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Decision

Matter of: Western Alternative Corrections, Inc.

File: B-409315; B-409315.2

Date: March 10, 2014

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Department of Justice, Federal Bureau of Prisons, for the agency.
James Lynn Werner, Esq., and Lawrence M. Hershon, Esq., Parker Poe Adams
& Bernstein LLP, for Alston Wilkes Society, the intervenor.
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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

Western Alternative Corrections, Inc. (WAC), of Hastings, Nebraska, protests the award of a contract to Alston Wilkes Society (AWS), of Columbia, South Carolina, by the Department of Justice, Federal Bureau of Prisons, under request for proposals (RFP) No. RFP-200-1184-SE for residential reentry center (RRC) services for federal offenders in North Charleston, South Carolina. WAC asserts that the agency's determination that AWS's proposal complied with a solicitation requirement for zoning approval was unreasonable.

We deny the protest.

BACKGROUND

The solicitation, which the agency issued on September 26, 2012, contemplated the award of an indefinite-delivery/indefinite-quantity fixed-price requirements contract

with a base period of two years and three one-year options. RFP at 4, 7.¹ The solicitation provided that the successful offeror would be responsible for establishing an RRC in North Charleston that provides comprehensive community-based services for federal offenders. Id. at 53.

Award was to be made based on the agency's determination of which proposal represented the best value to the government, considering the following "areas," listed in descending order of importance: past performance, technical/management, and price. RFP at 42-43. Both the past performance and technical/management areas included five factors, all of which were equal in importance. Id. at 43-44. One of the technical/management factors--site location--included two subfactors of relevance to this protest: site validity and suitability; and community relations program. Id. at 43.

The solicitation stated that the agency would assign color/adjectival ratings to offerors' proposals under each of the factors and subfactors. RFP at 43. The ratings were blue/very good; green/acceptable; yellow/poor; and red/unacceptable. Id. Definitions were provided for each rating. Id. As relevant here, the definition for the green/acceptable rating stated that the proposal "meets the minimum requirements of the solicitation." Id.

The solicitation included a "compliance matrix" in which proposal preparation instructions and evaluation criteria for each factor and subfactor were provided. RFP at 200-11. For the site validity and suitability subfactor, the compliance matrix stated:

The offeror shall submit official documentation that demonstrates they have a right to use, signed by both parties, zoning approval and, if applicable, an occupancy permit for their proposed site location. . . .

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 [an RRC] . . . within 60 days after the date of the initial proposal submission. . . . An offeror's failure to establish . . . proof may result in elimination from the competitive range prior to award

Id. at 204. Also for the site validity and suitability subfactor, the solicitation stated that the agency would evaluate the "validity" and "legality" of the offeror's zoning approval. Id. at 44, 204.

¹ Citations in this decision refer to the sequential numbers that the agency applied to each document in the agency report (AR), including the solicitation.

As for the capacity of the RRC, the solicitation provided that the successful offeror would be required to provide RRC services for up to a maximum of 45 inmates.² See RFP at 7, 22; Supp. AR at 2. This number included an estimated 36 “full-time resident inmates” and 9 “home detention inmates” and “furloughed inmates” who would not live on the premises. See RFP at 7-8; Supp. AR at 4.

AWS is the incumbent contractor for the agency’s North Charleston RRC requirement. Contracting Officer’s Statement ¶ 5. The maximum inmate requirement under the incumbent contract was 32 during the two-year base period and 38 during the current option period. See AR, Tab 31, Contract No. DJB200940, at 2; Supp. AR at 2.

The agency received proposals from only WAC and AWS by the solicitation’s closing date of November 26. AR, Tab 18, Source Selection Decision Document (SSDD), at 1. As relevant here, and in connection with the community relations program subfactor, AWS’s proposal included numerous letters from various local, state, and federal offices expressing support for AWS’s RRC. See AR, Tab 6, AWS Technical/Management Proposal, at 108-10, 113-14. AWS’s proposal also included one letter expressing non-support. Id. at 111. In particular, the proposal included an October 18, 2012 letter from the mayor of North Charleston to the contracting officer stating that “[t]he City of North Charleston does not support the RRC Services (Halfway House) at this location.” Id. The letter also asserted that “if [AWS is] approved under this RFP process, they propose to expand their current facility.” Id. Notwithstanding this assertion, AWS’s proposal included a statement that “no major renovations to the facility are necessary or anticipated.” AR, Tab 6, AWS Technical/Management Proposal, at 19.

On January 14, 2013, the agency convened a technical/management evaluation panel (TMEP). Contracting Officer’s Statement ¶ 8. The TMEP evaluated the proposals, identified strengths and weaknesses, and assigned initial proposal ratings. Id. In the course of the evaluation, the TMEP chairperson determined that conducting discussions would be necessary. Id. ¶ 9.

