



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Safety-Kleen (TS), Inc.

File: B-284125

Date: February 23, 2000

William E. Hughes III, Esq., Whyte Hirschboeck Dudek, for the protester.
Terrence J. Tychan, Department of Health and Human Services, for the agency.
Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency's apparent waiver of solicitation requirement that offerors possess a Maryland controlled hazardous substances facility permit is unobjectionable where the agency's needs can be met through award to offeror which did not satisfy the Maryland permit requirement, but has the appropriate permit in New Jersey, the state in which it will perform the relevant services, as permitted by the solicitation, and there is no reasonable possibility of prejudice to other offerors.

DECISION

Safety-Kleen (TS), Inc. protests the award of a contract to Clean Venture/Cycle Chem, Inc. under request for proposals (RFP) No. 223-99-2304, issued by the Food and Drug Administration, Department of Health and Human Services, for certain hazardous waste processing and disposal services. Safety-Kleen alleges that the awardee's proposal should have been rejected because the firm does not possess a CHS (controlled hazardous substances) facility permit for the State of Maryland, as required by section M of the RFP as a precondition to award.

We deny the protest.

The relevant facts in this case are not in dispute. Section M, item 4 of the RFP calls for the offeror to possess a Maryland CHS facility permit. The requirement is denominated as one of a number of "minimum mandatory requirements." Section M further provides that offerors that did not demonstrate that they met the minimum mandatory requirements would be ineligible for award.

The agency intended that a Maryland CHS facility permit be required only if a contractor proposed to operate a treatment, storage and disposal facility (TSDRF) within that state. In this regard, the agency argues that other sections of the RFP in effect supersede this specific requirement when an offeror is proposing to perform outside Maryland. For example, the agency cites: section C.11.1 of the RFP which states that the contractor “shall prepare all data and information required for waste transportation, treatment, or disposal as required by . . . [the state receiving the waste]”; section C.17.2 of the RFP which states that the “contractor shall, when shipping hazardous wastes to another state for disposal, comply with all receiving state requirements”; and section C.18.2 which requires contractor performance “in compliance with all applicable Federal, State, interstate and local regulations, laws, and codes governing the . . . disposal of . . . [hazardous] waste.”

The awardee proposed the use of a TSDRF within the state of New Jersey operated by its “sister company,” Cycle Chem, Inc., and its proposal evidenced possession of the requisite New Jersey permit. See Awardee’s Technical Proposal at 2, 23, and addendum (containing Cycle Chem’s Current New Jersey TSDRF Facility Permit); Agency Report at 1. The protester neither disputes that the awardee properly proposed only a New Jersey TSDRF site, nor that the awardee’s proposal demonstrated possession of the applicable New Jersey disposal facility permit. Nothing in the RFP precluded such an approach, as is also conceded by the protester. Protester’s Comments at 4. The protester, a Maryland-based firm, proposed to operate TSDRFs in Maryland and outside Maryland and possessed the requisite permits, including a Maryland CHS facility permit.

In our view, the agency’s position that the solicitation did not require a Maryland CHS facility permit when the operation of a TSDRF was proposed outside that state conflicts with the plain language of section M of the RFP, which explicitly mandates without qualification possession of the Maryland permit as an award prerequisite. Nonetheless, the agency’s waiver of the Maryland permit requirement for the awardee does not provide a legal basis to sustain Safety-Kleen’s protest in the circumstances presented here.

The requirement for a Maryland CHS facility permit as a precondition of an award for a firm not proposing to operate a TSDRF within Maryland clearly exceeds the agency’s needs. Notwithstanding the protester’s view that offerors had a right to “assume that the Agency had a rational basis” for the Maryland permit requirement, Protester’s Comments at 2, the requirement is obviously meaningful only with respect to the proposed operation of a Maryland TSDRF. The award to Clean Venture/Cycle Chem, which possessed the necessary New Jersey permit to operate a TSDRF within that state, in which it proposed to perform the relevant services, ensured that the agency’s actual needs would be met. In addition, the record evidences no possibility of prejudice attendant to the waiver of the requirement. There is no evidence of record, nor any reason to believe, that any firms were excluded from the competition due to the requirement, and there is no indication that the content or pricing of any of the offers submitted would have been different if

the mandatory requirements had been stated without reference to a Maryland permit. In this regard, rather than providing evidence of possible prejudice, Safety Kleen has instead asserted that it is entitled to rely on the agency's rejection of any proposal, such as the awardee's, which fails to satisfy a provision that the RFP denominates as a mandatory minimum requirement. However, in these circumstances, where the award to Clean Venture/Cycle Chem meets the agency's actual needs without prejudice to other offerors, the waiver is unobjectionable. Safety-Kleen Corp., B-274176, B-274176.2, Nov. 25, 1996, 96-2 CPD ¶ 200 at 8-9; RSI Realty Servs., Inc., B-262238, Dec. 12, 1995, 95-2 CPD ¶ 252 at 3-4.

The protest is denied.

Comptroller General
of the United States