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**DECISION**



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

FILE: B-201105

DATE: September 18, 1981

MATTER OF: Texstar Plastics Company, Inc.

**DIGEST:**

1. Specification requiring polycarbonate material was changed by amendment to RFP which deleted all references to polycarbonate. While terms of amendment are somewhat ambiguous, agency answer to question posed at preproposal briefing, which was included in revised RFP, was sufficient to put all offerors on notice of changed requirement. Therefore, protester was not prejudiced and protest that offerors did not compete on equal basis is denied.
2. Protester received, along with agency request for best and final offer, model contract prepared by agency and based upon protester's proposal. Model contract erroneously contained original specification which required use of polycarbonate material even though this requirement had been deleted by earlier amendment and had been discussed at preproposal conference. In view of preproposal conference and earlier amendment, protester's interpretation that model contract incorporated change back to original requirement for polycarbonate is unreasonable. Moreover, protest against ambiguity created thereby is untimely since filed well after submission of best and final offer.
3. Protest against improper disclosure of technical proposal information to competitor is untimely where filed more than 10 days after agency told protester that such information had erroneously been sent to competitor.

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4. Protest alleging that evaluation of technical proposals was not conducted in accord with evaluation criteria of RFP and that evaluation panel was unfamiliar with protester's technical proposal is denied. In camera review of evaluation material shows that evaluation was conducted in accord with RFP evaluation criteria and that evaluation panel was thoroughly acquainted with proposal.
5. GAO will not consider protest that awardee of contract is not small business because such issue concerns small business size status and is for conclusive determination of Small Business Administration.
6. Protest issue raised for first time in protester's comments on agency report must independently satisfy timeliness requirements. Where issue is filed in GAO more than 10 days after basis for protest is known, protest is dismissed as untimely.
7. Fact that contracting agency took 4 months to report on protest does not invalidate awards under protested solicitation. However, agency head is being notified of delay and recommendation made that reporting procedures be reviewed.

Texstar Plastics, Inc. (Texstar), protests against award of contracts to Sierracin/Sylmar Corporation (Sierracin) and Goodyear Aerospace Corporation (Goodyear Aerospace) by the Department of the Air Force pursuant to request for proposals (RFP) No. F33657-80-R-0122. The contracts, for the procurement of forward and aft canopy transparencies for use on F-16 aircraft, were awarded on October 17, 1980. The protest alleges a number of procurement irregularities. Since we do not believe any of these allegations warrant a finding that the awards are invalid, the protest is denied.

Texstar's first ground for protest is that all offerors did not compete on the same basis. Texstar contends that the awardees were allowed to offer aft canopies made of stretched acrylic while the RFP required the use of more expensive polycarbonate material.

Texstar alleges that, since Sierracin and Goodyear Aerospace were awarded contracts based upon the use of stretched acrylic material for aft canopies and the Air Force never informed Texstar that stretched acrylic would be an acceptable substitute for polycarbonate, the Air Force relaxed its minimum acceptable requirements without amending the solicitation and allowing Texstar to propose on the relaxed basis.

A draft RFP and cover letter entitled "Executive Summary" were issued by the Air Force on February 29, 1980. Both documents stated that competing transparencies must meet or exceed the requirements of General Dynamics Specification No. 162K002D, dated November 21, 1978, as amended, and a copy of that specification was attached. (General Dynamics is under contract with the Air Force to build F-16 aircraft and the canopies under the protested contracts will be provided to General Dynamics as Government-furnished equipment.) General Dynamics' specification 162K002D required in paragraph 3.3.8.3.1 that, "The parent transparency materials shall be optically processed polycarbonate sheet \* \* \*." However, the draft RFP stated that offerors were invited to suggest specification or requirement changes to the procuring activity and acceptable changes would be made known to all offerors by revision to the RFP.

On March 18, 1980, questions were solicited from potential offerors at a preproposal conference, and verbal answers were provided at that time. Formal written responses were prepared by the Air Force and distributed to offerors along with a revised Executive Summary and amendment 0001 to the draft RFP on April 7, 1980. Question number 37 was (quoting from the Air Force minutes of that meeting), "Will a proposal offering aft Model A & B canopies of stretched acrylic be responsive?" The Air Force representative responded, "Any proposed transparency material that meets the performance requirements of the RFP technical specifications would be acceptable." The April 7 Executive Summary stated that changes had been incorporated into the draft RFP. Texstar points out that the Executive Summary did not specifically state that there had been changes made in the draft RFP regarding transparency materials. However, amendment 0001 contained a revised provision entitled

"Transparency Materials" in section "M," paragraph 3.3.8.3.1, which stated, "The transparency materials shall meet the requirements of the vendor prepared material specification approved by the USAF." Reference to polycarbonate material was also deleted from paragraph 3.3.8.4 by amendment 0001. These changes were highlighted by a vertical line in the amended solicitation's margin.

