

DECISION



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

FILE: B-185058

DATE: August 9, 1976

MATTER OF: Inflated Products Co., Inc., and Brunswick Corporation

98720

DIGEST:

1. Questions of legality of proposed contract award to be made by Government department presented to GAO for decision by official who is not department head, will be decided as if department had submitted them under 31 U.S.C. § 74 (1970).
2. Request by procurement activity for GAO advance decision regarding legality of proposed award, will be decided and therefore question of timeliness of bid protest under Bid Protest Procedures is moot.
3. Where telex modification of bid does not indicate whether reductions for two items are to be applied to unit or total price, bid is ambiguous as it is reasonably susceptible of two varying interpretations, under only one of which bid price would be low, and it would be prejudicial to other bidder to permit bidder who created ambiguity to select after bid opening interpretation to be adopted.

Inflated Products Co., Inc. (IPI), protests any award of a contract to any other firm under invitation for bids (IFB) No. DAAK01-75-B-2145, issued on April 7, 1975, by the United States Army Troop Support Command (TROSCOM), St. Louis, Missouri. IPI contends that its firm should receive the award as the low responsive, responsible bidder. Counsel for IPI contends that if our Office rules against IPI on the merits the subject IFB should be canceled because the Army created an ambiguity by the amendment 00004 quantity changes. Counsel for Brunswick Corporation (Brunswick) protests any award to IPI contending that any award to IPI would be unlawful on the grounds that its bid was not responsive to the terms and conditions of the IFB and that an award should be made to Brunswick as the low responsive bidder.

The subject IFB originally called for 100 expandable shelters and 93 multipurpose shelters plus data items with additional quantity option rights. The IFB was amended four times and amendment 00004, dated July 23, 1975, increased the number of expandable shelters from 100 to 125 and decreased the number of multipurpose shelters from 93 to 70.

Bids were opened on August 22, 1975, and the record discloses that of the 44 firms solicited, bids were received from 2 firms, Brunswick and IPI. The contracting officer reports that IPI was the low bidder by approximately \$1.5 million and that its bid was substantially less than the Government's estimate. On August 25, 1975, the contracting officer requested IPI to verify its bid to preclude a possibility of a claim of error. IPI verified its bid on August 28, 1975. Although IPI was initially found to be a nonresponsive bidder, on March 9, 1976, the Small Business Administration issued a certificate of competency, certifying to IPI's capacity and credit to perform under the subject IFB.

The contracting officer reports that on March 19, 1976, he informed Brunswick that its protest against any award to IPI filed with the Army by letters dated August 27, October 21 and October 31, 1975, was denied.

In a letter received in our Office on March 19, 1976, counsel for Brunswick protested any award to IPI contending that IPI's bid was nonresponsive and that IPI would not be a responsible contractor within the meaning of the Armed Services Procurement Regulation (ASPR). By letter dated April 29, 1976, counsel for Brunswick advised our Office that it had filed a letter dated April 26, 1976, with the contracting officer stating additional grounds for the subject protest. Counsel for Brunswick states that these additional grounds were revealed by its April 16, 1976, examination of the bid package submitted by IPI, which Brunswick obtained pursuant to a request filed with the Army under the Freedom of Information Act. Counsel contends that IPI failed to bid on the correct quantity of shelters as reflected in amendment 00004, thereby rendering IPI's bid nonresponsive. Further, counsel for Brunswick contends that IPI's August 15, 1975, bid as amended by telex on August 22, 1975, is ambiguous since the telex does not identify whether the reductions for items 0001AA and 0005AA are to be applied to the unit or the extended price. Brunswick contends that this ambiguity is compounded by IPI's use of the terms "price" and "cost," although neither term is

used as such in schedule "E" submitted with IPI's original bid. Counsel for Brunswick contends that a further irregularity contained in IPI's bid is its failure to comply with section C-11 of the IFB requiring bidders to identify, at the time of submission of the bid or within 5 days thereafter, the name and plant location of each subcontractor to whom the bidder intends to award a subcontract of one million dollars or more for purposes of ascertaining compliance with provisions of the Equal Opportunity clause.

By letter dated May 6, 1976, the contracting officer replied to Brunswick's letter of April 26, 1976, stating that the additional arguments raised by Brunswick are without merit. The contracting officer further stated that the new issues raised by Brunswick are untimely under our Bid Protest Procedures, 4 C.F.R. part 20.2(b)(2) (1975). Counsel for IPI also argues that the additional grounds for Brunswick's protest are untimely raised and should not be considered by our Office.

