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DECISION

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

FILE: B-206449.3
B-206449.4

DATE: April 5, 1983

MATTER OF: Crown Laundry and Dry Cleaners, Inc.; Solon Automated Services Inc. - Reconsideration

DIGEST:

Prior decision, which sustained a protest on the basis that the awardee's bid was mathematically and materially unbalanced, but did not recommend that the contracting agency terminate the contract or refrain from exercising options, is affirmed where it has not been established that the decision was based on an error of law or fact.

Crown Laundry and Dry Cleaners, Inc. and Solon Automated Services, Inc. request that we reconsider our decision in Solon Automated Services Inc., B-206449.2, December 20, 1982, 82-2 CPD 548. In that decision, we sustained a protest by Solon against the award of a contract to Crown for the rental and maintenance of washers and dryers at Fort Bragg, North Carolina. The contract is for a base period of 1 year and 2 option years. Crown was awarded a contract based on a slightly lower 3-year total price than offered by Solon. We determined Crown's bid to be mathematically unbalanced because Crown's base year bid price was greater than its reasonable first year costs and its option price was lower than its likely option year costs. We found Crown's bid to be materially unbalanced because the Government would not realize the 1 percent price advantage represented by Crown's bid until the last month of the second option period and, consequently, a reasonable doubt existed that Crown's bid would ultimately provide the lowest cost to the Government. Since Crown's bid was mathematically and materially unbalanced, the award was improper. We did not recommend that the contract be terminated, however, because by the time the Army could have done so, it would have paid Crown 50 percent of the total cost it would incur for the entire 3-year period, affording Crown a windfall from its unbalanced bid. Rather, under the unusual circumstances presented, we recommended that the Army exercise both options, if otherwise proper.

Crown contends that we erred in our prior decision in calculating Crown's costs and concluding that its bid was mathematically unbalanced, by relying improperly on our decision in Lear-Siegler, Inc., B-205594.2, June 29, 1982, 82-1 CPD 632, and by assuming that large prompt payment discounts offered by Crown would not be realized. Solon contends that we erroneously denied its requested relief, termination of Crown's contract.

We have considered the arguments submitted by Crown and Solon and we are not persuaded that our initial decision was incorrect. Therefore, we affirm our initial decision.

CROWN LAUNDRY'S REQUEST FOR RECONSIDERATION

Crown initially contends that our finding of mathematical unbalance was incorrect because we relied on a misleading estimate of base year contract costs submitted by Solon. Solon estimated that Crown's maximum base year cost was $487,000 while its bid price was $914,500 before discounts and $731,055 after discounts. In its comments as an interested party in the protest, Crown criticized the estimate because it did not include costs for equipment financing, state sales tax, building rental and utilities and other miscellaneous costs. Crown did not in that submission provide its own estimate of costs, nor did it categorically state that its costs were higher than Solon estimated them to be. We noted that the unquantified omissions cited by Crown might be counterbalanced by Solon's use of retail prices rather than wholesale prices, and its omission of salvage value in formulating the estimate. In view of Crown's failure to demonstrate the estimate to be inaccurate, the Army's concession that Crown's bid was mathematically unbalanced and the fact that Crown's bid was dramatically higher than all other bids for the base year and significantly lower for the option years, we concluded that the bid was mathematically unbalanced.

Crown now submits, for the first time, an itemization of its base year costs which indicates a total cost of $636,176 prior to taking profit. Crown has not submitted invoices or other documents that would support its claim. We will not consider the new information submitted by Crown. Interested parties who do not submit all relevant evidence to our Office, expecting that the contracting

agency will adequately represent their position or that we will draw conclusions favorable to them, do so at their own risk. It is not our function to prepare defenses to allegations clearly raised, but rather to base our decision on the written record before us. B&M Marine Repairs, Inc.--Request for Reconsideration, B-202966.2, February 16, 1982, 82-1 CPD 131. In this case, the information necessary to prove that Crown's bid was not mathematically unbalanced was uniquely in Crown's possession, yet, despite having ample opportunity to submit that evidence in the course of our initial consideration of this matter, Crown did not do so. Under the circumstances, we decline to consider Crown's evidence at this late stage.

Crown next contends that our decision incorrectly relied on Lear Siegler Inc., supra. We cited Lear Siegler for the proposition that even though a contracting agency expects to exercise all options, a mathematically unbalanced bid which would not present a cost savings to the Government until nearly the end of the entire contract period, and then, only a slight cost savings, must be rejected as materially unbalanced.

Crown seeks to distinguish Lear Siegler on the basis that in that case, the contracting officer initially rejected the bid as unbalanced and then reconsidered his decision and determined the bid to be acceptable. In Crown's view, our decision merely affirmed the contracting officer's initial decision. In this case, Crown asserts, the contracting officer concluded that the bid was not unbalanced and, therefore, Lear Siegler is not apposite.

Lear Siegler, however, cannot be distinguished on the ground suggested by Crown. In that decision, we stated that due to the front-loaded price structure, it would not be until the final 6-month option period (following a 6-month base period and 2 option years) that the mathematically unbalanced bid's total cost would become low. Under such circumstances, the Government would assume an inordinate risk of loss after payment of an inflated bid price during the base period. Therefore, there was a reasonable doubt that the award would result in the lowest cost to the Government and the bid should have been found materially unbalanced.

Thus, our decision in Lear Siegler was based entirely on our analysis of the bid in question and not on deference to the contracting officer's initial, but eventually abandoned, determination. Moreover, the reasoning of Lear Siegler clearly applies in this case since it would not be until the last month of the second option year that Crown's bid would become low. We reject Crown's unreasonably narrow reading of Lear-Siegler.

Last, Crown contends we improperly assumed that the prompt payment discounts offered by Crown would not be taken by the Army and overlooked Defense Acquisition Regulation (DAR) § 2-407.3(b) (1976 ed.) and several of our decisions which require bids to be evaluated on the basis that discounts will be taken.

Crown misinterprets our decision. Our finding of material unbalance was not predicated upon Crown's prompt payment discounts, but rather upon the front-loaded nature of Crown's bid. We did note that the unusually large discounts only increased the possibility that Crown's bid would not ultimately provide the lowest cost, but we also stated that the Army's evaluation of the discount was proper. Thus, our decision is not inconsistent with DAR § 2-407.3(b) or our previous decisions concerning the evaluation of prompt payment discounts.[1]

SOLON'S REQUEST FOR RECONSIDERATION

Although in our prior decision we sustained Solon's protest against the award to Crown, we did not recommend that the Army terminate Crown's contract for the convenience of the Government or refrain from exercising options. We explained that terminating the contract or not exercising options would not be in the best interest of the

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[1]We note that both the General Services Administration and the Department of Defense have amended the Federal Procurement Regulations (FPR) and the DAR to eliminate the evaluation of prompt payment discounts due to various problems associated with evaluating them. See 47 Fed. Reg. 36164 (1982) (to be codified in FPR § 1-2.407.3); DAR 2-407.3 (Defense Acquisition Circular No. 76-36, June 30, 1982). The DAR amendments were not, however, effective at the time the award was made.

Government since by the time the contract could be terminated the Government will have paid approximately 50 percent of the total cost it will incur for the 3-year period. Moreover, a termination near the end of the base year would afford Crown an enormous windfall from its unbalanced bid structure and further compromise the integrity of the competitive bidding system.

Solon contends that, contrary to the conclusions we reached in our prior decision, the costs of terminating Crown's contract are minimal. Solon argues that under DAR § 7-103.21 (1976 ed.), which was incorporated by reference in the contract, Crown would be entitled to receive only actual costs incurred in performance of work completed, costs incurred in settling the contract and a fair and reasonable profit. Thus, the Government would not have to pay Crown its inflated first year price and Crown would not realize a substantial windfall through the termination.

We disagree.

First, Solon's analysis of the costs associated with termination for convenience is incorrect. The termination for convenience clause set forth in DAR § 7-103.21 provides that the contractor and contracting officer may agree upon an amount to be paid the contractor by reason of termination provided that the amount, exclusive of settlement costs, does not exceed the total contract price (less, of course, payments already made under the contract). It also states that if the contractor and contracting officer fail to agree on an amount, the contracting officer shall pay the contractor,

> "for completed supplies or services accepted by the Government * * * and not theretofore paid for, a sum equivalent to the aggregate price for such supplies or services computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges." (Emphasis added.)

Thus, the portion of the contract which has been performed and accepted would not be converted to a cost-type contract as Solon suggests. Rather, unless Crown agreed to lesser compensation, the Government would be obligated to pay for the laundry services rendered at the inflated contract rate.

Although, as Solon points out, we have in certain cases recommended termination even though the cost of termination would be substantial, we continue to believe that notwithstanding what we regarded as a procurement deficiency, under the unique circumstances of this case termination for convenience would not be in the best interest of the Government. In our view, the cost to the Government would be disproportionate to the benefit to be derived, given the good faith of the contracting officer in applying prior decisions of this Office. Under the circumstances, we believe we were correct in making only a prospective recommendation.

We conclude that neither Crown nor Solon has established that our decision was based on an error of fact or law. Therefore, we affirm our decision. Computer Data Systems, Inc., Reconsideration, B-205521.3, B-205521.4, July 26, 1982, 82-2 CPD 75.

for Milton J. Socolar
Comptroller General
of the United States