Texstar argues that the above actions did not put it on notice that stretched acrylic would be an acceptable substitute for polycarbonate material. We do not agree. While we find that the amendment 0001 revision is somewhat ambiguous, we think that its terms when read in light of the Air Force answer to question number 37 should have been sufficient to put Texstar on notice that the requirement for polycarbonate material had been deleted and that stretched acrylic would be acceptable, especially since the Air Force did not respond negatively when asked if stretched acrylic was acceptable. Indeed, the Air Force responded that any material would suffice as long as the RFP's performance specifications could be met. In such circumstances, we find the deletion of all references to "polycarbonate" from paragraph 3.3.8.3 which was captioned "Transparency Materials" should reasonably have conveyed to Texstar that materials other than polycarbonate were acceptable to the Air Force. See, for example, New England Telephone and Telegraph Company, 59 Comp. Gen. 746, 750 (1980), 80-2 CPD 225; see also Education Turnkey Systems, Inc., 57 Comp. Gen. 8 (1977), 77-2 CPD 267. Therefore, this portion of the protest is denied.

Texstar also argues that it had been misled into believing that only polycarbonate material would be allowed, because the Air Force mailed it a model contract (based upon Texstar's proposal) which contained the original specification requiring polycarbonate material. The Air Force admits that the model contract it sent Texstar erroneously contained the original specification. However, since this inadvertent change back to the original specification was not issued in the form of an amendment nor highlighted in any other way, the Air Force argues that it should not have been relied upon by Texstar. Moreover, the Air Force points out that, even if this error resulted in an ambiguity

being created, since Texstar did not protest such ambiguity before best and final offers were submitted (September 26, 1980), the argument was untimely filed.

We find that this portion of Texstar's protest is untimely. The Air Force sent out the model contracts on September 17, 1980, and Texstar noticed the discrepancy between amendment 0001 (which relaxed the transparency material requirement) and its model contract (which again restricted canopy construction by requiring use of polycarbonate material). We do not believe that Texstar's assumption that the specification had been changed back to the original form was reasonable, especially since no amendment accompanied the model contract and in view of the answer given to question number 37 concerning this requirement at the preproposal conference. Accordingly, we think that if the erroneous model contract provision created a specification ambiguity in Texstar's opinion, the matter had to be protested, in accordance with section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1981), before best and finals were due in order to be considered by our Office.

In any event, the Air Force reports that even if Texstar's quoted price for aft canopies was reduced to \$0, Texstar's total price for both the forward and aft canopy systems would still be higher than either Sierracin's or Goodyear Aerospace's quoted total canopy system prices. Therefore, assuming Texstar had been able to reduce its price for the aft canopies by using cheaper stretched acrylic material, Texstar would still not have been in line for award. Accordingly, Texstar has not shown that it was competitively prejudiced by the inclusion of the original specification in its model contract. See KET, Inc.--Request for Reconsideration, B-190983, January 12, 1981, 81-1 CPD 17.

The protester next alleges that it was competitively prejudiced because the Air Force improperly disclosed Texstar's technical proposal information to Sierracin. This occurred when the Air Force mailed model contracts, based upon the offerors' proposals, to the wrong parties. Due to an apparent mixup in the contracting activity's mailroom, Texstar was mailed a copy of Sierracin's model contract and Sierracin was mailed a copy of Texstar's model contract. On September 19, 1980, the contracting officer notified both offerors that this mistake had occurred, asked them not to look at the contents of

their competitor's model contract, and asked them to return the material. Texstar contends that, regardless of the reason for the model contract substitution, the mere possibility that Sierracin might have looked at Texstar's model contract and thereby gained a competitive advantage merits invalidating Sierracin's and Goodyear Aerospace's awards.

Texstar's protest against the Air Force model contract mixup was untimely filed and, therefore, will not be considered on its merits. Since Texstar was told by the contracting officer on September 19 that this mailing error had occurred, Texstar had to protest within 10 working days after this basis for protest was known. 4 C.F.R. § 21.2(b)(2) (1981). However, Texstar waited until after best and finals were submitted (September 26) and did not file its protest in our Office until November 4.

Texstar's next basis for protest concerns the evaluation of its technical proposal. Texstar alleges that the Air Force evaluation team had little familiarity with Texstar's proposal, that the evaluation requirements of the RFP were improperly applied or changed during the evaluation, and that the Air Force failed to conduct meaningful discussions with Texstar because certain alleged weaknesses in Texstar's proposal were not revealed to Texstar during negotiations. In this connection, Texstar states that it learned for the first time when it was debriefed on October 31 that its proposal had been erroneously downgraded in three areas because:

- (1) its monolithic canopy had passed General Dynamics' but not the Air Force's "bird strike" tests;
- (2) its laminated canopy was too heavy when, in fact, a lighter weight version was also proposed and was not even considered; and
- (3) poor management structure in the area of quality assurance.

Initially, it should be noted that it is not the function of our Office to reevaluate technical proposals.

However, we will examine the record to determine whether the judgment of the contracting agency was clearly without a reasonable basis. Ridgeway Electronics, Inc., B-199557, January 13, 1981, 81-1 CPD 21. Moreover, even though agencies are required to point out deficiencies or excesses in an offeror's proposal, the extent and content of written and oral discussions is primarily a matter of procuring agency judgment. University Research Corporation, B-196246, January 28, 1981, 81-1 CPD 50.

While the record in this protest is voluminous, with detailed comments relating to various technical aspects of Texstar's proposal, we do not find it necessary to discuss all of this technical data to resolve the protest. Since the Air Force has denied Texstar access to most of the evaluation records and its competitors' proposals, we have reviewed the material in camera in light of Texstar's complaints. Due to the nature of this information, our discussion is necessarily limited.

Based upon our review of the record, we do not find that the Air Force's technical evaluation was without a reasonable basis; nor do we find that the evaluation criteria were misapplied and/or changed by the evaluation team. Furthermore, the record reveals that the evaluation panel was well acquainted with Texstar's proposals and was very thorough in evaluating them. Accordingly, this portion of Texstar's protest is denied.

The record shows that the Air Force was initially concerned with Texstar's monolithic canopy's ability to meet the RFP bird strike requirement. Apparently, General Dynamics had tested Texstar's canopy but the Air Force was not satisfied that RFP standards were met. The Air Force conducted its own test and the canopy failed. Texstar was notified and asked if it would change the inner surface coating, if necessary, in order to meet the performance specifications. Texstar answered that the canopy had been properly qualified by General Dynamics but that it was willing to change the inner coating, if requested, at no extra charge. The Air Force was satisfied with this response and did not downgrade Texstar's proposal. The record

also shows that, contrary to Texstar's assertion, the Air Force considered Texstar's proposal for a light-weight version of its laminated canopy but such canopy had problems with hazing. In spite of such problems, this canopy was considered technically acceptable and the evaluation panel was optimistic that Texstar could overcome the technical problems. Finally, the record shows that the Air Force was initially concerned with Texstar's quality control reporting structure. In this regard, the Air Force admits that it erroneously downgraded Texstar's proposal but argues that this particular item of the evaluation had little effect on the overall technical evaluation of Texstar's proposal. Our examination shows that the evaluators did have doubts about Texstar's quality assurance system and did downgrade the proposal in this area. However, the quality assurance system was still considered technically acceptable and again the evaluators believed Texstar capable of overcoming this difficulty. Therefore, this perceived weakness had little effect on Texstar's overall evaluation.

Basically, the evaluators reported that all three offerors were fully capable of performing satisfactorily, although each had different strengths and weaknesses. The ratings were approximately equal for all three offers in three of the four RFP evaluation areas (Technical Performance, Management/Production Capability, Contractor Performance). However, it was the fourth criterion which caused Texstar to lose the competition--Cost. Texstar's price was significantly higher, and the awards to Goodyear Aerospace and Sierracin were made on this basis. We cannot fault the Air Force for considering price to be paramount since it was listed in the RFP evaluation criteria and we have frequently held that where proposals are otherwise equal, price may be the deciding factor. See, for example, Multinational Agribusiness Systems Incorporated, B-201447, June 15, 1981, 81-1 CPD 482.

In view of our finding that the Air Force downgraded Texstar because of a perceived weakness in the area of quality assurance, we believe that this subject should have been discussed with Texstar during negotiations. However, we do not believe Texstar's overall rating would have changed significantly if this misperception had been corrected through discussions. Finally, in view of the price differential, we do not believe this



impropriety would have resulted in a different outcome to the competition. Regarding the other items Texstar thinks should have been the subject of discussions, we do not agree, since these items did not cause a downgrading of the proposal and, as previously noted, the Air Force did notify Texstar of the bird strike test problems.

Texstar next contends that Sierracin was given an improper competitive advantage because it certified itself as a small business when, in fact, it was not. Texstar contends that the Air Force should have been aware that Sierracin had erroneously certified itself as a small business since Sierracin claims dominance in the transparency field.

Sierracin's size status and alleged dominance in the industry is a matter to be considered by the Small Business Administration which has conclusive jurisdiction over such issues under 15 U.S.C. § 637(b) (1976). Accordingly, we will not consider this argument on its merits. Macy M. Sharf Company, Inc.--Reconsideration, B-202955.2, June 30, 1981, 81-1 CPD 545.

In its comments on the Air Force report, Texstar alleges for the first time that the Air Force improperly waived the RFP requirement for bird strike qualification testing for both Sierracin and Goodyear Aerospace even though their proposal designs had never before been tested. The Air Force denies that this requirement was waived for either offeror.

We will not decide this issue since it was untimely filed. Texstar raised this issue for the first time in its letter dated May 12, 1981, which was received in our Office on May 19. Texstar points out that the Air Force merely "reviewed" the designs in these proposals and cites the contracting officer's statement as admitting that this is so. We sent Texstar a copy of the Air Force report and the contracting officer's statement on April 2. Accordingly, Texstar should have been aware of this basis for protest upon receipt of that information. The protest on this issue was not filed in our Office for approximately 6 weeks and, therefore, is untimely under section 21.2(b)(2) of our Procedures which requires

filing within 10 working days after the basis is known. Where, as here, a protester initially files a timely protest and later supplements it with new and independent protest grounds, the later-raised bases must independently satisfy our timeliness grounds.

John J. Moss, B-201753, March 31, 1981, 81-1 CPD 242.

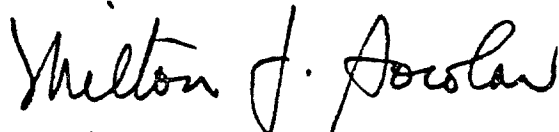
The last issue raised by the protester concerns the length of time it took the Air Force to report to our Office on this matter and the alleged delaying tactics used by the Air Force to thwart our granting any meaningful relief in the event the protest was sustained. Texstar believes that this delay was intentional on the part of the Air Force, that this was a willful violation of both the Air Force's regulations and General Accounting Office Bid Protest Procedures, and that such violation of regulations should invalidate the awards.

First, we do not agree that the length of time it took the Air Force to report has any bearing upon the validity of the awards; we have long recognized that we are without authority to require an agency to submit its report within 25 working days as requested by our Procedures. Magnavox Research Laboratories, B-184433, February 24, 1976, 76-1 CPD 126. Consequently, we are not recommending, as Texstar suggests, that the contracts be terminated. However, we do consider this matter to be an important one.

We first requested a report on this protest on November 10, 1980. Even though we continually called the Air Force representatives involved and urged an expeditious reply, the Air Force did not issue its initial report until March 12, 1981. Even then, the report was apparently not sent to the protester, and our numerous requests that it be provided to Texstar with enclosures were ignored. Moreover, we have been informed by Air Force representatives that it is Air Force policy not to send anything other than a cover letter and a contracting officer's statement to protesters and other interested parties. In our opinion, the Air Force should provide all releasable portions of the record to all parties concerned. In light of the 4-month delay before issuing a report on this protest, we are, by letter of today, notifying

the Secretary of the Air Force of our views regarding his agency's reporting policy in an attempt to correct these deficiencies.

The protest is denied in part and dismissed in part.

A handwritten signature in cursive script that reads "Milton J. Arosow". The signature is written in black ink and is positioned above the typed name and title.

Acting Comptroller General  
of the United States