



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Dismas Charities, Inc.

File: B-284754

Date: May 22, 2000

Alex D. Tomaszczuk, Esq., Dennis E. Pryba, II, Esq., Shaw Pittman, for the protester. Christine S. Trafford, Esq., and Joseph Summerill, Esq., Bureau of Prisons, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's proposal was reasonably eliminated from competitive range where protester failed to provide valid proof of compliance with zoning requirements by the date of submission of its best and final offer, as required by the solicitation.

DECISION

Dismas Charities, Inc., protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. 200-0499-W, issued by the Bureau of Prisons, Department of Justice for a residential community sanctions center (CSC) and mothers with infants together (MINT) program services facility in Phoenix, Arizona. Dismas contends that the agency had no valid basis for eliminating the Dismas proposal and failed to conduct meaningful discussions with the protester.

We deny the protest.

The BOP contracts with state and local governments and private organizations to provide a variety of services to federal offenders in the community through CSC facilities. These services are designed to assist offenders in becoming law-abiding, self-sufficient, contributing members of the community. RFP § C.I.B. The MINT program's participants are pregnant offenders who ordinarily spend 2 months before and 3 months after delivery in a "home-like" setting in order to promote maternal bonding and parenting skills. Amended RFP § C.II.23. Offerors were required to furnish the necessary facilities, equipment and personnel to provide for the

safekeeping, care, and program needs of persons residing in the CSC and MINT programs, to be provided in the downtown Phoenix area. RFP § C.I.D.

With regard to location of a proposed center, offerors were required to submit proof of zoning compliance. The RFP provided:

By the submission date for Best and Final Offers [BAFO], offerors shall provide the Contracting Officer with valid proof of all zoning and local ordinance requirements necessary for the operation of Community Corrections Center, Community Sanction Center, or any other program as specified in the Statement of Work applicable to any and all proposed performance sites have been met. An offeror's failure to establish and maintain proof may result in elimination from the competitive range prior to award and termination for default following award.

RFP § L.8.i.

Two offerors, Dismas, and the incumbent, Behavioral Systems Southwest, Inc., (BSSW) submitted offers by the August 10, 1999 closing date for receipt of proposals. Dismas's proposed facility is located in a commercial area, zoned "C-1." In order to satisfy the RFP requirements that it establish proof of its zoning compliance, Dismas submitted a letter, signed by a City of Phoenix Zoning Administrator, confirming that if Dismas's proposed facility met the definition of "recovery home" and otherwise operated as represented to the administrator, then the facility could be located "by right" in a C-1 area. Protest Tab 1, Letter from Zoning Administrator to Protester (July 12, 1999). On or about November 1, Dismas learned that the administrator had taken the position that Dismas could not operate the facility as planned because it did not qualify as a "recovery home." Protest at 6. Later in November, the agency conducted discussions with Dismas and BSSW and both offerors submitted additional information as requested. The agency did not question the sufficiency of Dismas's proof of zoning compliance during this period. On December 23, Dismas appealed the zoning administrator's decision to the Board of Adjustment.

On December 21, the agency requested BAFOs from both offerors, to be submitted not later than December 31. BSSW submitted its final proposal by December 31. Dismas indicates that it did not receive the agency's written request for BAFOs, but after an oral request by the contracting officer on January 5, Dismas submitted its final proposal that same day. While Dismas states that it provided oral notice of its appeals of the zoning administrator's decision both to the contracting officer and to Phoenix BOP personnel, it never provided written notice of the appeal to the agency.¹

¹ The contracting officer denies receiving oral notice of Dismas's zoning problems. On April 18, 2000, our Office conducted a telephone hearing in an attempt to resolve (continued...)

The Phoenix Board of Adjustment upheld the administrator's decision on January 6 and Dismas filed an appeal with the Maricopa County Superior Court on January 18. Again, Dismas states that it notified the BOP contracting officer of the January 6 ruling and of its intent to appeal to the Superior Court, but did not put that notice in writing. After learning of the various adverse zoning decisions, by letter of January 28 the contracting officer notified Dismas that its proposal had been eliminated from the competitive range for failing to comply with the zoning proof requirement in RFP § L.8.i. Dismas protested its elimination to the agency on February 1.² On February 3, the contracting officer received a recommendation to award the contract to BSSW since it was the only offeror in the competitive range. The agency denied Dismas's agency-level protest on February 15. On February 18, the Superior Court ruled in Dismas's favor, finding that the decisions of the zoning administrator and the Board of Adjustment were "clearly erroneous," because the facility proposed by Dismas met the zoning ordinance definition of recovery home "in every particular." Protest, Tab 2, at 3. The Court reversed the determination of the Board of Adjustment and declared Dismas's proposed use of its property to be in compliance with the express provisions of the city's zoning ordinance. *Id.* at 4. On February 25, Dismas filed this protest. To date, BOP has not awarded the contract.

Dismas first argues that the agency prematurely eliminated its proposal from the competitive range. In this regard, Dismas relies on its attempts to resolve its zoning problem and its oral notice of its efforts to the agency. The agency maintains that Dismas's failure to meet the requirements of RFP § L.8.i justified the elimination of the protester's proposal. We agree with the agency.

The determination of whether a proposal is in the competitive range is principally a matter within the discretion of the procuring agency. Federal Acquisition Regulation (FAR) § 15.306(c) allows an agency to establish a competitive range consisting of only the most highly rated proposals. In rating proposals, the agency must evaluate proposals and assess their relative qualities solely on the factors and subfactors stated in the solicitation; our Office reviews the agency's evaluation of proposals and

(...continued)

the factual dispute between the parties regarding oral notice by Dismas to the agency.

² Because Dismas's letter to the agency requested "reconsideration" of the decision to eliminate its proposal rather than "to initiate a protest," BOP argues that Dismas's letter was not a protest. Agency Report, Tab G. Thus, in BOP's view, Dismas's subsequent protest to our Office at the end of February is untimely. We disagree. Notwithstanding the failure to use the word "protest" to characterize its complaint, Dismas conveyed its dissatisfaction with the agency's decision and requested corrective action; it thus qualifies as a protest. *Small Bus. Sys., Inc.*, B-213009, July 26, 1984, 84-2 CPD ¶ 114 at 2.

determination to exclude a proposal from the competitive range for reasonableness and consistency with the criteria and language of the solicitation. FAR § 15.305(a); SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 4; WP Photographic Servs., B-278897.4, May 12, 1998, 98-1 CPD ¶ 151 at 3.

Here we find that the evaluation of Dismas's proposal and its elimination from the competitive range were reasonable and consistent with the solicitation. As quoted above, the RFP clearly warned that, by the time of BAFO submission, "offerors shall provide . . . valid proof of all zoning and local ordinance requirements" needed for the operation of the proposed facilities and programs, and that "[f]ailure to establish and maintain proof may result in elimination from the competitive range prior to award." RFP § L.8.i. While this provision does not mandate the elimination of a deficient proposal, it clearly gives the agency the discretion to eliminate a proposal if the offeror fails to provide the requisite proof. At the time Dismas submitted its BAFO, it did not satisfy the requirement. While the protester was pursuing its administrative remedies and ultimately succeeded in overturning the negative zoning ruling, at the time of its BAFO submission it could not submit "proof" that it met the applicable zoning and local ordinance requirements. In fact, it did not meet them until some 6 weeks after submission of its BAFO. Our conclusion is not changed by the absence of an award or BOP's acknowledgment at the hearing conducted by our Office that it could have extended the due date for BAFOs, had Dismas requested it. Even though no award had been made, the agency was ready to do so as early as February 3, when the recommendation to award to BSSW was made. Agency Report, Tab D, Award Recommendation Memorandum, Feb. 3, 2000.

Likewise, even if we assume that Dismas provided some oral notice (Dismas does not claim to have submitted written notice) of its efforts to resolve its zoning problem, that notice alone was not sufficient to require the agency to provide Dismas with additional time to meet the requirement. We note that Dismas never requested an extension. In any event, the contracting officer did not abuse his discretion in deciding to eliminate Dismas from the competitive range instead of delaying the procurement to permit Dismas to attempt to become compliant with the RFP requirement. An agency is not required to delay an award indefinitely while an offeror attempts to cure the causes for its failure to meet such a requirement. 50 State Sec. Serv., Inc., B-272114, Sept. 24, 1996, 96-2 CPD ¶ 123 at 5.

Dismas also argues that the agency failed to provide it with meaningful discussions on the issue of its zoning compliance. In negotiated procurements, contracting agencies generally must conduct discussions with all offerors whose proposals are within the competitive range. FAR § 15.306(d)(1). While agencies are not obligated to afford all-encompassing discussions, they must be meaningful, leading an offeror into the areas of its proposal requiring amplification or revision. Johnson Controls, Inc., B-282326, June 28, 1999, 99-2 CPD ¶ 6 at 4.

In Dismas's view, if the agency was dissatisfied with the protester's proof of zoning submitted with its initial proposal, then the agency should have conducted

discussions with it. In this regard, at the hearing, the contracting officer stated that, when reviewing Dismas's initial proof of zoning in early December, he found that proof was insufficient.³ If the contracting officer made this determination prior to the request for BAFOs, the contracting officer should have reopened negotiations to provide Dismas with an opportunity to revise its proposal.⁴ However, Dismas was not prejudiced by this failure to conduct appropriate discussions.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F. 3d 1577, 1581 (Fed. Cir. 1996).

Here, at the time leading up to submission of BAFOs, Dismas was simply incapable of providing the requisite proof because its "of right" zoning approval was, at best, in dispute. It was not until 2 weeks after it had been eliminated from the competitive range that it obtained a reversal of the decisions of the zoning administrator's and the zoning board's decisions. Thus, reopening negotiations prior to the BAFO due date to apprise Dismas of this perceived deficiency would not have resulted in any different outcome.

Indeed, reinstating Dismas to the competitive range and reopening negotiations today would apparently not result in a different outcome. In this regard, subsequent to the court's reversal of the adverse zoning decisions, the city of Phoenix has amended its zoning ordinance. The amended ordinance eliminates the definition of "recovery home" and replaces it with a similar definition concerning "transitional housing facility" or "halfway house." Agency Post-Hearing Comments, Tab A, Zoning Ordinance of the City of Phoenix, Nos. G-4255, G-4256. While most of the RFP requirements fit the definition of halfway house, a halfway house requires a special use permit, unlike the recovery home, which Dismas could operate "of right." Id.,

³ In our view, the contracting officer was confused about what proof would be appropriate. At the time Dismas submitted its proposal, it relied upon a Phoenix zoning ordinance and written interpretation from the zoning administrator that allowed operation of a facility meeting the definition of "recovery home" in a commercial (C-1) area "of right." Nothing in the record suggests that under those circumstances any additional proof of zoning would be required. The Superior Court's ruling in Dismas's favor also supports this view.

⁴ The contracting officer making this determination was not the original one assigned responsibility for this procurement. There is nothing in the record to show that the original contracting officer had any question about the sufficiency of the proof of zoning submitted by Dismas and thus, at the time discussions were held, the original contracting officer was not required to conduct discussions on this matter.

Ordinance No. G-4257. Further, while the RFP requires the successful offeror to provide a minimum of 80 beds, the amended ordinance restricts the maximum capacity to 30 beds and prohibits operation of a halfway house within one mile of any other such facility. Id. The zoning ordinance also was amended to add the definition of “prison” (“[a] facility in which persons are housed to serve a sentence as a result of being convicted of committing a criminal act”) and prohibits the operation of a prison within the Phoenix corporate limits. Id., Ordinance No. G-4255. Because the MINT program requires the housing of inmates currently serving criminal sentences, that aspect of the procurement would be classified as a “prison.” Based on these amendments, Dismas would be required to seek a special use permit to operate its facility, and would have to propose additional facilities, not already in its proposal, to meet the 80-bed and MINT program requirements. Under these circumstances, its current proposal would not be technically acceptable and likely could not be made acceptable without major revision. We note that the original start date for the new contract was to be May 1, 2000. Having already postponed award of the contract during this protest, there is no valid rationale for requiring the agency to wait longer based on the mere possibility that Dismas could prevail in additional challenges to the city’s zoning ordinance.

In addition, contrary to Dismas’s arguments, application of the new zoning ordinances to BSSW does not appear to prohibit it from operating facilities complying with the RFP requirements. In this regard, its operation of the MINT program would not be prohibited because the amended ordinance “grandfathers” BSSW’s facilities by excluding “any prison existing as a conforming or non-conforming use prior to the adoption of the amendment.”⁵ Agency Post-Hearing Comments, Tab A, Ordinance No. G-4255. As the incumbent contractor, BSSW has special use permits for its two current facilities, at least one of which is approved for 70 beds. In addition, the agency states that the chairman of the Phoenix Planning Commission has indicated that BSSW can continue to operate its current facilities and could “receive a non-conforming zoning approval (grandfather clause) from the City of Phoenix.” Id., Tab B, BOP Memorandum, Mar. 17, 2000.

The protest is denied.

Comptroller General
of the United States

⁵ Dismas argues that it too would be eligible for treatment under any “grandfather” provision because of the February 18 court decision. This could be true if Dismas had been able to begin operation of its facility prior to the effective date of the ordinance amendments. However, since it did not then begin operations, the fact that it could have does not mean that its proposed facility would be considered “existing” prior to the adoption of the amendments.