



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** Clean Venture, Inc.

**File:** B-284176

**Date:** March 6, 2000

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Michael Persico and Michael Lancos for the protester.  
William E. Hughes III, Esq., Whyte, Hirschboeck, Dudek, for Safety-Kleen, Inc., an intervenor.  
Reba M. Harrington, Esq., Defense Logistics Agency, for the agency.  
Christine Davis, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Agency reasonably evaluated protester's past performance as "fair" under a solicitation for a hazardous waste disposal contract based on the protester's "good" performance on its prior contracts that did not require the handling of the large quantities and the numerous varieties of waste at a large number of performance locations as required by the solicitation, as compared to the awardee's "good" past performance on contracts very similar in size and scope to the solicited work.

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### DECISION

Clean Venture, Inc. protests the award of a contract to Safety-Kleen, Inc., under request for proposals (RFP) No. SP4400-99-R-0004, issued by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Service (DRMS), for hazardous waste disposal services at various military facilities. Clean Venture protests the evaluation of its past performance.

We deny the protest.

The RFP contemplated the award of a fixed-price requirements contract for an 18-month base period with 3 option years. RFP § L.2, amend. 11 at 2. The RFP required the contractor to dispose of approximately 5.1 million pounds of waste during the base period and approximately 3.1 million pounds of waste during each option period. RFP Bid Schedule, as amended, at 22-89. The RFP required the contractor to pick up waste from 263 locations in the District of Columbia, Maryland,

Pennsylvania, Delaware, New York and New Jersey. RFP, Pick-Up Point Locations, as amended, at 4-21. The locations represented various agencies within the Department of Defense, including components of the Army, Navy, Air Force, Marines and National Guard, and the Coast Guard. Id.

The RFP described the anticipated waste stream based upon 10 general categories of hazardous waste. RFP Bid Schedule, as amended, at 22-89. Each category of waste contained multiple contract line items (CLIN) that further described the form of the waste, e.g., whether the waste was “aerosol,” “small container” waste (stored in containers less than 5 gallons), “containerized” waste (stored in containers greater than 5 gallons), or “bulk” waste (stored in containers greater than 119 gallons or not stored in containers). Id.; RFP § H.8, amend. 5, attach. 4, Waste Code CLIN Selection Criteria. The RFP also included CLINs requiring special hazardous waste support services, such as the removal of bulk waste using “roll-off” storage containers. RFP Bid Schedule, CLINs 6615DA-6615DE, amend. 11 § C.50.

The RFP provided for award based on a tradeoff between past performance, price and other factors.<sup>1</sup> RFP § M.13(a). The solicitation stated that, as between past performance and price, price was a less important, but still significant factor. RFP § M.13(c). With regard to the past performance evaluation, the RFP provided that the government would evaluate offerors’ “[p]ast performance on references that are of a similar nature to the subject solicitation.” RFP § M.13(d)(1)(i). For purposes of this evaluation, the RFP asked each offeror to provide information about its performance under contracts “for the same or similar services” during the past 2 years. RFP § L.15(a). For each project submitted as a past performance reference in its proposal, the offeror was to list the waste streams serviced, the corresponding quantity removed, any related support services provided (such as roll-off services), and the annual cost of the work, and was to discuss its qualifications and experience relative to each project.<sup>2</sup> RFP § L.15(a)(1), (b); Agency Report, Tab 9, Protester’s Past Performance Proposal, DRMS Form 1989.

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<sup>1</sup> The other factors identified in the RFP—socioeconomic plan and DLA mentoring business agreements—were significantly less important than past performance or price and had no bearing on the selection decision in this case. RFP § M.13(c).

<sup>2</sup> The RFP did not provide for the evaluation of experience unless the proposal established that the offeror gained the experience during the performance of a project submitted as a reference to be evaluated under the past performance factor. See RFP §§ L.15(b), M.13(d)(1)(i). Thus, the agency did not evaluate the information contained in the experience section of Clean Venture’s past performance proposal, which discussed the firm’s experience generically and did not tie the experience to specific projects to be evaluated under the past performance factor, as contemplated by the RFP. See Agency Report, Tab 9, Protester’s Past Performance Proposal, Experience.

The agency received initial proposals from eight firms and conducted a round of discussions with the six firms whose proposals were included in the competitive range, including Safety-Kleen and Clean Venture. The agency then received final revised proposals from the six firms. Agency Report, Tab 4, Prenegotiation Briefing Memorandum, § IIc., d., and Tab 16, Price Negotiation Memorandum, at 2-4.

Clean Venture's proposal offered the lowest price for the total requirement, including options, in the amount of \$6,157,300, which was 7 percent less than Safety-Kleen's next-lowest \$6,619,806. Agency Report, Tab 16, Price Negotiation Memorandum, at 4. In terms of past performance, Safety-Kleen received a "good" rating, while Clean Venture received a "fair" rating.<sup>3</sup> Id.

Three contracts formed the basis for Clean Venture's "fair" past performance rating. These contracts were with the Food and Drug Administration (FDA), the Smithsonian Institution, and the Washington Metropolitan Area Transportation Authority (WMATA).<sup>4</sup> DRMS evaluated Clean Venture's proposal information for each contract and conducted telephone interviews with the corresponding contract reference using a standard DRMS past performance questionnaire. Agency Report, Tab 10, Protester's Initial Past Performance Evaluation, and Tab 12, Protester's Final Past Performance Evaluation. While each contract reference rated the protester's performance as good or very good, see Agency Report, Tabs 10 and 12, Questionnaires for Offerors' Past Performance, the contracting officer concluded that each contract was relatively small and simpler to perform than this RFP work. In particular, the contracting officer found that the protester lacked experience handling the large quantities and numerous varieties of waste at a large number of performance locations required by this RFP. He believed that a "fair" rating appropriately credited the protester for having performed well on its prior contracts, while accounting for the fact that none of the contracts was nearly as demanding as the instant solicitation. Agency Report, Tab 16, Source Selection Decision Document, at 3; Video Transcript (VT) at 9:19:25; 9:44:44; 11:28:34.

In contrast, Safety-Kleen's performance record evidenced several complex contracts requiring the removal of large quantities and numerous varieties of waste at multiple pick-up locations (including the incumbent contract for part of the RFP

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<sup>3</sup> The possible past performance ratings were "unsatisfactory," "poor," "fair," "good," and "excellent." Agency Report, Tab 16, Standardized Adjective Ratings and Definitions of Past Performance for DRMS Contracts.

<sup>4</sup> The agency did not evaluate a contract completed by Clean Venture 4 years earlier. Clean Venture abandoned its protest of this omission by failing to rebut the agency's defense of its actions in its comments. See TMI Servs., Inc., B-276624.2, July 9, 1997, 97-2 CPD ¶ 24 at 4 n.3.

requirements), each of which Safety-Kleen had performed at a “good” level. See Safety-Kleen’s Past Performance Proposal; Agency Report, Tab 13, Awardee’s Past Performance Evaluation. At the hearing, the contracting officer noted that Safety-Kleen received overall good ratings on 12 current DRMS hazardous waste contracts worth between \$30 million to \$40 million overall. VT at 11:26:50; 11:27:30. Because Clean Venture lacked such experience, the contracting officer concluded that Safety-Kleen had a greater probability of success in performing the contract than Clean Venture, and that this superiority was worth the relatively small price premium. Agency Report, Tab 16, Source Selection Decision Document, at 3.

Through an award notice and subsequent debriefing, DRMS apprised Clean Venture of the protester’s and awardee’s price and past performance ratings, and the basis for the protester’s past performance evaluation. Protest at 1; Protester’s Comments, attach. 3, Debriefing Notes; Agency Report, Tab 17, Debriefing Notes (Nov. 16 and 17, 1999). Within 10 days of its debriefing, Clean Venture protested its “fair” past performance rating.<sup>5</sup>

It is not the function of our Office to evaluate past performance information de novo. Rather, we will examine an agency’s evaluation only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merits of offerors’ past performance is primarily a matter within the contracting agency’s discretion. Pacific Ship Repair and Fabrication, Inc., B-279793, July 23, 1998, 98-2 CPD ¶ 29 at 3-4.

As noted above, the RFP informed offerors that the agency would evaluate information provided by each offeror concerning contracts for “the same or similar services” performed within the last 2 years. Consistent with this advice, the agency

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<sup>5</sup> More than 10 days after its debriefing, Clean Venture protested that Safety-Kleen did not have a reputation for “good” past performance; that the contracting officer improperly deemed Clean Venture’s contract with the United States Geological Survey irrelevant to the past performance evaluation because it was worth only \$40,000 per year; and that the agency should have informed the protester during discussions that it could improve its proposal by providing additional references. See Protester’s Comments at 2, 5; Protester’s Post-Hearing Correspondence, Jan. 20, 2000. The agency disclosed at Clean Venture’s debriefing the basis for each of these protest issues, i.e., it discussed Safety-Kleen’s rating, the exclusion of the Geological Survey contract from Clean Venture’s past performance evaluation, and the agency’s position that Clean Venture received an opportunity during discussions to provide additional past performance references. See Protester’s Comments, attach. 3, Debriefing Notes. Because Clean Venture’s protests of these issues stem from information obtained at its debriefing, Clean Venture’s failure to raise the allegations within 10 days of the debriefing renders them untimely and not for our consideration. 4 C.F.R. § 21.2(a)(2) (1999).

evaluated the degree of similarity between the offerors' prior contracts and the RFP requirements. Based on this analysis, the agency found that the protester's contracts were smaller and less difficult than the RFP work, but that the protester's successful performance of these contracts gave it a fair chance of successfully meeting the greater demands of the RFP. Our review of the record, including the hearing testimony, shows that the agency had a reasonable basis for its findings in this regard.<sup>6</sup>

As indicated above, the RFP required the disposal of 3.2 million pounds of waste at an award price of \$1.47 million on an average, annual basis. See RFP Bid Schedule, as amended, at 22-89. The contracting officer estimated that the protester's largest contract (the FDA contract worth \$500,000 per year) entailed between 500,000 to 600,000 pounds of waste annually, and that far less waste was involved under the protester's other contracts—approximately 96,000 pounds of waste annually under the WMATA contract and an insignificant amount of waste under the Smithsonian contract (valued at \$65,000 per year). VT at 9:20:32, 9:49:18 to 9:50:28, 10:03:12. The contracting officer testified that he did not consider the quantity of waste under the FDA contract commensurate with the quantity of waste under the RFP; indeed, the contracting officer noted that some individual CLINs under the RFP entailed nearly as much waste as the total annual requirement under the FDA contract. See, e.g., RFP amend. 11, Bid Schedule CLINs 9902DD, 9904DD; VT at 9:22:33, 9:48:18. The contracting officer testified that smaller contracts, such as Clean Venture's, are not as indicative as large contracts in predicting performance under this RFP; this is so, he explained, because contractors experienced in handling large quantities of waste generally have more expertise, management, staff, equipment, and facilities, which increases the likelihood of success in performing a contract as large as the one solicited here. VT at 9:21:29, 9:33:50, 9:46:22.

The contracting officer further testified that, as is often the case with smaller contracts, the protester's contracts were less diverse and thus less demanding than the solicitation in terms of the waste streams to be served. VT at 9:21:29, 9:22:58. In particular, the protester's contracts reflected experience with containerized waste (waste contained in 5 to 85 gallon drums), whereas the RFP involved a significant number of waste streams not contained in 5 to 85 gallon drums, such as "small container" waste, aerosol waste, bulk waste, and roll-offs. VT at 9:25:14, 9:27:24 to 9:27:40, 10:00:52; Agency Report, Tab 9, Protester's Past Performance Proposal, FDA and WMATA References. The contracting officer testified that removing containerized waste is much easier than sorting, organizing and packing non-containerized waste in accordance with environmental regulations. Because the protester's contracts did not reflect significant experience with other than containerized waste, the contracting officer viewed Clean Venture's performance

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<sup>6</sup> We conducted the hearing because the documentation supporting the agency's evaluation was sparse and, in some instances, inconsistent.

record as relatively narrow compared to the solicitation requirements. VT at 9:27:57 to 9:30:30.

In addition, the contracting officer stated that the number and variety of performance locations to be served under the RFP far exceeded the number and variety served under the protester's prior contracts. As noted above, the RFP required waste disposal from 263 performance locations in several states. The contracting officer explained that each performance location corresponded with different generators, each governed by unique requirements specific to the activity and the base involved. According to the contracting officer, in terms of performance risk, a contractor without experience serving such a large number and variety of geographically diverse performance locations might not appreciate the complexity of serving multiple generators with unique requirements and might not be equipped to handle multi-state, simultaneous pick-ups. VT at 9:31:18 to 9:32:03, 9:56:40, 10:54:50, 10:56:27, 11:13:17.

The contracting officer found that Clean Venture's past performance record did not reflect that the firm had served multiple performance locations to the extent required by the RFP, which he felt increased the risk of performance problems in handling a contract of this magnitude. *Id.* For example, Clean Venture's FDA contract, although a multi-state contract, involved only nine FDA performance locations, which was considered much simpler than the RFP requirement. Agency Report, Tab 9, Protester's Past Performance Proposal, FDA Reference; VT at 11:07:22, 11:07:42. Similarly, under its WMATA contract, Clean Venture served 23 neighboring sites, accepting waste from what appeared to be a single WMATA generator, which, in the contracting officer's opinion, did not approach the number, variety, and geographic diversity of performance locations covered by the RFP.<sup>7</sup> See Agency Report, Tab 9, Protester's Past Performance Proposal, WMATA Reference, and Tab 10, Questionnaire for Offerors' Past Performance, Question 6; VT at 11:11:16 to 11:12:00, 11:12:40.

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<sup>7</sup> Clean Venture argues that the agency misinterpreted its WMATA experience in one respect. The protester argues that its proposal and its past performance reference mentioned that other Maryland and Virginia counties, municipalities, and schools "add-on" to the WMATA contract, which allegedly establishes that Clean Venture has served diverse generators, just as contemplated by the RFP and contrary to the findings of the contracting officer. See Protester's Post-Hearing Comments at 3-4; Agency Report, Tab 9, Protester's Past Performance Proposal, WMATA Reference, and Tab 10, Questionnaire for Offerors' Past Performance, Question 10. The protester has never identified, either here or in its proposal, how many additional generators it has served. The information provided in the protester's proposal and by its reference reasonably supports the contracting officer's conclusion that the WMATA contract does not involve nearly the same number or variety of performance locations as required by the RFP.

In summary, the contracting officer concluded that the protester's prior contracts did not entail the volume and diversity of waste, nor the number and diversity of performance locations contemplated by the RFP. As a result, the contracting officer concluded that the protester's good performance of these contracts did not necessarily presage good performance of a much larger and more complex contract, as required by this solicitation, and so rated the protester's past performance as "fair."<sup>8</sup> Based on our review, we conclude that the agency reasonably found the protester's past performance was significantly less desirable than the awardee's good performance on very similar contracts and that the awardee's advantage was worth the price premium.

In support of its contentions that the agency unreasonably downgraded its past performance, Clean Venture cites our decision in PMT Servs., Inc., B-270538.2, Apr. 1, 1996, 96-2 CPD ¶ 98. In that case, we found that DRMS improperly determined that the protester had a poor record of past performance, notwithstanding its successful performance of 15 hazardous waste disposal contracts, where the record did not reflect that the contract contemplated by the RFP was more complex than the protester's prior contracts, apart from the larger quantity of waste involved under the RFP. Here, there is sufficient evidence that the contract contemplated by the RFP is more complex than the protester's prior contracts, comparing such things as performance locations, waste streams, as well as the quantities involved under the respective contracts. Furthermore, our Office recognized in PMT that a contract's size may be relevant to its complexity, see id. at 6, and it was not inappropriate for the contracting officer to consider that the protester's contracts involved far less waste than will be required under this contract. See Chem Servs. of Indiana, Inc., B-253905, Oct. 28, 1993, 93-2 CPD ¶ 262 at 3. We also note that the quantity of waste under some individual CLINs in this RFP approximated the total annual requirements of the protester's largest contract, which the contracting officer reasonably viewed as significant. See PMT Servs., Inc., supra, at 8; VT at 9:22:33.

Clean Venture protests that DRMS judged the complexity of its contracts without conducting adequate interviews with its past performance references. The protester claims that the contract specialist, who conducted the interviews, did not sufficiently question references concerning Clean Venture's contract experience, especially with regard to waste streams, quantities, and performance locations. Protester's Post-Hearing Comments at 4.

The record shows that, while the contract specialist's interviews were brief, he strictly adhered to the questions listed on the past performance questionnaires,

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<sup>8</sup> The contracting officer's testimony is consistent with the contemporaneous evaluation.

which gave references an opportunity to discuss waste streams, quantities, performance locations, and other contract requirements relevant to the solicitation; to appraise the contractor's performance; and to offer any other comments that the reference desired. See VT at 13:16:13, 13:22:42, 13:33:02; Agency Report, Tabs 10 and 12, Questionnaires for Offerors' Past Performance.

In a statement submitted to our Office, the FDA reference said that, while answering the contract specialist's questions concerning the types and amounts of waste generated by the FDA, he "was cut off and not allowed to give a full evaluation of [Clean Venture] or the services that they provide." Letter from FDA Reference to Protester (Jan. 28, 2000). The contract specialist disputed this allegation at the hearing. He testified that he did not cut off the reference and that the reference never indicated that he felt cut off or rushed by the contract specialist at any point during the interview. VT at 13:33:02 to 13:35:55, 13:51:40 to 13:52:24. Whereas the contract specialist gave detailed testimony describing the interview, the FDA reference has not revealed what the contract specialist allegedly said to stifle the conversation and, more importantly, has not stated what information he intended to supply but for the contract specialist's alleged interruption. Without such evidence--which we invited the protester to present--we fail to see how the protester was prejudiced by the contract specialist's conduct of the interview, even assuming any impropriety occurred. See Pacific Ship Repair and Fabrication, Inc., supra, at 5-6.

In any case, it was not the agency's obligation to ascertain through past performance interviews the requirements under the protester's contracts, as the offeror has the burden of submitting an adequately written proposal. See SC&A, Inc., B-270160.2, Apr. 10, 1996, 96-1 CPD ¶ 197 at 5. Here, the agency's depiction of the quantities, waste streams, and performance locations served under the protester's prior contracts primarily derived from information contained in Clean Venture's proposal. Clean Venture has not alleged that the agency misinterpreted its proposal information in these areas, so as to affect its "fair" rating.<sup>9</sup> Nor has Clean Venture alleged that its prior contract experience differed from what was depicted in its

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<sup>9</sup> The record reflects that the agency did misread Clean Venture's proposal in several minor respects. For example, the contracting officer believed that Clean Venture had not performed some of the special waste handling services required by the RFP, such as grouping compatible chemicals into "labpack" containers, even though Clean Venture listed labpacking services in describing its FDA contract. See RFP § C.52; Contracting Officer's Report ¶ 17; VT at 10:17:20, 10:17:27; Agency Report, Tab 9, Protester's Past Performance Proposal, FDA Reference. However, the contemporaneous record and hearing testimony make clear that the protester's perceived inexperience in performing special waste handling services was peripheral to its "fair" rating, which stemmed from the smaller scope of its prior contracts in terms of waste streams, quantities, and performance locations. Agency Report, Tab 16, Source Selection Decision Document, at 3; VT at 10:11:17, 10:18:00.



proposal and relied upon by the agency; however, to the extent that it did, Clean Venture was responsible for any inaccuracies in its proposal.

The protest is denied.

Comptroller General  
of the United States