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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Military Waste Management, Inc.

File: B-294645.2

Date: January 13, 2005

A. Gene Watts for the protester.

Linwood I. Rogers, Esq., Defense Logistics Agency, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation's weight-based payment terms for solid waste disposal services are unduly restrictive is denied where record supports reasonableness of agency's determination that terms are necessary to meet agency's needs.

DECISION

Military Waste Management, Inc. (MWM) protests the terms of request for quotations (RFQ) No. SPO410-04-Q-0071, issued by the Defense Logistics Agency (DLA) for solid waste collection and disposal services at a DLA installation in Chesterfield County, Virginia.¹ The protester, the incumbent contractor, contends that the RFQ's weight-based rate structure is unduly restrictive of competition, on the basis that varying monthly payments will be difficult for a small business like MWM to budget for, and will provide a competitive advantage to large and local businesses with revenue from other contracts, since such firms allegedly will be more able to budget for business expenses during months of low refuse weights and agency payments by spreading performance costs among their other customer accounts.

We deny the protest.

¹ The installation houses a DLA inventory control point for aviation, the Defense Supply Center Richmond, and a DLA depot, as well as other tenant activities such as the Virginia Army National Guard. The installation also includes a child care center, an officers' club, a fitness center, and military housing.

The solicitation's statement of work, as amended, requires the contractor, among other things, to develop a schedule for the collection and disposal of refuse before the installation's refuse containers become 75-percent full. RFQ amend. 4, § 3.2.3. The contractor is to be paid on the basis of the actual tonnage of waste it collects. The RFQ provides alternate methods for weighing refuse: the contractor may use an on-board computer weighing system for collection vehicles that will not be dedicated to the work under the RFQ (so agency waste can be weighed independent of any other waste on the vehicle); alternatively, where dedicated vehicles are used solely for the collection and disposal of agency installation refuse, the solid waste collected for disposal may be weighed on state certified scales at the municipal landfill. Id. ¶ 3.3.1. Tonnage reports generated by on-board weighing equipment or the landfill scales are to be submitted by the contractor for payment at the contractor's tonnage rate.

MWM challenges the RFQ's weight-based payment terms, which differ from the payment terms under the protester's prior contract.² That contract provided for a fixed payment each month for refuse collection performed in accordance with an agency-imposed collection schedule without consideration of the amount or weight of refuse actually collected. The current RFQ, on the other hand, allows the contractor to set its own schedule for refuse collection, as long as each refuse container is emptied before it becomes 75-percent full, and provides for payment based on the weight of refuse collected. MWM contends that, as a small business, it is disadvantaged by the change in payment terms because it will be difficult for the firm to cover its expenses during any month of low weight refuse collections and a resulting low payment. MWM explains that because many of its business expenses remain constant each month (e.g., payroll, overhead, and utilities), varying monthly payments will make it more difficult for the firm to budget for its operations. Conversely, MWM believes large businesses and local contractors with other contracts will have a competitive advantage over a small firm like MWM, since they will be able to spread their business expenses over other contracts to more easily budget for the firms' performance costs.

² In its initial filing, MWM challenged several additional provisions of the RFQ that were subsequently amended by the agency to MWM's satisfaction; accordingly, we have not reviewed them further. Further, to the extent that MWM in its comments on the agency report for the first time contends that the procurement should be set aside for small businesses, the challenge is untimely and not for our review, since it involves an alleged solicitation impropriety apparent prior to the closing time for the receipt of quotations, that, to be timely, had to be protested prior to that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2004). The closing time under the RFQ was November 10, 2004; the protester's comments were filed on December 3.

While a contracting agency has the discretion to determine its needs and the best method to accommodate them, Mark Dunning Indus., Inc., B-289378, Feb. 27, 2002, 2002 CPD ¶ 46 at 3-4; Parcel 47C LLC, B-286324; B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 7, those needs must be specified in a manner designed to achieve full and open competition; solicitations may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 10 U.S.C. § 2305(a)(1)(A)(i), (B)(ii) (2000). Where a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3. A protester's mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. See AT&T Corp., B-270841 et al., May 1, 1996, 96-1 CPD ¶ 237 at 7-8.

