

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

27018

FILE: B-212033**DATE:** December 13, 1983**MATTER OF:** Slurry Systems**DIGEST:**

The protester has not shown that the Corps of Engineers improperly specified an "excavated trench" construction method using a 30-inch "soil-bentonite" wall to contain wastes at a landfill in New Jersey or improperly prohibited use of an alternative construction method involving a "vibrated beam."

Slurry Systems, a division of Thatcher Engineering Corporation (Slurry), protests the award of a contract to D'Appolonia Waste Management Services, Inc., under Army Corps of Engineers (Corps) invitation for bids (IFB) No. DACW41-83-B-0183, which was issued for the construction of a "cutoff wall" at the Lipari Landfill (Lipari) waste site, Lipari, New Jersey. Slurry alleges that the Corps arbitrarily excluded the "vibratory beam" method of constructing the wall.

The purpose of the cutoff wall is to isolate hazardous wastes at the site and thereby keep them from contaminating the surrounding water. The solicitation requires that the wall must be constructed using the "excavated trench" method with "soil-bentonite" backfill and excludes the vibrated beam method. The required method involves digging a trench and filling it with a soil mixture to produce a 30-inch wall; the prohibited method involves driving a beam into the ground and injecting "Aspemix" into the void which is left when the beam is extracted. The vibrated beam method produces a wall approximately 2-6 inches thick.

The Corps reports that the Lipari project is being funded under the "Comprehensive Environmental Response, Compensation and Liability Act of 1980" (Superfund). Superfund is administered by the Environmental Protection Agency (EPA), but the Corps is supervising construction of the wall pursuant to an interagency agreement with EPA. Before a project may be funded under Superfund, it must comply with certain procedures established by the "National Contingency Plan."

123070
027427

As noted by Slurry:

"The [national] plan contains certain minimum prerequisites which must be satisfied in order to authorize funding and remedial action. Pub. L. 96-510 § 105 stipulates the required minimum standards and that section provides in part as follows:

". . .[T]he . . . national hazardous substance response plan . . . shall establish procedures and standards for responding to releases of hazardous substances, pollutants and contaminants, [and] . . . shall include at a minimum:

.

"(2) methods for evaluation, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

"(3) method and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this Act;

"(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and non-governmental entities in effectuating the plan;

"(5) provision for indentification, procurement, maintenance, and storage of response equipment and supplies;

.

"(7) means of assuring that remedial action measures are cost effective over the period of potential exposure to the hazardous substances or contaminated materials."

A number of preliminary engineering studies were conducted in the case of Lipari. Three studies were conducted by R.E. Wright Associates (Wright); these studies

concluded that the construction of a cutoff wall was the best method for implementing remedial action there. Two of the studies did not recommend as to how the wall should be constructed. The third Wright report recommended that the wall be constructed using Slurry's vibrated beam method with Aspemix as backfill. A cost analysis performed by Radian Corporation (Radian) found that building the wall with the vibrated beam method would cost \$161,600 less than building it with the excavated trench method.

After reviewing all these studies, EPA's Assistant Administrator, Office of Solid Waste and Emergency Response, issued a "record of decision" which described remedial action to be taken, as follows:

"I have determined that the containment and treatment strategy for the Lipari site is a cost-effective remedy and that it effectively mitigates and minimizes damage to, and provides adequate protection of public health, welfare and the environment.

.

"I have determined that it is necessary to proceed with the installation of the [cutoff] wall. . . ."

As to events subsequent to this decision, EPA reports as follows:

"After signing the [August 3, 1982, determination], the Assistant Administrator allocated approximately \$1.6 million in funds for the Lipari site on August 13. She did this by approving an 'Action Memorandum' which specified that, in order to construct 'an impermeable 360° [cutoff wall],' the money was to be used, among other things, for 'modification of existing [cutoff wall] plans and specifications' and constructing the cutoff wall."

EPA also subsequently ordered that a final engineering study be conducted. The work statement for that study reads, as follows:

"The engineer shall complete the design [and a complete set of construction contract documents] for the proposed 360° ground water

cutoff wall. Design considerations shall include but will not be limited to: Modification of the existing cutoff wall plans and specifications prepared by R.E. Wright Associates dated October 5, 1981, to provide for conventional cutoff wall installation techniques in addition to the installation methodology [vibratory beam method] currently specified."

CH2M Hill (Hill), a consultant to EPA, performed the final study and recommended the excavated trench method with soil-bentonite backfill. Hill also concluded that the vibrated beam method should not be used to construct the cutoff wall. The EPA, the Corps, and the state of New Jersey reviewed Hill's report and agreed with Hill's conclusions. Hill was then instructed to develop final plans and specifications for the solicitation based on the recommendations in its report.

Slurry protested to Hill about the feasibility of using Slurry's vibrated beam method. Hill reviewed additional technical data supplied by Slurry, but refused to revise its initial recommendations. The Corps also refused Slurry's request to postpone issuing the solicitation. The solicitation, which was issued on May 31, 1983, required bidders to submit bids to construct a 30-inch wall using the excavated trench method and soil-bentonite as backfill material. The Corps reports that 10 bids were received.

Slurry first protests that the Corps had no authority to exclude the vibrated beam method from the specifications. Slurry stresses that the EPA Administrator issued her decision to take remedial action at Lipari based on reports which were in existence at the time the decision was made. Slurry notes that these reports were prepared pursuant to EPA's plan. Therefore, Slurry argues that the Administrator's decision incorporated Wright's recommendation that the vibrated beam method be used to construct the cutoff wall. Slurry concludes that the Corps did not have authority to exclude the vibrated beam method from the specifications based on the Hill report which did not exist when the Administrator decided to take remedial action.

The Corps contends that in her determination the Administrator adopted a containment strategy for remedial action, but she did not specify the method or materials to be used in implementing that strategy. The Corps further contends that it was not required to rely on the Wright reports because they were preliminary studies. Finally, the Corps questions the accuracy of Radian's cost analysis by

noting that the analysis assumed an average wall depth of 30 feet when, in fact, the depth may be up to 55 feet in some locations.

We find that the Corps had authority to issue specifications which excluded the vibrated beam method.

We have reviewed the Administrator's determination. This document specifies that the Administrator reviewed various listed reports, including the Wright report. She found, as noted above, that containment and treatment is an efficient and cost-effective method for remedial action. However, the determination does not expressly state what method or materials are to be used in building the containment wall, and it does not expressly state that the conclusions of any particular study were adopted.

Moreover, even if it could be said that the Administrator implicitly decided that the vibrated beam method of construction should be used and assuming that she expressed this intent in the work statement for the Hill report, it is clear that the EPA later changed its position and concurred with the Corps' and the state of New Jersey's views that this method should be excluded. Thus, the Corps could reasonably rely on EPA's concurrence in issuing the specifications based on Hill's conclusions.

We find that the EPA-Corps' actions did not violate the requirements of the plan. As noted above, the plan establishes a series of evaluation steps which must be completed before remedial action can be ordered and reimbursed under Superfund. In particular, as implemented by EPA, the evaluation steps include preliminary engineering studies to determine if remedial action at a site is feasible and warranted, the development of alternative methods for remedial action, and the selection of the best alternate for remedial action at that site. See generally, 47 Fed. Reg. 31,217 (1982). Nowhere, however, does the plan require that the remedial action finally ordered be based on any particular study. Moreover, the plan, as implemented by EPA, specifically provides that the project may be modified based on later findings. See 47 Fed. Reg. 31,216 (1982), at section 300.68(d)(2) and (e)(2).

Finally, EPA's plan did not require the Corps to specify that the remedial plan which would cost the least amount of money. The plan does require a detailed cost analysis of all possible remedial alternatives; however, the plan does not mandate that the least costly alternatives be selected. Instead, it provides for the elimination of alternatives whose cost is much greater than other alternatives when the alternatives do not provide substantially greater benefit to the environment. 47 Fed. Reg. at 31,217 (1982), at section 300.68(h)(1)). Thus, the EPA-Corps was not required to exclude the excavated trench method, which is allegedly higher in cost, once it was decided that only this method would provide adequate protection to the environment. In any event, the Corps questions the accuracy of Radian's cost analysis; moreover, EPA, in fact, did allocate "enough money" to construct the wall using the excavated trench method.

Slurry next protests that the elimination of its method unduly restricts competition. When a protester alleges that specifications unduly restrict competition, the issuing agency must establish that the restriction is reasonably related to the agency's minimum needs. Amray, Inc., B-208308, January 17, 1983, 83-1 CPD 43. Here, the Corps states that its minimum need is to protect the public health and welfare and the environment from the hazardous wastes. The Corps therefore contends that it needs the containment wall which will most effectively keep the wastes from migrating into the surrounding environment. The Corps states that a wall built by the excavated trench method meets its needs because the excavated trench method is the proven and traditional method for building containment walls. It believes that exclusion of the vibrated beam method is justified because the vibrated beam method is, allegedly, new and unproven. We find this explanation demonstrates that specifying the excavated trench method is reasonably related to the Corps' minimum needs. Slurry now must affirmatively prove that the Corps' specification is unreasonable. Amray, Inc., supra.

