

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE:

B-216772

DATE: August 23, 1985

MATTER OF:

Recyc Systems, Inc.

DIGEST:

1. An agency's incorrect characterization of the protester's proposal as "nonresponsive" does not render rejection of the proposal improper where the agency's determination of unacceptability actually constituted a reasonable basis for rejecting the protester prior to award.
2. Protester's proposal should not have been rejected for failing to satisfy minority business enterprise participation requirements in the solicitation where the proposals of the awardees contained similar deficiencies, but rejection for this reason did not prejudice the protester, and thus is not cause for disturbing the awards, since protester's proposal properly was rejected for another reason.

Recyc Systems, Inc. (Recyc), a member of the joint venture Driggs-Recyc, protests the award of two 5-year contracts under request for proposals (RFP) No. 0397-AA-23-N-4-MR, issued by the District of Columbia (District) for sludge disposal. The contracts were awarded to joint venture Jones and Artis and Bevard/Bio-Grow (JABB), and joint venture Ad & Soil, Inc., Enviro-Grow and MTI Construction (ADEM). Recyc contends its proposal improperly was rejected for failure to meet the minority business enterprise (MBE) and general permit requirements of the RFP. We deny the protest.

The RFP, as amended, called for submission of initial proposals by July 6, 1984, and provided that no single offeror would receive a contract for disposal of the District's total daily requirement of 1270 wet tons of sludge. The RFP required the contractor to "obtain and maintain all permits necessary for the performance of the contract" no later than the July 6 closing date; include a

032934

proposal for at least 35-percent MBE participation in the contract revenues; and provide 35 percent of the sludge hauling under the contract be performed by MBEs. The MBEs that the offerors proposed in order to meet these requirements were to be certified as such by the District's Minority Business Opportunity Commission (MBOC) as of the closing date.

Recyc was the apparent low offeror but, on August 9, the District notified Recyc that its offer was being rejected as "nonresponsive" because its proposed MBE subcontractor was not certified by the MBOC as of July 6 and because it lacked off-site sludge storage permits necessary to perform the contract. Discussions were held with JABB and ADEM, the only other offerors, and contracts were awarded to those firms on September 28.

Recyc argues that its proposal sufficiently met the permit and MBE requirements and thus should not have been rejected. Recyc further contends that if its proposal properly was rejected, the JABB and ADEM proposals also should have been rejected based on failure to comply with the same requirements.

We do not agree with Recyc that its proposal should not have been rejected. We do find, however, that the awardees' proposals, as well as Recyc's, did not meet the MBE certification requirement.

Permit Requirement

The record shows that on June 12, 1984, Recyc received Commonwealth of Virginia Water Control Board approval to construct a sludge lagoon in Fauquier County, and that Recyc began constructing the facility. Fauquier County subsequently disapproved the project, however, and this disapproval was the basis for the District's determination that Recyc did not meet the permit requirement. Although Recyc remained in litigation with the county over the matter at least as late as October 10, Recyc apparently believes its proposal should be found to satisfy the permit requirement based on its Virginia State approval.

The District, we find, reasonably concluded that Recyc did not meet the permit requirement, although the District's characterization of the matter as one involving "responsiveness," which suggests that the proposal was subject to automatic rejection at the initial submission date, is not correct.

We consistently have held that an offeror need not satisfy solicitation provisions which require, generally, that offerors obtain local, state or federal permits and licenses necessary for performance in order to be eligible for award. Rather, these matters are for resolution by the successful offeror and the licensing authority after award. HSA/Multichem, B-202421, Aug. 11, 1981, 81-2 C.P.D. ¶ 118. The nature of such a requirement generally is not changed by solicitation language stating that it must be satisfied as of the offer submission deadline. Thus, an initial proposal should not automatically be rejected based on failure to meet a general permit requirement. See generally A-1 Pure Ice Co., B-215215, Sept. 25, 1984, 84-2 C.P.D. ¶ 357.

If it is determined prior to award, however, that an offeror lacks, and will have difficulty obtaining, specific permits or licenses without which performance will not be possible or likely will be delayed, the agency properly may reject that offeror prior to award as nonresponsible, that is, lacking the present capability to perform if awarded the contract. See Nor-Cal Security, B-208296, Aug. 3, 1982, 82-2 C.P.D. ¶ 107.

Here, although the District characterized Recyc's proposal as nonresponsive to the permit requirement, the record shows that, in fact, it found the proposal unacceptable only after determining that Recyc would have great difficulty timely obtaining a Fauquier County sludge lagoon construction permit. Based on an August 17 letter from Recyc complaining about its rejection, the District further reviewed the permit matter. In a September 20 letter response to Recyc, the District stated that it was advised by the Fauquier County government that Recyc's permit application was neither considered nor approved by the county Board of Supervisors at its August 21 (most recent) meeting, and that the matter of the permit had not been scheduled for future meetings. According to Recyc, the matter still was being litigated as of October 10, almost 2 weeks after the awards were made, and, according to the District, Recyc still had not obtained its permit as of May 1985.

In view of Recyc's problems at the time of award, and considering the significant subsequent delays in obtaining the permit, we think the District's determination as to Recyc's permit clearly would have been a reasonable basis

for concluding that Recyc would have difficulty beginning timely performance and thus could not be considered a responsible prospective contractor. Recyc thus properly could be eliminated from the competition on this ground.

Recyc questions the reasonableness of finding the awardees acceptable in view of Recyc's rejection. Recyc contends that JABB should not have been found in compliance with the permit requirement because much of the sludge storage capacity covered by its permits, in fact, has been used. The District reports, however, that JABB submitted permits representing 2.59 years of storage capacity, five times more capacity than required by the solicitation. As stated above, the determinative consideration regarding the permits is whether the agency was satisfied prior to award that the firm would possess all necessary permits in time to perform as required. JABB obviously satisfied the District that its permits covered sufficient storage capacity, and Recyc's speculation as to the sufficiency of JABB's permits in this regard is not a basis for questioning the District's specific finding in this regard.

Recyc cites an October 5, 1984, letter from Queen Anne's County as evidence that ADEM in fact was in much the same position as Recyc with respect to certain permits and thus should have been treated the same. This letter does state that, as of October 5, one of ADEM's joint venturers lacked a necessary permit to operate a sludge storage/distribution facility in the county. The letter also goes on to state, however, that there had been a hearing on the matter October 4, and that a final decision was due within 30 days. Although this hearing was held after award, we believe the District reasonably could determine prior to award that the scheduling of the hearing constituted a sufficient indication that ADEM was in a different position than Recyc, in that it could obtain this permit in time to perform as required. Recyc was eliminated due to the absence of some similar indication that it would be able to obtain its permit on time.

Recyc's allegation regarding the sufficiency of the awardees' permits also is based on agency comments during negotiations questioning the firms on certain permits. The mere fact that questions may have been raised during negotiations, however, did not automatically render the proposals unacceptable. Again, it appears from the record that JABB and ADEM satisfactorily responded to any concerns

raised during negotiations. We consequently find no basis for concluding that the District improperly or unfairly determined that the awardees had met the permit requirement, while Recyc had not.

MBE Requirement

Recyc contends that both the ADEM and JABB proposals failed to evidence compliance with the MBE certification requirement as of the July 6 closing date as required by the RFP. Acceptance of the proposals, Recyc maintains, constituted unequal treatment of offerors since Recyc's proposal was rejected, in part, based on its failure to propose an MBE subcontractor certified as such as of the July 6 closing date. We agree with Recyc.

Although the District indicated in its report on the protest that JABB and ADEM had proposed properly certified MBE subcontractors by the July 6 closing date, documentation subsequently furnished by the District indicates that this, in fact, was not the case.

JABB stated in its proposal that the hauling portion of the contract would be performed by Bevard Brothers, Inc., which had subcontracted a substantial portion of the sludge hauling requirement--presumably at least 35 percent--to John A. Hardy & Son, Inc. (Hardy), a certified MBE. The MBOC certification for Hardy, however, was approved April 6, 1982, and shows an expiration date of April 6, 1984. Hardy thus did not possess a valid MBOC certification as of the July 6 closing date or the September 28 award date. The District has not attempted to explain this discrepancy.

The District has furnished us a copy of a certification for Faith Construction, Inc. (Faith), which, evidently, was attached to JABB's proposal. JABB's proposal nowhere states that Faith will be involved in the sludge hauling, however, and there is no indication in the record that Faith's certification in any way extends to Hardy. In any case, even assuming that Faith's certification otherwise would have brought JABB's proposal into compliance with the 35-percent MBE hauling requirement, the certificate carries an approval date of November 7, 1984, which was more than 1 month after the award to JABB.

ADEM's proposal also included an inadequate MBE certificate. ADEM's proposal stated that the 35-percent

MBE hauling requirement would be satisfied through the inclusion of MTI Construction Co. (MTI) in the joint venture. MTI was covered by two different valid MBOC certifications, both apparently submitted with ADEM's proposal, but neither of the certificates covers sludge hauling. One certificate, dated January 27, 1984, covers two work classifications, excavation and general contracting. The second certificate, dated February 7, 1984, covers asphalt paving, building construction, clearing and grubbing, concrete paving, and demolition. Thus, the MBE that ADEM proposed to meet the 35-percent sludge hauling requirement was not qualified to haul sludge as an MBE based on its MBOC certification. Again, the District offers no explanation as to this deficiency despite Recyc's specific allegation that the certification was deficient in this manner.

At the same time the District in effect was waiving certain aspects of the MBE provisions in order to award contracts to JABB and ADEM, it was strictly enforcing those same provisions to reject Recyc's proposal. Specifically, the District rejected Recyc's proposal because, in addition to its noncompliance with the permit requirement, the MBE it proposed to meet the MBE requirements was not MBOC-certified as of the July 6 closing date. The firm ultimately was certified on September 12, more than 2 weeks prior to the awards, but the District advised Recyc in its September 20 letter that permitting Recyc to satisfy the MBE requirement at that time would "prejudice the other offerors" and "compromise the integrity of the procurement process."

A contracting agency cannot enforce a requirement against one offeror while waiving it for others without violating the fundamental principle that all offerors must be treated fairly and equally. See generally E.C. Campbell, Inc., B-205533, July 8, 1982, 82-2 C.P.D. ¶ 34. Applying this standard here, we must agree with the protester that, in view of the District's acceptance of the JABB and ADEM offers despite MBE certification deficiencies, Recyc's offer, in fairness, should not have been found lacking in that respect. Nevertheless, since we have found the District's reliance on Recyc's permit problems a proper basis for rejecting the firm's proposal, Recyc was not prejudiced by the MBE certification matter. That is, even if the District had treated Recyc the same as it treated the competitors as to MBE certification, Recyc

still would not have been entitled to an award because its proposal was otherwise unacceptable. See Centennial Computer Products, Inc., B-211645, May 18, 1984, 84-1 C.P.D. ¶ 528.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel