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Decision

Matter of: Western Alternative Corrections, Inc.

File: B-412326

Date: January 19, 2016

Hal J. Perloff, Esq., and Thomas Rath, Esq., Husch Blackwell LLP, for the protester. Alex D. Tomaszczuk, Esq., and David B. Dixon, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Dismas Charities, Inc., the intervenor. William D. Robinson, Esq., and Nihar Vora, Esq., Department of Justice, Federal Bureau of Prisons, for the agency. Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably found the awardee's proposal technically acceptable is denied where record shows that agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Western Alternative Corrections, Inc. (WAC), of Hastings, Nebraska, protests the award of a contract by the Department of Justice, Federal Bureau of Prisons (BOP), to Dismas Charities, Inc. under request for proposals (RFP) No. RFP-200-1306-CS for Residential Reentry Center (RRC) services located in Western Nebraska. The protester argues that Dismas' proposal should have been rejected as unacceptable because it failed to provide certain information required by the solicitation, concerning valid proof of zoning, local area concerns, and an environmental checklist.

We deny the protest.

BACKGROUND

The solicitation here seeks to obtain RRC services for Western Nebraska. RRC contractors provide services, including employment and residence development, as well as other self-improvement opportunities, to assist federal offenders in becoming law-abiding citizens. Contracting Officer Statement (COS) (Nov. 9,

2015), at 1. Contractors are required to furnish all personnel, management, equipment, supplies, and services necessary to operate a RRC. Id. On April 29, 2013, the BOP issued solicitation No. RFP-200-1210-WS (the 2013 RFP) for the procurement of RRC services in Western Nebraska; WAC was the incumbent contractor for these services. Agency Report (AR) at 2. The 2013 RFP contemplated the award of an indefinite-delivery, indefinite-quantity, fixed-price requirements contract with a base period of 2 years and three 1-year options. On August 22, 2014, the agency made award to Dismas and a protest from WAC followed. Id. at 2. The agency advised our Office that it would take corrective action in response to the protest and we dismissed the protest as academic on September 18.¹ Id. In order to ensure continued RRC services during the corrective action, the agency awarded a contract to WAC to bridge the period from November 1, 2014, through October 31, 2015. Id.; COS (Nov. 9, 2015), at 1. The agency concluded that it would not complete the corrective action for the award under the 2013 RFP prior to the expiration of the first contract. The agency issued the RFP at issue here on July 13, 2015.

The RFP contemplated the issuance of a fixed-price, indefinite-delivery, requirements contract for a 4-month base period with four 2-month options. RFP at 34.² The solicitation provided that the proposals would be evaluated on the basis of three evaluation factors: (1) technical/management, (2) past performance, (3) and price. Id. at 39. The RFP provided that the technical/management factor was comprised of the following subfactors: (1) site location, (2) accountability, (3) programs, and (4) facility and personnel; the site location subfactor had two additional elements: (1) site validity and suitability, and (2) community relations program. Id. Firms were advised that the two non-price evaluation factors would be evaluated on a pass-fail basis, and that award would be made to the offeror that submitted the lowest-priced, technically acceptable proposal. Id. at 39.

The solicitation included a “compliance matrix” which provided proposal preparation instructions and evaluation criteria for each factor and subfactor. RFP at 196-203. To ensure that all factors and subfactors were addressed, the solicitation stated that offerors’ technical/management proposals would be evaluated as acceptable or unacceptable based on 22 items identified in a “lowest-price technically acceptable (LPTA) checklist,” which tracked the solicitation’s factors and subfactors. Id. at 37; 204-210. Of relevance to this protest, the site validity and suitability subfactor required that the offeror submit official documentation regarding zoning approval, “and, if applicable, an occupancy permit for their proposed site location.” Id. at 198. Offerors were also to submit the Local Area Concerns Within a Half-Mile Radius Attachment, that identified facilities whose proximity to the RRC might raise public

¹ See Western Alt. Corrections, Inc., B-410320, Sept. 18, 2014.

² Our citations refer to the Bates numbers within each tab of the agency report.

concerns. Id. The solicitation noted that there was no limitation regarding the number of entries concerning those establishments within the half-mile radius. Id. at 212.

The solicitation also required that offerors submit a business proposal that was to be separate from the technical/management proposal. RFP at 38. The business proposal was to provide a number of items including, of relevance to this protest, an environmental checklist, and was not to be rated or scored during the proposal evaluation. Id. at 40, 184.

The BOP received timely proposals from Dismas and WAC by the August 13 deadline. COS at 2. Both proposals received a rating of acceptable for all of the requirements for the technical/management and past performance factors. AR, Tab 17, Source Selection Decision, at 4, 7. The agency made award to Dismas because its proposed price of \$594,750, was lower than WAC's proposed price of \$750,300. Id. at 11. This protest to our Office followed.

DISCUSSION

WAC argues that Dismas' proposal should have been rejected as unacceptable because it failed to provide certain information required by the solicitation, concerning: (1) valid proof of zoning, (2) local area concerns, and (3) an environmental checklist.³ Protester's Comments (Nov. 20, 2015), at 2-3. For the reasons discussed below, we find no basis to sustain the protest.

In reviewing protests challenging an agency's evaluation of proposals, our Office does not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. A protester's disagreement with the agency's judgment, without more, does not establish that an evaluation was improper. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 19.

³ WAC also raises other collateral issues; although we do not discuss each issue, we have reviewed them all and find that none provides a basis to sustain the protest. In addition, the protester argued that Dismas' proposal failed to meet the requirements of the community relations element under the site location subfactor. Protest at 4-5. The agency addressed this issue in the agency report, AR at 5-6, but the protester did not respond. Thus, we find that WAC abandoned this issue. IntelliDyne, LLC, B-409107 et al., Jan. 16, 2014, 2014 CPD ¶ 34 at 3 n.3. Additionally, the protester withdrew an allegation regarding Dismas' failure to be registered in the System for Award Management. WAC Response to Request for Summary Dismissal (Nov. 3, 2015), at 2 n.1.

Valid Proof of Zoning

First, WAC argues that the BOP unreasonably concluded that Dismas met the solicitation's requirement to demonstrate that the building it proposed in Kearney, Nebraska met local zoning regulations. WAC argues that Dismas "has not and cannot" provide the agency with evidence of zoning approval as required by the solicitation, because, the protester contends, Dismas has not complied with the January 2014 version of the applicable Kearney zoning ordinances. Protest at 8. We find no merit to this argument.

Generally, evidence of compliance with zoning laws is a matter of responsibility relating to the ability of the successful offeror to perform, rather than a proposal's technical acceptability. See Bannum, Inc., B-407079.2, B-407079.3, July 14, 2015, 2015 CPD ¶ 235 at 3-4; SDA, Inc.--Recon., B-249386.2, Aug. 26, 1992, 92-2 CPD ¶ 128 at 2-3. 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., B-295911, B-295911.2, May 4, 2005, 2005 CPD ¶ 170 at 3; SDA, Inc.--Recon., supra, at 2. 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. 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 "offeror[s] shall submit official documentation that demonstrates they have . . . zoning approval . . . for their proposed site location." RFP at 198. Additionally, the solicitation stated that the agency would evaluate the "validity" of the offeror's zoning approval. Id. Finally, the solicitation cautioned that an "offeror's failure to provide documentation demonstrating . . . valid proof of zoning [would] render the offeror's entire proposal unacceptable." Id. We construe these provisions to collectively constitute a definitive criterion rather than a general standard of responsibility.

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. Firma Hermann Leis, supra; Carter Chevrolet Agency, Inc., B-270962, B-270962.2, May 1, 1996, 96-1 CPD ¶ 210 at 4. 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. Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39 at 5.

As stated above the technical/management evaluation factor included a site location subfactor, under which the solicitation also identified an element: site validity and suitability. The site validity and suitability element was included in the compliance matrix, along with all of the other factors and subfactors, and was to be evaluated by the agency as either acceptable or unacceptable. RFP at 205. The compliance matrix required that offerors “submit official documentation” of “zoning approval and, if applicable, an occupancy permit for their proposed site location.” Id. at 198.

Dismas in its proposal explains the following about the zoning of its proposed property:

Our existing site at 401 Central Avenue, Kearney, Buffalo County, Nebraska 68847 is in the jurisdiction of the City of Kearney and is zoned *Commercial*, specifically *C-3 General Commercial District*. In 2013 under the City’s Zoning Ordinance, an RRC was considered a *Group Care Facility* which was a defined use type allowed by right in all *Commercial* zoning districts. In December 2013, Dismas obtained a construction permit under these zoning requirements. In January 2014, the City of Kearney adopted a new zoning code; however since Dismas obtained a construction permit under the 2013 zoning requirements, our rights to construct and operate the RRC under those requirements were properly vested. In August 2014, we purchased the site and in early September began construction under our still-valid construction permit. Dismas completed construction of Dismas Charities Kearney in the spring of 2015 and received the final *Certificate of Occupancy* in May 2015. The Certificate of Occupancy documents our right to occupy and operate DCK as an RRC.

AR, Tab 7, Dismas’ Technical/Management Proposal, at 4 (emphasis in original).

In support of Dismas’ representations concerning its zoning approvals, its proposal included a copy of a letter dated June 5, 2013, from the Kearney City Planner that addressed the “current zoning ordinance in force and effect” in Kearney, known as the Unified Land Development Ordinance (ULDO). The letter stated that the City Planner had researched the most appropriate “Use Type” as defined in Chapter 13 of the ULDO, for a typical facility offering Federal Release Re-Entry Programs. AR, Tab 7, Dismas’ Technical/Management Proposal, at 7. As relevant to this protest, the letter stated that a Group Care Facility was allowed “by right” in the C-3 General Commercial Zoning District. Id. at 8.

The Kearney City Planner’s letter closed with the following paragraph:

As Staff discussed with your associate, [], we are in the midst of an ongoing amendment process that will affect many sections of the ULDO, including the information presented in this letter. However, the anticipated date that the amendments will become effective is estimated to be January 1, 2014 or later and is subject to change by City Counsel. Given the aggressive time frame [Dismas] discussed with Staff for the Kearney Area RFP, the current code provisions, as detailed in this letter, will be the regulations in place if the contract is awarded to [Dismas] this summer.

Id.

Dismas also submitted with its proposal a copy of a certificate of occupancy dated May 13, 2015, from the City of Kearney Department of Building Inspection. Id. at 6. This document identifies the address of the property and states that the “Use Zone” is “C-3.” Id. This document included the following in bold type:

Warning: The issuance of this Certificate is for the sole purpose of enabling the applicant/builder to comply with the requirements of Section R110 of the IRC [International Residential Code]. Issuance of this Certificate shall not be construed as an approval of violations of the IRC or any other ordinances of the City. The City of Kearney hereby disclaims any warranty of any type concerning compliance with codes or ordinances and affirmatively cautions the public that code violations may exist in the building(s) for which this certificate was issued.

Id.

The BOP reviewed Dismas’ proposal, and concluded that it provided adequate evidence of zoning approvals, as follows:

Dismas submitted a letter dated June 5, 2013 from the Kearney City Planner which identified their zoning classification and verified their zoning approval and a Certificate of Occupancy dated May 13, 2015. Specifically, the letter stated that a Residential Reentry Center (RRC) is considered a Group Care Facility which is allowed in all Commercially Zoned Districts, which is the classification of the location in which the proposed facility is zoned. This documentation is acceptable.

AR, Tab 17, Source Selection Decision, at 1 (emphasis in original).

In response to the protest, the BOP argues that its review of Dismas proposal was reasonable. As explained above, Dismas first obtained on June 5, 2013, a “Zoning Interpretation” from the Kearney City Planner, which stated that the city considered

the “Use Type” of Dismas’ proposed RRC facility to be a “Group Care Facility,” which is allowed “by right” in Zoning District C-3, among other commercial districts. AR, Tab 7, Dismas’ Technical/Management Proposal, at 7-9. In December 2013, Dismas obtained a construction permit from Kearney. Id. at 4. The contracting officer states that Dismas’ action, in obtaining a construction permit before award was made, was “not uncommon and provides a reasonable explanation and support for why its property would be controlled by the 2013 [zoning] regulations.” Supp. COS (Dec. 30, 2015), at 2. After Dismas completed construction of its proposed RRC facility, on May 13, 2015, the City of Kearney issued a certificate of occupancy, verifying that the facility was properly located within “Use Zone: District C-3.” AR, Tab 7, Dismas’ Technical/Management Proposal, at 6.

WAC first argues that Dismas’ proposal should have been rejected as unacceptable because the awardee does not have current zoning approval for its proposed site in Kearney. Protest at 7-8. WAC also contends that, under the 2014 revisions to the City of Kearney ULDO, Dismas’ proposed RRC site constitutes a “nonconforming use” and was subject to additional levels of review by the City of Kearney in order to acquire zoning approval. Protester’s Comments (Nov. 20, 2015), at 6-8. For these reasons, the protester argues that the BOP could not have reasonably relied on the 2013 letter or the 2015 certificate of occupancy issued by Kearney.

In support of its argument, WAC notes that the City of Kearney revised its ULDO in 2014, and contends that these revisions state that prior conforming uses that become non-conforming as a result of the 2014 zoning code changes are considered non-conforming. Protester’s Comments (Nov. 20, 2015), at 6 (citing ULDO § 12-117(E)). The protester further notes that the ULDO requires that non-conforming uses must be approved by the city council following public meetings. Protester’s Comments (Nov. 20, 2015), at 7 (citing ULDO § 58-105(A)(2)). The protester argues, therefore, that the awardee’s proposed RRC could not have been found to meet the solicitation’s proof-of-zoning requirements, as the awardee had not obtained approval from the City of Kearney as a result of city council meetings and public hearings.

The protester does not demonstrate, however, that the 2014 ULDO revisions revoked all prior zoning approvals. Instead, the ULDO provisions cited by the protester appear to set specific requirements for approval of properties that have become non-conforming as a result of changes (either in the ULDO or the property itself). In the absence of a specific citation to the 2014 code that renders all prior zoning approvals invalid and requires submission of new approvals, or a specific change that affected Dismas’ proposed RRC, we find no basis to conclude that the agency unreasonably relied on the 2013 letter and 2015 certificate of occupancy provided in the awardee’s proposal.

Next, WAC contends that the BOP unreasonably relied on Dismas’ certificate of occupancy as a basis to conclude that the awardee provided an acceptable

proof-of-zoning document. The compliance matrix, which included the evaluation criteria for each evaluation factor and subfactor, required offerors to provide an occupancy permit for the site validity and suitability element of the site location subfactor. RFP at 198. The agency states that the contracting officer reasonably relied on this document because the Kearney ULDO defines a certificate of occupancy as:

An official certificate issued by the Building Official, or his/her designee, prior to occupancy of a completed building or structure, upon [a] finding of conformance with the applicable building code and this Unified Land Development Ordinance.

ULDO § 12-106(D). For this reason, the agency concluded that the ULDO itself confirms that a certificate of occupancy constitutes valid proof of zoning. Supp. AR (Dec. 30, 2015) at 8-9; Supp. COS (Dec. 30, 2015) at 2.

WAC argues that the agency could not rely on the certificate as evidence of Dismas' compliance with the proof-of-zoning requirement because of qualifying language within that document. As discussed above, the certificate states as follows: "The City of Kearney hereby disclaims any warranty of any type concerning compliance with codes or ordinances and affirmatively cautions the public that code violations may exist in the building(s) for which this certificate was issued." AR, Tab 7, Dismas' Technical Proposal, at 6.

As discussed above, however, the protester does not demonstrate that the 2014 revisions revoked or invalidated the zoning approvals for the awardee. For this reason, we also conclude that the certificate of occupancy letter's disclaimer that the issuance of the certificate is not a statement of compliance with applicable Kearney ULDO provisions does not demonstrate that the agency unreasonably relied on the certificate to conclude that Dismas met the solicitation's proof-of-zoning requirements. Instead, as discussed above, we conclude that the agency reasonably relied on both the 2013 letter concerning Dismas' zoning approval, as well as the certificate of occupancy. On this record, we find no basis to sustain the protest.

Local Area Concerns

Next, WAC argues that Dismas disclosed some but not all possible "Local Area Concerns" located within a half-mile radius of its proposed facility, whose proximity to the RRC might raise public concerns, as required by the solicitation. Protester's Comments (Nov. 20, 2015), at 10-11. Specifically, the protester contends that Dismas in its proposal failed to acknowledge "a juvenile day reporting center, Kearney Cinema 8 theaters, and numerous apartments and single-family homes," that were located within a half-mile radius of its proposed facility. *Id.* at 11. For the reasons discussed below, we find no merit to this argument.

The solicitation's proposal instructions for the Site Validity and Suitability subfactor requires offerors to "complete and submit the Local Area Concerns Within a Half-Mile Radius Attachment, identifying facilities whose closeness to the RRC may raise public concern," and "[f]or those public concerns identified, include your approach for mediating any potential community impacts in the space provided." RFP at 198. The contracting officer states that after reviewing the attachment submitted by Dismas, she determined that the proposal met the acceptability standard under the site validity and suitability subfactor. RFP at 198; COS (Nov. 9, 2015), at 2-3.

WAC's initial protest argued that Dismas' proposal likely did not identify six potential local area concerns: (1) an Early Head Start daycare center, (2) a Juvenile Day Reporting Center, (3) the Big Apple Kearney Fun Center, (4) the Fort Kearney Museum, (5) Kearney Cinema 8 Theaters, and (6) private residences. Protest at 4. The record shows, however, that Dismas provided the required Local Area Concerns attachment in its proposal, and that this document specifically identified [DELETED] potential local area concerns, [DELETED] of which are listed above, as well as the [DELETED]. AR, Tab 7, Dismas' Technical/Management Proposal, at 13. In its comments on the agency report, WAC argued that although Dismas' list of local area concerns identified three of the concerns cited in its protest, the attachment was incomplete because it did not identify the remaining three items which the protester contends should have been considered concerns: "a juvenile day reporting center, Kearney Cinema 8 theaters, and numerous apartments and single-family homes." Protester's Comments (Nov. 20, 2015), at 10-11.

To the extent the protester contends that the awardee's proposal was unacceptable because its attachment did not identify the remaining three items, we find no basis to sustain the protest. In this regard, the intervenor argues, and we agree, that the alleged concerns cited by WAC were either not specifically identified in the protest, or were not clearly required to be identified by the terms of the attachment instructions.

First, with regard to the "Juvenile Day Reporting Center," neither the protest nor the protester's comments specifically identify the name or location of this alleged facility. Next, with regard to the Kearney Cinema 8 Theaters, the protester does not demonstrate that this was an establishment that was required to be identified in the attachment, as that document required identification of "facilities whose closeness to the RRC might possibly raise public concern, including, but not limited to, schools, day-care centers, historical landmarks, and other residential facilities." RFP at 212. The protester does not demonstrate that a movie theater is required to be identified. Finally, with regard to the alleged "numerous apartments and single-family homes," the protester does not specifically identify these properties. Additionally, it is not clear that offerors were required to identify private residences, as the Local Area Concerns attachment specified that offerors were to identify the

“Business Name & Address” of the facilities that could pose a concern. See RFP at 212. On this record, we conclude that the protester does not clearly demonstrate that the alleged omissions in the awardee’s Local Area Concerns attachment rendered its proposal unacceptable.⁴

Environmental Checklist

Finally, WAC argues that BOP should have rejected Dismas’ proposal as unacceptable because it did not provide supporting documentation of zoning required by the solicitation’s environmental checklist, specifically “copies of applicable zoning provisions.” Protester’s Supp. Comments (Nov. 20, 2015), at 2. We find no merit to this argument.

The solicitation stated that the environmental checklist was to be submitted as part of an offeror’s business/price proposal, which “must be entirely separate from the Technical/Management Proposal.” RFP at 38. The RFP provided that the business/price proposal, including the environmental checklist, “will not be rated or scored” during the proposal evaluation. Id. at 40. The BOP argues, therefore, that the environmental checklist was not part of the technical evaluation, and that failure to comply with the requirements of the checklist does not provide a basis to find a proposal unacceptable under the pass/fail criteria established for the technical/management factor.⁵ See AR at 6; RFP at 183. We agree with the agency that the checklist was not part of the technical/management factor evaluation, and that the protester does not demonstrate that noncompliance with the requirements of the checklist rendered the awardee’s proposal unacceptable.

In any event, even if the environmental checklist were part of the technical acceptability criteria for the solicitation, Dismas provided the narrative description

⁴ In any event, we note for the record that WAC’s Local Area Concerns attachment for its proposed property at 101 South Hastings Ave, Hastings, NE 68901, did not disclose that the property is within 0.5 miles of the Rivoli Movie Theatre at 528 West 2nd Street, Hastings, NE 68901. Additionally, the protester’s list did not disclose that, according to Google Maps, the property is within 0.5 miles of single family homes. Thus, to the extent WAC contends that such disclosures were required in offerors’ Local Area Concerns attachments, it appears that the protester’s proposal did not identify them, either. See AR, Tab 10, WAC’s Technical/Management Proposal, at 26.

⁵ To the extent that WAC believed that the environmental checklist should have been included in the criteria for the technical evaluation, this is essentially an untimely challenge to the terms of the solicitation. In this regard, protests based on alleged improprieties in a solicitation must be filed prior to the closing date for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1).

required and identified the applicable codes. AR, Tab 8, Dismas' Business Proposal, at 14. To the extent the protester argues that the codes identified did not demonstrate that the proposed property had the proper zoning approvals, we addressed this issue above, and conclude that the agency reasonably found that the awardee identified the appropriate local zoning provisions. See AR at 6.

To the extent WAC argues that Dismas' failure to attach a "copy" of the zoning provisions identified in its proposal should have rendered the proposal unacceptable, the protester does not demonstrate how this failure could have been a prejudicial error. In this regard, the protester does not demonstrate that, even if the agency's evaluation of Dismas' proposal constituted a waiver of the requirement to submit a copy of the zoning provisions, the protester was prejudiced by this action, i.e., that the protester would have submitted a different proposal or that it could have done something else to improve its chances for award had it known that the agency would waive the requirement. See Orion Tech., Inc., Chenega Integrated Mission Support, LLC, B-406769 et al., Aug. 22, 2012, 2012 CPD ¶ 268 at 7-8. We therefore find no basis to sustain WAC's protest.

The protest is denied.

Susan A. Poling
General Counsel