timely raised, that fact is not a material consideration for determining the validity of the award. Babcock & Wilcox submitted, signed and dated December 1, 1975, an offer, which for contract purposes simply required acceptance by the Government. The Government accepted this on January 20 by signing a separate "Contract/Award" document. The signing of this form by Babcock & Wilcox was then a mere formality. Imperial also notes that it had to submit its offer within the deadline specified in the request for proposals while Babcock & Wilcox was not so required. The argument is without merit inasmuch as that deadline date was October 31, and the Imperial offer was, as noted previously, dated November 3.

RFP No. -1006 was originally issued on August 7, 1975. Imperial submitted the only offer. Price analysis was performed, and it was found that the Imperial price was approximately 160 percent above the manufacturer's published price. A determination by the contracting officer that the Imperial price was excessive led to a finding that the Imperial offer was unacceptable. Imperial was informed of this fact on November 14, 1975, and of the fact that it would be permitted to submit an offer upon resolicitation of the requirement. The protest against this course of events not filed until March 1976 is clearly untimely and not for consideration under the same rules as applied above.

The resolicitation of RFP No. -1006 was initiated by the issuance of RFP No. -1095 on November 19. Three offers, including one from Imperial, were received by the December 29 closing date. The Leland Tube Company (Leland) submitted an offer on item No. 0001 only, and because its price of \$13,398 was slightly below the published prices of Babcock & Wilcox and substantially below the in excess of \$40,000 Imperial offer, award was made on February 20, 1976, to Leland on item No. 0001, after the successful completion of a preaward survey. Imperial was notified of this award by letter of February 23. Negotiations were conducted with Imperial and the other offeror on item No. 0002, and submission of best and final offers was requested for February 5. No changes were made in the original offers. Price analysis of the offers and the published prices of Babcock & Wilcox resulted in the determination that the prices offered were excessive. Both offerors were informed of this determination by letter, dated February 17.

Item No. 0002 was resolicited telephonically on February 17 as solicitation No. -4714. Three firms submitted offers. Although Babcock & Wilcox conditioned its offer on a minimum mill run quantity of 150 instead of the requested 100 feet for one portion of the item, its offer was the lowest received. Imperial and the other offeror were, consequently, requested to propose also on the basis of 150 feet in view of the fact that the provision found in solicitation No. -0891 allowing offerors to state deviations in minimum mill runs was not in this solicitation. Best and final offers were: Babcock & Wilcox, \$13,237; Imperial, \$26,701; and Channing-Hamilton, \$28,730. Contract award was made to Babcock & Wilcox with an effective date of March 4, 1976.

Regarding the award to Leland on item No. 0001 of solicitation No. -1095, it would appear that the protest of this award to our Office would be timely in view of the fact that Imperial was only advised by the letter of February 23 of the award. However, it was provided in the solicitation that award on initial proposals without negotiations was permissible, and paragraph 3-805.1(v) of the Armed Services Procurement Regulation (1975 ed.) permits such an award where, as exists here, adequate competition has been obtained, the award price is fair and reasonable, no negotiations have been conducted, and offerors were advised that an award on initial proposals might occur. Consequently, we cannot object to the award to Leland.

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Since Imperial was advised by letter of February 17 that its price on item No. 0002 was unreasonable and since it participated in the resolicitation without apparent objection, its protest against the determination of unreasonableness is untimely. In any event, whether a bid--or offer as here--is reasonable as to price is a determination to be made by the contracting activity, and our Office will not interfere with such a determination absent a showing that it was arrived at arbitrarily, capriciously, or otherwise made in bad faith. B-177476, May 14, 1973; A&E Blueprinters, Inc. of Maryland, B-182913, October 3, 1975, 75-2 CPD 210. There has been no such showing here.

Imperial further objects to the award to Babcock & Wilcox under solicitation No. -4714 since Babcock & Wilcox did not sign the actual contract until March 23. Contrary to Imperial's belief, the date of execution of the contract would have no effect on the validity of the contract, especially since delivery thereunder was not to commence until June 8, 1976.

Since we can find nothing wrong in the events leading to the issuance of this solicitation and since the price offered by Babcock & Wilcox was slightly over 50 percent lower than the Imperial price, we interpose no objection to the award.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States