

Wotherspoon  
PL 1

117611

20918

**DECISION**



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

**FILE:** B-203906; B-203906.2      **DATE:** March 1, 1982

**MATTER OF:** QED Design and Development Ltd.,  
Soundmaster Division of Foam Design,  
Inc.

**DIGEST:**

1. Where court of competent jurisdiction decides matter also before GAO, GAO dismisses protest.
2. Where common industry usage differentiates between two distinct processes for manufacturing foam, bid offering foam made using a process specifically deleted from solicitation is properly rejected as nonresponsive.
3. Protest is timely since it was filed within 10 days of rejection of bid as nonresponsive, even though protester was given informal oral advice prior to bid opening that its bid would be rejected if submitted on basis in question.
4. Protest that agency interpretation of solicitation is in excess of minimum needs is untimely where filed more than 10 days after time protester was aware of that interpretation--when its bid was rejected based on that interpretation.

Soundmaster Division of Foam Design Incorporated (Soundmaster) and QED Design & Development Ltd. (QED) protest the rejection of their bids as nonresponsive and the award of a contract to United Foam Plastics Corporation under invitation for bids DLA100-81-B-0802, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. The solicitation was for 330,000 cold weather foam sleeping mats. Soundmaster submitted the low bid, QED the apparent second low bid, and United Foam Plastics the third low bid.

We dismiss QED's protest and deny Soundmaster's protest in part and dismiss it in part.

#### QED Protest

QED, a British firm, expressed its bid price in United Kingdom pounds sterling. The contracting officer found QED's bid to be nonresponsive because it was not expressed in United States dollars as required by the solicitation and because constantly fluctuating exchange rates made it impossible to convert the bid to a firm-fixed price in United States dollars.

QED protested the determination to GAO, but also filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia. The material issues before the court were the same as those before GAO. The court found for the Government in all respects. Where, as here, a court of competent jurisdiction issues a final order in a matter whose material issues are also before us in a bid protest, we will dismiss the protest. Raycomm Industries, Inc., B-182170, February 3, 1975, 75-1 CPD 72. Therefore, we dismiss QED's protest.

#### Soundmaster Protest

The solicitation provided that the sleeping mats were to conform to United Kingdom Specification UK/SC 3767A, with deviations as stated in the solicitation. The UK Specification requirement in question is worded in this manner:

"The body of the mat [foam] shall be manufactured from \* \* \* expanded [blown] \* \* \* polyethylene. [Blown or expanded polyethylene is foam.] The material shall be physically blown using nitrogen or chemically blown using a nitrogen blowing agent \* \* \*."

The solicitation changed the second sentence by deleting the second alternative and read as follows: "The material shall be physically blown using nitrogen."

Prior to bid opening, Soundmaster advised DPSC that it would be offering mats of foam made by Dynamit-Nobel. According to Soundmaster, the process used to make the foam involves the manufacture of unblown or unexpanded polyethylene containing a powder, azodicarbonamide. When heat is applied, the powder releases nitrogen and, according to Soundmaster, physically blows the polyethylene into the required type of foam. At that time, DPSC told Soundmaster that foam made by that process would not comply with the requirement that "The material shall be physically blown using nitrogen."

The following unsolicited information was included in Soundmaster's bid.

"The material quoted will be physically blown using nitrogen [a paraphrase of the solicitation requirement] released from azodicarbonamide under heat, and this material meets all physical requirements of UK/SC 3767A and amendments."

Soundmaster's bid was reviewed by the Army's Natick Laboratories, which advised DPSC that Soundmaster's bid offered foam that was "chemically blown and not in conformance with the physically blown requirement." Soundmaster's bid was then rejected as nonresponsive, and the protest was filed here.

United Foam Plastics, the awardee, argues that Soundmaster was aware of the basis of its protest prior to bid opening, and that it was required to file its protest prior to bid opening.

Soundmaster's protest is timely. While Soundmaster was orally advised before bid opening that its foam did not comply with the physically blown requirement, Soundmaster's basis of protest did not arise until the rejection of its submitted bid, and the protest was filed within 10 working days of that date. See 4 C.F.R. § 21.2(b)(2) (1981).

During the course of the protest, over 4 months after bid opening, Soundmaster supplemented its protest, arguing that DLA's interpretation of the solicitation was in excess of the Government's minimum needs. While Soundmaster attempts to base the supplemental protest on a pre-bid-opening DPSC telex to Natick Laboratories, which Soundmaster received just prior to the supplemental protest, the basis for this protest was clearly known by Soundmaster when its bid was rejected shortly after opening. Since the supplemental protest was not filed within 10 working days of that time, it is untimely. See 4 C.F.R., supra. We also note that prior to this supplemental protest, both Soundmaster and DLA agreed that the respective merit of the two processes, which is the underlying issue in the supplemental protest, was not an issue.

Certain relevant facts do not appear to be in dispute. Soundmaster admits that azodicarbonamide is what is known in the foam industry as a chemical blowing agent. However, Soundmaster contends that this is irrelevant because the solicitation does not require the use of a physical blowing agent, but only that the foam be physically blown using nitrogen. The protester asserts that its foam complies with the requirement because the chemical blowing agent releases nitrogen which then physically blows the polyethylene into foam.

DLA admits that after the chemical reaction takes place, nitrogen is released which physically expands or blows the polyethylene to form the foam. However, DLA argues that all foam is eventually formed by physical action. According to DLA, the common understanding in the industry is that the terms physically blown and chemically blown refer to separate and distinct categories of blowing agents.

Based on our review of all of the technical literature submitted by the parties, we conclude that the only reasonable interpretation of the language in question is that offered by DPSC. Therefore, the bid was properly rejected as nonresponsive.

The technical literature uniformly distinguishes between the use of physical and chemical blowing agents in categorizing foam-making processes. For example, Dynamit-Nobel, the protester's supplier, in a patent application succinctly states that difference:

"The foaming of synthetic thermoplastic plastics material [e.g., polyethylene] is generally effected either chemically, by incorporation therein of a substance [e.g., azodicarbonamide] which on heating decomposes to liberate a gas, [e.g., nitrogen] or physically, using a foaming agent which is a volatile liquid incorporated in the composition to be foamed and which vaporizes when the composition is heated. The foaming agent can also be a gas introduced under pressure." [e.g., nitrogen]

Additionally, an article by R. L. Heck, III, in the Modern Plastics Encyclopedia, divides foaming agents into two basic categories, physical and chemical. That article states that "the most widely used foaming agent of the physical type is compressed nitrogen." It further states that chemical blowing agents "generally are solid materials, designed to decompose at a specific temperature to yield a large volume of gas and a solid decomposition residue." The article describes certain advantages and disadvantages of each general process.

Similar distinctions are made in the Plastics Engineering Yearbook; in "Blowing Agents" by Henry R. Lasman in the Encyclopedia of Polymer Science and Technology (Vol. 2); in the article "Expanded Ebonite for Low Temperature Insulation" by A. Cooper in the Journal of Cellular Plastics, and in a number of other articles and reference works. These references all distinguish between types of foaming processes on the basis of whether the blowing agents are physical or chemical. We find no support in the literature for including foam made using a chemical blowing agent in the same category as foam made using a physical blowing agent.

Soundmaster claims that the term "physically blown" has no uniform meaning in the industry and, as support, submits letters from two technical experts. Both letters conclude only that the chemical blowing agent releases a gas which physically expands the foam-- a fact that DLA has admitted. However, neither letter indicates that there is any industry understanding that foam made with a chemical blowing agent would reasonably be referred to as "physically blown foam." Therefore, we conclude that, based on the record before us, the solicitation term "physically blown using nitrogen" has a commonly understood meaning in the industry as foam made by a process which uses nitrogen as a physical blowing agent. It is proper to refer to a commonly accepted industry usage to ascertain the meaning of a technical term in a solicitation. Jackson Jordan, Inc., B-198072, August 8, 1980, 80-2 104.

This analysis is further supported by the following considerations. The original UK Specification permitted both chemically blown and physically blown foam. This distinction clearly reflects the industry literature. Soundmaster has not discussed what foam process would be commonly understood to be "chemically blown," if its definition of physically blown as including foam made with chemical blowing agents is accepted. We think that the UK Specification clearly distinguished between chemically blown foam and physically blown foam on the basis of the blowing agent used, just as the literature does. When DLA deleted the reference to chemically blown it was clearly restricting the solicitation to foam made with a physical blowing agent.

Finally, while Soundmaster disagrees that there is an industry understanding of the term physically blown and claims that it complies literally with the requirement, its bid does not comply literally. The solicitation requires that the foam be "physically blown using nitrogen." The chemical blowing agent used in making the foam offered by Soundmaster, azodicarbonimide, does not release nitrogen alone, but rather releases a mixture of gases. The mixture of gases is typically 62 percent nitrogen and 35 percent carbon monoxide, with traces of ammonia and carbon dioxide. Therefore, even accepting Soundmaster's literal reading of the requirement, its offered foam is physically expanded using a mixture of gases rather than nitrogen alone, and its bid is nonresponsive.

We dismiss in part and deny in part Soundmaster's protest.

*for* *Melton J. Aocolaw*  
Comptroller General  
of the United States