



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Special Waste, Inc.--Request for Recon-
sideration
File: B-230103.2
Date: October 24, 1988

DIGEST

1. General Accounting Office (GAO) affirms its prior decision upholding the contracting agency's termination of a contract previously awarded to protester and resolicitation of the requirement, and rejects argument that it did not have jurisdiction to decide the matter where: (1) protester first requested the GAO decision; (2) subsequently appealed substantially the same issues to the agency Board of Contract Appeals but failed to so inform GAO until after the issuance of the decision denying its protest; and (3) the propriety of the resolicitation necessarily involves consideration of the contract actions which preceded it.

2. Regardless of whether the protester was aware that a solicitation understated the estimated amount of certain waste material to be disposed of, prior decision holding that protester's offer was materially unbalanced is not legally incorrect since such unbalancing is determined irrespective of the protester's knowledge or intent at the time it submitted its proposal.

DECISION

Special Waste, Inc. (SWI), requests reconsideration of our decision in Special Waste, Inc., B-230103, June 2, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 520, in which we denied its protest of the Defense Logistics Agency's (DLA) termination of a contract, which had been awarded to SWI, for the convenience of the government and subsequent resolicitation of the requirement.

We affirm the prior decision.

Both the prior solicitation, request for proposals (RFP) No. DLA200-87-R-0037, and the new solicitation, RFP No. DLA200-88-R-0023, were issued for a 1-year requirements contract for the removal and disposal of hazardous wastes

043638 / 137131

located at nine facilities in Pennsylvania and Maryland. The RFP under which award was made to the protester listed the estimated quantity of waste materials to be removed and disposed of under each of 134 scheduled contract line items (CLINs) during the contract period.

Shortly after the contract was awarded to SWI, the agency discovered that it had understated the estimated quantity for several line items. Most significantly, it had understated the estimated quantity for CLIN 1201 as 10,000 pounds instead of 10,000 (55-gallon) drums at 1 pound per gallon (550,000 pounds).^{1/} The agency also took note that SWI's unit price for that CLIN was extremely high when compared to most of the other offerors' proposed unit prices for that item, and that the percentage of SWI's total contract price represented by its proposed price for that line item was much greater than that of all the other offerors.

On the basis of these factors, the agency concluded not only that the disposal of the proper estimated quantity for CLIN 1201 would greatly exceed the scope of the contract and the anticipated costs to the government,^{2/} but that competition was adversely affected by the error in the solicitation since the award was not based on the lowest cost to the government. Having concluded that the contract was improperly awarded to SWI, the agency terminated the contract for the convenience of the government and issued a new solicitation for the requirement.

We held that the agency's actions were proper because the initial solicitation did not adequately reflect the government's needs and because SWI's offer was mathematically and materially unbalanced.

^{1/} SWI proposed a price of \$6.50 per pound for this CLIN, while three out of the other four offerors proposed prices of \$0.65, \$0.70, and \$0.76 for that line item. (A fifth offeror, which had the second low total extended unit prices, proposed a price of \$7.00 for CLIN 1201.)

^{2/} The RFP's estimated quantity for CLIN 1201, 10,000 pounds, when multiplied by the protester's unit price of \$6.50 equals \$65,000, whereas the more accurate estimated quantity of 550,000 pounds when so multiplied equals \$3,575,000.

In its request for reconsideration, SWI contends that our Office had no jurisdiction to decide the propriety of the initial award to SWI, and that "since [the propriety of the agency's termination of the contract] properly belongs before the Armed Services Board of Contract Appeals," SWI did not "directly" protest the agency's termination of its contract to our Office, but only the propriety of the agency's resolicitation of the requirement. The protester further contends that our decision was in error because of erroneous and "unauthorized" findings of fact concerning SWI's awareness of the error in the government's estimate for CLIN 1201.

JURISDICTIONAL ISSUES

In its request for reconsideration SWI, for the first time, informed our Office that after filing its protest here, it also filed an appeal of the contract termination with the Armed Services Board of Contract Appeals (ASBCA). SWI now argues that because the propriety of the contract termination was before an agency board of contract appeals--of which fact we were unaware at the time of our decision--and had not been presented to our Office, we had no jurisdiction to decide that issue.

We think this argument fails not only because it is factually unsupported by the record but also because resolution of the issue of the propriety of the award to SWI and that award's subsequent termination is inherently part of the issue SWI concedes it did ask us to decide--whether the resolicitation of this requirement was proper.

First, as to the factual validity of the protester's argument that we did not have before us the issue of the propriety of DLA's award and termination actions under the prior solicitation, we note that in its initial protest letter, SWI contended that it had a "valid contract" with the procuring facility, and based on its allegations that the "prior contract . . . remains in full force and effect" (emphasis added), the protester reasoned that the agency should not be allowed to make an award under the new solicitation. It is, thus, apparent that SWI's protest position, in fact, placed in issue the question of the propriety (or validity) of the award of that contract.

Furthermore, in its comments on the agency report, the protester asserted that "SWI bases its protest on the grounds that the previous contract, DLA200-88-C-0005, awarded to SWI was invalidly terminated" (emphasis added) and listed as the "Issues Presented" by its protest:

- "I. Was there a valid contract between DRMS [the contracting activity, the Defense Reutilization and Marketing Service] and SWI?
- "II. Was termination for convenience appropriate?
- "III. Was termination for convenience valid?
- "IV. Was resolicitation after disclosure of SWI's prices proper?" (Emphasis added.)

The protester then argued at length that the prior contract was properly solicited and awarded, that SWI's original bid was not materially unbalanced, and that termination of its contract was not appropriate or valid because the government failed of its "obligation" to negotiate with SWI in an effort to resolve any contract problems. The protester concluded by stating that:

"The only appropriate remedy is for the Comptroller General to order the Contracting Officer . . . to reinstate [SWI's prior contract], and to enter into negotiations with SWI so as to determine, and compensate SWI for, its lost profits or that portion of the contract already completed" (Emphasis added.)

These quotations from SWI's protest filings contradict the protester's present contentions that it did not protest the termination of its previous contract to our Office.

Second, a request that we rule on the propriety of a resolicitation which follows the termination of a contract thought to have been improperly awarded necessarily entails our examination of the award and termination actions.

As we pointed out in our initial decision, although an agency's decision to terminate a contract for the convenience of the government is a matter of contract administration and, therefore, is generally not within our bid protest function, we will review such a termination if it is based upon a determination by the contracting agency that the initial contract was improperly awarded. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667 at 2. Our review of such cases is for the limited purpose of determining whether award defects perceived by the agency, in fact, justify termination.

Evergreen Helicopters, Inc., B-202652, Sept. 28, 1981, 81-2 CPD ¶ 252 at 4. Further, while separate resolutions of the same issues by two different administrative forums would be inappropriate, the fact that a contract provides for the settlement of disputes under the contract as authorized by the provisions of the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (1982), does not negate our jurisdiction to review the propriety of the agency's procurement procedures, upon the request of the protester, to determine whether the contract award was valid and proper.

It is clear that the question of the propriety of DLA's award of a contract to SWI and subsequent termination of that contract is within our jurisdiction and was properly a matter for our consideration since resolution of the protest, in fact, required that we consider the issue. We would not consider in a vacuum the propriety of the resolicitation. Obviously, the events which gave rise to it--i.e., the award of a contract and that contract's termination--would be part and parcel of our consideration because if we were to conclude that the award to SWI was proper and the bases relied upon by DLA for terminating it unsupported, then there would be no need for a resolicitation, and we would sustain the protest. Conversely, as in this case, if we conclude that the original award was defective, then the termination of the awarded contract and resolicitation of the requirement under a corrected solicitation would be proper.

ALLEGATIONS OF FACTUAL ERROR

The protester argues that our conclusion that its offer was materially unbalanced was based upon erroneous and "unauthorized" findings that SWI was aware of the mistake in the Army's estimate for CLIN 1201 and structured its offer with the intent to take advantage of that mistake.

We said that it appeared (from the record)--and SWI's comments on the agency report suggested--that the protester was aware of the error in the government's estimate for CLIN 1201 and priced its offer to take advantage of it. We remain of the opinion that that is a fair reading of the protester's statement that:

"In order for [the Army's] calculations to establish a materially unbalanced [offer], they would have to reflect exact quantities for all CLINs, not actual quantities of **those CLINS for**

which SWI INTENDED to make a profit, and estimated quantities for CLINs bid below cost." (Under-scores in original; other emphasis added.)

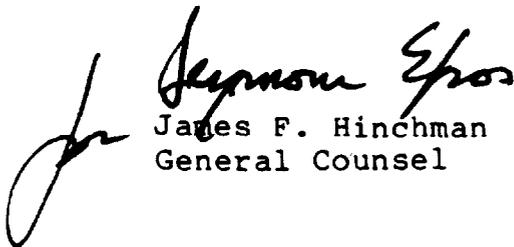
We do not believe that the choice of CLINs, as the protester states, "for which SWI intended to make a profit"--which included CLIN 1201--was financially unrelated to the indications of record that the Army had understated the estimated quantity for most, if not all, of those CLINs.

Nevertheless, whether or not SWI knew of the solicitation's understatement of certain quantity estimates or structured its offer with the intent to benefit unfairly from those errors is irrelevant to the determination that SWI's offer was materially unbalanced. As we explained in our prior decision, in a procurement where estimated quantities are involved, a mathematically unbalanced offer (such as that of SWI) is materially unbalanced if the government estimate of the anticipated quantity of goods or services is not a reasonably accurate representation of the government's anticipated needs. See Special Waste, Inc., supra. In cases of this nature, the offer should be rejected, or if award has been made the contract should be terminated, because there is reasonable doubt that an award based on such an offer will result in the lowest cost to the government. Arctic Corner, Inc., B-209765, Apr. 15, 1983, 83-1 CPD ¶ 414.

Since these well established principles of federal procurement law are clearly stated in our decision, we find no merit in SWI's contention that our determination that its offer was materially unbalanced was based upon erroneous findings of fact.

In any event, apart from the issue of whether SWI's offer was materially unbalanced, there still remains our earlier conclusion that termination of SWI's contract and resolicitation was warranted because the original solicitation grossly understated the government's actual needs.

The prior decision is affirmed.


James F. Hinchman
General Counsel