The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: G.W., Inc.

File: B-222570; B-222571

Date: August 26, 1986

DIGEST

Agency decision to negotiate for the procurement of hazardous waste disposal services, requesting competitive proposals instead of sealed bids, is appropriate under the Competition in Contracting Act of 1984 where complex requirements demand discussions to assure the quality and safety of performance and award is based on both technical and price-related factors.

DECISION

G.W., Inc. (GWI), protests the Defense Logistics Agency's method of acquiring hazardous waste disposal services for over 50 military installations under requests for proposals (RFP) No. DLA200-86-R-0035 (B-222570) and DLA200-86-R-0029 (B-222571), issued by the Defense Reutilization & Marketing Service, Battle Creek, Michigan. GWI contends that DLA should have asked for sealed bids instead of competitive proposals. We deny the protest.

Both RFP's require technical proposals and unit prices for hazardous waste disposal services. The contractor has to pick up the waste at various military installations and transport it from there to approved disposal sites. Different sites are approved for particular kinds of hazardous waste. The waste consists of toxic, flammable, and corrosive materials and includes asbestos, cyanide, items contaminated with PCP, flame powder, magnesium chips, and sulfuric acid.

Offerors were advised that the lowest, single responsible offeror submitting a technically acceptable proposal would receive the award. The following equally weighted criteria determine technical acceptability: (1) disposal methods and sites plan; (2) transporters; (3) interim storage sites; (4) safety procedures; and (5) operations plan.

GWI advances several arguments why DLA's decision to procure the services by competitive proposals instead of sealed bids is improper. GWI argues that by law sealed bidding is the preferred method of procurement. Moreover, it maintains, the services are not so unduly complicated or technical as to require discussion or negotiation. GWI urges that procurement of hazardous waste disposal is a simple process because the activity is "mature, highly refined, and thoroughly regulated." GWI contends that DLA does not need technical proposals, but only has to assure itself that offerors have required licenses and permits because state and federal environmental agencies will affirmatively determine an offeror's technical capability and understanding before issuing those documents. GWI points out that the services were previously procured using sealed bid procedures.

DLA reports that it acted under the aegis of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C.A. § 2304(a)(2) (West Supp. 1985), and Federal Acquisition Regulation (FAR), § 6.401(b)(1) (FAC 84-5, Apr. 1, 1985), pursuant to which it decided to use competitive proposals because it needed to conduct discussions with responding offerors. DLA admits that it used sealed bidding in the past, but states that it obtained unsatisfactory results. The agency reports that it needed detailed technical data concerning the ability of offerors and their subcontractors (transporters and disposal facilities) to comply with constantly changing state and federal environmental regulations. Under sealed bidding procedures, bidders had only one opportunity to provide all of the required technical data and DLA had to reject as nonresponsive any bid which failed to include all the required data. DLA reports that this adversely impacted on competition because the bulk of the offers received are capable of being made acceptable through negotiation. A related problem was the bidder's inability to change its price should DLA disapprove of a proposed subcontractor.

In the past there was a statutory preference for formal advertising (sealed bidding); however, CICA eliminates that preference. The Saxon Corp., B-221054, Mar. 6, 1986, 86-1 C.P.D. ¶ 225. CICA directs agencies to ask for sealed bids only if four conditions are simultaneously present--(i) time permits, (ii) the award will be based on price, (iii) discussions are not necessary, and (iv) there is a reasonable chance of receiving more than one bid. 10 U.S.C.A. § 2304(a)(2)(A). In the absence of any of the four conditions, an agency is required to request competitive proposals. Integrity Management International, Inc., B-219998.2, Feb. 18, 1986, 86-1 C.P.D. ¶ ___; 10 U.S.C.A. § 2304(a)(2)(B). Where an agency's service requirements

demand both the evaluation of technical proposals, to assure the adequacy of offerors' technical capabilities, and discussions to assure understanding of complex requirements, the use of competitive proposals is proper for two reasons--the award is not based on price alone, and discussions are required. United Food Services, Inc., B-220367, Feb. 20, 1986, 86-1 C.P.D. ¶ 177.

We find that DLA properly asked for competitive proposals instead of sealed bids because of its need to conduct discussions and to evaluate technical proposals. In our view, DLA's concerns regarding offerors' understanding of state and federal regulations governing the environmental activities they were offering to undertake is a sufficient basis for conducting discussions. We have found this area complex and subject to conflicting interpretations. See Monterey City Disposal Service, Inc., 64 Comp. Gen. 813 (1985), 85-2 C.P.D. ¶ 261 (federal agencies compliance with local environmental requirements).

Further justification for discussions lies in two solicitation provisions. First, the RFP contains a Use of Subcontractor provision granting DLA a veto power over the offeror's use of proposed subcontractors. The identities and capabilities of proposed subcontractors are disclosed in the offerors' respective technical proposals. Without the ability to conduct discussions concerning the identify, capabilities and cost of a substitute subcontractor, the presence of a single objectionable subcontractor could prevent DLA from accepting an otherwise advantageous offer. Likewise, the RFP's Clean Air and Water Certification provision requires the offeror to notify DLA immediately, before award, if a proposed subcontractor is under consideration for listing on the Environmental Protection Agency's List of Violating Facilities. This notice, which could result, at DLA's option, in the preaward substitution of another subcontractor for the proposed subcontractor, also requires discussions between the offeror and DLA. GWI does not question DLA's inclusion of either of the above provisions in the RFP.

We further find it appropriate for DLA to evaluate the technical capabilities of both offerors and proposed subcontractors in view of the danger that improper performance of their duties can pose to the public health. An award following such an evaluation is necessarily based on both technical and price factors.

In our judgment, DLA properly solicited competitive proposals.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel