Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Safety-Kleen Corporation

File: B-274176; B-274176.2

Date: November 25, 1996

Martin R. Fischer, Esq., Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Adduci, Mastriani & Schaumberg, for the protester.
R. J. Frick, Esq., and Lt. Col. David S. Franke, Department of the Army, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency's direction to awardee concerning its performance of a contract constituted an improper out-of-scope modification of that contract is denied where the record shows that the resulting change is not a material one--the nature and purpose of the contract has not been altered; the magnitude of the change in relation to the overall effort is minimal; and there is no evidence that the field of competition would have been materially changed.

2. While in accepting the awardee's proposal, the contracting agency waived material solicitation requirement that offeror submit insurance certificate covering a task to be performed under the contract, General Accounting Office will not sustain protest where the agency believes that its minimum needs do not require the submission of such a certificate, and where there is no evidence that the protester has been prejudiced by the agency's waiver of the requirement.

DECISION

Safety-Kleen Corporation protests the alleged modification of contract No. DAKF12-96-D-0018, awarded by the Department of the Army pursuant to request for proposals (RFP) No. DAKF12-95-R-0008 to ChemFree Corporation for parts cleaner recycling services. Safety-Kleen primarily argues that the alleged modification constitutes an impermissible out-of-scope change to the contract. In a supplemental protest, Safety-Kleen argues that ChemFree's proposal failed to meet one of the solicitation's material requirements and should have been found technically unacceptable.

We deny the protests.

BACKGROUND

Army Forces Command (FORSCOM) installations require these services for degreasing operations, maintenance projects, and related cleaning activities. The solicitation divided the contiguous United States and Puerto Rico into 10 geographic regions, each with its own set of contract line items, and contemplated the award of multiple contracts. Among those offers determined to be technically acceptable, the Army would make award to the lowest-priced offeror for each region.

The solicitation's requirements concern circulating parts cleaners; wheel-mounted adjustable level parts cleaners; immersion parts cleaners; paint and spray gun cleaners; and government-owned parts cleaners. Offerors were to provide all of the equipment--save the government-owned parts cleaners--and cleaning fluid required to accomplish the solicitation's requirements.

The solicitation was structured based upon the agency's experience with hazardous solvent-based cleaning systems that required the contractor to furnish the solvent fluids and to periodically service the parts cleaners by collecting the contaminated fluids, transporting them to a recycling facility, and replacing them with clean solvent.

Section C.5.4.3. of the RFP stated:

> ". . . The [cleaning] solvent shall be capable of degreasing and decarbonizing applications for maintenance projects and related cleaning activities. The benchmark cleaning performance shall be as the performance of PD-680, Type II or equivalent. . . .
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> "If an equivalent application is offered, it shall be specifically identified and supported by an independent analysis to verify the solvent's cleaning capability."

The solicitation contained a number of other requirements related to the anticipated hazardous nature of the solvent-based cleaning systems. A provision at issue here, discussed further below, required the contractor to have minimum environmental impairment liability (EIL) insurance coverage in the amount of $5 million per incident and $10 million aggregate, and to submit an insurance certificate of not less than this amount with its proposal.

Technical acceptability would be determined based upon an evaluation of each offeror's proposal under two factors, technical excellence and quality control. One technical excellence subfactor, "License, Permits, and Certificates," would be rated on a "pass/fail" basis. Under this subfactor, offerors were required to submit, among other things, the EIL insurance certificate noted above. All of the remaining

subfactors and factors would be rated "unsatisfactory," "needs improvement," or "satisfactory." Offerors were required to receive a "satisfactory" rating, and a "pass" rating under the "Licenses, Permits and Certificates" subfactor, in order to be eligible for award.

