

DECISION



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

FILE: B-216392

DATE: September 24, 1984

MATTER OF: Western Waste Management

DIGEST:

1. There is no legal basis to object to a below-cost bid. Whether a bidder can meet contract requirements in light of its low price is a matter of bidder responsibility, the affirmative determination of which is not reviewed by GAO except in circumstances not present in this case.
2. When a "buy-in" is suspected, contracting officer must take appropriate action to ensure that buy-in losses are not recovered through change orders or otherwise.

Western Waste Management protests award to another firm under solicitation No. DAEA18-84-B-0135 issued by the Army. We dismiss the protest.

Western's basis for complaint is that the other bidder's price is too low. Western states that the awardee's price is nearly 20 percent below the government estimate as well as lower than the awardee's prices for prior years. Western "suspects" that the awardee will seek to recover its losses from its low bid by "raising other costs to the base." Western also refers to section 9.103(c) of the Federal Acquisition Regulation (FAR), which warns that "award of a contract . . . based on lowest evaluated price alone can be false economy. . . ."

There is no legal basis to object to an award on the basis of a below-cost offer. Technical Food Services, Inc., B-210024, Dec. 21, 1982, 82-2 CPD ¶ 563. Whether the bidder will be able to meet contract requirements in light of its offered price is a matter of responsibility. Before award, an agency must make an affirmative determination that the bidder is responsible. Because that is a

030100

B-216392

very subjective determination based on business judgment, we will not review a challenge to such an affirmative determination unless there is a showing of possible fraud or bad faith on the part of contracting officials or an allegation that a specific responsibility criterion set forth in the solicitation was not met. Neither is applicable here.

It is not clear what Western means by its statement that the awardee will seek to raise "other costs to the base." The submission of a below cost offer, with the expectation of an increase in the contract amount through unnecessary or excessively priced change orders or of receiving follow-on contracts at artificially high prices, is known as "buying-in." Such a bidding approach is not illegal. Contracting officers, however, are required to "take appropriate action to ensure buying-in losses are not recovered" through change orders or otherwise. See Federal Acquisition Regulation, § 3.501-2(a), 48 Fed. Reg. 41,102, 42,112 (1983) (to be codified at 48 C.F.R. § 3.501-2(a)); Tombs & Sons, Inc., B-206810.2, May 10, 1982, 82-1 CPD ¶ 447.

Finally, we point out that the FAR provision cited by the protester is part of a section which merely indicates that a bidder must be found responsible before award to that bidder, regardless of its price, can be made. It does not preclude acceptance of a below-cost bid if the bidder is found to be responsible.

The protest is dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel