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**Comptroller General
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**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: Bannum, Inc.
File: B-407079.2; B-407079.3
Date: July 14, 2015

Justin T. Huffman, Esq., Nancy M. Camardo, Esq., and Joseph A. Camardo, Jr., Esq., Camardo Law Firm, PC, for the protester.
Alexander B. Ginsberg, Esq., and Alex Tomaszczuk, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Dismas Charities, Inc., the intervenor.
Sarah Bloom, Esq., and William D. Robinson, Esq., Bureau of Prisons, for the agency.
Kenneth Kilgour, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee does not meet solicitation's definitive responsibility criterion for residential reentry center zoning approval is denied where record shows contracting officer reasonably determined awardee satisfied this criterion.

DECISION

Bannum, Inc., of Odessa, Florida, protests the Bureau of Prison's (BOP) award of a contract to Dismas Charities, Inc., of Louisville, Kentucky, under request for proposals (RFP) No. 200-1179-MA, for the operation of a residential reentry center (RRC) in West Virginia.¹ Bannum argues that the agency unreasonably waived a material solicitation requirement for Dismas.

We deny the protest.

¹ BOP provides certain federal offenders an opportunity to serve the final months of their sentences in residential reentry centers (RRC) in order to ease their reintegration into society. Rather than operate the RRCs itself, BOP typically procures RRC services from private contractors. Agency Report (AR) at 2.

BACKGROUND

The RFP provided for the award of a single fixed-price, indefinite-delivery/indefinite-quantity contract, with a base period of 1 year with four 1-year options, for the operation of an RRC providing services in Northern West Virginia. Award was to be made to the offeror whose proposal represented the best value to the government, considering the following evaluation areas (in descending order of importance): past performance; technical/management, including factors for site location, accountability, programs, facility and personnel; and price. RFP at 6, 31, and 36. Past performance and technical/management, when combined, were significantly more important than price. Id. at 36.

Relevant here, the solicitation provided that:

If not contained in the initial proposal, offerors shall provide the Contracting Officer with valid proof of all zoning and local ordinance requirements necessary for the operation of Residential Reentry Center . . . within 60 days after the date of initial proposal submission. . . . An offeror's failure to establish and maintain proof may result in elimination prior to award and termination for default following award.

RFP at 34.

Bannum and Dismas both submitted timely proposals on October 1, 2012. Contracting Officer's Statement of Facts (COSF) at 2. With respect to the zoning requirement, Dismas' proposal stated that its proposed property was currently zoned I-2, Heavy Industrial, which did not permit a residential use. See AR, Tab 9, Dismas Technical Proposal at 4. According to a letter from the City of Clarksburg's Code Enforcement Department to Dismas, which was included in Dismas' proposal, the City of Clarksburg's Codified Ordinances do not define or have a specific zoning classification for RRC's, but the Codified Ordinances would permit an RRC in parcels zoned I-1 (but not I-2). AR, Tab 9, Dismas Technical Proposal at 11, Letter from Clarksburg Code Enforcement Department to Dismas, Jan. 9, 2012. Dismas indicated in its proposal that it would seek to have the property rezoned I-1, Light Industrial, which would permit a residential use. AR, Tab 9, Dismas Technical Proposal, at 4.

On November 1, 2012, Dismas submitted its proof of zoning in the form of an email from the city clerk dated October 30, 2012, with an attached copy of an ordinance approving the change in zoning for Dismas' proposed property from I-2 to I-1.² AR,

² The ordinance amending the zoning map to rezone Dismas' proposed parcel was enacted by the City of Clarksburg Council, and signed by the city clerk, the city attorney, and the mayor. AR, Tab 10, Dismas' 60-Day Zoning Submission at 4. As the Source Selection Decision Document (SSDD) notes, a number of public
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Tab 10, Dismas' 60-day Zoning Submission, at 4. The CO determined that Dismas' submission met the proof of zoning requirements of the solicitation. See AR, Tab 52, SSDD at 27.

Bannum, as the incumbent contractor, proposed the renovation of its existing leased facility and the construction of another building on the same site. There is no dispute in the record that the protester's site was properly zoned.

Due to delays in the procurement process, including several rounds of discussions and an agency-level protest, the agency did not proceed to final source selection until the end of February 2015. Dismas' proposal was rated as blue/very good for both the past performance and technical/management areas, while Bannum's proposal was rated blue/very good for the past performance area and green/acceptable for the technical/management area. AR, Tab 52, SSDD, at 2-11, 17. In addition, Dismas submitted the lower price (\$5,983,417 versus \$6,513,342 for Bannum). COSF at 7. Dismas' proposal was found to represent the best value on the basis of its superiority for the non-price areas and lower price. Id. at 8. On March 30, 2015, the agency awarded the contract to Dismas. Upon learning of the award, Bannum timely filed this protest with our Office.

DISCUSSION

Bannum asserts that the agency improperly concluded that Dismas' proposal was eligible for award when Dismas' documentation that it had satisfied the solicitation's zoning requirement failed to include a subdivision plan for the awardee's proposed parcel. In this regard, Bannum asserts that Dismas was required to furnish, prior to award, notice of the approved subdivision of its proposed parcel in order to meet the solicitation proof of zoning requirement. Bannum concludes that since Dismas, even as late as the time of award, had not provided to the agency a subdivision approval, Dismas could not have satisfied the solicitation requirement that within 60 days of proposal submission the offeror provide the agency with proof of all zoning and local ordinance requirements necessary for the operation of a RRC. Protest at 2-3. BOP maintains that it reasonably considered the protester's proposal to be in conformance with the requirements of the solicitation, including the proof of zoning requirement. AR at 8.

Generally, evidence of compliance with zoning laws relates to the ability of the successful offeror to perform rather than to whether the offer is acceptable, and, therefore, is a matter of responsibility. See Western Alternative Corrections, Inc., B-409315, B-409315.2, Mar. 10, 2014, 2014 CPD ¶ 94 at 6-7; Public Facility

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hearings had been held to solicit public comment on the rezoning of Dismas' proposed property. See AR, Tab 52, SSDD at 27.

Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2, May, 4, 2005, 2005 CPD ¶ 170 at 1, 3. We have found zoning to be an aspect of an offeror's responsibility even where the solicitation expresses the requirement in terms of responsiveness or technical acceptability. Western Alternative Corrections, Inc., supra; TRS Design & Consulting Servs., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168 at 4. An agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.5(c); Public Facility Consortium I, LLC; JDL Castle Corp., supra, at 3. A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror's ability to perform a contract. Federal Acquisition Regulation § 9.104-2; Firma Hermann Leis, B-295956, B-295956.2, May 19, 2005, 2005 CPD ¶ 102 at 3; The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 3.

As discussed above, the solicitation here provided that "offerors shall provide the Contracting Officer with valid proof of all zoning and local ordinance requirements necessary for the operation of a Residential Reentry Center (RRC)." RFP at 34; see RFP at 201. In addition, the solicitation stated that, under the site location factor of the technical/management area, the agency would "consider[] the validity of the offeror's . . . zoning approval." RFP at 37; see RFP at 201. Finally, the solicitation cautioned that an "offeror's failure to establish . . . proof [of zoning approval] may result in elimination from the competitive range prior to award." RFP at 201. We construe these provisions to collectively constitute a definitive responsibility criterion rather than a general standard of responsibility. See Western Alternative Corrections, Inc., supra, at 7; The Mary Kathleen Collins Trust, supra, at 2.

Where an allegation is made that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting official reasonably could conclude that the criterion has been met; generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria since the agency must bear the burden of any difficulties experienced in obtaining the required performance. Western Alternative Corrections, Inc., supra, at 7; Firma Hermann Leis, supra. The relative quality of the evidence is a matter for the judgment of the contracting officer, as is the determination of the extent to which an investigation of such evidence may be required. Western Alternative Corrections, Inc., supra, at 7; Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39 at 5.

Here, the agency's conclusion that Dismas met the solicitation's proof of zoning requirement was based on a letter from the City of Clarksburg's Code Enforcement Department stating that the City of Clarksburg's Codified Ordinances would permit

an RRC in parcels zoned I-1, AR, Tab 9, Dismas Technical Proposal at 11, Letter from Clarksburg Code Enforcement Department to Dismas, Jan. 9, 2012; and an email from the City of Clarksburg city clerk with an attached copy of an ordinance approving the change in zoning for Dismas' proposed property from I-2 to I-1, AR, Tab 10, Dismas' 60-day Zoning Submission, at 4. COS at 2. Further, the record does not establish that, as alleged by the protester, the rezoning of Dismas' proposed parcel to I-1 would not be effective until the parcel was subdivided. Further, nothing in the transmittal of the ordinance amending the zoning map to rezone Dismas' proposed parcel, nor in the ordinance itself, indicated that the amendment, and therefore the rezoning, was in any way contingent, including contingent on any subdivision of the parcel.

We conclude that the agency reasonably relied on the documentation and assurances from the City of Clarksburg provided by Dismas that its proposed parcel had been properly rezoned such that an RRC could be located on it. In this regard, the determination of the correct zoning for a site is a matter for the local zoning authorities, and any questions regarding zoning are an issue to be resolved between the offeror and the zoning authorities. A.C. Bulls and Sons, Inc., B-239948, Oct. 12, 1990, 90-2 CPD ¶ 285 at 3. If Dismas does not comply with applicable local zoning laws, and, as a result of enforcement action by the cognizant authorities, Dismas chooses not to perform the contract or is enjoined from doing so, the contract may be properly terminated for default. Calian Tech. (US) Ltd., B-284814, May 22, 2000, 2000 CPD ¶ 85 at 10-11. On this record, we see no basis on which to question the reasonableness of the agency's determination that Dismas' proposal was eligible for award.³

The protest is denied.

Susan A. Poling
General Counsel

³ The protester also asserts that without subdivision approval, Dismas would be unable to obtain a building permit. Protest at 2-3. The RFP, however, did not require that offerors have a building permit. Moreover, the record indicates significant agency concern that Bannum itself would be unable to obtain a building permit. In this regard, BOP questioned whether parking could be added in the proposed location in compliance with the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157, and whether the City of Clarksburg was likely to approve Bannum's plans. See AR, Tab 2 at 4. While the contracting officer repeatedly asked Bannum for clarification in this regard in several discussion notices, see AR, Tabs 13, 19, 21, and 27, Discussion Notices 1, 3, 4, and 6, Bannum failed to address the agency's concerns. See COSF at 4-5.