Three offerors submitted proposals for Regions 1, 4, and 10. After an initial evaluation, the Army conducted discussions and requested and received best and final offers (BAFO). ChemFree offered to provide an equivalent application in the form of an aqueous-based, bioremediation technology which does not utilize hazardous solvents. The firm proposed to utilize this technology in all of the required circulating parts, cleaners, and adjustable level parts cleaners. For all of the immersion cleaners, spray and paint gun cleaners, and government-owned parts cleaners, ChemFree proposed to utilize the traditional solvent-based cleaners to be wholly serviced by subcontractors. The Army determined that ChemFree's technology was an equivalent application, and that the firm had submitted the lowest-priced, technically acceptable offer for these three regions. ChemFree was awarded the contract at an estimated value of $3,936,022, on June 20, 1996. Safety-Kleen's offer was also technically acceptable, but its price was $700,000 higher than ChemFree's price.[1]

One month later, the Army's Mobility Technology Center (MTC), the PD-680 specification preparing activity, notified the contracting activity that it did not consider ChemFree's offered product to be a PD-680 replacement. The contracting activity subsequently received letters from several installations to be covered under ChemFree's contract expressing their concerns about the firm's product. Of particular relevance here, the Aviation and Troop Command stated that it would not use ChemFree's product because it was not approved for aviation maintenance use.

By letter to ChemFree dated August 6, the contracting officer directed the firm to "satisfy the requirement with PD-680, type II, or equivalent solvent at all aviation maintenance activities through-out the FORSCOM installations. These procedures shall be in effect until the approval of the ChemFree fluid for use on aircraft parts is demonstrated."

Safety-Kleen filed its initial protest on August 16, primarily arguing that the direction in this letter constituted an impermissible out-of-scope change to ChemFree's contract. After receiving the agency report on the initial protest,

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[1]Safety-Kleen, which offered the traditional solvent-based cleaner technology, had been the incumbent contractor providing these services to all FORSCOM installations. The firm submitted the only proposal for the other seven regions, and was awarded a contract for those regions. The third offeror withdrew its proposal during discussions.

Safety-Kleen filed a supplemental protest in which it argued that the Army should have found ChemFree's proposal technically unacceptable since the firm did not submit EIL insurance certificates for its transportation subcontractors.[2]

DISCUSSION

Alleged Out-of-Scope Contract Modification

As a general rule, our Office will not consider protests challenging contract modifications, as they involve matters of contract administration that are the responsibility of the contracting agency. Bid Protest Regulations, section 21.5(a), 61 Fed. Reg. 39039, 39045 (1996) (to be codified at 4 C.F.R. § 21.5(a)); American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136; Central Texas College Sys., B-215172, Feb. 7, 1985, 85-1 CPD ¶ 153. One exception to this rule exists where, as here, it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement. Neil R. Gross & Co., Inc., 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212; Everpure, Inc., B-226395.4, Oct. 10, 1990, 90-2 CPD ¶ 275. In determining whether a modification improperly exceeds the scope of the contract, we consider whether there is a material difference between the modified contract and the contract originally competed. CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD ¶ 364; Clean Giant, Inc., B-229885, Mar. 17, 1988, 88-1 CPD ¶ 281. The materiality of a modification is determined by examining factors such as whether the nature and purpose of the contract has been altered by the modification, Clean Giant, Inc., supra, the magnitude of the change in relation to the overall effort, CAD Language Sys., Inc., supra, and whether the field of competition would be materially changed by the contract modification. Rolm Corp., B-218949, Aug. 22, 1985, 85-2 CPD ¶ 212.

The Army states that ChemFree has provided 1,054 parts cleaners to the FORSCOM facilities covered by its contract.[3] As noted above, ChemFree proposed to utilize bioremediation technology for all circulating parts cleaners and adjustable level parts cleaners, and to use solvent-based technology for all remaining parts cleaners. Pursuant to the contracting officer's August 6 direction, however, ChemFree has provided 84 solvent-based technology circulating parts cleaners in the place of its proposed bioremediation technology circulating parts cleaners. As Safety-Kleen points out, since ChemFree did not offer to provide any solvent-based circulating

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[2]Safety-Kleen's supplemental protest also alleged that the Army unreasonably found ChemFree's product to be an equivalent application. We summarily dismissed this basis of protest as untimely.

[3]ChemFree's contract indicates that the firm is to provide a total of 1,169 parts cleaners to FORSCOM facilities.

parts cleaners or associated maintenance/servicing, the firm's provision of such cleaners and servicing is a change.

Our review of the record shows that this change is not material. The substitution does not alter the fundamental purpose of the contract--to provide parts cleaner recycling services. Further, while ChemFree did not propose to utilize solvent-based technology for its circulating parts cleaners, the firm's use of solvent-based technology was not a change precipitated by the Army's August 6 letter. ChemFree's proposal clearly lays out the division of its operations into bioremediation and solvent-based sectors, and explains its plans for performing solvent-based technology functions, including the fact that it has subcontractors in place to provide the services associated with this technology. Hence, contrary to the protester's view, this is not a case where the contracting agency has accepted an offer premised upon one approach and subsequently modified the contract to obtain a wholly different approach. See Memorex Corp.--Recon., B-200722.2, Apr. 16, 1982, 82-1 CPD ¶ 349.

The actual change here involves substituting a small quantity of one type of equipment for another type of equipment, and slightly expanding the role of the in-place subcontractors. This change is minimal when viewed in the context of the overall contract effort. Only 8 percent of the parts cleaners that have been provided are affected, and there have been no other contractual changes. In particular, the pricing remains the same. Cf. American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136, aff'd, 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443 (substitution of diesel for gasoline engines was a modification outside the scope of the original contract where it resulted in significant changes to the original contract, including increasing the unit price by 29 percent). Moreover, in consonance with the August 6 letter, the Army asserts that this is a temporary change designed to satisfy user concerns while testing is performed on ChemFree's product. The contracting officer states that, recognizing that many of the concerns likely stem from lack of knowledge about ChemFree's system and initial reluctance to change, she believes that at some point in the near future the equipment at issue will revert to the proposed bioremediation technology.

Safety-Kleen counters that the magnitude of the change thus far is simply the "tip of the iceberg." The protester contends that more parts cleaners will be switched over to the solvent-based technology since there is no guarantee that user concerns will be satisfied, and that a pricing adjustment is inevitable.[4] The record does not support this contention, which essentially anticipates action in the future that might

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[4]ChemFree's pricing for its bioremediation technology is premised upon service once a year, but solvent-based technology requires more frequent servicing and, presumably, a higher price.

never arise. Protests that merely anticipate improper agency action are speculative and premature. See General Electric Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512. Consequently, we have no basis to consider this contention at this time. Id.

Finally, there is no evidence--indeed, no allegation--that the competition would change as a result of the substitution resulting from the August 6 letter, i.e., that more firms would have entered the original competition if the change had been incorporated in the original solicitation. See Rolm Corp., supra. Under the circumstances, we have no basis to conclude that the change which occurred here was material.[5]

EIL Insurance Certificate Requirement

Section C.1.6.7. of the solicitation, "Spill/Environmental Impairment Liability (EIL) Minimum Contractor Responsibility," stated:

> "C.1.6.7.1 The Contractor's minimum environmental Impairment Liability coverage shall be $5 Million per incident and $10 Million aggregate. The Contractor further agrees to supply an Insurance Certificate of not less than this amount with offeror's proposal.
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> "C.1.6.7.2 In the event a spill or ground or water pollution results from contractor's transportation, storage, recycling, reclaiming, re-refining or disposal of the generator's contaminated solvents, the contractor agrees to pay all costs and expenses to remedy that pollution or spill related clean-up in excess of the aforementioned minimum Environmental Impairment Liability by the utilization of their own assets."

In connection with the "Licenses, Permits and Certificates" subfactor, the solicitation required offerors to submit certain documentation with their proposals, including: "Coverage as a minimum for $5 million for each incident and $10 million in aggregate." As discussed above, this subfactor was rated on a "pass/fail" basis, and offerors were required to receive a "pass" rating to be eligible for award.

Safety-Kleen argues that ChemFree's proposal should have been found ineligible for award since the firm did not submit EIL insurance certificates for the

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[5]Citing our decision in KPMG Peat Marwick, LLP, B-259479.2, May 9, 1995, 95-2 CPD ¶ 13, Safety-Kleen also argues that the August 6 letter is evidence of improper post-BAFO discussions since it improperly allowed ChemFree to materially modify its proposal. Our analysis and conclusion above that this change is not material applies equally here, and we need not consider this matter further.

subcontractors it proposed to transport the hazardous waste generated by the solvent-based parts cleaners called for under the contract.

The Army concedes that ChemFree did not submit such EIL insurance certificates, but contends that the solicitation did not require such certificates for the transporters of the hazardous waste. The Army interprets the solicitation as requiring these certificates only for the treatment, storage, and disposal (TSD) facility--the recyclers. Since ChemFree submitted EIL certificates for its recyclers, the Army considers that the requirement was fully satisfied. The Army attempts to buttress its position by citing to a preproposal question and answer on the matter.[6]

In determining the meaning of particular solicitation provisions, the solicitation must be read as a whole and in a manner that gives effect to all of its provisions. Tektronix, Inc., B-244958, B-244958.2, Dec. 5, 1991, 91-2 CPD ¶ 516. Our review of the provisions in their entirety shows that section C.1.6.7.2 in effect defines the scope of the EIL insurance coverage to be provided. That section requires the contractor to assume liability in excess of the required minimum EIL insurance coverage if a spill or pollution results from the contractor's "transportation, storage, recycling, reclaiming, re-refining or disposal" of the contaminated solvents. The clear implication is that the contractor's EIL insurance must cover spills or pollution resulting from the performance of each of these specific tasks whose clean-up costs do not exceed the minimum. As a result, offerors were required to submit proof that their EIL insurance covered all of these tasks, including transporation.

The Army's reliance on the preproposal question and answer to argue that EIL insurance was not required is puzzling, as they do not support its interpretation. In answer to ChemFree's question concerning the applicability of the various hazardous waste-related requirements to an offeror that would not use hazardous materials, the Army responded:

> ". . . In response to permits, license, and insurance requirements that are specifically required due to the fact the offeror WILL handle or transport hazardous waste, then (1) the TSD permit to transport hazardous material does not apply if hazardous material is not transported, (2) EIL insurance to cover the receiving facility of hazardous waste does not apply if the offeror does not transport hazardous material to a receiving facility. In those instances that

[6]While the Army also argues that the EIL insurance certificate could not have applied to the transporters because federal law does not require them to carry such coverage, we are unaware of any prohibition on an agency's requiring more than the minimum demanded by law.

permits, licenses, and insurance requirements are to cover liability for transporting hazardous materials and that event does not happen, the requirement would not apply." (Emphasis added.)

The inartful phrasing of this response cannot disguise the fact that it does not state, as the Army suggests, that the EIL insurance certificate requirement applies only to the receiving facility. It merely states that if the offeror does not intend to transport hazardous materials, the EIL insurance requirement does not apply. Here, ChemFree did propose to transport hazardous materials, and the requirement does apply.

The record shows that ChemFree did not meet this requirement, the materiality of which is not disputed by the Army. In negotiated procurements, a proposal that fails to conform to a solicitation's material terms and conditions should be considered unacceptable and may not form the basis for an award. Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132. Hence, Safety-Kleen is correct that the agency effectively and improperly waived the requirement for ChemFree when it found its proposal technically acceptable and awarded the firm this contract.

We cannot conclude, however, that the agency's waiver of the requirement placed Safety-Kleen at a competitive disadvantage. Despite the firm's reference to the cost of EIL insurance, Safety-Kleen does not assert that it would not have offered this coverage for the transportation aspect of its operations if it had known that the agency did not consider it necessary. Even if it had made such an assertion, there is no evidence that its dropping of such coverage would have afforded it sufficient savings to overcome the price difference here. Nor is there anything in the record to suggest that additional firms would have entered the competition if the agency had clearly communicated its less restrictive needs to the marketplace. Tektronix, Inc., supra.

We will not sustain a protest in which an agency relaxed its requirements for one offeror absent some evidence in the record that the protester was prejudiced. HHI Corp., B-266041; B-266041.2, Jan. 25, 1996, 96-1 CPD ¶ 21; Tektronix, Inc., supra. Here, despite its reference to a decision which included an extensive discussion of the issue of prejudice, AT&T, B-250516.3, Mar. 30, 1993, 93-1 CPD ¶ 276, aff'd, Dept. of Energy--Recon.; Sprint Communications Co.--Recon., B-250516.4; B-250516.5, Aug. 20, 1993, 93-2 CPD ¶ 111, Safety-Kleen has not even alleged that it was prejudiced in formulating its offer. We therefore conclude that the agency's waiver

of the requirement here did not affect the protester's competitive position and thus provides no basis to disturb the award to ChemFree. Tektronix, Inc., supra.

The protests are denied.

Comptroller General
of the United States