



The Comptroller General
of the United States

Washington, D.C. 20548

Knouitz

Decision

Matter of: Tri-S, Inc.
File: B-226793.2
Date: June 26, 1987

DIGEST

1. Amendment which contained historical data on the chemical composition of boiler soot for disposal is not material where under the terms of the original solicitation bidders assume the risk of disposing of the soot regardless of its content.
2. A requirement that the bidder have a specific license or permit relates to responsibility, that is, capability to perform, and the bidder should be afforded a reasonable opportunity after bid opening to furnish evidence that it meets the requirement.

DECISION

Tri-S Incorporated protests the award of a contract to Total Waste Management, Inc. under invitation for bids (IFB) No. N62472-86-D-2244, issued by the Navy for hazardous waste disposal services for the Portsmouth Naval Shipyard, Portsmouth, New Hampshire.

We deny the protest.

The solicitation required the contractor to dispose of an indefinite quantity of various types of hazardous waste materials identified in the solicitation. Total Waste submitted the low bid in the amount of \$386,735 and Tri-S submitted the second low bid in the amount of \$393,455.50.

Tri-S argues that the Navy improperly accepted Total Waste's low bid because Total Waste failed to acknowledge amendment No. 1 to the solicitation. The amendment provided historical data on the chemical composition of boiler soot to

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be disposed of; specifically, it provided that the ash to unburned carbon content for the soot historically has been ash 67 percent, carbon 33 percent, and vanadium 1 percent.

The amendment also stated that "the soot may contain . . . toxicity levels of vanadium in the range of 1200-22000 parts per million" and included laboratory test results of previous soot analyses.

The protester states that it is more costly to dispose of boiler soot containing a 1 percent level of vanadium because certain disposal sites do not accept soot containing this level of vanadium. In its comments submitted in response to the Navy's report on this protest, Tri-S states that there is a "new State of Maine regulation" which defines disposal options for material containing vanadium at a level of 1 percent. The protester states that the regulation requires that the disposal site have an air monitoring system where this level of vanadium is present. The protester explains that the landfill used in the prior contract for disposal of this material cannot be used for the current requirement because it does not have an air monitoring system. Tri-S states that in preparing its bid it lost a volume discount which could have been obtained from using a single landfill for disposal of the various waste materials identified in the IFB. Further, the protester explains that the local landfill approved for vanadium at a 1 percent level is not competitive with the nonvanadium landfill and, therefore, it is not cost effective to use the vanadium approved landfill for disposal of the other types of waste identified in the IFB. Based on these factors, the protester maintains that it costs \$8,872 more to dispose of boiler soot containing a 1 percent level of vanadium than to dispose of soot containing a lesser amount of vanadium.

The Navy argues that the amendment is not material and therefore it acted properly in accepting Total Waste's low bid. The Navy states that the historical data on the chemical composition of the boiler soot provided by the amendment is for information purposes only; that is, the amendment merely indicates that in the past vanadium at a 1 percent level has been identified in the boiler soot and also advises bidders that such material may be present in the boiler soot to be disposed in this procurement. In this regard, the Navy states vanadium is a chemical present in boiler soot which is released from corrosion of boiler tubes and that prospective bidders familiar with disposal of boiler soot would know that vanadium may be present regardless of whether this information is provided in the solicitation. Further, the Navy explains that with the exception of sandblast grit, all of the various types of waste

identified in the solicitation for disposal are hazardous and that the solicitation clearly advised bidders of this.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Maintenance Pace Setters, Inc., B-213595, Apr. 23, 1984, 84-1 CPD ¶ 457; Four Seasons Maintenance, Inc., B-213459, Mar. 12, 1984, 84-1 CPD ¶ 284. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery or the relative standing of the bidders. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405 (1986). An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation, for example, where it merely clarifies an existing requirement. See Pittman Mechanical Contractors, Inc., B-225486, Feb. 25, 1987, 87-1 CPD ¶ 218; Maintenance Pace Setters, Inc., B-213595, supra. Where an amendment is not material, the failure to acknowledge the amendment may be waived and the bid may be accepted. Emmett R. Woody, B-213201, Jan. 26, 1984, 84-1 CPD ¶ 123.

We do not find that the historical data on the chemical composition of boiler soot contained in the amendment imposed any legal obligation different than that imposed under the original solicitation. The historical data did not change the basic contract requirement stated in the solicitation that the contractor provide "services [including] furnishing labor, transportation, equipment, materials, supplies, and supervision to transport and dispose of liquid and solid hazardous waste . . ." identified in the solicitation. Thus, under the terms of the original solicitation, bidders assume the risk of disposing of soot regardless of its content.

In any event, the solicitation, as originally issued, advised bidders that the "soot is derived from the combustion process of number 6 fuel oil which powers the shipyard's power plant." Thus, bidders were on notice as to how the soot was derived and knew from the original solicitation its most probable chemical content. The Navy states that any contractor familiar with the disposal of boiler soot would know that vanadium may be present in the soot and the protester does not deny that this is the case.

Tri-S also complains that Total Waste failed to submit with its bid, as required by the solicitation, copies of operating permits. The firm states that the Navy improperly

permitted Total Waste to submit the permits after bid opening.

The requirement that a bidder obtain a specific license or permit concerns the bidder's responsibility, that is, its performance capability, rather than bid responsiveness, that is, its promise to perform. This is true even where, as here, the solicitation requires that the bidder possess at the time of bid opening and/or submit with its bid such licenses or permits. Carolina Waste Systems, Inc., B-215689.3, Jan. 7, 1985, 85-1 CPD ¶ 22; see also Aviation Specialists Inc.; Aviation Enterprises, Inc., B-218597, B-218597.2, Aug. 15, 1985, 85-2 CPD ¶ 174. Therefore, the bidder should be afforded a reasonable opportunity after bid opening to furnish evidence of the required permits. Id. Accordingly, the Navy acted properly in permitting Total Waste to furnish such documents after bid opening.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel