The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Chemical Waste Management, Inc.

File: B-232276

Date: December 13, 1988

DIGEST

1. Rejection of proposal under the first step of a two-step sealed bid procurement was reasonable, where protester proposed using a new technology previously employed only on smaller scale projects, the protester lacked data necessary to establish the technology's ability to comply with the government's time constraints and production requirements, and changes needed to make proposal competitive would have constituted a major revision to the original proposal.

2. Agency properly sought data concerning operational experience with proposed new technology, under the first step of a two-step sealed bid procurement, in order to determine the technology's acceptability.

3. Unfair or prejudicial motives will not be attributed to agency contracting personnel on the basis of inference or supposition.

4. Discussions were meaningful where agency's clarifying questions accurately communicated the concerns of the evaluation board and led the protester to the areas of its proposal in need of amplification.

DECISION

Chemical Waste Management, Inc. (CWM), protests the Department of the Army's rejection of its technical proposal under request for technical proposals (RFTP) No. DACW41-88-B-0092, issued by the United States Army Corps of Engineers for an environmental cleanup construction project. The RFTP begins the first step of a two-step sealed bidding procurement for

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the cleanup of the Bridgeport Rental and Oil Services (BROS) Superfund site in Logan Township, New Jersey.1/

CWM protests that the Army did not evaluate the proposal in accordance with the factors specified in the RFTP. Specifically, CWM contends that (1) an unstated evaluation criterion was used to exclude the protester from the competition; (2) the Army failed to properly apply the stated evaluation criteria; (3) the evaluation was improperly focused on a single aspect of its proposal; (4) its technical proposal was inappropriately evaluated under responsibility criteria that should only be applied during the second step of the procurement; (5) the Army was biased against the use of CWM's proposed technical approach; and (6) the questions asked during discussions did not reasonably notify the protester of the agency's concerns.

We deny the protest.

The Army issued the RFTP for construction of facilities necessary to dispose of PCB-contaminated debris, sediment, soil, water, and oily waste (collectively referred to as waste feed) from an approximately 22 acre site, which includes a 15 acre lagoon.2/ The RFTP called for destruction of the waste feed at a thermal destruction facility (TDF). Offerors had the option of proposing: (1) the construction of an on-site TDF; (2) a procedure for gathering and then hauling the waste feed to an off-site TDF; or (3) both

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1/ Two-step sealed bidding is a hybrid method of procurement that combines the benefits of sealed bids with the flexibility of negotiations. Step one is similar to a negotiated procurement in that the agency requests technical proposals, without prices, and may conduct discussions. Step two consists of a price competition conducted in accordance with sealed bid procedures, except that the competition is limited to those firms which submitted acceptable proposals under step one. Federal Acquisition Regulation (FAR) §§ 14.501 et seq.; A.R.E. Manufacturing Co., Inc., B-224086, Oct. 6, 1986, 86-2 CPD ¶ 395.

2/ The site was used as a waste oil storage and recovery facility (tank farm) from 1950 through the early 1970's. Approximately 75 percent of the lagoon surface is covered with waste feed consisting of a 6-inch thick layer of PCB-contaminated oil.

(1) and (2) as alternatives. CWM chose the third approach, submitting two proposals--an on-site TDF proposal, and an off-site TDF proposal. The latter, proposing transportation of the waste feed from the New Jersey site to a Chicago, Illinois, TDF, was rejected, and is the subject of this protest.

The RFTP required the submission of two volumes--the first volume addressed technical matters while the second covered matters relative to the offerors' qualifications and experience. Separate evaluation criteria were provided for each volume. The evaluation criteria for the technical volume were: (1) technical approach, (2) operation plan, (3) work plans and schedule, and (4) overall responsiveness to the solicitation. Initially, these criteria were weighted in descending order; however, amendment No. 0006 deleted the weighting scheme in order to make an offeror's acceptability for the second step of the procurement contingent upon the submission of an offer acceptable under all the technical evaluation criteria. The evaluation criteria for the second volume were: (1) past project experience, (2) record of performance, (3) organization and personnel, (4) corporate commitments, (5) resource utilization, (6) overall responsiveness to the RFTP.

The RFTP contemplated that offerors proposing an off-site solution would gather the waste feed and haul it to the off-site TDF; however, CWM's proposal contained an intermediate step which used the patented basic extraction sludge treatment (B.E.S.T.) process--a relatively new solvent-based technology for pretreating the waste feed3/ on-site before hauling it off-site for incineration. Offerors proposing on-site TDFs had to submit detailed design reports describing all TDF subsystems. The Army did not specify similar data requirements for off-site proposals because design and construction of on-site waste feed subsystems was not required where the waste feed would be hauled directly to an off-site TDF having its own waste feed subsystem. However, notwithstanding CWM's proposed use of an off-site TDF, CWM's on-site B.E.S.T. process incorporates several waste treatment functions that would be considered analogous

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3/ B.E.S.T. emulsifies oily sludge waste feed with the solvent triethylamine (TEA) which breaks the oil/water emulsion. Centrifugation and distillation techniques are then used to physically separate the sludge into its component oil, water, and solids fractions. During this process contaminates such as PCBs and metals are concentrated in the separated fractions for recycling or disposal.

to the subsystems of an on-site TDF, including staging, storage, processing, feeding and monitoring of waste feed. CWM recognized the need for technical data addressing these issues and provided with its proposal data which had been generated during the 1987 testing of a prototype full-scale commercial B.E.S.T. facility at the General Refining, Inc. (GRI), Superfund site, near Savannah, Georgia.

The Army reports that it found CWM's off-site TDF technically acceptable, but rejected CWM's proposal because its GRI data did not provide enough information on the subsystem aspects of the B.E.S.T. process. The principal concerns were whether the B.E.S.T. process subsystems would be able to accommodate both the differences between the GRI waste feeds and those encountered at the BROS site (BROS waste feeds have a higher PCB/solids content), and the greater quantities of waste feeds at the BROS site. Maintenance of high production rates required to meet project scheduling was a major agency concern throughout the evaluation.

During discussions the agency sought further information on the B.E.S.T. process by asking CWM to:

> "14. Clarify operational experience other than the two days described for ... [the GRI site] and discuss any production data and how it relates to the proposed production rate...."

CWM failed to furnish data beyond the GRI data. On this basis, the evaluation board found that there was insufficient "operating experience at commercial scale to develop the necessary data base relative to the effects of equipment reliability or safety." CWM was notified of the rejection of its off-site proposal by a letter which stated, in part:

> "The Environmental Protection Agency requires a field demonstration of new technology before that technology is considered for clean up of a Superfund site. The field demonstration is necessary to evaluate the operability and reliability of the process and process control mechanisms, to establish a process material balance and to document the problems (process, mechanical, safety and environmental) which are met."

Noting that the agency's rejection letter did not state a reason beyond the lack of a field demonstration for rejecting its proposal, CWM contends that the Army improperly rejected its proposal after evaluating it against a new and unstated evaluation criterion, the field

demonstration of new technology, without providing CWM an opportunity to respond. In support of its contention, CWM notes that the language of the rejection letter parallels language found in a contemporaneous Environmental Protection Agency (EPA) letter to the Army. Further, CWM argues that, even if field demonstration results properly could be considered in the evaluation, its GRI data were sufficient to establish B.E.S.T. as an acceptable technology for use on the BROS project. Basically, CWM contends that its GRI data established that experimental laboratory results could be used to predict actual field results under differing site conditions with a high level of confidence. In CWM's view, this makes the production of other operational data to establish technical acceptability unnecessary.

The Army admits that the rejection letter's adoption of the field demonstration language from the EPA letter was in error, but urges that the underlying theme of the letter--that the proposal was unacceptable because the B.E.S.T. process was not sufficiently documented to allow an assessment of reliability, safety and operability of the process--is both correct and consistent with the evaluators' comments concerning CWM's proposal. As discussed below, based on our review of the Evaluation Board's technical evaluation worksheets and narratives from both the initial evaluation and the post-best and final offer evaluation, we agree.

As a preliminary matter, we find that the Army did not, as alleged, apply an unstated evaluation criterion in arriving at its determination to reject CWM's proposal. Rather, the Army decided that field demonstration results of the B.E.S.T. process were necessary in order to evaluate CWM's proposal under the "technical approach" evaluation criterion in the RFTP. We believe the Army's approach was reasonable given that the protester proposed a relatively new technology for use in carrying out the task of hazardous waste disposal.

Further, in our view, the Army reasonably concluded that CWM's proposal did not meet the minimum technical requirements of the RFTP, and that it would have required major revisions before it would become acceptable. Our review of an agency's technical evaluation under the first step of a two-step sealed bid procurement is limited to ascertaining whether the evaluation is reasonable. ICSD Corp., B-222542, July 23, 1986, 86-2 CPD ¶ 97. Where technical supplies or services are involved, the contracting agency's technical judgments are entitled to great weight. We will not substitute our judgment for the contracting agency's unless its conclusions are shown to be arbitrary or otherwise

unreasonable. Boliden Metech, Inc., B-229861.2 et al., May 9, 1988, 88-1 CPD ¶ 446.

Here, the agency's concerns about the B.E.S.T. process focused on three factors: the system's capability to handle (1) a greater volume and (2) different mix of waste feed at the BROS site than at the GRI site; and (3) concern about potential environmental problems with the use of the solvent TEA. CWM contends that the agency's concerns are unwarranted, arguing specifically that (1) the Army overestimated the increase in volume at the BROS site; (2) with regard to the waste feed mix, the Army erroneously concluded that there is a significantly higher concentration of PCBs at the BROS site; and (3) the Army's concerns about the use of TEA are unfounded. While CWM presents a strong argument with regard to the concerns about the use of TEA, the protester's disagreement on the volume and feed mix issues is not sufficient to show that the agency's position is unreasonable, particularly where, as here, highly technical judgments are involved and the procurement is for potentially hazardous services. See Boliden Metech, Inc., B-229861.2 et al., supra.

Since we see no basis to object to the agency's technical evaluation of CWM's proposed approach, we find that the agency acted reasonably in rejecting the proposal on the basis that resolving the agency's concerns about the B.E.S.T. systems would require a major revision of the proposal. Specifically, it is clear that CWM is using the B.E.S.T. process in part to reduce the volume of the waste prior to its transportation to Illinois, and that it is an integral part of its proposal. CWM envisioned a five-stage project which gathers the waste feed, stores it for processing, applies the B.E.S.T. process to reduce its volume, hauls the concentrated feed to the off-site TDF, and destroys the waste feed at the TDF. Since the first, second, fourth and fifth stages are acceptable, the question is whether CWM could delete the third stage (the B.E.S.T. process) without making a major revision to its proposal. We think not. Elimination of the B.E.S.T. process would require major revisions in the balance of the proposal which would include, at a minimum, offering different higher capacity equipment and facilities to handle the increases in volume of waste feed, storage requirements, loading facilities, backfill requirements, scheduling, layout of work area, and health and safety considerations.

The protester argues that it could have provided "extensive additional analytical data" showing the acceptability of the B.E.S.T. process, thereby avoiding any major revision to its proposal. We find this argument unpersuasive. The data to

which CWM refers appears to be laboratory data concerning the effectiveness of the B.E.S.T. process which CWM urges can be used to project the operational effectiveness of the technology under field conditions. However, this is not what the Army required to determine the acceptability of the proposed technology; the Army required actual operational data. Our review of the evaluation documents shows the Army thought well of the chemical/theoretical aspects of the B.E.S.T. process, but was concerned whether the technology was sufficiently proven to be mechanically/operationally implemented at the BROS site on the proposed scale with a waste feed different from the waste feed at the GRI site.

To the extent that CWM contends that the Army improperly applied the evaluation criteria in descending order of importance rather than assigning them equal weights as required by amendment No. 0006, the argument is without merit. CWM's contention is based on a statement in the contracting officer's report ("The Technical volume was to be evaluated on the following factors, in descending order..."). In our view, the statement is ambiguous since it is not clear if it correctly refers to the initial RFTP, which called for evaluation in descending order, or inaccurately refers to the RFTP following Amendment No. 0006, which deleted the requirement for evaluation in descending order. In any event, even assuming that CWM's proposal was evaluated under the pre-amendment No. 0006 evaluation scheme, we do not see how this could have prejudiced the protester because amendment No. 0006 altered the evaluation to evidence an equally strong concern for each of the evaluation criteria--i.e., an unacceptable rating in any one criterion would bar the offeror from the second step of the procurement. Therefore, since CWM's proposal is unacceptable because of its technical approach, it would have been rejected under either evaluation scheme.

The protester also contends the evaluation improperly focused on one preliminary aspect of its proposal (the B.E.S.T. process) and then improperly compared it to TDF standards. This argument lacks merit since the record shows that the emphasis in the evaluation was principally aimed at the processing capabilities of the waste feed subsystems common to both the B.E.S.T. and TDF technology, and that all offerors were required to submit substantial information concerning their proposed waste feed subsystems.

CWM further contends the Army's interest in CWM's prior experience with the B.E.S.T. technology resulted in its technical proposal being inappropriately evaluated under responsibility criteria that should only be applied during the second step of the procurement. We disagree. It is

clear that the agency's concern was not so much with CWM's experience with the B.E.S.T. process as with the operational history and technical acceptability of the process itself; the Army's consideration of CWM's experience related not to CWM's responsibility, but to whether the firm had demonstrated that its proposed process could meet the Army's technical requirements.

The protester further contends that the Army acted in bad faith and was biased against the B.E.S.T. process. It is well-established that our Office will not attribute unfair or prejudicial motives to agency personnel on the basis of inference or supposition, A & A Realty, Inc., B-222139, June 20, 1986, 86-1 CPD ¶ 575. Moreover, a charge of bias must be supported with "hard facts." A.R.E. Manufacturing Co., Inc., B-224086.4, Apr. 15, 1987, 87-1 CPD ¶ 410. Here, while the protester cites numerous examples in support of its allegation, none of them in our view demonstrates bias on the Army's part.

For example, CWM cites an April 20, 1988, handwritten note which indicates that EPA personnel had technical concerns regarding the solvent used in extraction processes such as the one proposed by CWM. However, contrary to the protester's assertion, the note shows that the Army was open to working with the extraction process approach and expressed the view that the concerns "could probably be taken care of technically and tested to assure that residue met all requirements." Similarly, CWM argues that the other offerors were not required to provide the kind of data that it was required to provide. This argument is without merit since all other offerors proposed the use of an established technology (TDFs) and furnished considerable, albeit different, technical data in the course of complying with the RFTP's specifications and design report requirements; only CWM proposed a new, unfamiliar technology. We think it reasonable that agency evaluators would closely scrutinize a proposal offering a new approach to hazardous waste disposal. Accordingly, we see no support in the record for CWM's contention that the Army was biased against its approach.

The protester also contends that the Army's discussion questions did not reasonably notify it of the agency's concerns. CWM urges that question 14, asking for "operational experience" and "production data," was very specific and received a specific answer using data only from the GRI site. CWM argues that had the question been more general, such as asking for "analytical data" or "other data," it would have "provided extensive additional analytical data

concerning the B.E.S.T. process." This argument is without merit.

Under FAR § 14.503-1(f)(1), when a contracting officer decides to request additional information under step one of a two-step procurement from an offeror whose proposal may be made acceptable, the contracting officer is to identify the nature of the deficiencies in the proposal or the additional information required. Here, the question posed to CWM specifically requested operational experience other than the GRI experience previously furnished, as well as production data and an explanation of how the operational experience and production data related to CWM's proposed production rate. Thus, in our view it is clear that the Army's concerns with the B.E.S.T. technology were adequately communicated to the protester, and it was on notice of those areas of its proposal requiring amplification.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel