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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Sun Chemical Corporation--Costs

**File:** B-288466.4

**Date:** December 7, 2001

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

Scott Arnold, Esq., and Harvey G. Sherzer, Esq., Greenberg Traurig, 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.

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## **DIGEST**

Request for reimbursement of protest costs is denied where agency decides to take corrective action in response to supplemental protest allegation but the issue on which the corrective action was based is not clearly meritorious.

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## **DECISION**

Sun Chemical Corporation requests that our Office recommend that it recover the costs, including attorneys' fees, incurred in connection with one of its supplemental protest allegations challenging 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.

We deny the request.

Each offeror was required to submit, as part of its offer, samples of the black ink, green ink, and varnish it proposed to furnish if awarded the contract. RFP § L at 52. Samples were to be tested and evaluated in accordance with the factors listed in section M of the RFP to determine compliance with all of the characteristics listed for examination in the solicitation. *Id.* at 53. In this regard, while the solicitation

required the supplier to be responsible for most testing of these materials to ensure their compliance with the stated performance requirements, RFP Specification ¶ 4.2.1, the BEP assumed the responsibility for evaluating the inks and varnish on BEP equipment for compliance with the requirements of RFP Specification ¶ 3.5, "Printing Performance Requirements," and ¶ 3.6, "Printed Work Requirements," since these evaluations necessitated the use of BEP equipment. RFP Specification ¶ 4.2.4. Press trials were to be conducted on an I-8 press, which runs at speeds of 8,000 sheets per hour, and on an I-10 press, which runs at speeds of 10,000 sheets per hour. RFP Specification ¶¶ 3.5.4 and 6.2.

Award was to be made 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. If a sample failed to meet any mandatory criterion, the technical evaluation was to "cease immediately" and "further evaluation [would] not be considered." RFP § M.1.(a)(3)A.I. Two of the three mandatory criteria were applicable to the inks. The first criterion, "Health and Safety," stated both that the inks must not emit hazardous substances during printing or any other production or storage process, and that ink samples causing any adverse effect upon BEP employees would be rejected as technically unacceptable.<sup>1</sup> The RFP did not identify a particular test to determine compliance with the health and safety criteria, but treated compliance as a matter incidental to the entire evaluation and testing process. The second criterion, "Volatile Organic Compounds (VOC) Content," stated that inks containing greater than 12.0% by weight of VOCs would be rejected as technically unacceptable.

Samples that passed all of the mandatory criteria were to be evaluated against two "gradable" criteria to determine the relative quality of each offeror's performance with respect to the specification's printing and processing requirements and its printed work requirements. Hence, while the BEP was required to evaluate the samples against these requirements to determine compliance with the minimum standards, for each of these gradable criteria, the BEP was to evaluate each offeror's sample relative to other offerors' samples and award the maximum number of points available to the offeror providing the best overall performance.

SICPA and Sun were the only firms to submit offers by the February 9, 2001 closing date. SICPA, the incumbent supplier of these inks, submitted an offer for "the same high quality Aqua ink system used today in BEP production." SICPA Proposal Cover Letter at 1. The BEP's laboratory tests of both offerors' samples demonstrated that they complied with applicable requirements, including the mandatory criterion for

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<sup>1</sup> The third mandatory criterion imposed a similar health and safety requirement for the varnish.

VOC content of the inks. The BEP scheduled press trials to evaluate offerors' ink samples against the remaining technical evaluation criteria.

The BEP subjected both offerors' inks to press trials on an I-8 press. Sun's green ink passed the preliminary evaluation notwithstanding some evidence that it had adverse effects on BEP employees; the press trial logs for Sun's black ink showed no evidence of adverse effects. The press trial log sheets for both of SICPA's inks show that they performed in a manner consistent with the production standards and mention no adverse effects on BEP employees. The BEP commenced press trials on an I-10 press with Sun's green ink. As explained in our decision denying the bulk of Sun's protest, Sun Chemical Corp., B-288461 et al., Oct. 17, 2001, 2001 CPD ¶ \_\_\_, the BEP found that Sun's green ink had adverse effects on BEP employees. In accordance with the RFP's terms, the BEP stopped further technical evaluation and eliminated Sun's proposal from further consideration.

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. 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 explained that SICPA'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—who also served as chair of the technical evaluation panel—asked that laboratory tests be performed on SICPA's samples. The contracting officer stated 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.

After it received the agency report on its initial protest, Sun filed a supplemental protest in which it alleged that the BEP improperly failed to subject SICPA's inks to the testing required to evaluate the inks and varnish against all of the solicitation's technical evaluation criteria. In its supplemental report, the BEP'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. Sun's supplemental comments pointed out this apparent change in position, and we asked the agency for an explanation.

In response to our request, the BEP 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 project 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. We dismissed the allegation as academic based on the agency's proposed corrective action. Sun asks that we recommend it recover the costs incurred in connection with this supplemental protest allegation.

When an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(e) (2001). Under this provision, we will recommend recovery of protest costs where, based on the circumstances of the case, we conclude that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5. For a protest to be clearly meritorious, the issue involved must not be a close question. J.F. Taylor, Inc.--Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3. Rather, the record must establish that the agency prejudicially violated a procurement statute or regulation. Millar Elevator Serv. Co.--Costs, B-281334.3, Aug. 23, 1999, 99-2 CPD ¶ 46 at 2. The fact that an agency decides to take corrective action does not establish that a statute or regulation clearly has been violated. J.F. Taylor, Inc.--Entitlement to Costs, *supra*. As explained below, the circumstances of this case lead us to conclude that it is inappropriate to recommend that the protester recover its protest costs.

The BEP contends that the allegation was not clearly meritorious because the contracting officer had the discretion to waive completion of the testing for SICPA after it was determined that it met the mandatory technical criteria and after Sun's proposal was eliminated from the competitive range. As support for its position that the contracting officer "has the authority to avoid conducting evaluations," Opposition to Request for Costs at 2, the BEP relies upon cases where we have held that agencies may reasonably waive first article testing for firms that successfully produced the same or similar items under prior agency contracts with materially similar specifications. See, e.g., Marine Instrument Co., B-241292.3, Mar. 22, 1991, 91-1 CPD ¶ 317; Baird Corp., B-213233, Dec. 20, 1983, 84-1 CPD ¶ 8. The agency's reliance on these cases is misplaced.

Unlike in solicitations contemplating first article testing, this solicitation did not permit the government to waive the requirement to test and evaluate samples under any scenario. The ink and varnish samples submitted for testing and evaluation here were, for all practical purposes, the offerors' technical proposals. The RFP required their submission as part of the offer and provided for the conduct of specific tests--in the form of both press trials and certain laboratory tests--for the purpose of establishing compliance with the specifications and the mandatory technical

evaluation criteria. RFP § L at 53. Failure of the samples to meet the mandatory technical criteria would result in the offeror's proposal being determined technically unacceptable. Id. Hence, the evaluation and testing of the samples was critical to the evaluation process and the determination of technical acceptability. See Diverstech Co., B-270840, May 1, 1996, 96-1 CPD ¶ 209 at 2-3; Panasonic Communications & Sys. Co., B-239917, Oct. 10, 1990, 90-2 CPD ¶ 279 at 2-3.

The BEP correctly points out, however, that we will sustain a protest objecting to a waiver of test requirements only where the protester demonstrates that it was prejudiced thereby. McRae Indus., B-287609.2, July 20, 2001, 2001 CPD ¶ 127 at 5; SCI Sys., Inc., B-258786, Feb. 13, 1995, 95-1 CPD ¶ 80 at 6, recon. denied, B-258786.2, July 17, 1995, 95-2 CPD ¶ 35. We concluded in our prior decision that the BEP properly found Sun's proposal technically unacceptable. As a result, for the agency's actions to be prejudicial, Sun must show that had the BEP completed its testing and evaluation of SICPA's inks—that is, had it run the press trials on an I-10 press and conducted a complete evaluation to determine SICPA's compliance with the stated requirements for examination, including the incidental health and safety criteria—it would have found SICPA's proposal technically unacceptable, thereby compelling the BEP to resolicit the requirement. Sun has made no such showing.

Again, the BEP waived complete testing and evaluation of SICPA's inks and found its proposal technically acceptable because it concluded 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, and which were fully compliant with the specification requirements. If the BEP's conclusion is correct, there is no basis to conclude that SICPA's proposal would have been found technically unacceptable had testing and evaluation been completed. However, whether or not SICPA's proposed inks were the same as the production inks is not readily apparent, but instead would require substantial further analysis, as indicated, in part, by our Office's request for clarification during the pendency of the protest. In other words, balancing the substantial evidence in the record that the inks were the same against unanswered questions regarding the interpretation of the BEP's analytical tests and the similarity between the specifications applicable to this solicitation and the prior contract, whether or not SICPA's inks would have been found technically unacceptable was a close question.

Given that the existence of prejudice to Sun is, at a minimum, not readily apparent, we conclude that the issue that prompted the corrective action was a close question, and thus that the protest was not clearly meritorious on this ground. Millar Elevator Serv. Co.—Costs, supra, at 3. Since a prerequisite to a recommendation for the recovery of costs is that the corrective action be taken in response to a clearly meritorious protest, there is no basis on which to recommend that Sun recover its protest costs in this case.

Anthony H. Gamboa  
General Counsel