



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: PMT Services, Inc.

File: B-270538.2

Date: April 1, 1996

Susanne M. Kayser for the protester.

Kenneth A. Martin, Esq., Riley & Artabane, for Moheat Environmental Services, Inc., an intervenor.

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DIGEST

Agency's technical evaluation of an offeror's past performance of hazardous waste disposal contracts under the solicitation's past performance evaluation factor and selection of a substantially higher-price proposal for award is unreasonable where the agency did not meaningfully consider the complexity of the protester's prior contracts vis-a-vis the complexity of the contract to be awarded.

DECISION

PMT Services, Inc. protests the award of a contract to Moheat Environmental Services, Inc. under request for proposals (RFP) No. SP4400-95-R-0016, issued by the Defense Reutilization and Marketing Service (DRMS), Defense Logistics Agency, for hazardous waste disposal services at DRMS offices in San Antonio and Fort Hood, Texas, and surrounding locations. PMT challenges the agency's evaluation of its past performance and the source selection decision.

We sustain the protest.

The RFP, issued as a total small business set-aside, provided for the award of a fixed-price requirements contract for an 18-month base period with 2 option years. The RFP identified 120 waste pickup sites, 9 different categories of waste, and the various sizes and types of containers in which waste would be disposed of under the contract. The RFP estimated that more than 2.1 million pounds of waste would be disposed of during the base period.

Offerors were informed that proposals would be evaluated under three evaluation factors: technical, past performance, and price. Under the technical factor, proposals were to be evaluated on a "go/no-go" basis for compliance with stated RFP requirements, including requirements for waste treatment, disposal, and

management plans. Proposals determined technically acceptable under that factor would then be comparatively evaluated under the two remaining factors, past performance and price, to determine which offer represented the best value. The RFP provided that the past performance factor was "the most important factor for award" and that price, though significant, was "a somewhat lesser factor of importance."

Offerors were also informed that past performance would be evaluated as follows:

"The Government will evaluate the quality of the offeror's past performance. The assessment of the offeror's past performance will be used as a means of evaluating the relative capability of the offeror and the other competitors. Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have acceptable technical proposals.

"Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The Government is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction and timely delivery of services. . . .

"By past performance, the Government means the offeror's record of conforming to specifications and to standards of good workmanship; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and competitive behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer. DRMS will also consider an offeror's performance on same or similar contracts in terms of waste quantities, variety of pick up locations and waste streams, performance timeframes, and complexities of the services provided."

DRMS received five proposals, including those of PMT and Moheat, and all five proposals were determined to be technically acceptable and within the competitive range. Discussions were conducted, and best and final offers (BAFO) received and evaluated, as follows:

Offeror	Past Performance	Total Price
PMT	Marginal	\$2,102,868
Moheat	Acceptable	\$3,130,705
A	Acceptable	\$3,210,898
B	Good	\$3,834,034
C	Good	\$4,928,398

The contracting officer's investigation of PMT's record of past performance found that PMT had successfully performed a number of hazardous waste disposal contracts. In fact, PMT's proposal and discussion responses identified 15 contracts for hazardous waste disposal that PMT had performed within the last 2 years; these contracts ranged from small dollar contracts to a contract with the Army for waste disposal at Tooele Army Depot with an estimated contract value of \$446,000. The agency contacted PMT's identified contract references and was informed that PMT's prior performance on these hazardous waste disposal contracts ranged from "satisfactory in all respects" to "performance has been excellent." Nevertheless, the contracting officer assessed PMT's past performance under these contracts as "marginal" solely because PMT had not previously performed a contract of similar size and "complexity" to the contract contemplated by the RFP. Specifically, the contracting officer stated:

"PMT's past performance does not show that the contracts they have performed have the complexity that is involved in picking up, removing, transporting and disposing of the variety of waste streams in the varied sized containers (small containers less than 7 pounds, 55 and 85 gallon drums, roll-offs), over the number of locations (120 generators), within the specified number of days (5, 10, 15 or 30 days); all while preparing the appropriate paperwork (manifests and waste profiles). Based on this assessment, PMT was rated Marginal in past performance with a probability of successful performance as poor. Risks concerning potential contract performance and schedule compliance are above normal allowable levels."

Moheat's proposal was evaluated as "acceptable" under the past performance factor with the following explanation:

"The second low offeror, Moheat, performed at the San Antonio/Ft. Hood location until [September 1994] under a contract that had approximately 32 pick up locations, and the same waste streams as

this solicitation. Total amount of waste removed under the San Antonio contract [during Moheat's 18 month contract period] was around 1.9 million pounds. That contract also had a 10-day expedited removal requirement. Moheat's performance was excellent. Total amount of waste to be removed under this solicitation is approximately 2 million pounds as stated above, with a standard 30 day removal and 5, 10 and 15 day expedited removals. There are more pick up locations and management services under this solicitation than under the previous San Antonio contract with Moheat; however, total amount of pounds and variety of waste streams remains about the same."

The contracting officer evaluated the risks associated with these two offerors, as follows:

"Risks concerning potential contract performance and schedule compliance are the maximum allowable for Moheat compared with PMT's risks which are above normal allowable levels. Except for the increased number of pick up locations, and management services, Moheat would be rated a Good in past performance with a probability of success of good.

"There is an increased potential for environmental noncompliance with a contractor that has less experience. Costs associated with the cleanup of a site or a Notice of Violation resulting from environmental noncompliance can far outweigh any money anticipated to be saved by awarding to an offeror with less experience."

Based on this analysis of the firms' past performance, the contracting officer determined that Moheat's probability of success was "fair" while PMT's was "poor." The contracting officer advised the source selection authority (SSA) that Moheat's 49 percent higher-priced BAFO represented a better value than PMT's lower-rated BAFO because Moheat's better past performance record indicated a greater likelihood of successful performance.

The SSA reviewed the contracting officer's evaluation documentation and accepted all of the contracting officer's findings, except the assessment of Moheat's past performance as "acceptable." The SSA determined that Moheat's past performance rating should be increased to "good" for the following reason:

"I consider [Moheat's] past performance to be Good in regards to this procurement. They have performed previously at these sites under [the San Antonio contract]. All the available information indicates that they performed well on that contract. Delivery orders under that

contract were issued [through September 1994] so their experience at these sites is fairly recent. A significant number of additional pickup points have been added to this procurement since [the San Antonio contract]. However, these additional pickup points are almost all very small generators [of hazardous waste] and do not significantly change the general nature of this procurement when compared to the [San Antonio contract]."

The SSA selected Moheat's offer for award, based upon his assessment that Moheat's offer was a better value than PMT's. Specifically, the SSA stated:

"Moheat's proposal is considered of greater value than PMT's. Both offerors submitted technically acceptable proposals. Moheat's past performance rating is Good while PMT's is Marginal. PMT's record of past performance indicates that they have had successful performance on contracts that are less complex than the requirements of this solicitation. PMT's past performance shows that all of the contracts they have performed have had only one pickup location. The largest contract that they have performed is estimated at \$446,000 over three years. Moheat's past performance rating is Good and is discussed . . . above. Past performance is the most important best value factor. Based upon their past performance the probability of Moheat performing this contract successfully is considered good. Based upon their past performance, the risks concerning PMT's potential contract performance and schedule compliance are significantly above the risks associated with Moheat."

DRMS awarded the contract to Moheat on November 14, 1995, and this protest followed.

The protester complains that DRMS arbitrarily assessed its past performance as poor, based only upon the size of PMT's prior contracts and without any consideration of the firm's history of successful performance of the same services as solicited under the RFP here. PMT states that notwithstanding the agency's concern about not having multiple pick-up locations under its prior contracts, the agency informed it during discussions that the majority of waste would be generated at San Antonio and Fort Hood, and that the contract could be managed easily with 3 or 4 full-time employees. PMT argues that, given its history of successful performance, its substantially lower-priced offer was the best value to the government.

DRMS does not dispute that PMT's past performance history evidences successful performance of the same services sought by the RFP, but argues that because PMT has not previously performed a contract of similar size and complexity, its proposal

was properly assessed to be higher risk under the past performance factor than that of Moheat. DRMS also contends that a contractor with less experience presents a greater potential of environmental noncompliance.

Federal Acquisition Regulation § 15.605(b)(1)(ii) generally requires agencies to evaluate past performance in all procurements in excess of \$100,000. This regulation implements the policy stated in Office of Federal Procurement Policy Letter 92-5, 58 Fed. Reg. 3573, Jan. 11, 1993, that "a contractor's past performance record is a key indicator for predicting future performance." The evaluation scheme here, which establishes past performance as the only subjectively rated evaluation factor, is not inconsistent with this policy. 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 a reasonably based past performance rating. Chem-Servs. of Indiana, Inc., B-253905, Oct. 28, 1993, 93-2 CPD ¶ 262. However, we will question such a conclusion where it is not reasonably based or is undocumented. Ashland Sales & Service, B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108; SDA Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320.

Here, we find that the agency's determination of PMT's past performance as "marginal with a probability of poor performance" is not reasonably based. The agency's assessment of PMT's prior contract experience was based entirely on the conclusion that PMT had not performed contracts of similar "complexity." The agency has not defined, either in the RFP or in its protest submissions, what is intended by the term complexity with respect to these services. Nonetheless, it seems reasonable to believe that factors relevant to complexity may include such things as the degree of care or special handling needed for disposal of specific types of waste, the size of the staff needed to accomplish the work, the level of reporting and record keeping required, and the number of vehicles needed for performance. The agency did not, however, take into account these factors or any other factor other than size.

While contract size may be relevant to contract complexity, see Chem-Servs. of Indiana, Inc., supra, evaluating "complexity" of contract requirements based on size alone, without considering such other indicators of complexity may not yield a meaningful conclusion about an offeror's probability of future success. An increase in the amount of waste to be disposed of under a contract, for example, or the number of pick-up locations, are factors to be considered, but it does not follow that the complexity of the requirements has increased merely because of increases under these factors. In other words, if a contractor that has successfully disposed of 200,000 or 600,000 pounds of specific wastes--as PMT has done under two prior contracts--now must dispose of 2 million pounds of waste, it may simply have to make more pick-ups using the same procedures and similar resources. On the other hand, the contractor may have to do considerably more, such as develop new procedures for handling hazardous waste with which it has no experience, provide

more trucks and drivers, and coordinate the additional resources committed to the effort. The point to be made on this record is that one cannot simply say that because the size of the contract has increased, its complexity has also increased.

Here, the agency has provided no information, apart from its arguments concerning the size of the contract to be awarded, to show that the contract contemplated by this RFP is more complex than the contracts previously performed by PMT. PMT's proposal, however, evidences that it performed contracts involving services similar to the services solicited here, *i.e.*, contracts that involved multiple waste streams, similar varieties of containers, comparable response times, and preparation of paperwork such as waste profiles, and it is not apparent why, in terms of overall complexity, there is any meaningful difference between the prior contract efforts and what is required here.

Specifically, at Tooele Army Depot (the contract which DRMS evaluated as PMT's largest), PMT removed a variety of waste streams, *i.e.*, demiter packing from munitions, dried brine salts, ashes, furnace salts, construction residue, contaminated debris, and contaminated soil. PMT also analyzed the various waste streams, identified the specific wastes contained therein, and prepared waste profiles. The contract administrator for PMT's Tooele Army Depot contract rated PMT's performance as "outstanding" because of its ability to timely discover "show stopping" problems and provide workable solutions, to control scheduling to ensure timely project completion, to respond to changed conditions, to complete manifests and waste profiles accurately and on time, and to provide well-trained and cooperative personnel.

As is the case under this RFP, the Tooele contract involved large quantities of waste, and the servicing of multiple waste streams, required analysis of and identification of the specific wastes present in the various waste streams, and involved related paperwork and report requirements. The only major difference identified by the agency as a significant problem with PMT's past performance and apparent from the record is that the Tooele contract involved a single waste generation location. However, as indicated, PMT had been advised during discussions that the RFP essentially contemplated only two major generation locations, that the remaining locations did not add significantly to the RFP requirements, and that the RFP could be easily managed by three to four full-time employees. There has been absolutely no showing on this record that what is primarily a two-location requirement is more complex than the one-location requirement PMT previously serviced. In this regard, the agency's evaluation did not identify any types of waste, handling procedures, staffing requirements, or quantity and management resources which would make this RFP work meaningfully more complex than that performed under the Tooele contract. In sum, on this record, we cannot say that the agency's reliance on the size and a number of waste generation locations reflects a reasonable analysis of PMT's prior contracts and, in

the absence of a meaningful distinction in the complexity of this work as compared to PMT's prior work, that the agency's evaluation of PMT's past performance as "marginal" is reasonably based.

Moreover, with respect to size itself, DRMS's evaluation of PMT's prior contracts is not based on accurate factual information. Although the contracting officer stated that PMT's largest contract involved the removal of only 245,000 pounds of waste per year (the Tooele Army Depot contract), PMT had successfully performed another contract (at a lower price) involving the removal of 625,000 pounds of waste per year (the Anniston Army Depot contract). This quantity was for a single item of waste, which seems significant here because it exceeds the size of any of the contract line items under the RFP (almost all of which are for substantially smaller amounts of waste). The Anniston Army Depot contract also required a response time of 24 hours, which is significantly more rigorous than the RFP's shortest expedited response time of 5 days. Although this contract involved roll-on/roll-off containers, which the agency stated to be less difficult to service than smaller containers, this contract experience is relevant because the RFP encompasses the disposal of waste in roll-on/roll-off containers.

The SSA, in making his source selection decision, accepted the contracting officer's evaluation of PMT's past performance history, and then widened the perceived comparative difference between PMT's and Moheat's proposals under the past performance factor by increasing Moheat's rating from acceptable to good. As noted above, Moheat's proposal only received an acceptable rating initially because the RFP significantly increased the number of waste generation locations from those performed by Moheat under its prior contract. The SSA increased Moheat's past performance rating to good because, the SSA concluded, the larger number of waste generation locations did not significantly increase the work beyond that which Moheat previously performed. In this regard, the SSA believed that the waste generation locations, outside of San Antonio and Fort Hood, would generate small quantities of waste that could be easily incorporated into the overall management of the contract.¹ Although the SSA discounted the number of waste generation locations in increasing Moheat's past performance rating, the record shows that the SSA did not similarly consider the immateriality of these locations to PMT's rating. To the contrary, PMT's lack of experience with multiple locations under a single contract was a specific concern stated by the SSA in his selection decision.

The SSA selected Moheat for award after determining that the evaluated difference in the firms' past performance justified a more than one million dollar (49 percent)

¹The SSA's understanding of amount of waste to be generated at most of the waste generations locations identified in the RFP was consistent with the advice given by the contracting officer's technical representative to PMT prior to BAFOs.

price premium. This tradeoff decision, however, is based upon an inadequate evaluation of PMT's past performance. Until there is a proper assessment of PMT's past performance, the SSA cannot reasonably determine whether Moheat's past performance is worth the 49 percent price premium.

We recommend that DRMS reevaluate proposals and make a new source selection decision consistent with this decision. If DRMS selects an offeror other than Moheat for award, it should terminate the contract to Moheat and make award to that other offeror. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, § 21.8(d)(1), 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8). The protester should submit its certified claim for costs to the contracting agency within 90 days of receiving this decision. Bid Protest Regulations, § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States