

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF  
THE DEPARTMENT OF ADMINISTRATION**

SAFETY WASTE INCINERATION	)	
	)	
v.	)	
	)	
DEPARTMENT OF CORRECTIONS	)	OAH No. 05-0643 PRO
_____	)	DOC RFQ No. 06-001

**DECISION**

**I. Introduction**

This is a small procurement protest. The Department of Corrections issued a request for quotes for medical biohazard waste disposal services. Nancy Oliver, d/b/a Safety Waste Incineration (Safety Waste) submitted a quote. The department issued a notice of intent to award the contract to Entech Alaska, LLC (Entech). Safety Waste filed a protest, which was denied, and the contract was awarded to Entech. Safety Waste filed an appeal with the Department of Administration. The appeal was referred to the Office of Administrative Hearings.<sup>1</sup>

The parties submitted documents and agreed to a hearing and decision on the record. Based on the evidence on record, the appeal is denied.

**II. Facts**

Safety Waste held a contract for the disposal of medical biohazard waste materials generated by the Department of Corrections. Safety Waste disposed of all the materials it received from the department by incineration. The contract was scheduled to terminate in the summer of 2005, and the department issued a solicitation to establish a new one-year

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<sup>1</sup> Protests and appeals of small procurements are exempted from the provisions of AS 36.30.560-.615. AS 36.30.550(a). The procedures for protests and appeals in small procurements are set out in 2 AAC 12.695, which provides that the commissioner of the purchasing agency may delegate a small procurement protest for a hearing consistent with AS 36.30.670(b). 2 AAC 12.695(f)(4). In this case, the Department of Corrections agreed to referral to the Office of Administrative Hearings but did not delegate authority to render a final decision in the case. See AS 44.64.030(b), (c). This proposed decision is subject to adoption by the Department of Administration in accordance with AS 44.64.060(e).

contract (with a one-year renewal option).<sup>2</sup> The request for quotations required destruction of all waste by incineration. After the request for quotations was issued, the department issued an amendment in order to allow competing bids from vendors who do not dispose of waste materials by incineration.

The amended solicitation requires the following:

...[The contractor must] pick-up and destroy by incineration or any other approved acceptable method any medical type Bio-hazard waste, i.e.: Sharps, used bandages, dirty gloves, blood products, etc. Price must include all containers, lids, and bags....

[The contractor must] provide...cardboard boxes with lids (lids must have a punch-out hole in center to provide disposal access) for packaging that are properly labelled as infectious (Bio) waste. These containers must meet all DEC, OSHA, Federal, State and City regulations (whichever is most stringent). Containers must be available in these sizes or equivalents: (10, 20 and 35 gallon) and must all come with a red plastic liner (2 mils thick or better).

All waste must be destroyed by incineration or any other approved acceptable method, to a sterile non-infectious state in accordance with DEC, OSHA, Federal, State, or City regulations (whichever is most stringent). Bio Hazard Waste will not be sorted or separated by DOC (Dept. of Corrections) facility personnel in any way or manner to facilitate a vendor's disposal method.

Sterile ash/residue must be disposed of in accordance with DEC, OSHA, Federal, State, or City regulations (whichever is most stringent).

"Sharps" are syringes, blades, or other objects that can puncture or tear. Under the existing contract, the department's personnel routinely separate sharps and store them apart from other biohazardous materials by placing them in separate plastic containers. On the rare occasions when pathological waste (e.g., human tissue) is generated, the department separates the pathological wastes and calls the waste disposal contractor for immediate disposal. The department's personnel will continue to separate sharps and pathological waste in the same manner under the new contract.

The physical separation of sharps and pathological waste by department personnel is not intended to facilitate any particular disposal method; rather, it is intended to

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<sup>2</sup> The renewal option does not state whether the option is unilateral (i.e., exercised at the sole discretion of the department), or whether it requires mutual consent. The nature of a renewal option should be specified in the contract. See generally Robinson v. Office of Public Advocacy, OAH No. 05-0019-CON (June 30, 2005).

provide increased storage security for sharps, to ensure the physical integrity of storage containers for other biohazardous materials, and to comply with applicable regulations governing the department's treatment of sharps and pathological waste prior to transfer to the waste disposal contractor.

### **III. Discussion**

Safety Waste's protest asserts that: (1) Entech's disposal method requires sorting of biohazard waste materials, and the request for quotations specifically stated that materials would not be sorted; (2) Entech was incapable (given restrictions on its methods of operation) from providing services in accordance with the terms of the request for quotations. On appeal and in comments, Safety Waste contends that Entech has not performed in compliance with the contract requirements.

#### **A. Sorting of Biohazardous Materials.**

The department separates sharps and stores them separately from other biohazardous materials. That the containers of sharps are subsequently placed within the same container as other biohazardous materials does not mean that no sorting or separation has occurred. Subsequent bundling of sorted and separated materials does not change the fact that prior sorting and separation has occurred. Similarly, the department separates pathological wastes from other biohazardous wastes and holds them for pickup outside of the normal waste disposal schedule. Notwithstanding the department's assertion that it does not sort or separate medical wastes, it is plain that it does.

