



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Thermal Combustion Innovators, Inc.

File: B-279602

Date: July 1, 1998

Raymond C. Schreck, Esq., for the protester.
Merilee D. Rosenberg, Esq., and Philip S. Kauffman, Esq., Department of Veterans Affairs, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is not an interested party to complain of the agency's failure to issue solicitation for medical waste removal services as a small business set-aside where another small business is in line for award.
2. Requirement that contractor performing medical waste removal scan materials to detect radioactive material and return containers with such material to medical facility under certain circumstances is not objectionable based on agency's explanation, uncontested by protester, that requirement is intended as an added precaution to ensure compliance with regulatory requirements regarding radioactive materials, not as a substitute for medical and treatment facilities' responsibilities in dealing with hazardous waste; scanners used for detection are available, contrary to protester's assertion; and possibility that contractor will have to transport an unknown number of containers with radioactive material from treatment facilities to medical facilities, and thus will have to factor some cost into its price for hiring licensed hauler of radioactive waste, does not impose undue risk on offerors.

DECISION

Thermal Combustion Innovators, Inc. protests the terms of request for proposals (RFP) No. 600-018-98, issued by the Department of Veterans Affairs (VA) for medical waste removal and disposal services.

We deny the protest.

On February 17, 1998, the agency issued the RFP for a fixed-price requirements contract for medical waste removal and disposal at four VA facilities in southern California, for an initial 1-year period, with four 1-year option periods. RFP at 2. The VA had canceled an earlier RFP for the same services, in response to a protest by TCI.

The instant solicitation provides for the contractor to furnish labor, materials, equipment, transportation, and other items necessary for the removal, storage, treatment, and disposal of certain specified types of medical waste. RFP at 2-3. The RFP specifically excludes hazardous and radioactive waste from coverage. RFP at 2.

As initially issued, paragraph C-9 of the RFP required the contractor to check containers for radioactivity prior to removal, by use of a "properly calibrated vehicle or hand-held portable scanner." RFP at 15. The contractor was not to remove any container with radioactive waste. By letter dated March 10, TCI objected to this requirement as duplicative of the obligations of the medical and treatment facilities to detect and measure radioactivity. TCI also asserted that no reliable vehicle or hand-held scanners are available on the market. By amendment No. 2 to the RFP, dated March 13, the agency added a provision to paragraph C-9 specifying that the contractor is responsible for returning to the medical facility any container with radioactive material detected by the treatment facility; the rest of paragraph C-9 remained unchanged. Although TCI had also protested the agency's failure to set the procurement aside for small businesses, the agency declined to modify the RFP to set it aside for small businesses.

One day prior to the receipt of proposals, TCI filed a protest with the contracting officer, asserting that the RFP should be set aside for small businesses and complaining that amendment No. 2 to the RFP did not satisfactorily address its concern about responsibility for detection of radioactive material. On March 20, the agency proceeded with the receipt of offers as scheduled; this protest to our Office followed.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), an acquisition with an anticipated dollar value exceeding \$100,000 (such as this one), shall be set aside exclusively for small business concerns when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and award will be made at fair market prices. TCI contends that it has identified other small businesses willing to compete for the requirement and argues that the agency is therefore obligated to issue the solicitation as a small business set-aside.

The VA argues that our Office should dismiss this aspect of TCI's protest because the lowest-priced, technically acceptable offeror, who is in line for award under the terms of the RFP, is Amaritime Environmental Solutions, which is another small business.¹

¹Section M of the RFP provided for evaluation of an offeror's proposed price and compliance with minimum experience requirements. The record shows that the contracting officer concluded that all the offerors satisfied the experience

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Our Bid Protest Regulations define an "interested party" for purposes of filing a protest as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a) (1998). A party will not be deemed interested where it would not be in line for the protested award even if its protest were sustained. See GTA Containers, Inc., B-240422, Nov. 14, 1990, 90-2 CPD ¶ 396 at 2-3 (despite agency's failure to include preference for small disadvantaged business, protest is dismissed where, even if it were sustained, a small disadvantaged business other than the protester would be in line for award).

Here, TCI argues that, because the procurement was not set aside and it thus knew that it would be competing against large businesses, it was "forced . . . to propose a very low contract price"; according to TCI, if the competition had been limited to small businesses, it would have been able to offer a "fair market price"--i.e., a higher price than it actually offered. TCI's comments, May 11, 1998 at 4. The fact remains, however, that even with the submission of its "very low" price, another small business, Amaritime, submitted a lower price. Under these circumstances, there is no reason to conclude that TCI would have been in line for award if the procurement had been set aside. Accordingly, we conclude that TCI is not an interested party to challenge the agency's decision not to set aside the procurement.

TCI also objects to the requirement for detecting and handling radioactive waste, principally on the grounds that the requirement unnecessarily duplicates the responsibilities of the medical and treatment facilities, and that the scanners called for are not available. We see no basis to conclude that the requirement is improper. VA states that the requirement was not intended to shift responsibility from the agency to the contractor but to act as an added precaution to ensure compliance with Nuclear Regulatory Commission regulations; TCI does not refute this assertion. Further, the agency contends that, contrary to TCI's initial assertions, the offerors here were all able to locate vehicle or hand-held radiation scanners to meet the solicitation requirements; TCI similarly fails to respond to this argument. Finally, TCI asserts that the possibility that the contractor will be required to transport containers with radioactive material from a treatment facility to a medical facility requires offerors to factor into their prices the cost of hiring a licensed radioactive waste hauler. TCI argues that offerors have no basis to do so, since the extent of any hauling requirement is unknown. We see no basis for objecting to the

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requirements; accordingly, the lowest priced offeror, Amaritime, was selected for award.

requirement on this ground, however, since the mere presence of risk in a solicitation does not render it inappropriate. Alamo Contracting Enters., Inc., B-242458.2, Apr. 30, 1991, 91-1 CPD ¶ 430 at 3-5.

The protest is denied.

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