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Decision

Matter of: Sun Chemical Corporation

File: B-288466; B-288466.2; B-288466.3

Date: October 17, 2001

David D. DiBari, Esq., Carlos E. Provencio, Esq., and Timothy P. Peterson, Esq., Clifford Chance Rogers & Wells, for the protester.

Scott Arnold, Esq., Harvey G. Sherzer, Esq., and Alan Sutton, Esq., Howrey Simon Arnold & White, for SICPA Securink Corporation, an intervenor.

Marvin Kent Gibbs, Esq., Department of the Treasury, Bureau of Engraving and Printing, for the agency.

Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency improperly determined that protester's product failed to meet a mandatory technical evaluation criterion and rejected its proposal as technically unacceptable is denied where the record shows that the agency's determination was reasonable and consistent with the solicitation's stated evaluation criteria.

2. Protest that contracting agency improperly failed to subject awardee's product to the testing required to evaluate that product under all of the solicitation's technical evaluation criteria is academic where the agency, during the pendency of the protest, proposes to take corrective action by completing the testing and evaluation of the awardee's product in accordance with the express terms of the solicitation.

DECISION

Sun Chemical Corporation protests the award of a contract to SICPA Securink Corporation under request for proposals (RFP) No. BEP-01-04, issued by the Department of the Treasury, Bureau of Engraving and Printing (BEP), to obtain black and green intaglio ink and varnish for application to new United States paper currency. Sun contends that the BEP improperly determined that its green ink failed to meet a mandatory health and safety technical evaluation criterion and rejected its proposal as technically unacceptable. Sun also contends that the BEP improperly failed to subject SICPA's inks and varnish to the testing required to evaluate its products against all of the solicitation's technical evaluation criteria.

We deny the protests.

The BEP produces paper currency using intaglio printing, a process that involves the creation of engraved designs that are made into dies and transferred to printing plates; the printing plates are used to print the currency on high-speed, sheet-fed rotary presses. Each sheet of currency paper is forced, under extremely heavy pressure, into the recessed lines of the printing plate to pick up the ink. The backs of the notes are printed with green ink and allowed to dry for 24-48 hours before the faces are printed with black ink. See <www.bep.treas.gov/document.cfm/18/121>, BEP Money Facts.

The BEP issued this solicitation on December 22, 2000, to procure the black and green intaglio ink and varnish¹ used to print paper currency at the BEP's Western Currency Facility in Fort Worth, Texas, and at its Washington, D.C. Facility. The RFP contemplated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for one base year, with up to four 1-year option periods, to the firm whose proposal was most advantageous to the government, considering price and other factors.

These other factors included three mandatory technical evaluation criteria against which offerors' samples were to be evaluated, on a pass/fail basis, to determine whether the inks and varnish had adverse health effects on BEP employees and to determine the volatile organic compounds (VOC) content of the inks. Samples that passed all of the mandatory criteria were to be evaluated against two "gradable" criteria to determine performance with respect to both the printing and processing and the printed work requirements set forth in the specification.² Under these gradable criteria, each offeror's samples were to be evaluated relative to other offerors' samples.

Each offeror was required to submit samples of ink and varnish identical to the materials it proposed to furnish if awarded the contract. These samples were to be fully compliant with all of the requirements of the specification, including numerous physical and chemical requirements. For each technical proposal, each offeror was required to submit one 20-drum sample each of black ink and green ink and one 400-pound sample of varnish to BEP's Washington, D.C. Facility for evaluation. Each offeror was also required to submit batch samples for laboratory testing and Material

¹ The varnish, used to manufacture the inks, might be used by the BEP to recycle or reconstitute the inks. RFP Specification ¶ 3.1.

² The BEP was also to evaluate offerors' past performance. SICPA's past performance was favorably evaluated and is not at issue here.

Safety Data Sheets (MSDS) disclosing any hazardous materials contained in its products.

Samples were to be evaluated using the BEP's sheet-fed intaglio currency presses at current normal production settings at the Washington, D.C. Facility. The BEP was to have the ultimate decision regarding press settings, conditions and adjustments necessary to optimize print quality and press performance. "Printing and processing of the material samples [were to] be terminated if and when the BEP determine[d] that the material sample jeopardize[d] the safety and health of Bureau employees or damage[d] the equipment." RFP § M.1.(a)(3)A.

If a sample failed to meet any of the mandatory technical evaluation criteria, the technical evaluation was to "cease immediately" and "further evaluation [would] not be considered." RFP § M.1.(a)(3)A.I. One of the two mandatory criteria applicable to inks, "Health and Safety," stated:

During printing, storage of printed sheets, examining and trimming of printed sheets, overprinting and any other production process, the ink shall not emit substances that are hazardous. The ink shall not emit substances that are hazardous in the press fountain, during printing, and when cured on printed sheets. During the storage of full or partial drums, the ink shall not emit substances or fumes that are hazardous. Ink samples that cause any adverse effect upon BEP employees shall be considered technically unacceptable and will be rejected. The BEP retains the right to reject any ink which has an adverse effect upon its employees, such as but not limited to headache; eye, dermal, nasal or throat irritation; sensitization; nausea; and dizziness.

RFP § M.1.(a)(3)A.I.A.1. (emphasis added), citing RFP Specification ¶¶ 3.7.2. and 3.7.3.³

On February 9, 2001, the BEP received three offers in response to the solicitation. Sun submitted one offer and SICPA, the incumbent supplier of these inks, submitted two separate offers, one of which was for "the same high quality Aqua ink system

³ RFP Specification ¶ 3.7.2., "Hazardous Substance Emissions," describes the requirements for hazardous substance emissions and provides sources to assist in determining the levels at which emissions are deemed hazardous. RFP Specification ¶ 3.7.3., "Health and Safety," states that the BEP "retains the right to reject any ink and varnish that causes an adverse effect upon its employees. Adverse effects include, but are not limited to, headache; eye, dermal, nasal, or throat irritation; nausea and dizziness. The ink shall not contain any ingredients that are skin or respiratory sensitizers."

used today in BEP production.”⁴ SICPA Proposal Cover Letter at 1. In addition to their written proposals, both offerors submitted samples and the appropriate MSDSs. The agency reviewed and approved the MSDSs, and its laboratory tests of both offerors’ batch samples demonstrated that they complied with applicable specification requirements, including the mandatory technical evaluation criteria for VOC content of the inks. The BEP subsequently scheduled press trials of offerors’ ink samples to evaluate the inks against the remaining technical evaluation criteria. Press trials were to be conducted on both an I-8 press, an intaglio press that runs at speeds of 8,000 sheets per hour, and an I-10 press, a new generation intaglio press that runs at speeds of 10,000 sheets per hour. RFP Specification ¶¶ 3.5.4. and 6.2.

On February 27, the BEP conducted a preliminary press trial of Sun’s green ink on an I-8 press to evaluate an aspect of the gradable criteria. The trial was monitored by the project manager, a chemist who serves as the contracting officer’s technical representative for currency intaglio inks and varnishes, and who served here as the chair of the technical evaluation panel (TEP). Also present were one other TEP member, two printers operating the press, and two other printers in the vicinity.

The project manager states that the press was properly cleaned to ensure that no contaminants that might affect Sun’s ink would be present. This process included purging the ink pumps of any residues that might be present from the BEP’s production ink, and cleaning the press itself to ensure that any residual production ink was removed from the press and the press fountain. Press personnel cleaned the press with cloths soaked in the solvent VARSOL and discarded the used cloths into a covered trashcan. The project manager states that when the lid of the drum containing the ink was removed, “a solvent-like odor permeated the atmosphere . . . Since the only other solution in the area was VARSOL, and since the containers of VARSOL were closed, the odor was attributed to the presence of Sun’s ink.” Project Manager’s Statement at 2. The project manager states that the two printers operating the press, and he and the other TEP member, began to suffer symptoms of nausea, dizziness, and light-headedness but did not report to the agency’s health unit. Statements submitted by all of these individuals are consistent with the project manager’s account. The press trial log sheet does not refer to the symptoms now reported but does note that the “ink is significantly odoriferous.” The project manager states that Sun’s ink passed the preliminary evaluation and that an extended evaluation to assess printing characteristics was to be conducted later. The trial log for the subsequent press trial of Sun’s black ink on an I-8 press shows no evidence that BEP employees suffered adverse effects.