Slurry has raised a number of points to meet this burden. Slurry's first objections essentially concern the Corps' use of the Hill report to specify the excavated trench method and to exclude the vibratory beam method for

construction at Lipari. Slurry claims that the Corps acted unreasonably in relying on the Hill report because Hill specified the excavated trench method and eliminated the vibrated beam method without independently testing the two methods. Slurry also questions the reliability of the Hill report because Slurry claims the report was completed too hastily.

The Corps responds that its decision to eliminate the vibrated beam method and specify the excavated trench method was based on its review of the Hill report and its independent analysis of the two systems. The Corps acknowledges that no new testing was done, but states that both the Corps and Hill reviewed numerous studies which had previously been completed by others. The Corps also asserts that, contrary to Slurry's allegation, the Hill report did not find that further testing was required to determine if soil bentonite was a feasible backfill material to use but, rather, testing was required to determine the exact mix of sand, soil and bentonite of which the backfill material should be composed. Finally, the Corps alleges that Hill did review the additional data provided by Slurry and that the Corps was not unreasonable in refusing to base the specifications on the Wright report because the report was a preliminary study and the report did not completely address the advantages of the excavated trench method or the disadvantages of the vibrated beam method.

To the extent Slurry alleges that the facts demonstrate that Hill did not do a complete analysis, it is within the purview of the contracting agency to determine the adequacy of the technical data upon which it bases its decisions. See Joseph Pollack Corporation, B-209899, December 23, 1982, 82-2 CPD 573. Therefore, we cannot question the Corps' decision to accept that study as one reason for excluding the protester's method.

The Corps also has advanced specific reasons for its decision to exclude the vibrated beam method from the specifications. The Corps states that there may be gaps in a wall built by the vibrated beam method owing to vibrations during construction, the possibility of the Aspemix injection apparatus clogging, and the thinness of the resulting wall. In addition, the Corps is concerned because there are, at best, only indirect methods to insure that the wall is properly placed into the soil. Concerning Aspemix, the material which Slurry desires to use for the wall, the Corps states that while Slurry's own testing indicates that Aspemix will meet the specifications' requirements, this

material has not been subjected to independent testing, and there is no technical data to indicate the effects which Lipari leacheates and organic solvents will have on an Aspemix wall. The Corps therefore states that over the long term, the integrity and thickness of an Aspemix wall will be reduced.

The Corps states that the potential for gaps is not a problem with walls built by the excavated trench method. The Corps also notes that visual observation of the wall will insure that the wall is properly placed. Concerning soil bentonite, the material specified in the IFB for the wall, the Corps states that this material has been tested in the engineering community and its capabilities and limitations are known. The Corps acknowledges that the permanence of a wall built with soil bentonite is unknown, but states that the 30-inch thickness of a wall built by the excavated trench method will help protect against degeneration of the wall.

Slurry has countered these objections by stating that a review of existing technical data shows that use of the vibrated beam will not result in a wall with gaps. Slurry also alleges that the Corps has overlooked deficiencies of soil bentonite walls built by the excavated trench method. Finally, Slurry argues that the Corps could satisfy its needs in a less restrictive manner by stating performance specifications rather than design specifications.

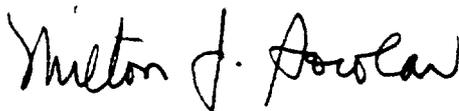
Both Slurry and the Corps have supplied our Office with numerous reports and studies to support their views. Essentially, these documents evidence to us that a technical dispute exists concerning the benefits and disadvantages of each system. This, however, does not show that the Corps' technical judgment, based on data justifying exclusion of the vibrated beam system, is arbitrary.

Finally, we cannot conclude that the Corps should have stated the specifications in terms of performance characteristics rather than in terms of design requirements. Our decision in North American Reporting, Inc.; Ace-Federal Reporters, Inc., B-198448, November 18, 1980, 80-2 CPD 364, cited by Slurry to support this argument, is inapplicable here. In that decision, we questioned the Federal Energy Regulatory Commission's exclusion of the "monitored" electronic recording method of stenographic reporting since there was no indication that the method was defective in itself. By contrast, the Corps has stated that the problems with the vibrated beam method are problems inherent in that

method. Moreover, the protester does not allege that it was prevented from bidding on the excavated trench method, and there is no indication that any other company was prevented from competing under the IFB. Slurry has not shown that the Corps' position is arbitrary. Thus, the Corps' specifications do not unduly restrict competition merely because they are stated in terms of design requirements.

We conclude that Slurry has not affirmatively shown that the specification for a 30-inch soil-bentonite wall built by the excavated trench method and the exclusion of the vibrated beam method is unreasonable.

Therefore, we deny the protest.


for Comptroller General
of the United States