



The Comptroller General  
of the United States

Washington, D.C. 20548

*Spencer*

## Decision

Matter of: Special Waste, Incorporated

File: B-230103

Date: June 2, 1988

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### DIGEST

Termination of contract for the convenience of the government and resolicitation of a requirement was not improper where shortly after award agency discovered that the quantity estimates for one line item in the contract were significantly understated and that award had been made based upon a mathematically and materially unbalanced offer.

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### DECISION

Special Waste, Incorporated (SWI), protests the action of the Defense Logistics Agency (DLA) in terminating for the convenience of the government a contract awarded to SWI under request for proposals (RFP) No. DLA200-87-R-0037 and DLA's subsequent issuance of RFP No. DLA200-88-R-0023. Both solicitations were issued for a requirements contract for the removal and disposal, over a 12-month period, of hazardous wastes located at the Defense Reutilization and Marketing Office at Chambersburg, Pennsylvania, and eight other facilities in Pennsylvania and Maryland.

The protest is denied.

The initial RFP included a schedule of 134 contract line items which specified the various materials to be removed and disposed of under the resulting contract. For each line item, the schedule listed an estimated quantity of waste material to be disposed of during the contract period. Under the provisions of the RFP, offerors were to propose unit prices for each line item in the schedule, and award was to be made to the technically acceptable, responsible offeror having the lowest total of the extended unit prices (unit price multiplied by the stated estimated quantity) for all line items in the schedule. On December 4, 1987, award was made to SWI based on its best and final offer, which was more than 50 percent lower than that of the next low offeror.

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Shortly after SWI received the award and after one of the competing offerors, the incumbent contractor, raised questions concerning the estimates in several line items, two of the facilities discovered and notified the contracting officer that the estimated quantity in the contract for line item 1201 was grossly inaccurate and that SWI's unit price for that item was very high. The line item in the SWI contract read as follows:

"Item No.	Supplies/ Services	Est. Qty.	Unit	Unit Price	Amount
1201	Containers, 1 gl. [gallon] or larger, with more than 1 inch of the wastes described in CLINs 0500-5999"	10,000	lb	\$6.50	\$65,000.00

The contracting officer concluded that the estimated quantity for contract line item number (CLIN) 1201 was incorrect. He explains that in previous years' contracts, the unit of measure for CLIN 1201 was expressed as "drums" (55-gallon size) as opposed to "pounds," and that this change in the unit of measure was apparently overlooked when the quantity estimate for this line item was prepared. Thus, he explains, the intended estimate of 10,000 "drums" was erroneously stated as 10,000 pounds in the RFP. This error resulted in a significantly understated estimated quantity and would have resulted in a much higher cost for that line item than the agency contemplated, since the disposal of 10,000 drums of waste materials under the terms of the contract as awarded would actually cost not \$65,000 (10,000 drums at \$6.50 each), but \$3,575,000 (10,000 55-gallon drums at \$6.50 per pound).<sup>1/</sup>

Further, the contracting officer states that upon his post-award review of the procurement, he noticed that while the prices proposed by SWI and the second low offeror for CLIN 1201 were \$6.50 and \$7.00, respectively, the prices proposed for that line item by the other three offerors were \$.65, \$.70, and \$.76. He also noted that the percentage of the protester's total contract price represented by its price for CLIN 1201 exceeded that of all other offerors; SWI's price for CLIN 1201 was 12.30 percent of its total price,

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<sup>1/</sup> The solicitation and contract state that for purposes of ordering and payment on CLIN 1201, one gallon of container capacity equals one pound of waste materials.

while the CLIN 1201 prices for the third, fourth and fifth offerors were from .42 to .58 percent of their respective total prices.<sup>2/</sup> The contracting officer concluded, therefore, that SWI's offer was mathematically unbalanced. Moreover, it appeared (and, indeed, the protester's comments on the agency report suggest) that the protester was aware that the government's estimate in CLIN 1201 was erroneous and that the protester priced its offer to take advantage of that error.

In light of these circumstances, the contracting officer determined that competition had been adversely affected; that the contract awarded did not actually represent the lowest cost to the government; and that disposal of the correctly estimated quantity of material under CLIN 1201 would greatly exceed the scope of the contract awarded to SWI and would "grotesquely increase" the cost to the government. Concluding that the contract had been improperly awarded, the agency terminated it for the convenience of the government on December 22, 1987. SWI then protested, first to DLA, and then to this Office.<sup>3/</sup>

SWI asserts that the initial contract was properly awarded, and that because SWI's "bid" under the initial RFP became a matter of public record after it received the award, SWI's ability to compete under the government's resolicitation of "substantially the same materials and services" has been detrimentally affected, and free and open competition is now precluded for this procurement.

Although our Office generally does not review an agency's decision to terminate a contract for the convenience of the government, since that is a matter of contract administration which is not within our bid protest function, we will review such a termination, where, as here, it is based upon an agency determination that the initial contract award was improper. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667.

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<sup>2/</sup> The CLIN 1201 price of the second low offeror, whose offer also appears mathematically unbalanced, was 6.50 percent of its total price.

<sup>3/</sup> At the time SWI protested to our Office, award under the revised solicitation was pending. The agency subsequently determined, due to urgent and compelling circumstances, to award the contract prior to the issuance of our decision on this protest.

Termination of a contract is not improper when, subsequent to award, the contracting agency discovers that the solicitation under which the requirement was procured did not properly or adequately reflect the government's needs. Norfolk Shipbuilding and Drydock Corp., B-219988.3, supra. In this case, the agency stated its estimate of waste material to be disposed of under the CLIN 1201 in numbers of pounds, whereas, correctly stated, the number should have referred to barrels, not pounds. Consequently, the solicitation estimate for that item was greatly understated and, thus, did not reflect the government's needs.

Not only does the failure of the solicitation underlying the government's contract with SWI to adequately reflect the government's needs require termination of the contract, this action was also warranted because SWI's offer was mathematically and--contrary to the protester's insistence--materially unbalanced. An offer is mathematically unbalanced when it is based upon enhanced prices for some items and nominal prices for other items, with the result that each individual item does not carry its share of the cost of the work specified for that item plus overhead and profit. See DOD Contracts, Inc., B-227689.2, Dec. 15, 1987, 87-2 CPD ¶ 591; Command Systems, B-218093, Feb. 15, 1985, 85-1 CPD ¶ 205. Here, the record shows, and the protester does not deny, that its offer was mathematically unbalanced as to CLIN 1201.

Award can be based upon a mathematically unbalanced offer unless this offer is also materially unbalanced. Id. An offer is materially unbalanced if there is doubt that the offer represents the lowest cost to the government. When estimated quantities are involved, a mathematically unbalanced offer is materially unbalanced if the solicitation's estimate of the anticipated quantity of goods or services is not a reasonably accurate representation of the agency's anticipated needs. Command Systems, B-218093, supra; Michael O'Connor, Inc.; Free State Builders, Inc., B-183381, July 6, 1976, 76-2 CPD ¶ 8. An offeror who intends to benefit unfairly from its unbalanced offer will, as did SWI, quote an enhanced price on the item(s) it knows or believes will actually be required in substantially larger quantities than those stated in the solicitation and lower or nominal prices for those items that are likely to be required in quantities as stated (if not lesser quantities). Since, in such a case, there is reasonable doubt that award based upon a mathematically unbalanced offer will result in the lowest cost to the government, the offer should be rejected, or, if a contract has been awarded, the

contract should be terminated, and the requirements resolicited on the basis of a revised estimate(s). Michael O'Connor, Inc.; Free State Builders, Inc., B-183381, supra; see also Edward B. Friel, Inc., et al., 55 Comp. Gen. 488 (1975), 75-2 CPD ¶ 333; Arctic Corner, Inc., B-209765, April 15, 1983, 83-1 CPD ¶ 414.

As discussed above, the government estimate for CLIN 1201 is indisputably understated by a substantial amount, such that SWI's mathematically unbalanced offer must be considered materially unbalanced. The offer, therefore, should not have been accepted and, accordingly, we conclude that the contract termination was proper for that reason.

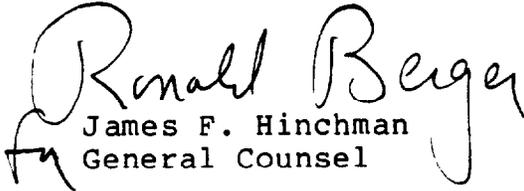
Furthermore, DLA reports that the new solicitation contained revised estimates because it found that even the intended estimates under the initial solicitation did not accurately reflect its needs. Therefore, SWI's ability to compete for the requirement under the resolicitation was not, as SWI maintains, prejudiced by any disclosure of its prices under the initial solicitation. In any event, impermissible competitive prejudice is not created by a resolicitation after prices have been exposed where the resolicitation is required for compliance with federal procurement principles. See Norfolk Shipbuilding and Drydock, B-219988.3, supra at 4.

SWI further contends that the agency was precluded, under the holding in Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982), from terminating its contract for convenience since DLA was well aware at the time of award that other bidders offered considerably lower prices for CLIN 1201. SWI contends that instead DLA was required to attempt to negotiate with SWI with respect to CLIN 1201 a modification of its contract as to price or quantity or price and quantity.

As in Torncello, the instant case involves a requirements contract for the performance of work called for in a number of line items, one of which was priced by the awardee at a considerably higher price than should have reasonably been expected; but there the similarity between the two cases ends. In Torncello, the contracting agency characterized as a "constructive" termination for the convenience of the government its action in diverting business (work) that was called for in one line item of the contract to a competing bidder on the underlying solicitation who had offered a lower price for that line item. There, the contracting agency did not, as it did here, terminate the contract shortly after award on the basis that it was improperly awarded ab initio. Rather, it attempted to circumvent its contractual obligation to the awardee with respect to the

erroneously estimated line item by contracting all work required under that item to a firm that had bid a lower price for the item. Here, DLA was required to terminate SWI's contract because the government estimate was grossly understated for one line item and SWI's offer was materially unbalanced. Consequently, the court's holding in Torncello is in no way applicable here.

The protest is denied.

  
James F. Hinchman  
General Counsel