The BEP also conducted press trials of SICPA’s green and black inks on I-8 presses. The press trial log sheets for both press trials show that the inks performed satisfactorily and mention no adverse effects on BEP employees.

⁴ SICPA’s other offer was rejected for reasons not relevant here.

On March 28, the BEP conducted a press trial of Sun's green ink on an I-10 press. The project manager monitored the trial and the contract specialist, the acting foreperson for the press section, a division manager, and three printers who were to operate the press were also present. The press trial began at approximately 9:10 a.m. The project manager states that the press was cleaned in a similar fashion as that described above but that press personnel used a different cleaning solution, Z-45 Experimental Ink Blaster, which the acting foreperson states has virtually no odor.

The project manager states that when the drum containing Sun's ink was opened, "a solvent-like odor immediately permeated the air. The odor became progressively worse as the evaluation continued. Virtually everyone in the area began to suffer symptoms of nausea, dizziness, light-headedness, skin irritation, or headache." Project Manager's Statement at 2. At about 9:30 a.m., one of the printers summoned the Occupational Safety and Health Coordinator for the Operations Directorate regarding these complaints. The safety coordinator states that, when he arrived, employees were complaining of headaches, nausea, and dizziness, and that he noticed a "pungent odor" in the air that was not one he had experienced. Safety Coordinator's Statement at 1. He states it was apparent to him that the employees were in "some distress" and that, acting strictly on health concerns of the employees and according to BEP practice, he terminated the testing of the ink sample. *Id.* The contract specialist telephoned the contracting officer to relay these events and to advise her that the safety coordinator had terminated the press trial due to employee health concerns. The project manager and contracting officer concurred with this decision. All three printers and the division manager sought medical attention at the agency's health unit; the project manager and the contract specialist report that they also experienced symptoms but did not seek medical attention. The daily production equipment operational summary sheet notes that the printing crew went to the health unit because the test ink was "making printers sick."

The TEP report for Sun's offer states that Sun's green ink emitted an "offensive solvent-like odor," and that, "[u]pon exposure to this odor, press personnel began suffering from symptoms such as nausea, dizziness, headache, and drowsiness. Press personnel were sent to the Health Unit for immediate medical attention." Sun's TEP Report at 1. The report concluded that since the green ink caused adverse effects on employees, the proposal was deemed technically unacceptable and Sun's black ink and varnish were not considered for further evaluation. The TEP report attached the medical reports for the employees who reported to the health unit. These reports document their complaints of nausea, skin sensitivity, headaches, lightheadedness, and drowsiness.

The contracting officer states that her decision to reject Sun's proposal as technically unacceptable was based upon the TEP report and the medical reports attached thereto, as well as on her conversations with the project manager and contract specialist the day of the I-10 press trial. The contracting officer states she

ascertained that no other contaminants were introduced into the press room and that the BEP had used a standard cleaning solution to clean the press for which there had never been any reports of adverse effects. Since Sun's ink was the only ink in the pressroom and no other contaminants were present, since she had eliminated the cleaning solution from consideration as the cause, and since the symptoms reported were consistent with those listed in Sun's MSDS,⁵ she believed the only rational conclusion she could draw was that Sun's ink caused the adverse effects experienced and reported by the BEP employees. Contracting Officer's Aug. 30, 2001 Statement at 7-8. As Sun's green ink caused adverse effects on BEP employees, its black ink and varnish were not tested and its proposal was not considered for further evaluation in accordance with the solicitation's terms. Memorandum of Pre-Negotiation Objectives at 5.

