



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

B-176393

October 13, 1972

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Dear General Robinson:

Reference is made to a letter dated August 3, 1972, reference DSAH-G, from your Assistant Counsel, furnishing a report concerning the protest of Dairy Sales Corporation against the partial cancellation of its contract under IFB DSA130-72-B-0910 (IFB -0910), issued by the Defense Personnel Support Center, Chicago, Illinois (SKH-Chicago).

The above-referenced solicitation was issued on March 15, 1972, in contemplation of requirements contracts to receive, store, print, package, and mark Government-furnished butter. SKH-Chicago, the national control point for butter printing services, solicits such services nationally, awards the contracts therefor, and issues all delivery orders under such contracts. The Government-furnished butter which is processed under these contracts is surplus butter made available to the Department of Defense by the Department of Agriculture (USDA). The butter is shipped on Government bills of lading (GEL) from preselected USDA warehouses to the printer and, upon completion of the processing, to preselected destination points.

Section D-IV of IFB -0910 provided that bids would be evaluated as follows:

"Bids will be evaluated on the basis of the lowest overall cost to the Government per pound. For the purpose of evaluating bids, the following will be used in determining the lowest overall net cost to the Government.

1. The unit price per pound less discount if applicable.
2. The most economic cost of transporting Government-owned bulk butter by truck and/or rail to the bidder's butter printing plant from any of the following points:
 - Cold Storage Warehouse, Chicago, Illinois
 - Cold Storage Warehouse, St. Paul, Minnesota
 - Cold Storage Warehouse, Oakland, California
 - Cold Storage Warehouse, New York, New York

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3. Cost of transporting the printed butter by truck and/or rail from bidder's butter printing plant to the following delivery points set forth with respect to each area:

<u>AREA</u>	<u>DELIVERY POINT</u>
I. NORTHEAST	WILLIAMSBURG, VIRGINIA
II. MIDWEST	KANSAS CITY, MISSOURI
III. SOUTH	NEW ORLEANS, LOUISIANA
IV. WEST	OAKLAND, CALIFORNIA

4. The cost of transporting butter as specified in (2) and (3) above will be evaluated on the basis of shipments weighing 40,000 pounds net weight.
5. In determining the lowest bid for each item, the cost enumerated in 1 and 3 above will be added separately to the cost of delivery from the most advantageous of the four points listed in par. 2 above for the purpose of determining the lowest cost to the Government."

Item 0003 of the solicitation schedule was for the processing of an estimated 2,200,000 pounds of butter into pats for delivery to Williamsburg, Virginia. The protestant was the apparent low bidder at an evaluated price of \$.0439 per pound. Bon Ton Foods, Inc., of Mamaroneck, New York, submitted an evaluated bid of \$.0466 per pound.

The procuring activity proposed to make award of Item 0003 to Dairy Sales. However, Bon Ton advised SRH-Chicago that the freight rate from the New York USDA warehouse to Mamaroneck, used in the evaluation of its bid, was in error. SRH-Chicago verified that a lower rate was in existence, which when applied to Bon Ton's bid, placed it in a tie with Dairy Sales at a unit price of \$.0439. In accordance with Armed Services Procurement Regulation (ASPR) 2-407.6, award of Item 0003 was made to Dairy Sales following a drawing by lot.

After award had been made to Dairy Sales, Bon Ton alleged that the freight rate from Mamaroneck to Williamsburg used in evaluating

its bid also was in error. The corrected freight rate, subsequently verified by the contracting officer, reduced Bon Ton's evaluated unit price to \$.0432. Thus, Bon Ton became the low bidder for Item 0003.

Upon the advice of counsel, who regarded the matter as governed by our decision which is reported at 37 Comp. Gen. 330 (1957), the procuring activity determined that award of Item 0003 contravened 10 U.S.C. 2305(c) and therefore was a nullity. A partial cancellation of Dairy Sales' contract was effected by the award of Item 0003 to Bon Ton to the extent of its capacity, 2,080,000 pounds, and by the issuance of a corrected award document to Dairy Sales, as the second low bidder, for the remaining 120,000 pounds. Dairy Sales protested this action on the basis that the Government had arbitrarily and capriciously canceled its contract for the processing of the total quantity of Item 0003.

Our decision reported at 37 Comp. Gen. 330 (1957), which was relied upon by the procuring activity, involved a situation similar to the instant one in that an erroneous freight rate evaluation by the contracting agency resulted in an award to other than the low bidder. Therein, we held that the award was in contravention of 10 U.S.C. 2305(c); that award of the contract contrary to the provisions of the statute was a nullity and conferred no rights on the contractor against the Government; and, therefore, the contract should be canceled. Similarly, in our decision B-164826, August 29, 1968, cited by your Agency as further justification for its action, we directed cancellation of a contract awarded to other than the low bidder as a result of a mathematical error by the contracting agency in the computation of freight rates. The partial cancellation of Dairy Sales' contract was therefore consistent with previous decisions of this Office.

However, upon further reflection and for the reasons set forth below, we are of the opinion that Dairy Sales' contract should have been partially terminated for the convenience of the Government, rather than canceled. We are in agreement with the position of the Court of Claims that "the binding stamp of nullity" should be imposed only when the illegality of an award is "plain", John Reiner & Co. v. United States, 325 F. 2d 438, 440 (Ct. Cl. 1963), or "palpable", Warren Brothers Roads Co. v. United States, 355 F. 2d 612, 615 (Ct. Cl. 1965). In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory

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or regulatory requirements because of some action or statement by the contractor (Prestex Inc. v. United States, 320 F. 2d 367 (Ct. Cl. 1963)), or if the contractor was on direct notice that the procedures being followed were violative of such requirements (Shoenbrod v. United States, 410 F. 2d 400 (Ct. Cl. 1969)), then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of quantum meruit. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. John Reiner & Co. v. United States, *supra*; Brown & Son Electric Co. v. United States, 325 F. 2d 446 (Ct. Cl. 1963).

In the instant case, the freight rates used in the evaluation of bids were furnished by a Government activity, not by the bidders. There is no indication of record that Dairy Sales contributed to the erroneous information upon which Bon Ton's bid was evaluated or that Dairy Sales was on direct notice, prior to the initial award of Item 0003, that an incorrect rate from Mamaroneck to Williamsburg had been used in the evaluation of Bon Ton's bid. Under these circumstances, we are unable to conclude that the initial award of Item 0003 to Dairy Sales, while improper, was plainly or palpably illegal, and we are therefore convinced that the contractor could successfully maintain an action for damages computed under the termination for the convenience of the Government clause of the contract. Accordingly, we recommend that the partial cancellation of Dairy Sales' contract be changed to a partial termination for the convenience of the Government and that settlement be made with the contractor pursuant to that clause. To the extent they conflict with the views expressed herein, our decisions 37 Comp. Gen. 330 (1957) and B-164826, August 29, 1968, are overruled, and should no longer be followed.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510. In view thereof, your attention is directed to section 236 of the act which requires that you submit written statements of the action taken with respect to the recommendation. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

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We would appreciate advice of whatever action is taken on our recommendation.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

Lieutenant General Wallace H. Robinson, Jr.
Director, Defense Supply Agency