The agency here explains that the change in payment terms reflects its adoption of several recommendations made after a recent study of the effectiveness of the installation's solid waste disposal efforts. The agency reports that the study found that the agency could not accurately report the installation's solid waste tonnage, and that refuse containers were underutilized as they were typically emptied when less than half full. In addition, the report concluded that cost savings could be realized not only by increasing contractor flexibility in scheduling refuse collections, but by providing for contractor payments based on the tonnage of refuse actually collected, since the study found that the installation's average solid waste disposal costs per ton far exceeded the tonnage rate charged to the contractor at the municipal landfill. The agency determined that allowing the contractor to design its own schedule for servicing the containers, with only a minimum requirement that each container be emptied prior to becoming 75-percent full, and providing for payment based on refuse weight, would encourage efficient container use, and provide a more efficient collection schedule (as the contractor would be discouraged from making additional refuse collections of minimal weight), and lower price (for performing fewer collections than previously had been required). Agency Report at 2-4. The agency also points out that the weight-based rate structure encourages the agency to continue to reduce its solid waste tonnage to comply with internal directives for it to increase recycling and to take other measures to divert non-hazardous solid waste from landfills, since such waste reduction efforts will directly decrease agency costs under the RFQ. Additionally, the weight-based payment and contractor reporting provisions of the RFQ, the agency explains, will provide it with more accurate records of installation refuse, in terms of actual weight and management costs, to meet agency reporting requirements.³

³ The agency's interest in its continuing refuse reduction relates to a Department of Defense (DOD) policy memorandum directing military agencies to ensure, by the

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Our review of the record here shows that MWM has not persuasively refuted the support provided by the agency for the challenged weight-based payment terms. The record shows that the agency has a reasonable basis to expect that the efficiency of refuse container use should increase under the RFQ, and that the weight-based payment terms will also provide an economic incentive for the agency to reduce its solid waste, while promoting required recycling efforts, and, by so doing, will directly reduce its solid waste management costs during the 5-year performance period contemplated by the RFQ. In short, MWM's disagreement with the agency's determination of its needs here fails to show that those needs—for a more accurate record of its installation's solid waste tonnage, to increase utilization of refuse containers, and to promote cost savings by payment for actual refuse tonnage, while indirectly encouraging agency recycling efforts—lack a reasonable basis or that the agency's intended method of accommodating those needs is otherwise improper.⁴

Moreover, to the extent MWM contends that large or local businesses will have a competitive advantage under the weight-based payment terms of the RFQ, the contention provides no basis to question the propriety of the RFQ. An agency is not required to neutralize a competitive advantage that a potential vendor may have by virtue of its own particular business structure and circumstances where the advantage does not result from unfair action on the part of the government. National Gen. Supply, Inc., B-292696, Nov. 3, 2003, 2004 CPD ¶ 47 at 2. Here, the advantage cited by MWM, other firms' business revenue from other customers which might be used to meet those firms' business expenses during performance of this contract, results not from unfair agency action, but from the particular business structure and

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end of fiscal year 2005, that “the diversion rate for non-hazardous solid waste is greater than 40%, while ensuring integrated non-hazardous solid waste management programs provide an economic benefit when compared with disposal using landfilling and incineration alone.” Agency Report, Tab 3, DOD Pollution Prevention Measure of Merit (May 13, 1998), at 1. The DOD policy requires each military installation to report annually its total solid waste diversion rate, and its cost avoidance (or additional costs) resulting from the use of integrated solid waste management. Id. at 2.

⁴ Our review of the record also does not support the protester's challenge to the on-board weighing equipment provisions of the RFQ. While MWM alleges that the equipment is costly for a small firm to acquire, the RFQ does not require the contractor to use such equipment; as explained above, the RFQ alternatively allows the contractor to use the scales at the municipal landfill. Further, despite MWM's general challenge to the equipment provision, the firm has not provided any persuasive support for its contentions that the required equipment is unreliable for the intended limited use here, that it lacks required certification, or that it is otherwise unavailable to potential vendors.

circumstances of those firms. In sum, since the protester has not supported its contention that the RFQ's payment terms are either unduly restrictive or that they convey an unfair competitive advantage, we have no reason to question the propriety of the challenged solicitation terms.

The protest is denied.

Anthony H. Gamboa
General Counsel