The TEP report for SICPA's offer states that the technical evaluation of SICPA's inks and varnish was waived because the firm's samples were "identical" to the current production materials in use, and those materials had not presented any adverse health effects on employees. SICPA TEP Report at 1. SICPA's inks, which were found technically acceptable, did not undergo evaluation under the gradable technical evaluation criteria and did not undergo press trials on an I-10 press.⁶

In her memorandum of pre-negotiation objectives, the contracting officer stated that SICPA's inks and varnish met all of the mandatory criteria and performance requirements in the initial phase of the press trials and, therefore, the project manager asked that laboratory tests be performed on SICPA's samples. The contracting officer stated that the test results established that SICPA's samples had the identical physical and chemical properties and VOC content of the current production inks and varnish supplied to BEP under the prior contract, which were fully compliant with the specification requirements, and she waived further press evaluations of SICPA's proposal. Memorandum of Pre-Negotiation Objectives at 3. The contracting officer states that her decision to waive further press evaluations was based on the fact that SICPA's ink was the only technically acceptable ink; SICPA's ink was "identical" to the BEP production ink; forgoing the I-10 press trials would not adversely affect any offeror; and forgoing the I-10 press trials would conserve BEP resources. She also considered the fact that the gradable evaluation criteria were only to provide a basis for evaluating competing proposals; here there were no competing proposals. Contracting Officer's Aug. 30, 2001 Statement at 5-6.

⁵ The MSDS states that "exposure to high concentrations of vapor may cause headache, nausea, dizziness, loss of coordination and fatigue," and skin contact may cause mild to moderate skin irritation.

⁶ The record does show that SICPA's inks were tested for and passed the RFP's mandatory VOC content technical evaluation criterion, and that the inks were tested for and met various physical and chemical requirements.

The contracting officer established a competitive range comprised of SICPA's offer and requested a final proposal revision from the firm. Sun was informed that its offer was technically unacceptable because it failed to meet the mandatory health and safety technical evaluation criterion and the firm filed its initial protest after its debriefing. The BEP subsequently determined that "[u]rgent and compelling circumstances that will significantly affect the interests of the United States" would not permit it to wait for a decision and executed an override of the statutory stay of performance of the contract; the BEP anticipated awarding the contract within 30 days. See 31 U.S.C. § 3553(d)(3)(C)(i)(II) (1994).

In its initial protests, Sun argues that its ink could not have caused the alleged adverse effects suffered by BEP employees and that the BEP's conclusion that it did is both unreasonable and unsupported by an adequate documentary record. In a supplemental protest filed in response to the agency report, Sun argues that the BEP improperly failed to subject SICPA's inks to the testing required to evaluate those inks against all of the solicitation's technical evaluation criteria.

Sun's Proposal

Our Office will review an allegedly improper technical evaluation of product samples to determine whether the evaluation was fair and reasonable and consistent with the evaluation criteria. Design Contempo, Inc., B-252589.2, Aug. 11, 1993, 93-2 CPD ¶ 90 at 4. We will not make an independent determination of the merits of an offeror's proposal or, in the case of a product demonstration, the performance of the offeror's product; rather, we will review the evaluation record, including the results of any test demonstration, to ensure that the agency's technical judgment has a rational basis and is consistent with the stated evaluation criteria. Exploration Prods., B-279251.2, B-279251.3, June 1, 1998, 98-2 CPD ¶ 15 at 5. Our review of the record here shows that the BEP's decision to reject Sun's proposal as technically unacceptable meets that standard.

At the outset, Sun argues that its ink could not have "caused" the adverse effects "allegedly" suffered by the BEP employees. Protester's Sept. 13, 2001 Comments at 2. In support of its position, Sun cites the "uncontroverted" opinion of its consultant that its ink "could not have emitted any potentially hazardous substances in concentrations that even approached, let alone exceeded, acceptable limits" given the expansive dimensions of the pressroom and the excellent ventilation. Id.

While the question whether Sun's ink emitted hazardous substances in excess of acceptable limits might be answered by an objective and scientific methodology, as referenced in RFP Specification ¶ 3.7.2., the RFP imposes no such methodology for answering the question whether Sun's ink could cause adverse effects on BEP's employees. RFP Specification ¶ 3.7.3. The RFP did not establish an objective or scientific process for determining that an ink sample "caused" adverse effects, did

not limit the definition of adverse effects, did not require that the adverse effects suffered meet a particular level of severity or be uniformly suffered, and did not establish a minimum number of BEP employees that must be affected before a sample could be rejected. The solicitation's broad grant of discretion to the BEP to terminate the testing of ink samples that caused "any adverse effect upon BEP employees," and to reject them as technically unacceptable, does not give the contracting officer unfettered discretion here, but that discretion is subject only to the test of reasonableness.

Sun contends that the contracting officer's determination that its ink caused adverse effects on BEP employees, and her resulting decision that the firm's proposal was technically unacceptable, is both unreasonable and inadequately documented.

It is true that the TEP report and the post-negotiations memorandum could have included more detail regarding the basis for rejecting Sun's proposal. It is equally true that the BEP personnel involved could have been more diligent in memorializing contemporaneous events, given their importance to this procurement. We nonetheless find that the contracting officer's statement containing post-protest explanations of her decision, and the other statements in the record,⁷ are credible and consistent with the contemporaneous record and support the reasonableness of her decision. See *NWT, Inc.; PharmChem Lab., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16 (post-protest explanations that provide a detailed rationale for contemporaneous conclusions will generally be considered in review of the rationality of agency decisions, so long as those explanations are credible and consistent with the contemporaneous record).

In making her decision, the contracting officer relied on the TEP's account that BEP employees had suffered adverse effects from Sun's ink and the medical reports describing these adverse effects. Citing internal BEP memoranda generated several years ago, Sun asserts that the BEP did not follow its internal procedures for rejecting test materials on the basis of employee health and safety concerns and that, as a result, the medical reports are insufficient to support the decision to reject its proposal.

We do not agree. These internal memoranda were not a part of the solicitation and do not have the force and effect of law; they do not establish legal rights and

⁷ Sun is correct that the events described in several post-protest statements with respect to the February 27 press trial of its green ink are not reflected in the contemporaneous record. Although this diminishes the weight of the statements in this regard, see *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, it does not compel us to ignore them altogether. In any event, the decision to reject Sun's ink was made on the basis of the March 28 press trial, not the February 27 press trial.

responsibilities such that actions taken contrary to such guidance are subject to objection.⁸ See Talon Mfg. Co., Inc., B-261687, B-261687.2, Oct. 19, 1995, 95-2 CPD ¶ 184 at 3; Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114 at 8 n.7. Rather, the relevant inquiry is whether the agency adhered to law and regulation by evaluating proposals in accordance with the evaluation scheme announced in the RFP, Reflectone Training Sys., Inc.; Hernandez Eng'g, Inc., B-261224; B-261224.2, Aug. 30, 1995, 95-2 CPD ¶ 95 at 6, and whether the agency's decision was reasonable.

Sun asserts that the BEP has significantly overstated the symptoms reported by the BEP employees at the I-10 press trial. Citing portions of the statements submitted by these individuals in the agency report, Sun contends that two of the four members of the press crew were "unaffected," one more "only claimed a skin sensitivity that may have been caused by his admittedly low blood pressure that day," and the final pressman only stated that he "started" to experience lightheadedness and headache at the time the trial was stopped. Protester's Sept. 13, 2001 Comments at 3. Sun also contends that, of the four observers, one reported no effects and three claimed a lightheadedness that, "under the circumstances, could not reasonably be deemed an 'adverse health effect.'" Id. An objective review of the contemporaneous medical reports and the statements provided by these individuals undermines Sun's position.

One printer reported that the vapor from the ink made him nauseous. Sun's contention that he was "unaffected" ignores this contemporaneous report and fails to fully quote from his statement, which reads, "During [the evaluation] I noticed that the ink produced a strong odor when applied to the hot printing plates; however, the odor did not affect me. One of the Bureau's safety officers halted the evaluation because the other plate printers and other personnel in the area of the press experienced dizziness and headaches, and I experienced slight feelings of nausea." The second printer reported that exposure to the ink caused him to have an allergic reaction and sensitivity in his facial skin. Sun's contention that his skin sensitivity "may have been caused by his admittedly low blood pressure that day" distorts his statement, which says that he had "an allergic reaction because [his] face became very sensitive. [He] . . . went to the health unit, where it was determined that [his] blood pressure had dropped very low. I was fine after about an hour of no exposure to Sun's ink." We do not read this statement to mean that this individual's skin sensitivity was caused by his low blood pressure but, rather, that his exposure to the ink may have caused his blood pressure to drop. The third printer reported that exposure to the ink caused him to have headaches, and to be lightheaded and drowsy. Sun focuses on his statement that he was only "starting" to experience lightheadedness and dizziness in an effort to minimize his symptoms. At the very

⁸ Sun's objection to the forms on which the medical reports were filed is similarly misplaced. Absent any solicitation requirement for the use of particular forms, our overriding concern is with their substance.

least, Sun's apparent position that BEP employees should be severely ill before tests of ink samples can be halted and proposals rejected is not required by the solicitation.

Sun's characterization of the acting foreperson as "unaffected" is literally true but omits the fact that she left the area before Sun's ink was introduced into the press and the safety coordinator had stopped the evaluation by the time she returned. Acting Foreperson's Statement at 1. In any event, the RFP did not require that all BEP employees in contact with the ink suffer adverse effects before an ink could be rejected.⁹ Sun's attempt to diminish the symptoms reported by the remaining observers as not adverse "under the circumstances" is equally unpersuasive, given the inclusion of their symptoms in the RFP's definition of "adverse effects" and the lack of any requirement that the symptoms meet a severity threshold.

Sun also contends that the contracting officer unreasonably failed to consider Sun's prior press trials, during which no adverse effects were contemporaneously reported. Even if we set aside the fact that the RFP required only one instance of adverse effects, and not a pattern, Sun's contention is unpersuasive. With respect to the February 27 press trial of its green ink, Sun correctly asserts that there is no contemporaneous evidence of adverse effects. The record does, however, contain credible evidence that symptoms included within the definition of "adverse effects" were suffered by some but apparently deemed insufficiently severe to stop the press trial. There is no reason to believe that the contracting officer's decision would have changed had she considered this information. With respect to the press trials of Sun's black ink, whether or not the black ink is "substantially the same as the green ink in terms of volatile chemical content," as argued by Sun in its Sept. 13 Comments at 7, has no bearing on whether the green ink caused adverse effects on BEP employees since the solicitation divided these matters into separate questions.

Sun finally contends that the contracting officer unreasonably failed to consider whether there were any other potential causes for the alleged adverse effects and relied upon a subjective standard that would permit rejection of a proposal based upon the "whims of a single employee." Sun's Sept. 10, 2001 Comments at 7. Sun's contention is not supported by the record.

Again, the solicitation did not impose an objective methodology for answering the question whether an offeror's ink caused adverse effects on BEP employees but,

⁹ For this reason, Sun's contention that there is no evidence that the printers who cleaned the green ink out of the I-10 press after the press trial had adverse effects is not dispositive. In addition, the daily production equipment operational summary, which states that Sun's ink was taken out after the trial and the production ink put back in, lists only three operating personnel for that day, the three printers who filed medical reports here.

instead, granted broad discretion to the contracting officer to make such a determination subject only to the test of reasonableness. The contracting officer states that she learned from the contract specialist and the project manager that no other contaminants were introduced into the pressroom and that employees had used a standard cleaning solution to properly clean the press. She explains that she would have been notified if BEP employees had experienced adverse effects from the cleaning solution but, to date, the cleaning solution had never caused any adverse effects. As a result, she had no basis to believe that the cleaning solution was the cause of the reported adverse effects. Contracting Officer's Aug. 30 Statement at 7-8. In this regard, we note that the list of symptoms that might be caused by this cleaning solution does not include dizziness, headache, or lightheadedness, and nausea would result only if the solution were ingested. In contrast, the list of symptoms that might be caused by Sun's ink does include these symptoms. *Id.* at 8. It is also undisputed that the pressroom was of adequate size and properly ventilated. The record shows that when the contracting officer was presented with credible reports that BEP employees suffered adverse effects when testing Sun's green ink, she engaged in a logical process of elimination that led her to eliminate any other potential cause save Sun's green ink. Sun has not persuaded us that her decision, which led to the rejection of its proposal as technically unacceptable, was unreasonable.

SICPA's Proposal

As discussed above, after Sun's ink was found technically unacceptable, the BEP waived further testing and evaluation on SICPA's inks and found its proposal technically acceptable. According to the TEP report, the basis for this finding was the conclusion that SICPA's proposed inks were identical to those SICPA was currently providing BEP as production inks for both presses, for which there had been no reports of adverse effects. The contracting officer elaborated on this finding in her pre-negotiation objectives memorandum. She explained that Sun's inks and varnish met all of the mandatory criteria and performance requirements in the initial phase of the press trials and that, as a result, the project manager asked that laboratory tests be performed on SICPA's samples. The contracting officer states that the results of these tests established that SICPA's samples had the identical physical and chemical properties and VOC content of the current production inks and varnish supplied by SICPA, which were fully compliant with the specification requirements. Memorandum of Pre-Negotiation Objectives at 3.

In its supplemental protest, Sun argued that the BEP improperly failed to subject SICPA's inks to the testing required to evaluate the inks against all of the solicitation's technical evaluation criteria. In responding to that allegation, the agency's position that SICPA's proposed inks were "identical" to the production inks appeared to change. In her supplemental statement, the contracting officer stated that she relied on SICPA's statement that it was offering "the same high quality Aqua ink system used today in BEP production," SICPA Proposal Cover Letter at 1, and

that analytical tests confirmed that SICPA's proposed ink met the physical characteristics outlined in the specification and was technically acceptable. Contracting Officer's Sept. 21, 2001 Statement at 2.

In response to our request to explain this apparent change in position, the agency stated that the project manager concluded SICPA's proposed inks were the same as the production inks SICPA was providing under the prior contract for both presses based on a variety of factors, including the fact that the formulation numbers for the samples and the production inks were the same, the fact that the evaluations conducted on the I-8 press showed that the sample inks performed consistently with SICPA's production inks, and various laboratory tests. The BEP nonetheless stated that it had decided to take corrective action by completing the testing and evaluation of SICPA's ink samples in accordance with the solicitation's terms. The BEP explained that, while the program manager stood behind his belief that SICPA's sample ink was the same as its production ink, the analytical tests conducted by the agency to confirm this belief were inconclusive and reasonable experts could differ as to what the results showed.

This Office will not consider a protest allegation where the issue presented has no practical consequences with regard to an existing federal government procurement, and thus is of purely academic interest. Since this allegation challenges the original evaluation of SICPA's proposal, and since that original evaluation is no longer valid in light of the BEP's proposed corrective action—which will necessitate a new evaluation based on completed testing of SICPA's samples and a new source selection decision based upon that new evaluation—there no longer is any current basis for Sun's allegation; the allegation has been rendered academic by the corrective action. See VSE Corp.—Recon. and Entitlement to Costs, B-258204.3, B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260 at 2.

Sun does not dispute that its allegation has been rendered academic but contends that the BEP has made intentional misrepresentations that amount to bad faith and have tainted the evaluation process. We do not agree.

The record shows that the project manager believed SICPA's inks were identical to the production inks based on their identical formulation numbers and the fact that their performance on the I-8 press was consistent with the performance of the production inks. When it became apparent that SICPA's proposal was the only offer remaining in the competition, the project manager asked that laboratory tests be performed to confirm his belief.¹⁰ While we agree with Sun that the agency has not clearly articulated the basis for its contemporaneous claim that the inks are

¹⁰ The agency provided copies of all laboratory results in its agency report. Agency's Aug. 30, 2001 Index of Documents at 3-4.

identical, we see no evidence that the agency has intentionally misrepresented its position in this regard.

To the extent Sun argues that the BEP's completion of the testing and evaluation of SICPA's inks will not be fairly and impartially performed, its argument merely anticipates improper agency action and, as a result, is speculative and premature. We will not question agency action on the basis of such speculation. Ervin and Assocs., Inc., B-279161 et al., Apr. 20, 1998, 98-1 CPD ¶ 115 at 5; VSE Corp.--Recon. and Entitlement to Costs, supra. Sun has produced no evidence that the BEP acted in bad faith in ordering the completion of the testing and evaluation of SICPA's inks, or that the decision was motivated by the specific intent of ensuring an award to SICPA. See PRC, Inc., B-233561.8, B-233561.9, Sept. 29, 1992, 92-2 CPD ¶ 215 at 4.

The protests are denied.

Anthony H. Gamboa
General Counsel