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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Great Lakes Dredge & Dock Company

File: B-290158

Date: June 17, 2002

Daniel C. Sauls, Esq., Thomas P. Barletta, Esq., and Paul R. Hurst, Esq., Steptoe & Johnson, for the protester.

Michael H. Payne, Esq., Starfield & Payne, for Weeks Marine, Inc., an intervenor.

Peter M. Kilcullen, Esq., Kilcullen Law, for Bean Stuyvesant, LLC, an intervenor.

Madeline Shay, Esq., U.S. Army Corps of Engineers, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency was not required to reject as nonresponsive bid for dredging and disposal of dredged material that failed to include all permits for proposed disposal site, because submission of permits pertains to bidder responsibility.

DECISION

Great Lakes Dredge & Dock Company protests the award of a contract to any bidder other than itself under invitation for bids (IFB) No. DACW51-01-B-0024, issued by the U.S. Army Corps of Engineers, New York District for a navigation improvement project for New York Harbor, Kill Van Kull and Newark Bay Channels. Great Lakes contends that the agency should have rejected as nonresponsive the two bids that were lower in price than its own.

We deny the protest.

The IFB, which was issued on September 4, 2001 and amended ten times prior to bid opening, required the dredging and disposal of rock and non-rock material from the channels. The solicitation provided for placement of the non-rock material removed at the Historic Area Remediation Site (HARS), IFB § 02900, ¶ 7.2.1, but also identified some of the material to be dredged as “[n]on-rock material unsuitable for placement at the HARS [disposal facility].” IFB, § 02900, ¶ 6. The IFB gave bidders the option of using the OENJ Cherokee Bayonne Landfill Remediation Site or of proposing their own facility for disposal of this material. IFB Amend. No. 0010,

§ 00010, Item No. 0001AC. Bidders proposing their own facilities were to enter the name, address, and permit number of their site(s) on the bid schedule, and Note 8 to the schedule instructed bidders as follows:

Should bidders choose to supply their own site in 0001AC, bidders shall submit the documents specified [in] Section 00800: Special Contract Requirements within 70 calendar days from the date the bids were opened and determined as an apparent low bidder or the Contractor's bid will be considered non-responsible and rejected. In addition the bidders should submit with the bid, permits demonstrating that the chosen disposal site(s) is legal to operate on or before the date of the bid opening must accompany the bid package, or the bid will be considered non-responsible and rejected.

IFB amend. No. 0010, § 00010, Note 8.¹

¹ Paragraph 1.45 of Section 00800 provided detailed guidance regarding the documentation that bidders were required to submit with their bid packages and that the apparent low bidder was required to furnish within 70 days after bid opening. The opening section of the paragraph stated as follows:

If the bidder selects to bid an alternate disposal site(s) for the processing and disposal of Non-rock material unsuitable for placement at the HARS other than the Government designated upland site, the Apparent low bidder must submit with his bid the site(s)'s permit, and must demonstrate to the **Government within 70 calendars [sic] from the bid opening** that the alternate disposal site(s) is operational, capable of processing and disposing of the Non-rock material unsuitable for placement at the HARS on that date and is in compliance with the New Jersey Department of Environmental Protection and/or with the New York State Department of State Coastal Zone Management Program Policies or other host state compliance as appropriate for disposal of dredged material.

Further along, the paragraph noted that all necessary permits required for the dredged material placement were to be provided to the government with the bid package, including "placement site permits as applicable and others as related to transportation, processing and placement of the dredged material, or any other aspects of the Apparent low bidder's proposed disposition of the dredged material including any and all permits, authorizations, contracts, agreements, licenses, [and] rights of entry" relating to legal or regulatory requirements concerning interim storage, dewatering and other treatment or processing, zoning compliance, waterfront development, water quality certification, coastal zone management, tideland management, and wetland management. The paragraph went on to note that
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Four bids were opened on the March 15, 2002 opening date. The three lowest bids were as follows:

<u>Bidder</u>	<u>Total Bid</u>
Weeks Marine, Inc.	\$44,199,621
Bean Stuyvesant LLC	\$47,403,111
Great Lakes	\$47,928,201

On May 10, the contracting officer determined that Weeks was non-responsible and rejected its bid, leaving Bean in line for award as the apparent low bidder. The contracting officer determined that Bean's bid was responsive and is currently in the process of examining Bean's responsibility.

Great Lakes proposed to use the Cherokee site for disposal of the non-rock material not suitable for placement at the HARS, while Bean proposed an alternate site, the City of Linden, New Jersey landfill. Specifically, in materials accompanying its bid, Bean explained that it intended to process the raw dredged material at the CTI Claremont Dredged Material Processing Facility, Jersey City, New Jersey, which already possessed all necessary permits and approvals (copies of which Bean furnished with its bid package), and then dispose of it in the City of Linden landfill. Bean listed the permits that the City of Linden landfill already possessed and noted that disposal of the dredged material in the landfill would require approval of a Revised Landfill Closure/Post-Closure Plan and issuance of a Final Landfill Closure and Disruption Permit and an Acceptable Use Determination permit.² Bean enclosed with its bid a copy of the Revised Landfill Closure/Post-Closure Plan submitted to the NJDEP on January 17, 2002 and a copy of its Final Closure Permit application, but did not furnish copies of any permits for the landfill.

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documentation of compliance with any other legal or regulatory requirement was required to be provided to the government within 70 calendar days after bid opening. IFB amend. No. 0010, § 00800, ¶1.45.

² The introductory section of the revised closure plan explained that the Linden landfill had been closed for acceptance of waste on December 31, 1999, and that in July 2000, the City of Linden had requested the use of stabilized dredge material as the final capping system of the landfill. The document went on to explain that the use of dredge material, which had not been included in the previously approved landfill cap, required the approval of the New Jersey Department of Environmental Protection (NJDEP), and hence, the submission of a new Revised Closure Plan application.

The protester argues that it was a material requirement of the IFB that bidders commit to disposing of the non-rock materials not suitable for placement at HARS in a facility that was legal to operate and had all permits necessary to receive the material from this project as of the bid opening date. Great Lakes contends that Bean failed to comply with this requirement in that, by its own admission, it did not have all of the requisite permits at the time of bid opening, and in that its bid documentation affirmatively establishes that the City of Linden landfill was not "legally able to operate" at the time of bid opening. In support of its argument, the protester cites two decisions that, in its view, stand for the proposition that a bid's failure to propose an approved and permitted facility for contaminated material as required in a solicitation renders the bid nonresponsive, Aqua-Tech, Inc. v. United States Army Corps of Engineers, 564 F. Supp. 773 (D.D.C. 1983), and Waste Conversion, Inc., B-224425.2, Nov. 7, 1986, 86-2 CPD ¶ 534.

A requirement for the submission of the permits necessary for performance at a particular site relates to how the contract requirements will be met, rather than to the performance requirements themselves; such a requirement thus pertains to bidder responsibility. VA Venture; St. Anthony Med. Ctr., Inc., B-222622, B-222622.2, Sept. 12, 1986, 86-2 CPD ¶ 289 at 5. A bidder need not demonstrate compliance with solicitation requirements pertaining to its responsibility, that is, its ability to perform as promised, in order to have its bid determined responsive. Moreover, the fact that the IFB called for submission of a permit showing that the proposed disposal site was "legal to operate" as of the bid opening date does not convert the permit requirement into a matter of bid responsiveness. The terms of a solicitation cannot convert a matter of responsibility into one of responsiveness. Integrated Prot. Sys., Inc., B-254457.2, B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24 at 3; Norfolk Dredging Co., B-229572.2, Jan. 22, 1988, 88-1 CPD ¶ 62 at 3. Accordingly, we see no merit in the protester's argument that Bean's bid should have been rejected as nonresponsive.

We think that the cases cited by the protester in support of its argument that the Corps should have rejected Bean's bid as nonresponsive are distinguishable. In Aqua-Tech, which concerned an Army Corps of Engineers IFB for removal of toxic waste from a site in Ohio, the IFB required transportation of the waste materials directly to an Environmental Protection Agency (EPA) approved disposal site, and disposal of the waste material at that site. Bidders were required to designate their proposed disposal sites in their bids. Aqua-Tech failed to propose an EPA-approved site in its bid; accordingly, the bid was rejected as nonresponsive. In the case at hand, in contrast, the IFB did not require that the dredged material be disposed of in an approved disposal site; hence, the identity of the disposal site did not bear on the responsiveness of the bid. Moreover, the issue that the court considered in Aqua-Tech was whether the Corps had correctly rejected Aqua-Tech's bid, and not whether the grounds for rejection of the bid pertained to responsiveness as opposed to responsibility.

The other decision cited by the protester, Waste Conversion, concerned a Corps of Engineers IFB (for excavation and removal of contaminated soil and hazardous wastes from an inactive hazardous waste disposal site located in New Jersey) that required bidders to furnish the name and address of an approved off-site disposal facility that they intended to use for disposal of contaminated materials. We did not address the issue of whether the Corps had correctly rejected the protester's bid as nonresponsive for failing to furnish the name of an approved site; the issue that we considered was whether the bidder should be permitted to substitute an alternate disposal site for the one that it had designated in the bid. We concluded that Waste Conversion should not be permitted to substitute one site for the other after bid opening "irrespective of how the requirement at issue is classified, that is, whether it is considered a matter of responsiveness or one of responsibility." Waste Conversion, Inc., supra, at 3. In other words, we did not reach a conclusion as to whether the issue was one of responsiveness or responsibility.

The protest is denied.

Anthony H. Gamboa
General Counsel