But the request for quotations does not prohibit all sorting and separation of materials. It prohibits sorting and separation "to facilitate a vendor's disposal method." It is undisputed that the sorting and separation of sharps is done under the present contract and that there will be no change in that practice. The sorting and separation is done not to facilitate a particular disposal method, but rather for reasons related to the department's security concerns, because storage containers for other biohazardous materials are inappropriate for sharps, and because the department is subject to regulatory requirements that restrict its ability to commingle different types of medical waste.

Because the department's sorting and separation of sharps and pathological wastes is not done to facilitate any particular method of waste disposal method, it is not in violation of the request for quotations.<sup>3</sup>

B. Responsibility.

Safety Waste contends that due to regulatory restrictions on Entech's methods of operation, Entech will be unable to perform in accordance with the requirements of the request for quotations. These objections concern matters of responsibility, not responsiveness.<sup>4</sup>

Safety Waste's protest does not clearly articulate the reasons why it believes that Entech cannot perform the requested services in compliance with the request for quotations, other than to point out that if wastes are not sorted and separated, incineration is the only possible disposal method. But sorting and separation of wastes does occur, for reasons unrelated to the waste disposal method, and Safety Waste has not shown that Entech is otherwise unable to comply with the contract.

The protest observes that under the Municipality of Anchorage's medical waste disposal policy, Entech and all other firms are required to incinerate certain types of medical waste, and that they must separately autoclave and dispose of sharps. The protest decision states that, having investigated the matter, the department believes that Entech does and will comply all applicable regulatory requirements. Safety Waste has not shown that Entech is unable to do so, given that the medical wastes have been sorted and separated by the department prior to pickup.

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<sup>3</sup> On appeal, Safety Waste notes that a number of nurses have objected to the manner in which the separately stored sharps will be bundled with other biohazardous materials prior to disposal. The department is at liberty to dispense with bundling if that is preferable for security, personnel, financial, regulatory or other legitimate reasons unrelated to facilitating disposal by the contractor. Unbundling the sharps would eliminate several potential problems identified by Safety Waste, including placing sharps boxes in the biohazard boxes, opening of biohazard storage boxes for removal of sharps, and limiting the volume of the materials.

Safety Waste also notes that some nurses may place pharmaceuticals with sharps. But the department points out that its own policies prohibit such treatment of pharmaceuticals, which must be returned to the pharmacist. The pharmacist disposes of all such pharmaceuticals, arranging for incineration of controlled substances. See DOC Policy and Procedures #807.05.

<sup>4</sup> Responsiveness concerns the offeror's promise to perform in accordance with the solicitation; responsibility concerns the offeror's ability to perform as promised. Matter of Bachner Co., Inc. and Bowers Investment Co., No. 02.06/02.07, at 4, note 1 (Department of Administration, October 9, 2002);

C. Contract Compliance.

On appeal, Safety Waste asserts that Entech has not complied with certain of the contract requirements, including: (1) destruction of medical waste; (2) use of non-conforming storage bags; (3) use of unqualified personnel. All of those issues are matters of contract performance and administration. Matters of contract administration are committed to the discretion of the contracting officer, and are outside the scope of the protest remedy. Furthermore, Safety Waste did not establish that the contracting officer has permitted non-compliance with the material terms of the contract.<sup>5</sup> Accordingly, the issues raised in Safety Waste's comments are remanded to the contracting officer, who bears responsibility for enforcing the material terms of the contract.<sup>6</sup>

**IV. Conclusion.**

Safety Waste has not established that Entech was non-responsible. Enforcement of the contract is a matter of contract administration. The protest appeal should be denied.

DATED December 5, 2005.

Andrew M. Hemenway  
Administrative Law Judge

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Matter of Waste Management, Inc., No. 01.08, at 15-16 (Department of Administration, April 25, 2002); 2 AAC 12.500.

<sup>5</sup> (1) Autoclaving and grinding of sharps is allowed by the applicable policies of the Municipality of Anchorage, and the request for quotations requires nothing more; (2) The contracting officer should enforce the two mil requirement or, if the requirement is not material, waive it; (3) The contract states that the contractor's personnel will be required to submit to background investigations or security checks; the department has discretion to determine whether personnel employed by the contractor will be admitted to the facility.

<sup>6</sup> A protest may be filed against the award of a contract on terms that vary from the material terms of the solicitation. However, once the contract has been awarded, an allegation that performance is being allowed on terms other than those set forth in the contract must be raised by an action in the superior court. *See, e.g., Kenai Lumber Co., Inc. v. LeReseche*, 646 P.2d 215 (Alaska 1982); *McKinnon v. Alpetco*, 633 P.2d 281 (Alaska 1981); *see also* 2 AAC 12.485.

**ADOPTION**

The undersigned, on behalf of the Commissioner of Administration and in accordance with AS 44.64.060, adopts this Proposed Decision as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance within 30 days after the date of this decision.

DATED: December 21, 2005

By: \_\_\_\_\_  
Mike Tibbles  
Deputy Commissioner

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Nancy Oliver  
\_\_\_\_\_  
ABG Vancior  
\_\_\_\_\_

Signature

Date

12.22.05