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Comptroller General  
of the United States

United States General Accounting Office  
Washington, DC 20548

# Decision

**Matter of:** L. W. Matteson, Inc.

**File:** B-290224

**Date:** May 28, 2002

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Richard W. Miller, Esq., for the protester.

Edward T. Goldstein, and Robert M. Anderson, Esq., U.S. Army Corps of Engineers, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Under invitation for bids for dredging, agency reasonably rejected bid as unbalanced where bidder failed to include cost of preparing a site for disposal of dredged sediment in its unit price for dredging sediment, for which payment would be made over the term of the project, and instead included disposal site costs in its lump sum price for grubbing and clearing, a minor work item, such that the disposal site costs comprised 99 percent of the price for grubbing and clearing; rejection of the bid was proper based on the agency's reasonable determination that the unbalancing posed an unreasonable risk that bidder would receive substantial up-front payment upon completing the grubbing and clearing work, whether or not it had completed the site preparation work.

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## DECISION

L. W. Matteson, Inc. (LWM) protests the rejection of its bid as unbalanced under invitation for bids (IFB) No. DACW37-01-B-0012, issued by the U.S. Army Corps of Engineers for dredging work and placement of rockfill at backwater lakes in Pool 10 of the Upper Mississippi River, near Prairie du Chien, Wisconsin. LWM disputes the agency's determination that its bid was unbalanced.

We deny the protest.

The IFB sought fixed-price bids for dredging approximately 180,000 cubic meters of sediment from the lakes and safely transporting and disposing of the dredged material; clearing (felling, trimming and cutting of trees, as well as disposal of trees and other vegetation); grubbing (removal of stumps and large roots); stripping

(removal of surface humus and material); and placing a geotextile underlayer and 310 metric tons of rockfill. The requirements were divided among eight contract line items (CLIN), including CLINs 0001 and 0008, requesting fixed, per-cubic-meter unit prices for dredging sediment, and lump sum CLIN 0003, for clearing and grubbing the rockfill site. The Corps received two bids: LWM's was low at \$1,511,020, and J. F. Brennan's was second low at \$1,544,270. Both bids were in excess of the (revised) government estimate (\$1,247,307).

The contracting officer's review of bids revealed that LWM's price for CLIN 0003, for clearing and grubbing, was unusually high in comparison to the government estimate and the other bid; while the government estimate for CLIN 0003 was \$1,720, and J.F. Brennan's price was \$1,000, LWM's price for the item was \$298,500. In response to the contracting officer's notification that its price for CLIN 0003 was considered to be "extremely high," and his request for bid verification, Letter from Corps to LWM, Oct. 2, 2001, at 2, LWM explained that its CLIN 0003 price largely reflected the cost for preparing a site at which the dredged sediment could be deposited. Specifically, according to LWM:

Our intentions on bid day were to develop the Kapinus site as our primary disposal site. Use of this site will require considerable earth moving (over 120,000 yards by our estimate) and, two road crossings. It is the development of that disposal site, which will come long before any dredging will take place, that makes up 99% of our bid for the clearing and grubbing bid item.

When I was putting the bid together, I was confused as to which bid item would pay for the disposal site development. [Specification] Section 02327--Disposal of Dredge Material has no payment clause. That being the case, I looked for a lump sum bid item that had something to do with disposal site development and could come early in the project. . . . Section 02325 "Dredging" does not mention paying for site development either.

Letter from LWM to Corps, Oct. 10, 2001, at 1.

The contracting officer interpreted the IFB as providing that disposal of the dredged material was not to be separately priced, but instead was to be included in the unit prices for dredging under CLIN 0001 (and under the very limited CLIN 0008 option item). The contracting officer determined that LWM's bid thus was materially unbalanced in that the CLIN 0003 price was excessive, bearing no relation to the actual cost of the clearing and grubbing work, and might constitute an advance payment. Upon learning of the resulting rejection of its bid, LWM filed an agency-level protest. The agency denied that protest, finding that LWM's price for CLIN 0003 was so unreasonably high that it constituted an advance payment and posed an unreasonable risk to the government. LWM thereupon filed this protest with our Office. LWM asserts that including the site preparation costs for the

disposal site in its CLIN 0003 bid price was not inconsistent with the terms of the solicitation, and did not warrant rejecting its bid as unbalanced.

Federal Acquisition Regulation (FAR) § 14.404-2(g) provides that a “bid may be rejected if the prices for any line items or subline items are materially unbalanced (see [FAR §] 15.404-1(g)(1)).” Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated, as indicated by the application of cost or price analysis techniques. FAR § 15.404-1(g)(1). While unbalanced pricing may increase risk to the government, agencies are not required to reject an offer solely because it is unbalanced. *Id.* Rather, where the contracting officer receives an unbalanced offer, the contracting officer is required to consider the risks to the government associated with the unbalanced pricing in making the award decision, and whether a contract will result in unreasonably high prices for contract performance. FAR § 15.404-1(g)(2). An offer properly may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the government. *Id.*; see HSG Philipp Holzmann Technischer Service GmbH, B-289607, Mar. 22, 2002, 2002 CPD ¶ \_\_ at 5.<sup>1</sup>

Our analysis in this case begins with consideration of whether the disposal site preparation costs included in LWM’s CLIN 0003 price instead should have been included under CLIN 0001, as the agency argues; if it was improper to include these disposal costs under CLIN 0003, then, given that these costs represented 99 percent of LWM’s CLIN 0003 price, LWM’s bid included a significantly overstated contract line item price and thus satisfied the FAR definition of an unbalanced bid. We agree with the Corps that CLIN 0003 clearly was not to include the disposal site preparation costs. The CLIN 0003 clearing and grubbing work was defined in the IFB as follows:

Clearing shall consist of the felling, trimming, and cutting of trees into sections and the satisfactory disposal of the trees and other vegetation designated for removal, including down timber, snags, brush, and rubbish occurring in the areas to be cleared.

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<sup>1</sup> Although previous versions of the FAR provided for rejection of unbalanced bids where their acceptance would be tantamount to an advance payment, that term no longer appears in the discussion of unbalanced pricing in revised part 15 of the FAR, applicable here. (It is not clear why references to “advance payment” remain in FAR § 52.214-19, which was included in the IFB. Enco Dredging, B-284107, Feb. 22, 2000, 2000 CPD ¶ 44, at 6 n.3.) Thus, while the agency expressed an advance payment concern, we will consider its determination in terms of its analysis of the risk that LWM’s pricing poses to the government. Indus. Builders, Inc., B-283749, Dec. 29, 1999, 99-2 CPD ¶ 114 at 6; see Reece Contracting, Inc., B-285666, Aug. 21, 2000, 2000 CPD ¶ 135 at 2-3.

Grubbing shall consist of the removal and disposal of stumps, roots larger than 75 millimeters in diameter, and matted roots from the designated grubbing areas.

Specification 02230, §§ 1.1.1, 1.1.2. Not only does clearing and grubbing appear to differ substantially in character from the extensive earth moving and road crossings contemplated by LWM as part of disposal site preparation, but the clearing and grubbing was to be undertaken within the limits of the rockfill area, that is, in a different location than the contemplated disposal site. Amend. 0001, § 7.

It is equally clear from our review of the solicitation that disposal site preparation costs were to be included under CLIN 0001. In this regard, Specification 02325, Dredging, § 1.14, in discussing payment for dredging, provided that:

Payment under this [dredging] item shall include all costs for dredging work and satisfactory disposal (placement) of dredged material in the Contractor selected disposal (placement) area(s). No separate payment will be made for: . . . disposal (placement) area sitework . . .

We conclude that there was no reasonable basis for LWM's including its costs for disposal site preparation in CLIN 0003 rather than CLIN 0001. Id. It follows that the agency properly determined that LWM's price was unbalanced.<sup>2</sup>

By including its disposal site preparation costs in its CLIN 0003 price rather than under CLIN 0001, LWM's pricing approach created the potential that LWM could recover a disproportionate share of the overall contract price early in the performance period. Although LWM has expressed its intention to incur the disposal site preparation costs at the beginning of the project (asserting that development of the disposal site is a necessary prerequisite to beginning dredging), neither the IFB nor its bid obligated it to do so. As a result, the agency concluded, in the event of early termination of LWM's contract, the agency would have expended a substantial

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<sup>2</sup> LWM argues that it was fundamentally unfair to allow recovery of up-front disposal site preparation costs only over the term of the project. This argument is untimely; such protests of the terms of a solicitation must be filed prior to bid opening. 4 C.F.R. § 21.2 (a)(1) (2002).

sum for CLIN 0003 work that had not been performed. Indus. Builders, Inc., supra, at 7-8. We think the agency reasonably found that this was an unacceptable risk to the government; this risk warranted rejecting LWM's bid as unbalanced.<sup>3</sup>

The protest is denied.

Anthony H. Gamboa  
General Counsel

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<sup>3</sup> We note that, since LWM's CLIN 0003 price was many times higher than the actual value to the government of the work required under the CLIN, the agency also had an adequate basis to reject LWM's entire bid as unreasonably priced. FAR § 14.404-2(f) (entire bid may be rejected due to the unreasonableness of the prices of individual line items). Indus. Builders, Inc., supra, at 7 n.9.