On May 11, 1976, counsel for Brunswick instituted Civil Action No. 76-0807 in the United States District Court for the District of Columbia (Brunswick Corporation v. Hon. Martin R. Hoffman and L.T. Marshall). The complaint requested an order to prevent the Secretary of the Army, and his subordinates, from awarding a contract to IPI under the subject IFB. The complaint also sought injunctive relief to maintain the status quo pending final determination of Brunswick's protest to our Office. The action further sought an order requesting the Comptroller General to transmit to the court a copy of his report, recommendations, and conclusions with respect to Brunswick's protest. On May 19, 1976, counsel for Brunswick and counsel for the Secretary of the Army and the contracting officer stipulated with the approval of Judge Barrington D. Parker as follows:

"THEREFORE, it is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties that:

- "(1) inasmuch as defendant Secretary of the Army, through his agent, has denied defendant Marshall's request to award the contract to Inflated under the Solicitation prior to resolution of plaintiff's protest by the GAO, award of the contract will not be made until at least 10 days after the Comptroller General issues a final determination on the merits of Brunswick's protest;

- "(2) plaintiff will withdraw its application for a temporary restraining order filed on May 11, 1976 and its motion for a preliminary injunction filed on May 19, 1976;
- "(3) all proceedings in the action herein will be stayed until the Comptroller General issues a final determination on the merits of plaintiff's protest; and
- "(4) the parties will make available to the Court a copy of the Comptroller General's decision on Brunswick Corporation's protest No. B-185058(2) as soon as possible after its issuance."

On May 26, 1976, a conference was held at this Office which all the interested parties attended. Written comments from counsel for IPI and Brunswick were subsequently furnished to our Office.

By letter dated May 28, 1976, the Command Counsel, Department of the Army, Headquarters United States Army Materiel Development and Readiness Command, requested a decision by our Office on the merits of the protest notwithstanding the possible untimeliness of certain issues raised by Brunswick. Counsel for IPI has set forth several reasons for its view that Brunswick's protest is untimely and should not be considered by our Office. However, the Army has expressed its concern whether an award to IPI, as the result of its bid under the subject IFB, would be legally supportable in the light of the terms of IPI's bid and of the new issues injected into this protest by Brunswick's letter dated April 26, 1976. The Army states that research of relevant GAO decisions has failed to clearly resolve the problem to the satisfaction of the Army and, therefore, the Army requests our decision to assist the Army in complying with the statutory mandate of 10 U.S.C. § 2305(c) (1970). In view of the Army's request for our decision regarding the legality of a proposed award to IPI, our Office will consider the merits of the protest under 31 U.S.C. § 74 (1970), notwithstanding the possible untimeliness of certain issues raised. The matter will be treated as a request from the department head under 31 U.S.C. § 74. 55 Comp. Gen. 52 (1975).

B-185058

Counsel for IPI submits that it did bid on the item quantities as amended by amendment 00004 in view of the following. IPI acknowledged amendment 00004 and signed and returned it on August 15, 1975. On August 22, 1975, IPI sent a telegraphic modification to its bid to TROSCOM which counsel argues changed the unit prices at which IPI offered to perform under the IFB. Since IPI had previously acknowledged amendment 00004, counsel contends that IPI's subsequent modification to its offered unit prices applied to the amended quantities.

Counsel for Brunswick sets forth several grounds for its position that IPI's bid is nonresponsive. Counsel urges that IPI's bid price modification was ambiguous and therefore should be disregarded.

IPI's bid, as submitted on August 15, 1975, quoted the following prices for the items under procurement.

<u>Item</u>	<u>Quantity</u>	<u>Unit Price</u>	<u>Amount</u>
0001AA (Expandable Shelter-Production Model)	100	\$ 33,800	\$3,380,000
0002AA (Expandable Shelter-Preproduction Model)	1	100,000	100,000
0003AA (Expandable Shelter-Maintenance Capability Model)	1	100,000	100,000
0005AA (Multipurpose Shelter-Production Model)	93	11,100	1,032,300
0006AA (Multipurpose Shelter-Preproduction Model)	1	40,000	40,000

On August 22, 1975, IPI amended its bid by a telex which stated in relevant part:

"REDUCE PRICE ON ITEM 0001AA BY \$10,164.00,
INCREASE COST ON ITEM 0002AA BY \$75,000.00,
INCREASE COST ON ITEM 0003AA BY \$25,000.00,
REDUCE COST ON ITEM 0005AA BY \$3,760.00 AND
INCREASE COST ON ITEM 0006AA BY \$35,000.00.

"ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME."

TROSCOM interpreted the telex as reducing the unit price for items 0001AA and 0005AA and evaluated the bid accordingly, resulting in a reduction of its bid price by \$1,533,700, making IPI the low bidder.

In 50 Comp. Gen. 302 (1970), a bidder for the sale of Government surplus property sent an ambiguous telegraphic bid modification. The agency adopted the interpretation of the telegram transforming the bid into the highest offer. Our Office disagreed with the agency's position, stating:

"* * * where a telegraphic bid modification is reasonably susceptible of two varying interpretations and the bid price would be high under one interpretation but not under the other, it would be prejudicial to other bidders to permit the bidder who created the ambiguity to select after bid opening the interpretation to be adopted
* * *.

* * * * *

"Accordingly, since the teletype bid modification is ambiguous, it should be disregarded * * *."

Id. at 304. Where a bid is reasonably subject to two interpretations, a bidder may not explain the bid's meaning when he thereby would be in a position to prejudice other bidders since such action would "cause overall harm to the system of competitive bidding despite the immediate advantage gained by a lower price in the particular procurement." Rix Industries, B-184603, March 31, 1976, 76-1 CPD 210.

TROSCOM contends that an "application of reason" serves to remove any doubt as to the true meaning of IPI's telex. Based upon the objective evidence available at the time of bid opening, including the absence of a specific statement as to whether the reductions are applied to the unit or total prices, we do not agree that IPI's telex could only reasonably be interpreted to reduce the unit prices for the expandable and multipurpose shelters.

One basis for construing a bid modification is to consider the reasonableness of the bid prices resulting therefrom. In 51 Comp. Gen. 831 (1972), our Office ruled that a possible interpretation of a confusing bid modification which produced an unreasonably low price for the items under procurement could be disregarded by the agency. Counsel for Brunswick contends that under TROSCOM's interpretation of the telex, IPI's unit price for the 100 expandable shelters bid upon is \$23,636, and its unit price for the 93 multipurpose shelters is \$7,340. If the prices for the preproduction models and maintenance capability models are included, IPI's average price for the 102 expandable shelters bid upon is \$26,114, and its average price for the 94 multipurpose shelters bid upon is \$8,060. Under TROSCOM's interpretation of the telex, IPI's average prices are substantially below Brunswick's and the Government's estimated unit prices for the shelters. It is reported that these prices are below the unit prices paid by TROSCOM for 157 expandable and 347 multipurpose shelters under contracts awarded to Brunswick in June 1972. IPI's quotation of average prices below the unit prices paid by TROSCOM for substantially larger quantities of the shelters procured in 1972 appeared to be so low that TROSCOM requested IPI to verify its bid because of the possibility of a mistake.

Counsel for IPI contends that the telex must be interpreted to apply to unit prices because "it would be unreasonable to suppose that such tiny reductions would apply to the total price * * * when such large increases were made in the price of the single unit items." We do not agree with IPI's contention. Decreasing the total of the extended prices originally bid by Inflated for the production models of the shelters by \$13,924 appears at least as reasonable as decreasing that total by \$1,533,700, especially when the telex increased the preproduction and maintenance capability models of the shelters by \$135,000. (These figures accept IPI's contention that it bid on the quantities of shelters listed in amendment 00004.)

We believe that consideration of the objective evidence available at the time of bid opening suggests that, at best, the telex is subject to two reasonable interpretations.


Counsel for Brunswick contends that when IPI's bid is evaluated on the basis that the modification applies to its total prices, Brunswick's alternative bid is the low responsive bid by over \$200,000, and that ASPR § 2-407.1 (1975 ed.) requires that the contract be awarded to Brunswick. Brunswick's statement of its price

B-185058

appears to be based upon the procuring activity accepting its accelerated delivery schedule and waiver of the testing requirements. We have been advised by TROSCOM that Brunswick's accelerated delivery schedule will be accepted and that waiver of the testing requirements will be granted. Assuming the accuracy of these figures, acceptance or rejection of IPI's explanation of its telex determines whether or not it is the low bidder. See C&S Construction Company, Joint Venture, B-185798, April 19, 1976, 76-1 CPD 267, and cases cited therein.

Counsel for IPI contends that if our Office holds against IPI on the merits, TROSCOM should be directed to cancel the IFB and readvertise the procurement, rather than award the contract to Brunswick. Apparently this argument is based upon the contention that amendment 00004 was misleading as to the proper method of bidding upon the amended quantities of shelters under procurement. While we believe that it would have been better for the amendment to have provided space for the insertion of prices, we do not believe that this deficiency constitutes a compelling reason to reject all bids. Further, any claim of solicitation improprieties which are apparent prior to bid opening are required to be filed prior to bid opening under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1).

In view of the above, the protest of IPI is denied and the protest of Brunswick sustained. Therefore, award may be made to Brunswick if its bid is still available for acceptance and the contracting officer determines that Brunswick is a responsive and responsible bidder and that its price is reasonable. In view of our conclusion, it is not necessary to consider the other bases of protest raised.


Deputy Comptroller General
of the United States