



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Enviroclean Systems, Inc.

File: B-278261

Date: December 24, 1997

Diane Ried Cosenza, Esq., Didriksen & Carbo, for the protester.
Maj. Jeffrey D. Stacey, Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging use of negotiated procedures rather than sealed bidding to acquire waste management services is denied where the record shows that the agency reasonably concluded that discussions might be required before award.

DECISION

Enviroclean Systems, Inc. protests the use of negotiated procedures by the Department of the Army to procure solid waste management services for Fort Polk, Louisiana, pursuant to request for proposals (RFP) No. DAKF24-97-R-0013. Enviroclean argues that the Army is required to use sealed bidding procedures for this procurement.¹

We deny the protest.

Enviroclean is the current incumbent contractor providing solid waste collection and disposal services at Fort Polk. The company received its contract after submitting the low bid on the earlier procurement. On May 30, 1997, the Army issued a follow-on solicitation for these services, using two-step sealed bidding. After Enviroclean challenged the use of other than an IFB, the Army canceled the solicitation on June 17, 1997. Approximately 3 months later, on September 15, the Army issued the above-referenced RFP for these services. According to Enviroclean, the use of other than sealed bidding procedures is unnecessarily burdensome, will adversely affect competition, and may be a punitive attempt by

¹Enviroclean alleges that the agency is improperly using two-stepped sealed bidding when it should use an invitation for bids (IFB), the approach the agency used the last time it solicited for this effort. The solicitation here is actually an RFP. Despite this error, our decision will address Enviroclean's underlying concern--that the agency should have procured these services using sealed bids.

the Army to avoid award to Enviroclean because of a performance dispute that arose between it and the Army during the previous contract.

The Army responds that this procurement meets the requirements in statute and regulation for using negotiated procedures rather than soliciting sealed bids. First, the Army explains that significant changes to its requirements are now reflected in its solicitation, and that these changes may require it to hold discussions with potential offerors. For example, the contracting officer states that the solicitation includes a waste reduction requirement whose method of implementation is left to the discretion of the contractor. Contracting Officer's Statement, Nov. 5, 1997, at second unnumbered page. In addition, the Army has elected to make quality more important than price in its evaluation of proposals, and has identified numerous quality evaluation subfactors in the solicitation. RFP § M.001. Finally, the Army denies that it is changing its method of solicitation in order to avoid selecting the protester.

The Competition in Contracting Act (CICA) directs agencies to use the competitive procedure that is best suited to the circumstances of the procurement. 10 U.S.C. § 2304(a)(1)(B) (1994). CICA does, however, require the use of sealed bidding when: (1) time permits; (2) award will be based on price; (3) discussions are not necessary; and (4) more than one bid is expected. 10 U.S.C. § 2304(a)(2)(A); Federal Acquisition Regulation (FAR) § 6.401(a); Specialized Contract Servs., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90 at 4. When an agency determines that these conditions are not met, CICA requires the use of negotiated procedures. 10 U.S.C. § 2304(a)(2)(B). An agency's determination that the conditions requiring use of sealed bidding are not present must be reasonable. F&H Mfg. Corp., B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520 at 4.

With respect to the Army's decision that discussions with offerors may be necessary before it awards a contract for these services, the Army explains that, despite the protester's assertions to the contrary, the specifications for this procurement are not adequate to ensure that offerors will create successful waste disposal and recycling programs to meet the government's needs. In addition, it explains that there were several problems with contract interpretation during the previous contract, including disagreements over how the government's recycling program should be implemented. Enviroclean disagrees with the Army's assertions in this area because the recycling requirements in the contract were also included in past solicitations--which were successfully competed using sealed bidding--and because the specific solicitation provision that was the source of a significant dispute between it and the Army has been deleted from this procurement.

The statement of work included in this RFP reveals that offerors are given significant discretion in fashioning an approach to meeting the Army's needs for these services. For example, the RFP requires that the contractor must achieve a goal of disposing of at least 25 percent of the solid waste collected on the

installation by means other than a landfill. RFP § C.5.1.3. A contractor's failure to meet this goal will result in significant deductions in its payment. RFP § C.5.1.3.1. To achieve this goal, the solicitation requires the contractor to establish an installation-wide recovery and recycling program, and offers almost no direction on how the program will be structured. RFP § C.5.1.1.3.

Our review of the solicitation provisions cited above leads us to conclude that the Army reasonably anticipated that discussions may be necessary in view of the substantial discretion vested in offerors to structure programs to meet the agency's needs. Also, the Army points out that numerous disputes arose during the last contract regarding the recycling requirement. While the protester correctly notes that the specific provision that was the source of an earlier dispute with the Army has been deleted from this solicitation, the deleted clause--requiring the use of a material recovery facility (a facility which separates solid waste into groups such as recyclables and materials that must be sent to a landfill)--clearly relates to the ongoing requirements of this solicitation. In short, even though the solicitation no longer states how the contractor must achieve the goal of reduced reliance on landfills, the overriding requirement for waste reduction remains very much a part of this contract. Given that these requirements were the subject of much dispute when the Army provided detailed direction on how to achieve the solicitation's goals, we think the agency reasonably concluded discussions may be necessary when the solicitation offers less direction. See Carter Chevrolet Agency, Inc., B-228151, Dec. 14, 1987, 87-2 CPD ¶ 584 at 3-4.

Since we conclude that the Army reasonably decided that discussions may be necessary to complete this procurement, and this factor alone justifies the decision to use negotiated procedures, we need not consider the other ground offered by the Army in support of its determination to use negotiated procedures--i.e., its decision to make quality more important than price in the evaluation.

Finally, with respect to the protester's allegation that the Army is acting in bad faith in this procurement, the protester has presented no evidence in support of this contention. Without such evidence, we will not attribute prejudicial motives to

agency contracting officials on the basis of mere inference or supposition.²
Meridian Management Corp., Inc.; NAA Servs. Corp., B-254797, B-254797.2, Jan. 21,
1994, 94-1 CPD ¶ 167 at 6.

The protest is denied.

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²In any event, the protester appears to have abandoned this issue. In response to the protester's assertion that there "may" be collusion between Army officials and a nearby recycling facility, the agency denied any such collusion and noted that offerors are permitted to select their own recycling facility. In its comments filed after the agency report, the protester makes no further mention of this issue.