

**DECISION**



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

**FILE:** B-206684                      **DATE:** July 15, 1983  
**MATTER OF:** Creative Electric Incorporated

**DIGEST:**

1. Award to optional Supply Schedule contractor under small purchase was not objectionable where GAO cannot conclude that procuring agency acted other than in good faith.
2. Even if purchasing agent did not comply with regulatory requirements before making award during pendency of protest, failure is procedural defect and does not affect validity of otherwise proper award.
3. Fact that contracting agency took extraordinary amount of time to submit report on protest does not invalidate otherwise valid award; however, agency head is being notified of delay in report submission and recommendation is being made that reporting procedures be reviewed.

Creative Electric Incorporated (Creative) protests its failure to receive the award of a purchase order for a "lock-in amplifier" under request for quotations (RFQ) No. K3547, issued on a brand name ("Ithaco Dynatrac model 393") or equal basis as a "small purchase" by the National Bureau of Standards (NBS). Creative notes that its evaluated price for the brand name item was lower than the evaluated price of the only other offeror (the brand name manufacturer). In Creative's view, this pricing advantage should have required an award to it. Creative also protests that the award was made prior to a resolution of its pre-award protest to the purchasing agent and that it took approximately 300 days for the agency to submit a report to our Office on its protest.

We deny the protest.

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NBS contends that the award--under which Ithaco delivered the product in April 1982--was properly made. The RFQ, issued in the belief that a General Services Administration (GSA) Supply Schedule contract did not cover the brand name item, resulted in the receipt of two quotations. Creative offered a brand name item it had previously purchased for its own use, but had apparently never used. Both quoters offered 1-year warranties on the item. The brand name manufacturer noted on its quotation that the item was on a nonmandatory group of the GSA Supply Schedule. The NBS purchasing agent then phoned the GSA contracting officer for that Supply Schedule contract. The GSA contracting officer reportedly advised NBS that although the item could be purchased on the open market from Creative, in view of the potential problems that could arise where the purchase was from someone other than a manufacturer of, or a regular dealer in, the product and in view of the added administrative cost that is associated with an open-market purchase, an open-market purchase was not warranted by the \$276.61 price difference between the two quotations. The view of the NBS "requisitioner," who discussed the purchase with the NBS purchasing agent, was that the "risk to timely completion of the experimental research project for which the amplifier was needed" made a purchase from Creative inadvisable notwithstanding the lower price. It was felt that any necessary repairs required during the warranty period might take longer if an award was made to Creative. Accordingly, award was thereafter made to the brand name manufacturer under authority of Ithaco's GSA contract.

Small purchases need not be awarded to the firm offering the lowest quotation (R. E. White & Associates, Inc., B-205489, April 1, 1982, 82-1 CPD 294), as long as there is a good-faith finding that the award is in the best interest of the Government and the price is reasonable. City-Wide Photography Consultants, Inc., B-203193, June 3, 1981, 81-1 CPD 444. Creative does not contest the reasonableness of the awardee's price. Nevertheless, Creative insists that it was not in the best interest of NBS to pay more for the identical product based on NBS's allegedly erroneous assumption that Creative's warranty service might not be as prompt as Ithaco's service. As stated by Creative:

"Creative Electric, Inc. is itself a manufacturer of sophisticated electronic signal processing equipment and would have performed most warranty repairs itself. We may well have

indicated that we might have to order certain repair parts from the original equipment manufacturer [located approximately 34 miles from Ithaco] or that in some extreme instance we might have required factory assistance, although this would have been highly unlikely. This is a situation which is encountered routinely in the business world and does not represent an undue risk to the buyer."

There is nothing in the record to substantiate the alleged position that GSA could have processed and administered the purchase order more cheaply than NBS could have through an NBS open-market contract. Nevertheless, and although others might have reached a different conclusion concerning the question of the adequacy of Creative's repair service, we cannot conclude that NBS made the Ithaco award in bad faith.

Contracting officials are presumed to act in good faith and, in order to show otherwise, the protester must submit virtually irrefutable proof that they had a malicious and specific intent to harm the protester. J. F. Barton Contracting Co., B-210663, February 22, 1983, 83-1 CPD 177. Based on our review of the record, we cannot conclude that the award derived from an alleged "malicious and specific intent" on the part of NBS to harm Creative. Although the record shows that NBS was considering a "manufacturer-only" restriction even before the RFQ was issued, we cannot equate this consideration to a "malicious and specific intent" on NBS's part to harm Creative. Therefore, we cannot question NBS's actions under the above review standard even if, as further alleged by Creative, the "requisitioner" rather than the purchasing agency "directed the purchase," the written evidence of which was actually signed by the purchasing agent. It is not uncommon, or improper, that purchasing agents receive advice, perhaps controlling in many instances, from many individuals prior to awarding a contract.

#### Other Grounds of Protest

Creative argues that it submitted an oral protest to the purchasing agent prior to Ithaco's award, but that the agent improperly proceeded with an award. Assuming the validity of Creative's argument, we have consistently held that the failure to follow the regulatory requirements in the making of the award notwithstanding the pendency of the

protest is merely a procedural defect which does not affect the validity of an otherwise valid award. See, for example, M.C. Hodom Construction Company, Inc., B-209241, April 22, 1983, 83-1 CPD 440. Further, delay by a contracting agency in submitting a report to our Office on a protest, even though the delay is extraordinary in length, as here, has no bearing on the validity of an otherwise properly awarded contract. Texstar Plastics Company, Inc., B-201105, September 18, 1981, 81-2 CPD 223. However, we are, by letter of today, notifying the Secretary of Commerce that the delay shows a need for review of the Department's procedures for furnishing bid protest reports.

Finally, Creative claims quotation preparation costs. Since we cannot question the award, as noted above, we deny the claim.

The protest is denied.

for *Harry D. Van Cleave*  
Comptroller General  
of the United States