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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Clean Harbors Environmental Services, Inc.

File: B-296176.2

Date: December 9, 2005

William E. Hughes III, Esq., Whyte Hirschboeck Dudek SC, for the protester.

Michael H. Payne, Esq., Payne Hackenbracht & Sullivan, for Clean Venture, Inc., an intervenor.

Doris Gibson, Department of Health and Human Services, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that past performance evaluation was unreasonable is sustained where record shows that agency made no attempt during evaluation to assess the relevance of the offerors' prior contracts, notwithstanding solicitation term requiring such an assessment.

DECISION

Clean Harbors Environmental Services, Inc. protests the award of a contract to Clean Venture, Inc. under request for proposals (RFP) No. 263-04-P (GG)-0061, issued by the National Institutes of Health (NIH) to acquire comprehensive chemical and low-level radioactive waste management services for NIH's main campus. Clean Harbors maintains that the agency misevaluated proposals in the area of past performance.¹

¹ Clean Harbors raised numerous additional arguments in its initial protest, but in its comments did not provide a substantive response to the agency report in any area except its assertions relating to past performance. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does not respond to the agency's position or provides a response that merely references or restates the original allegation without substantively rebutting the agency's position, we deem the initially-raised arguments abandoned. Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.

We sustain the protest.

The RFP contemplated the award of a contract for comprehensive chemical and low-level radioactive waste management services at NIH's main campus in support of the agency's biomedical research program. Offerors were advised that the agency intended to make award to the firm submitting the proposal deemed to offer the overall "best value." For evaluation purposes, the RFP advised that the agency would consider the following three criteria, in descending order of importance: technical, cost/price and past performance. (The technical criterion included 11 subcriteria that are not relevant to this protest.)

The RFP advised that the agency would only evaluate the past performance of concerns deemed to have a likelihood of receiving award based on their technical proposals. Offerors were to provide a list of five contracts completed within the last 2 years, as well as all current contracts similar in nature to the solicited requirement. Past performance would be evaluated based on information obtained from references included by the firms in their proposals, as well as relevant information obtained from other sources known to the government, for purposes of assessing the performance risk associated with each offeror. RFP at 120. The RFP further provided: "The government will consider the currency and relevance of the information, source of the information, context of the data, and general trends in the offeror's performance." Id.

The agency received numerous proposals. After establishing an initial competitive range of three proposals, the agency engaged in discussions and obtained revised proposals. The agency then further limited the competitive range to two firms, the protester and the awardee, and obtained final proposal revisions (FPR). On the basis of the FPRs, the agency made award to Clean Venture, finding that its and Clean Harbors' proposals were technically equal, that both firms had satisfactory past performance, and that the Clean Venture proposal offered a cost savings over the Clean Harbors proposal. Clean Harbors filed a protest with our Office challenging the award decision. In response to that protest, the agency proposed to reevaluate the proposals; on the basis of this corrective action, Clean Harbors withdrew its earlier protest (B-296176, May 3, 2005). Thereafter, the agency reevaluated the proposals, concluded again that the firms' past performance was equal, and affirmed its original source selection decision. Clean Harbors again protests the decision to make award to Clean Venture.

Clean Harbors, the incumbent for the requirement, asserts that the agency miscalculated the offerors' past performance information, specifically, that the agency improperly failed to take into consideration the relevance of the offerors' past performance references, and that this was inconsistent with the terms of the solicitation. Clean Harbors asserts that this resulted in competitive prejudice because it has more relevant experience, and therefore should have received a higher past performance rating, than Clean Venture.

The agency, in a supplemental submission to our Office, asserts for the first time that, in fact, the comparative relevance of the past performance references in the offerors' proposals was considered, and the references were carefully reviewed for relevance, as well as for substance. Agency Supplemental Submission, Nov. 2, 2005, at 2. The agency therefore maintains that it met its obligation, consistent with the terms of the RFP to evaluate the relevance of the firms' past performance references.

As a general matter, the evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offerors' past performance. Id.

The past performance evaluation here did not meet this standard. The evaluation was based on responses to past performance questionnaires the agency sent to each of the references included in the offerors' proposals. Two references for each firm (of the five solicited) submitted responses to the questionnaires, which the agency reviewed to arrive at a past performance rating for each concern. Past Performance Evaluation at 1. In this regard, the Revised Source Selection Determination (RSSD) shows that the source selection official relied only on the averaged past performance questionnaire numerical scores in his award deliberations, as reflected in the following language:

The past performance evaluation is a tool to assess the relative risks associated with each offeror. The Past Performance Evaluation is based on information obtained from references provided by the offeror, as opposed to an evaluation of the offeror's written proposal. The references referred to in the Past Performance Evaluation give their assessment of similar contracts they have had with an offeror. The references were given the NIH Past Performance Customer Questionnaire to rate the performance of each offeror relative to the requirements of each contract. The average Past Performance numerical ratings as provided by the references are shown below. The differences in the past performance scores for the two companies were minimal. Past performance is relatively equal as shown below.

RSSD at 5.

Significantly, there is no indication—in the RSSD or elsewhere in the record—that the agency went beyond the questionnaires and considered the relevance of the offerors'

past performance references. This is problematic because, as noted, the RFP provided for consideration of the relevance of the past performance information received, RFP at 137, and the two references received for Clean Venture--from the Smithsonian Institution and the Washington Metropolitan Area Transit Authority--involved substantially smaller, less complex contracts than the current requirement. Clean Venture Proposal at 106-09; AR, exh. 7, at 2-14. There thus is reason to question the relevance of Clean Ventures' past performance. At the same time, the protester, as the incumbent contractor for the NIH requirement here, possessed arguably the most relevant past performance information available. However, there is no indication that the agency ever considered the relevance of that contract, either; instead, the record shows only that the agency considered the questionnaires for two different contracts performed by Clean Harbors, one for a private drug company and the other for the Army. AR, exh. 7, at 2. Indeed, while the agency states in its submissions to our Office that it considered past performance information in the proposals, in addition to the questionnaires, there is no support in the contemporaneous record to show that it considered Clean Harbors' performance as the incumbent at all, or for that matter, that it considered any other information included in the proposals or otherwise available to the agency. Rather, as discussed above, the record contains documentation showing only that the agency considered the scores derived from the questionnaire responses received for the two firms, and, thus, the agency's arguments during the protest are simply not supported by the record. We conclude that the agency's actions were inconsistent with the RFP, and otherwise unreasonable.

We find as well that the agency's failure to consider the comparative relevance of the offerors' past performance could have affected its source selection decision; although both firms received the same past performance ratings, it appears, as noted, that the references relied on for Clean Venture's rating were smaller, less complex contracts as compared to Clean Harbors' incumbent contract for the very requirement being solicited. (In addition, to the extent that the other contracts referred to in the offers could have been evaluated and deemed more or less relevant, the record shows that the agency apparently did not consider that information in arriving at its ratings.) In view of the foregoing, we find that Clean Harbors was prejudiced by the agency's failure to evaluate the comparative relevance of the offerors' past performance, and sustain the protest on this basis.

We recommend that the agency reevaluate the offerors' past performance, giving due consideration to the relevance of the offerors' prior and current contracts and, based on that reevaluation, make a new source selection determination. Should the agency find that Clean Venture's proposal no longer represents the best value to the government, we further recommend that the agency terminate that firm's contract and make award to Clean Harbors, if otherwise appropriate. Finally, we recommend that Clean Harbors be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2005). Clean

Harbors' certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving of our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel