



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Waste Conversion, Inc.

File: B-224425.2

Date: November 7, 1986

DIGEST

Where firm submitted two bids to perform the required waste disposal services, each based on a different disposal site, and where the bids were priced differently precisely because of the different costs of using the respective sites, agency properly did not allow the substitution after bid opening of the higher-priced disposal site for the lower-priced one once it was determined that the lower-priced one was not actually approved.

DECISION

Waste Conversion, Inc. (WCI) protests the award of a contract to Severson Containment Corporation under invitation for bids (IFB) No. DACW41-86-B-0053, issued by the Army Corps of Engineers for the excavation and removal of contaminated soil and hazardous wastes from an inactive hazardous waste disposal site located in Atlantic County, New Jersey. We deny the protest.

BACKGROUND

The IFB's bid schedule required certain documents to be furnished along with the bid. One of those documents was described as follows:

"Furnish the name and address of RCRA [Resource Conservation and Recovery Act] approved off-site disposal facility that the Contractor is proposing to use for the disposal of contaminated materials. Furnish a letter from the disposal facility stating that they have been contacted by the Contractor and that they are willing to accept the material as identified in the specifications."

In response to the IFB, the Corps received ten bids from nine bidders. WCI submitted the low bid of \$1,969,472, and designated in the bid a disposal site in Wayne, Michigan, operated by Wayne Disposal, Inc. (the Wayne site). WCI also submitted a separate bid of \$2,396,932, designating a disposal site in South Carolina operated by GSX Services, Inc. (the GSX site). WCI included with the bids a cover letter stating that the Wayne site was trying to obtain necessary insurance and hopefully would do so by bid opening, but WCI was submitting the GSX-based bid in case the insurance was not secured. Severson submitted the second low bid of \$2,274,740, and also designated the GSX site.

The Corps sent a list of the disposal sites designated by the bidders to the Environmental Protection Agency (EPA) for review. Shortly thereafter, the EPA advised the Corps that it recently had issued an order to cease all disposal of hazardous waste at the Wayne site until the site completely complied with the EPA regulations issued pursuant to RCRA. (See 40 C.F.R. part 265 (1986)). In specific, the EPA informed the Corps that the operators of the site had not been able to obtain liability insurance as required by RCRA regulations. The EPA informed the Corps that the Wayne site thus was prohibited from accepting waste excavated from the site in Atlantic County, New Jersey.

After learning that the EPA would not permit the Wayne site to be used, WCI sent the Corps a letter offering to substitute the GSX site for the Wayne site in its low bid of \$1,969,472. The agency, however, concluded that WCI's low bid was nonresponsive because WCI had conditioned or qualified the bid, and awarded the contract to Severson.

THE PROTEST

WCI contends that the Corps' finding of nonresponsiveness is erroneous. WCI asserts that it made an unqualified commitment in its bid to meet all the material terms of the IFB and submitted all the documentation called for by the IFB for designating a waste disposal site. In WCI's view, the substitution of the GSX site for the Wayne site after bid opening should be purely a matter of responsibility--which can be addressed after bid opening--since it involves WCI's ability to meet the commitment made in WCI's bid. In this regard, WCI points out that the requirement that the disposal facility receiving the waste materials be approved under RCRA to accept such materials was contained in the portion of the IFB entitled "Responsibility."

The Corps argues that regardless of whether the information required by an IFB is intended for use in determining the

bidder's responsibility, the bid must be found nonresponsive if the information provided by the bidder is inconsistent with the IFB's requirements. In the Corps' view, WCI's low bid was nonresponsive because the company in effect took exception to the IFB's requirement that an RCRA-approved site be designated as the disposal site for the hazardous waste materials. The Corps emphasizes that the cover letter that WCI submitted with its bids clearly revealed that WCI knew that the Wayne disposal site was not an approved site. In this regard, the Corps notes that in Aqua-Tech, Inc. v. United States Army Corps of Engineers, 564 F. Supp. 773 (D.D.C. 1983), the court found that non-compliance with an almost-identical solicitation provision for designating an approved waste disposal site rendered the bid nonresponsive.

In addition, the Corps argues that WCI should not be permitted, in any event, to substitute the GSX site used in its higher bid for the Wayne site in the low bid because this would permit WCI to have "two bites at the apple" and, thus, adversely affect the integrity of the competitive bidding system. The agency points out that the only difference between the two bids was the price for the disposal of the hazardous waste materials.

DISCUSSION

We agree with the Corps that WCI cannot be permitted to substitute the GSX site for the Wayne site irrespective of how the requirement in issue is classified, that is, whether it is considered a matter of responsiveness^{1/} or one of responsibility. The reason is that although generally it is permissible to submit alternate bids, see, for example, Sidings Unlimited, B-220820, Dec. 18, 1985, 85-2 C.P.D. ¶ 686, permitting the subject substitution clearly would be unfair to the other bidders. In its cover letter to the bids, WCI specifically stated that it was submitting an alternate bid designating the GSX disposal site because the insurance problems for the Wayne site were still unresolved

^{1/} We note that in Aqua-Tech, Inc. v. United States Army Corps of Engineers, supra, the bidder did not identify in its bid the proposed disposal facilities or provide commitments from them to accept and dispose of the waste. Here, WCI complied with the IFB's documentation requirement concerning the designation of a waste disposal site and the submission of a letter from the site operators that they would accept the hazardous waste materials.

at the time of bid submission, and the GSX-based bid was greater than the Wayne-based bid precisely because it was more costly to dispose of waste at the GSX site. As the Corps points out, the only difference between the two bids was the price for the disposal of the hazardous waste--our review shows WCI charged \$242 per ton of contaminated bulk solids in the GSX bid and \$175 per ton of such solids in the Wayne bid.

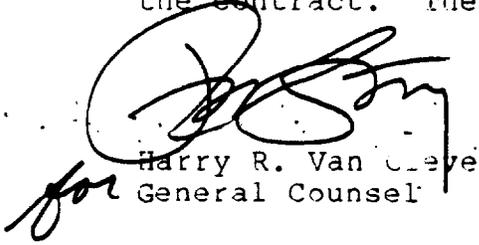
Given the direct and specific connection between the designation of the disposal sites and the pricing of WCI's two bids, it would be inimical to the integrity of the competitive bidding system for the Corps to allow the substitution after bid opening of the higher-priced GSX site for the lower-priced Wayne site so that WCI could remain the overall low bidder, i.e., in effect to allow WCI the post-bid opening opportunity to reduce its \$242 per ton GSX site price to the \$175 per ton Wayne site price. To conclude otherwise would permit a bidder, aware prior to submitting its bid that certain disposal sites have approval problems, to submit two or more bids so that the bidder would be deemed nonresponsible based on the sites in all but the highest bid. Then, seeing after opening that one of its lower bids--not necessarily its lowest one--could be successful, the bidder could substitute the acceptable site from its highest bid. In that situation, the bidder in effect could choose the alternate bid on which it wanted the award to be based. This type of advantage not only would be unfair to the other bidders, since it would allow that firm to control the bidding results, but would be unfair to the government in that the bidder unilaterally could select which of its bid prices would be accepted.

The protester, in maintaining that the protest issue involves a matter of responsibility and therefore can be addressed after bid opening, contends that the Corps at least should have allowed WCI to designate a third disposal site.

WCI's point is an academic one, and thus need not be decided. The record shows that time was of the essence in this procurement since it involved "Superfund" work contracted by the Corps on behalf of the EPA to clean up contamination of an area located near a drinking water aquifer that ranked among the top 100 sites on the EPA's National Priorities List of uncontrolled hazardous wastes. The hazardous wastes there posed a significant risk to the health of the community and the environment through the contamination of the ground water. Consequently, any delay in the removal of the wastes from the area would present a significant risk to public health and increase the possibility of additional environmental damage.

WCI's letter offering to substitute the GSX site for the Wayne site did state that the company also had been discussing the "possible usage of Chemical Waste Management's Model City New York landfill" and further stated that should the site be EPA-approved, WCI might utilize it at the time of contract performance. However, the record reveals that in its review of the Corps' list of disposal sites designated by the bidders, the EPA advised the agency that this site also was prohibited from receiving hazardous waste; it thus does not appear that WCI had any arrangements for disposal at an approved site other than GSX. Under the circumstances, delaying the award to Severson to allow WCI to attempt to obtain a commitment for waste disposal at yet another RCRA-approved site would not have been in the government's interest.

We thus think that WCI's low bid properly was found ineligible for award as submitted; could not be rendered eligible by substitution of the GSX site; and that the situation reasonably permitted no further delay in awarding the contract. The protest is denied.



for Harry R. Van Cleave
General Counsel