



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Bannum, Inc.  
**File:** B-249758  
**Date:** November 24, 1992

James G. Campbell, Esq., Ogden, Newell & Welch, for the protester.  
Mina Mazaheri Raskin, Esq., Federal Bureau of Prisons, Department of Justice, for the agency.  
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Award to a higher-priced, technically superior offeror under request for proposals which gave greater weight to technical merit is justified where the agency reasonably determined that awardee's proposal was worth the higher price, and where selection decision was reasonably based and consistent with solicitation's evaluation scheme.
2. Contracting agency's failure to award contracts to the protester under separate solicitations associated with procurements for similar services does not constitute de facto suspension or debarment where the record shows that agency did not determine that the protester is nonresponsive; rather, the agency's award decisions were each properly based upon a reasonable evaluation which found the protester's proposals technically inferior.

### DECISION

Bannum, Inc. protests the award of a contract to Keeton Corrections, Inc. by the Federal Bureau of Prisons (BOP), Department of Justice, under request for proposals (RFP) No. 200-074-SE for residential community correction services in Pensacola, Florida. Bannum challenges the evaluation of its proposal.

We deny the protest.

### BACKGROUND

The RFP, issued October 24, 1991, requested offers on a firm, fixed-unit-price basis for estimated requirements, for a 2-year base period and three 1-year options. The

statement of work (SOW) required offerors to furnish the necessary facilities, equipment and personnel to provide for the safekeeping and program needs of federal offenders residing at a Pensacola, Florida, facility to be furnished by the contractor, known as a halfway house.

Section M.5 of the RFP listed the following evaluation criteria, in descending order of importance, which the agency would consider in evaluating proposals: technical excellence, qualifications and experience, past performance, and accreditation. As for price, the RFP provided that the lowest price offered would receive the highest point score and that each higher price would be given a decreasing percentage of the total possible points. Technical factors comprised 85 percent of the evaluation weight and price 15 percent. Award was to be made to the offeror whose proposal, conforming to the solicitation, was determined to be in the best interest of the government.

Of the 17 firms solicited, three firms, including Bannum and Keeton, submitted initial proposals. The agency evaluated initial proposals based upon the RFP's evaluation criteria. Through two separate sets of "clarifications and discussion" questions which pointed out deficiencies in the offerors' proposals, the agency held discussions and requested best and final offers (BAFO) from all three. BAFOs were evaluated and ranked under each of the five evaluation criteria. Since the agency evaluated three proposals, the highest rank of three was assigned to the best response on each criterion. The rank obtained on each criterion was then multiplied by a predetermined weight for that criterion to arrive at a final score. The resulting ranking and scoring on each criterion of Keeton's and Bannum's proposals was as follows:

	Percent Weight/ Available Points	Keeton Rank/score	Bannum Rank/score
<b><u>Technical</u></b>			
Technical Excellence	30/90	3/90	1/30
Qualifications/ Experience	20/60	2/40	3/60
Facility/Location	15/45	2/30	2/30
Past Performance	15/45	3/45	3/45
Accreditation	5/15	1/5	3/15
Subtotal Technical	255	210	180
<b><u>Price</u></b>	15	15	15
Total Score	270	225	195

The source selection official recognized that although Bannum submitted the lowest unit price,<sup>1</sup> Keeton's proposal was the highest rated in the technical area. The contracting officer determined that based upon its technically superior proposal, award to Keeton was in the best interest of the government and awarded the contract to that firm. This protest to our Office followed.<sup>2</sup>

#### PROTESTER'S CONTENTIONS

Bannum challenges the evaluation of its proposal, arguing that had the agency followed the evaluation criteria listed in the RFP, Bannum's proposal would have been selected as the most advantageous to the government. The protester also argues that BOP has improperly subjected Bannum to a de facto debarment.

#### DISCUSSION

Of the five technical evaluation criteria, Bannum's proposal received the lowest ranking/score (1/30) under the "technical excellence" criterion, worth a maximum of 90 points. The record shows that the initial evaluation of proposals, conducted by a regional panel of evaluators, revealed nine major areas of deficiencies under this criterion. For instance, that panel found that although the RFP required offerors to provide evidence that they had liability and property insurance, Bannum failed to provide such documentation. The initial evaluation also revealed that the protester did not specify the number of beds Bannum's facility had available; did not specify the number of staff that it would have present during strip searches; failed to address certain aspects of the Convict Labor Act (concerning the employment of residents) applicable to the contract; failed to identify the laboratory Bannum would use in connection with substance abuse testing as required by the RFP; did not address the number of urine tests that would be administered to residents; and failed to provide a plan for accessibility to the facility by physically handicapped individuals. Bannum's proposed substance abuse counselor

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<sup>1</sup>Bannum offered the lowest unit prices of \$39.95/manday for the base period, and \$40.95, \$41.95, and \$42.95 for each option period. Keeton offered the next low unit price of \$43/manday for the base and option periods.

<sup>2</sup>Pursuant to Federal Acquisition Regulation (FAR) § 33.104(c)(2)(ii), the head of the contracting activity determined that urgent and compelling circumstances that significantly affect the interests of the United States would not permit awaiting our decision and authorized contract performance notwithstanding the protest.

did not meet the RFP's minimum educational requirements. In addition, the regional evaluators identified various deficiencies related to Bannum's proposed food service program that needed further clarification.

The results of the regional evaluation, along with all three proposals, were forwarded to the agency's central office for further evaluation, which found additional deficiencies with Bannum's proposal. For example, the agency found that Bannum failed to submit a required 24-hour emergency medical care agreement, and failed to submit documentation (1) showing that the community where Bannum's facility would be located had been advised of the proposed program, and (2) whether any public opposition existed to locating the facility in the community.

Bannum's proposal was ranked second (2/30) under facility/location. On January 9, 1992, BOP conducted a preliminary site inspection of the facility Bannum proposed, finding several deficiencies related to the health and safety of the residents. These included a lack of proof of fire retardancy for bedding, pillows, curtains and furniture; lack of adequate individual closet space; lack of an adequate smoke detector system; and several other deficiencies related to poor lighting and inadequate space.

The agency pointed out these deficiencies to Bannum through discussion questions, affording the protester two separate opportunities to respond to the agency's concerns with respect to Bannum's technical proposal and its proposed facility. BOP concluded, however, that Bannum's responses were insufficient to cure the deficiencies noted in its proposal.

The evaluation of technical proposals is the function of the contracting agency; our review of an allegedly improper evaluation is limited to determining whether the evaluation was reasonable and consistent with the stated criteria. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454. Mere disagreement with the agency's evaluation does not render the evaluation unreasonable. Id. We will uphold award to offerors with higher technical scores and higher prices so long as the results are consistent with the evaluation criteria and the contracting agency reasonably determines the cost premium involved was justified considering the technical superiority of the awardee's proposal. See Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364. Here, we find that the record supports BOP's evaluation of Bannum's proposal and the award decision.

Although Bannum was afforded two opportunities to cure the deficiencies noted with its proposal, and in fact did respond to several of those deficiencies, the protester's

responses were insufficient to overcome the agency's concerns regarding Bannum's proposal, including the adequacy of the proposed facility. For example, the record shows that Bannum failed to address the Convict Labor Act provisions applicable to the contract; failed to provide a signed 24-hour emergency medical care agreement; and failed to provide evidence that its proposed facility would be accessible to physically handicapped individuals--all of which were deficiencies specifically pointed out to Bannum during discussions. In response to the agency's concern over the lack of documentation evidencing liability and property insurance, the protester merely submitted a copy of what appears to be a letter to its insurance broker requesting a refund due to the closing of another program previously run by Bannum.

In response to the agency's concern over the lack of evidence of fire retardant bedding materials--a deficiency noted with Bannum's proposed facility--the protester simply provided what appears to be a photocopy of advertisements for "vinyl-covered" pillows and "flame-resistant" mattresses; attached to the advertisements Bannum provided what appears to be an invoice for approximately six mattresses, six polyester pillows, and six beds sold to Bannum and shipped to another facility in Fayetteville, North Carolina. BOP considered the protester's responses to the clarification and discussion questions to be inadequate and insufficient to affect Bannum's initial ranking/score under the technical excellence and facility criteria.

Despite repeated opportunities to respond to the agency's specific concerns, Bannum failed to address several deficiencies in its proposal; where the protester did respond, Bannum's answers did not overcome BOP's concerns related to the technical excellence and facility criteria. In view of the RFP's specific requirements and the agency's discussion questions pointing out the weaknesses in those areas, and since Bannum simply failed to cure the deficiencies noted in its proposal, we find that the agency reasonably downgraded Bannum with respect to technical excellence and facility and location.

The protester asserts that BOP applied different standards in evaluating Bannum's and Keeton's proposals. For example, Bannum argues that BOP ranked Keeton's proposal higher in the technical excellence area despite missing pages in the awardee's proposal, and despite BOP's raising approximately the same number of deficiencies in the protester's and the awardee's proposals. Bannum also argues that it should have been rated higher in the facility/location criterion because it submitted 27 letters indicating no opposition from the community where its facility would be located, while the awardee submitted only 3 such letters.

The evaluation results reveal no evidence that Bannum was treated differently from Keeton, nor is there any evidence that BOP was biased in evaluating proposals. The agency states that in order to enhance the impartial evaluation of technical proposals, BOP has established a policy requiring competitive proposals to be evaluated by a BOP panel without direct authority over the intended performance location. The record here shows that BOP followed its policy by conducting separate evaluations of proposals at the regional as well as at the central office level. The record here does not support the protester's arguments that those evaluations were biased or inconsistent with the RFP's evaluation criteria.

Regarding the alleged "missing pages," the record shows that two of the regional evaluators noted that page No. 54 of Keeton's proposal, addressing procedures for expunging certain materials from an inmate's records, and concerning inmates' appeal rights, was missing. We think that the evaluators reasonably found this apparent administrative error--which primarily consisted of two paragraphs explaining Keeton's procedures--to be only a minor oversight easily corrected when Keeton provided BOP with the page containing the relevant information during discussions.

Although BOP initially found approximately the same number of deficiencies with Bannum's and Keeton's proposals, the deficiencies in the two proposals differed markedly with respect to type. For instance, while the deficiencies noted with Bannum's proposal reflected the firm's understanding of the RFP's SOW, with a direct impact on how Bannum intended to implement various aspects of the proposed program (most notably, drug tests, substance abuse counseling, number of beds available in the facility, food services, and strip searches), the weaknesses initially noted in Keeton's proposal were primarily administrative in nature (missing page, and proof of legal status). Keeton's clerical errors were corrected during discussions, and by comparison to Bannum's more serious deficiencies potentially affecting program performance, BOP reasonably rated the awardee's proposal higher under the technical excellence criterion.

As for letters from the community, the RFP required offerors to provide documentation indicating that the community where the facility would be located had been advised of the program. The RFP did not require any specific number of letters, but simply some documentation indicating that potential neighbors had been notified and supported the offeror's intent to locate and operate a halfway house in that community. Since the RFP did not require offerors to submit a specific number of letters, the fact that Bannum submitted more letters than did Keeton does not show that the evaluation of Bannum's proposal was unreasonable. This

is particularly so since the requirement for documentation of community support was only one of several requirements related to the offerors' proposed facility and location, and the record shows that Bannum failed to allay BOP's central concerns related to its proposed facility.<sup>1</sup>

While BOP's evaluation of BAFOs and the offerors' responses to the agency's discussion questions could have been better documented, in particular with respect to the agency's final evaluation of proposals under the technical excellence criterion, the record does not support Bannum's contention that it was treated unfairly. Bannum points to inconsistencies in supplemental memoranda that BOP submitted to our Office explaining the apparent lack of documentation regarding the agency's final evaluation of proposals under the technical excellence criterion. The first memorandum states that "Bannum was rated second highest," under technical excellence, while the second memorandum states that Bannum was rated "the lowest" on that factor. The agency explains that the inconsistency was an inadvertent clerical error. The agency's explanation notwithstanding, the second memorandum accurately reflects the results of the evaluation which is supported by the evaluation documents already in the record. The results of the evaluation, which included the evaluators' individual comments regarding strengths and weakness in the proposals, were adequate to give the contracting officer an understanding of the relative merits of proposals. The protester's mere disagreement with the evaluation and with BOP's ultimate conclusion that Keeton's proposal was technically superior does not establish that the evaluation was unreasonable. See Transportation Research Corp., B-231914, Sept. 27, 1988, 88-2 CPD ¶ 290.

#### De Facto Debarment

The protester also contends that BOP has de facto debarred Bannum from competing in government contracts. Bannum alleges that approximately 2 years ago, a BOP employee

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<sup>1</sup>The protester also asserts that due to public opposition to the location of the awardee's facility, Keeton has been unable to commence contract performance, showing that the evaluation of proposals with respect to facility/location was flawed. The record shows, however, that BOP reasonably evaluated proposals based on the information offerors submitted with their proposals, and in response to the agency's discussion questions. The fact that Keeton may not be able to timely provide the facility after award is a matter of contract administration which we do not review. 4 C.F.R. § 21.3(m)(1); see Bannum, Inc., B-248169.2, Sept. 29, 1992, 92-2 CPD ¶ 216.

stated while conducting a program audit of one of Bannum's facilities that "[she] will do [her] best to see that [Bannum's] contracts in the Southeast are closed down," and that she and her supervisor were "tired of [Bannum's] rhetoric," and that she was going to "nail [Bannum] to the wall." According to the protester, those remarks, coupled with the fact that BOP did not award Bannum this contract or another contract under a recent solicitation for similar services, evidence that BOP procurement officials are biased against Bannum and have de facto debarred or suspended the firm from competing in government contracts, without regard to the procedural due process rights afforded under FAR subpart 9.4.

A contracting agency may not exclude a firm from contracting with it without following the procedures for suspension or debarment by making repeated, or even a single, determination of nonresponsibility, if it is part of a long-term disqualification attempt. Deloitte Haskins & Sells; B-222747, July 24, 1986, 86-2 CPD ¶ 107. Where a protester alleges bias on the part of procurement officials, the protester must prove that the officials intended to harm the protester. Advanced Sys. Tech., Inc.; Eng'g and Prof. Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153. In the absence of such proof, contracting officials are presumed to act in good faith. Institute of Mod. Procs., Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93.


Rather than finding Bannum nonresponsible with respect to the procurements the protester describes, BOP evaluated Bannum's proposals in accordance with the criteria announced in the RFP and found Bannum's proposal deficient. Contrary to the protester's contentions, therefore, the agency's decision to not award contracts to Bannum was reasonably based on the agency's conclusion that, in each case, the protester's proposal was technically inferior to the awardee's. Bannum is not precluded from correcting its deficiencies and competing in future procurements. See, e.g., Clyde G. Steagall, Inc., d/b/a Mid Valley Elec., B-237184 et al., Jan. 10, 1990, 90-1 CPD ¶ 43.

Additionally, the BOP employee alleged to have criticized Bannum was not involved in any aspect of this procurement. Nor does she have debarment authority or "control" over the evaluation and award process, as the protester suggests. The agency has further informed us that no steps have been taken to debar the protester, and Bannum has not been excluded from competing for other contracts with BOP, or with any other government agency. In fact, BOP recently awarded Bannum contracts for similar services in Clarksburg, West Virginia, and in Fayetteville, North Carolina, which



belies Bannum's assertion of a de facto debarment.<sup>4</sup> While the remarks allegedly made about Bannum over 2 years ago, would have been inappropriate and reflect a lack of judgment, the loss of a contract such as this one, particularly where the protester was afforded several opportunities to cure deficiencies in its proposal, simply does not demonstrate an intent to harm Bannum nor constitute evidence of a de facto debarment.

The protest is denied.

  
for James F. Hinchman  
General Counsel

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<sup>4</sup>The fact that the agency challenged Bannum's small business size status and initially rejected Bannum as nonresponsible with respect to one of these contracts does not constitute evidence of a de facto debarment or suspension where the business size challenge and the nonresponsibility determination were each subject to the Small Business Administration's authority to conclusively determine Bannum's business size and responsibility. See, e.g., Pittman Mechanical Contractors, Inc., B-242499, May 6, 1991, 91-1 CPD ¶ 439.