

# DECISION



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

29257

FILE: B-214225

DATE: September 10, 1984

MATTER OF: Amarillo Aircraft Sales & Services, Inc.

## DIGEST:

1. Although GAO generally will not review an agency's determination to terminate a contract for the convenience of the government since this is a matter of contract administration, nevertheless, where the contracting agency's action is based upon a determination that the contract was improperly awarded, GAO will review the validity of the procedures leading to award to the terminated contractor.
2. A contracting agency's determination that award of a requirements contract was improper is reasonable where reference prices selected by offerors under the economic price adjustment provisions of the solicitation were based upon different markets, the prices in which were apparently subject to change at different rates, and where, as a result, proposals could not be evaluated on a common basis and contracting officials were unable to determine which proposal was most likely to offer the lowest ultimate cost to the government.
3. Where an offeror had properly selected in its best and final offer reference prices for manufacturers under economic price adjustment (EPA) provisions of the solicitation but had then been misled by contracting officials into stating that any contract would be governed by the EPA provisions for nonmanufacturers, and had subsequently submitted updated reference prices without specifying whether they were offered under the EPA provisions for manufacturers or those for nonmanufacturers, it would have been improper for agency to reject the proposal as

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unacceptable without clarification or discussion since the uncertainty as to reference prices could have been easily resolved.

4. Language in Torncello v. United States, 681 F.2d 756 (Ct.Cl. 1982), to the effect that termination of a contract for the convenience of the government requires some kind of change in the circumstances of the bargain or the expectations of the parties, does not limit a termination for convenience based on a determination that the award was improper.
5. The untimeliness of a protest to the contracting agency does not render improper a subsequent agency determination to undertake corrective action.

Amarillo Aircraft Sales & Services, Inc., protests the termination of contract No. DLA600-83-D-0281, awarded to Amarillo by the Defense Fuel Supply Center (DFSC), Defense Logistics Agency (DLA), for the supply of aviation gasoline (AVGAS) and JP-4 jet fuel at the Amarillo Air Terminal, Amarillo, Texas. The contracting officer decided to terminate the contract, a requirements type, fixed-price with economic price adjustment (EPA) contract, on the ground that the EPA reference prices selected by the offerors made it impossible for contracting officials to determine which proposal offered the lowest ultimate cost to the government. We deny the protest.

#### Statement of Facts

By request for proposals (RFP) No. DLA600-83-R-0448, DFSC solicited offers to meet the government's requirement for refueling and service at a number of airports, including a requirement for an estimated 26,000 gallons of AVGAS and 3,600,000 gallons of JP-4, plus necessary defueling and reservicing, at Amarillo Air Terminal over 2 years.

The RFP included EPA clauses allowing for economic price adjustments of the contract price to reflect subsequent changes in the cost of fuel over the duration of the contract. Manufacturers of refined petroleum products were requested to complete EPA clause No. E19.05, pursuant to which they were to select as a reference price for each

subitem or type of fuel the established catalog or market price of a commercial item sold in substantial quantities to the general public. Fixed base operators/refueling agents were requested to complete EPA clause No. E19.08, pursuant to which they were to select as their reference prices the current net price payable by the contractor to its supplier for the product supplied. In the event of a change in the reference price, the price payable under the contract for each unit of the appropriate fuel would correspondingly increase or decrease, though in no case could it exceed the original contract price plus 10 percent during the first year or the effective contract price as of the start of the second year plus 10 percent during the second year.

Pride Refining, Inc. and Amarillo submitted offers for meeting the government's requirements at Amarillo Air Terminal. Although Pride is a manufacturer of refined petroleum products, it indicated that it intended to rely upon an agent at Amarillo Air Terminal to fuel and service aircraft and it selected reference prices both under the EPA provisions for manufacturers and those for fixed base operators/refueling agents. As a manufacturer, Pride selected as its reference price for JP-4 the weighted average of the high/low price of regular gasoline and No. 2 fuel oil in the Dallas-Fort Worth, Texas, area, as published in Platts' Oilgram, and as its reference price for AVGAS Pride's own posted price for AVGAS. Under the provisions for fixed base operators/refueling agents, Pride selected as its reference prices for JP-4 and AVGAS its own invoice prices for those fuels.

Amarillo, a fixed base operator/refueling agent, selected as its reference price for JP-4 the invoice price charged by Southern Union Refining Company and as its reference price for AVGAS the invoice price charged by the Phillips Petroleum Co. In support of its reference price for JP-4, Amarillo submitted a letter from Southern Union in which that firm agreed to supply JP-4 "for the purpose of supporting your bid" at a price "based on our estimated crude cost plus \$5.66 [per barrel] at the time of delivery."

DFSC evaluated Pride's best and final proposal, which cited the reference prices Pride offered as a manufacturer, as offering to meet the government's requirements at a

price of \$4,124,870, or \$2,134.28 less than Amarillo's best and final proposal of \$4,127,004.28. However, since the RFP indicated that changes in the reference prices up to the time of award would be considered in the evaluation of offers, DFSC subsequently requested that Pride and Amarillo update their reference prices. Although neither reported a change in its reference price for AVGAS, each reported an increase in its reference price for JP-4. DFSC then evaluated Pride's proposal as offering a total price of \$4,199,120, when adjusted for the change in the reference price for JP-4, and Amarillo's proposal as offering an adjusted price of \$4,132,152.28. Accordingly, it made award on September 29 to Amarillo for its Amarillo Air Terminal requirements.

On September 30, however, Pride protested to DFSC the award to Amarillo. Pride subsequently alleged that award to Amarillo was improper since there was no evidence that Amarillo's reference price for JP-4, the price quoted by Southern Union, was determined by competitive market pressures rather than subject to Southern Union's complete discretion, so that the reference price provided no protection for the government against unwarranted price increases. Pride further alleged that award was also improper because, among other reasons, allowing Amarillo as a fixed based operator to select a "variable price" while requiring Pride as a manufacturer to select an "established price" denied Pride an opportunity to compete on an equal basis with Amarillo.

In response to Pride's allegations as to Amarillo's reference price for JP-4, the contracting officer indicated that:

"Assuming that the transactions between Amarillo and its supplier are at arms length, the reference price is an objective one and not susceptible to manipulation by Amarillo. While the solicitation called for an invoice posting to substantiate the price, neither was available in this case since Amarillo was not purchasing JP-4 from Southern Union at the time.

. . . . .

"Given the objectivity of the reference prices of both Pride and Amarillo, both qualify as acceptable reference prices under the terms of the request for proposals (RFP). I therefore disagree with Pride that Amarillo's reference price was inadequate or non-responsive to the solicitation. Amarillo furnished the information that the Government requested."

Nevertheless, the contracting officer sustained Pride's protest. He determined that in order meaningfully to compare proposals and to ascertain which offered the government the lowest ultimate cost, it was necessary that the reference prices for each item substantially track the same market. Since he found that over the 2-year period of the contract changes in the invoice price paid by Amarillo to Southern Union for JP-4 might radically differ from changes in reference prices based upon the sale of refined fuels in the general product market, such as Pride's reference price, he concluded that he was unable to determine whether Amarillo had indeed submitted the low offer. Accordingly, the contracting officer declared his intention of terminating Amarillo's contract for the convenience of the government and of resoliciting using a common escalator in order to ensure that offerors would compete on a common basis. Amarillo thereupon protested the proposed termination to our Office.

#### GAO Review of Terminations for Convenience

As a general rule, our Office will not review an agency's decision to terminate a contract for the convenience of the government, since by law this is a matter of contract administration for consideration by a contract appeals board or by a court of competent jurisdiction. However, where the contracting agency's action is based upon a determination that the contract was improperly awarded, then our Office will review the validity of the procedures leading to award to the terminated contractor. Central Texas College, B-211167.3, March 2, 1984, 84-1 CPD ¶ 259; Safemasters Company, Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD ¶ 38; see also Western Union Telegraph Company, B-206979, April 22, 1982, 82-1 CPD ¶ 372.

## Propriety of the Proposed Termination

### A. Allegations of the Parties

Amarillo asserts that the agency is mistakenly perceiving a problem here. It states that the EPA provisions of the solicitation were similar to those our Office and the courts have approved in the past, that it selected an appropriate reference price under those provisions, and that both Amarillo's and Pride's reference prices for JP-4 were ultimately based upon the market price of crude oil.

Amarillo also asserts that even if there was a problem with comparing its proposal with Pride's that was irrelevant because Pride's offer could not have been accepted and such a comparison therefore was not necessary.

In response, contracting officials and Pride maintain that the government was unable meaningfully to compare the proposals and to determine which offered the lowest ultimate cost to the government because Amarillo and Pride submitted reference prices which, in DLA's words, "vary with different markets."

DLA, pointing out that it generally has no problem with the use of the EPA clauses because the different reference prices selected by offerors will have a common basis in that they will substantively track the price of the product being procured, states that the reference price selected by Amarillo for JP-4, Southern Union's "estimated crude cost plus \$5.66 at the time of delivery," is not an acceptable reference price for tracking the price of JP-4 because it does not track the same market as does the reference price selected by Pride. Instead, DLA states, Amarillo's reference price is tied to the crude oil cost of a single supplier, whose means of calculating its crude costs are not explained and whose costs are neither publicly posted nor subject to verification. The contracting officer notes that while the risk to the government that Southern Union might "indiscriminately" raise its price to Amarillo for JP-4 and thereby increase the price to the government by means of the EPA provisions is somewhat limited by the 10 percent yearly ceiling on increases, nevertheless the potential liability to the government is large in absolute dollar terms since approximately 75

percent of the more than \$4 million contract price is attributable to product cost.

#### B. GAO Analysis

The RFP provided that a contract for all products and services required at each location would be awarded to "that responsible offeror whose offer conforming to the solicitation will be most advantageous to the government, price and other factors considered." We have generally held that such language requires award on the basis of the most favorable cost to the government, assuming a conforming offer from a responsible offeror, Norcoast-BECK Aleutian, 60 Comp. Gen. 625 (1981), 81-2 CPD ¶ 84 (invitation for bids), and we have specifically held that the government must assure itself that the probable lowest ultimate cost will be obtained prior to awarding any requirements contract. Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD ¶ 358 (request for proposals). Further, it is fundamental federal procurement law that offerors must be treated equally, RMI, Inc., B-203652, April 20, 1983, 83-1 CPD ¶ 423, and that a solicitation must be drafted in such a manner that offers can be prepared and evaluated on a common basis. Lawrence Johnson & Associates, Inc., B-196442, March 11, 1980, 80-1 CPD ¶ 188.

We believe that application of the above principles to this procurement supports the agency's determination that the award to Amarillo was improper. For contracting officials reasonably to determine which proposal was most likely to offer the lowest ultimate cost to the government, the proposals must be susceptible of evaluation on a common basis. The proposals submitted by Pride and Amarillo, however, include reference prices which, despite Amarillo's contention to the contrary, clearly do not reference the same market. Pride selected a reference price for JP-4 based upon the established, public price of regular gasoline and No. 2 fuel oil in the Dallas-Fort Worth market. By contrast, Amarillo selected a reference price for JP-4 which was directly based upon the price charged for JP-4 by its supplier in a private transaction between a single seller and a single buyer, and which was indirectly based upon the unexplained and unverifiable costs to its supplier of crude oil. That these reference prices do not reflect the same market was evidenced by Amarillo's

displacement of Pride as the apparent low offeror as a result of changes in the reference prices between the time of the best and final offers and the time of the update of the reference prices 2 months later. Given such a displacement after only 2 months of competition for a contract scheduled to run 2 years, given that approximately 75 percent of contract costs are attributable to product cost, and given the mere \$66,967.72 difference between the two offers for a contract in excess of \$4 million, we cannot conclude that the contracting officials acted unreasonably in determining that there was no reasonable assurance that award to Amarillo would result in the lowest ultimate cost to the government.

We have considered the cases cited by Amarillo and we do not believe that they require the conclusion that offerors may properly be asked to select one of a number of reference prices where such reference prices are based upon different markets. Although the solicitation considered by the court in Steuart Petroleum Co. v. United States, 438 F. Supp. 527 (E.D. Michigan 1977), indeed allowed bidders to select a price escalator from a number of market indicators, the court held that the contract award there was improper because the awardee had chosen an upwardly volatile price escalator likely to result in higher costs to the government than the escalators chosen by other bidders. Steuart Petroleum, 438 F. Supp. at 533. Nor did we in our decisions in Ashland Chemical Company, B-206882, Jan. 18, 1983, 83-1 CPD ¶ 57, or in Collins Telecommunications Products Division, B-199539, March 26, 1981, 81-1 CPD ¶ 225, hold that offerors may properly be asked to select from among reference prices based upon different markets. Rather, in Ashland Chemical, we considered whether the solicitation required the submission of information relative to an EPA clause which was not provided by the successful bidder, Ashland Chemical Company, B-206882, supra, 83-1 CPD ¶ 57 at 3-5, while in Collins Telecommunications we considered whether the agency reasonably evaluated the accuracy of the successful bidder's certification that its product entitled the bidder to use a particular EPA reference price, Collins Telecommunications Products Division, B-199539, supra, 81-1 CPD ¶ 225 at 2, 6.

In Anchorage Telephone Utility, B-197749, Nov. 20, 1980, 80-2 CPD ¶ 386, also cited by Amarillo, the agency requested proposals for the supply of telephone service



over a 10-year period. Four offerors submitted proposals in which they quoted tariffed rates while Anchorage offered a price subject to annual price adjustments based upon changes in the Consumer Price Index (CPI). While the contracting agency escalated Anchorage's evaluated price to reflect likely increases in the CPI over the 10-year period, it did not escalate the evaluated price of the other four offerors to reflect possible future increases in the tariffs. We denied Anchorage's protest against the agency's decision to treat tariffed rates differently from prices subject to changes in the CPI because the agency's specific historical experience with tariffed rates indicated that the tariffs, unlike the CPI, were likely to remain unchanged during the term of the contract. The difference between Anchorage Telephone Utility and this case is that in Anchorage Telephone Utility we found that the agency reasonably determined that it could evaluate offers on a common basis and determine which was most likely to offer the lowest ultimate cost to the government, while here the agency cannot reasonably determine which proposal was most likely to offer the lowest ultimate cost to the government.

With regard to the acceptability of Pride's offer, Amarillo alleges that Pride's offer could not have been accepted at the time of award because, while Pride had certified itself to be and was in fact a manufacturer, it had nevertheless completed the EPA provisions for fixed base operators/refueling agents as well as those for manufacturers and had subsequently excluded from consideration the reference prices submitted as a manufacturer. Amarillo therefore alleges that since only its proposal conformed to the solicitation, "no evaluation of offers was really required" and thus there existed no need to terminate the contract with Amarillo.

Pride certified itself to be a manufacturer but selected reference prices in its initial proposal both under the EPA provisions for manufacturers and under those for fixed base operators/refueling agents. In its July best and final offer Pride cited as its reference prices those initially offered as a manufacturer. Then, on September 1, Pride dispatched a telex to contracting officials in which it stated that escalation under the contract would be in accordance with the EPA provisions

for fixed base operators/refueling agents to the exclusion of the provisions for manufacturers. Pride alleges, and the agency has failed to dispute, that it was urged to do this by contracting officials on the ground that it intended to rely upon a refueling agent at Amarillo Air Terminal. Pride did not expressly indicate in its September 22 update of reference prices whether the reference prices then submitted reflected any changes in the reference prices previously submitted under the provisions for manufacturers or in those previously submitted under the provisions for fixed base operators refueling agents. However, the agency informs us that Platt's Oilgram was readily available to contracting officials, that the updated reference price for JP-4 was in fact the reference price based upon Platt's Oilgram, as modified by changes in the intervening months, previously submitted under the EPA provisions for manufacturers, and that Pride was considered to be and was evaluated as a manufacturer submitting reference prices under the EPA provisions for manufacturers.

We need not determine whether Pride's best and final offer was acceptable as modified. Under these circumstances, where (1) Pride was known to be a manufacturer and had certified itself to be such, (2) Pride submitted with its best and final offers the reference prices selected as a manufacturer, (3) Pride's updated reference price for JP-4 tracked the changes in the reference price for JP-4 based upon the readily available Platt's Oilgram, (4) the confusion as to whether Pride's offer was submitted under the EPA provisions for manufacturers or under those for fixed base operators/refueling agents apparently resulted in large part from erroneous advice from contracting officials, (5) the confusion could have been easily resolved, and (6) exclusion of Pride would have left only one offeror, we believe that the contracting officer would have acted improperly if, without first holding further discussions or requesting clarification, he had found Pride's proposal to be unacceptable on the basis of the uncertainty as to the EPA provisions. See Data Systems Division of Litton Systems, B-208241, Sept. 29, 1982, 82-2 CPD ¶ 297 (proposal was improperly found to be unacceptable after best and final offers where alleged deficiencies concerned requirements which offeror either essentially met or as to which the agency never clearly communicated its concerns and the failure to meet was readily resolvable). In other words, we do not believe Pride's proposal had to be rejected for the reasons put forth by Amarillo.

Amarillo argues that termination for convenience would be improper under the holding of Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982). Amarillo cites the language in Torncello that a termination for convenience requires "some kind of change in the circumstances of the bargain or in the expectations of the parties," Torncello, 681 F.2d at 772, supra, and contends that the decision to terminate could not have resulted from a change in circumstances or expectations since the contracting officials were aware of the terms of the solicitation and the details of the offers when award was made.

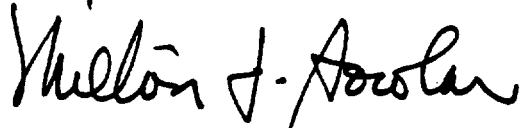
However, in setting forth those historical limits on the use of termination for convenience which the court seeks to reaffirm, the court cites with approval a line of cases illustrating the requirement for a change in circumstances or expectations. Torncello, 681 F.2d at 766, supra. Among the cases thus cited are several in which contracting officials came to believe as a result of a protest subsequent to award that the award had been improper and accordingly took corrective action which the court held entitled the terminated awardee to recovery on the basis that its contract had been terminated for the convenience of the government. Warren Brothers Roads Company v. United States, 355 F.2d 612 (Ct. Cl. 1965) (cancellation for improper rejection of bidder as nonresponsive); Coastal Cargo Company v. United States, 351 F.2d 1004 (Ct. Cl. 1965) (cancellation for failure to refer responsibility question to Small Business Administration); John Reiner & Company v. United States, 325 F.2d 438 (Ct. Cl. 1963) (cancellation because of defective solicitation). Accordingly, we do not believe that the decision in Torncello limits a termination for convenience arising from a post-award protest against the propriety of the award.

Amarillo also argues that termination is not in the best interests of the government since Amarillo has already begun performance and termination costs allegedly would be substantial. It is true that the determination as to whether an improperly awarded contract should be terminated involves consideration of several factors other than cost, including the seriousness of the procurement deficiency, the degree of prejudice to other offerors or to the integrity of the competitive procurement system, the good faith of the parties, the impact of termination on the procuring agency's mission, and the extent of performance. See

Central Texas College, B-211167.3, supra, 84-1 CPD ¶ 259 at p. 3; United States Testing Company, Inc., B-205450, June 18, 1982, 82-1 CPD ¶ 604. These are matters we consider when determining whether to recommend a termination for convenience; they are also matters the agency takes into account when it decides, on its own, whether to terminate a contract. Since an agency decision to terminate a contract on its own, on the basis of those factors, is largely a matter of discretion, we will not second-guess the agency's decision in this respect.

Finally, Amarillo contends that Pride's protest to the agency was untimely because it really involved a challenge to the EPA provisions of the solicitation, and that therefore a termination of its contract as a result of the untimely protest would be improper. Without deciding whether Amarillo properly categorizes the Pride protest, we point out that the untimeliness of a protest to the agency does not render improper a subsequent agency determination to undertake corrective action. See Orkand Corporation; Falcon Research and Development Company, B-209662.2, and B-209662.2, April 4, 1983, 83-1 CPD ¶ 349; NonPublic Educational Services, Inc., B-207306.2, Oct. 20, 1982, 82-2 CPD ¶ 348.

Accordingly, the protest is denied.



Acting Comptroller General  
of the United States