On March 22, a special assistant to the mayor of North Charleston sent the contracting officer an e-mail that included the following statements:

² The solicitation provided the maximum inmate requirement in terms of “inmate days.” RFP at 7. The specified maximum inmate days for each of the base period years and the second and third option years was 16,425. Id. at 7. The specified maximum inmate days for the first option year was 16,470 (slightly higher because it included a leap-year day). Id. The maximum 45 inmate requirement is derived by dividing the number of annual inmate days (16,425) by the number of days in a year (365). Supp. AR at 2.

[T]he City has been very involved with the . . . proposed [RRC]. I understand there are 2 submissions for this project. I wanted to make sure you understood the City's position before you make any decisions. The City has been very supportive of [WAC's proposed site]. . . . I wanted to make sure you understood [that AWS's] submission . . . does not have the support of the City. This property does not meet the necessary requirements for [an RRC]. This property is located in [an area] which has been declared by [the] City Council to be blighted, and such uses are not allowed in that area.

AR, Tab 33, E-Mails Regarding Zoning, at 2.

On April 4, discussion notices were sent to both WAC and AWS. Contracting Officer's Statement ¶ 9. AWS's notice included two items of relevance here. The first stated: "Please provide proof of zoning as it appears that zoning is deficient . . ." AR, Tab 11, AWS Discussions Response, at 1. The second stated: "The occupancy load must be determined by the local building official or the fire marshal and documentation must be provided." Id. at 3.

In response to the first item, AWS submitted a letter dated January 25, 2013, from the North Charleston zoning administrator. AR, Tab 11, AWS Discussions Response, at 1, 8. The letter stated:

I have checked the Official Zoning Map of the City of North Charleston and have determined that the [parcel on which AWS's RRC exists] is zoned B-2 General Business. [An RRC] is a type of transient accommodations facility . . . which is a permitted use in the B-2 zoning district[,] provided the transient facility is not located in an area of the City which the City Council has previously declared to be blighted[,] such as this existing location As such, the existing legal nonconforming facility may continue to operate as originally intended; however, the existing use may not be changed to another use or expanded in any manner so as to increase the nonconformity.

Id. at 8.

In response to the second discussions item, AWS submitted its current City of North Charleston certificate of occupancy for its RRC facility. AR, Tab 11, AWS Discussions Response, at 3, 22. The certificate of occupancy permits up to 65 persons to occupy AWS's RRC facility. Id. at 22.

After reviewing WAC's and AWS's responses to the discussions items, the TMEP finalized the evaluated proposal strengths and weaknesses and assigned final proposal ratings. See AR, Tab 7, Final Technical/Management Evaluation Report. As relevant here, AWS's proposal received a rating of green/acceptable for the site

validity and suitability subfactor. AR, Tab 7, Final Technical/Management Evaluation Report, at 4. WAC's and AWS's final proposal ratings and evaluated pricing are shown in the table below.

	WAC	AWS
Past Performance	Blue/Very Good	Blue/Very Good ^[3]
Technical/Management	Green/Acceptable	Blue/Very Good
Evaluated Price	\$7,496,506.80	\$6,885,855.00

AR, Tab 18, SSDD, at 4, 16; AR, Tab 22, WAC Debriefing Ltr., at 2.

The contracting officer, who also served as the source selection authority, considered the evaluated strengths and weaknesses and final proposal ratings assigned to both WAC's and AWS's proposals. Contracting Officer's Statement ¶ 19. The contracting officer then determined that AWS's lower-priced proposal represented the best value to the government. See id.; AR, Tab 18, SSDD, at 25.

After the contracting officer made this determination, the TMEP chairperson took steps to confirm the validity of AWS's January 25 zoning verification letter. In this regard, the TMEP chairperson telephoned the North Charleston zoning administrator who had issued the letter. AR, Tab 30, TMEP Chairperson Decl. ¶ 3. During the call, the zoning administrator stated that AWS could "continue to perform" so long as AWS's RRC facility was not changed.⁴ Id., attachs., at 3 (TMEP chairperson notes of call with North Charleston zoning administrator). Following the call, the TMEP chairperson reviewed AWS's proposal and noted the representation therein that no major renovations to AWS's facility were necessary or anticipated. AR, Tab 30, TMEP Chairperson Decl. ¶ 6.

Thereafter, the TMEP chairperson concluded that notwithstanding the increase in the maximum required number of inmates for the RRC (i.e., the increase from 38 under the current contract to 45 under the solicitation), AWS would not be

³ For past performance, the record as provided by the agency shows only that AWS's proposal was found to have "met or exceeded the requirements of the solicitation." Contracting Officer's Statement ¶ 16. However, this finding directly correlates to the solicitation's definition of the blue/very good rating. See RFP at 43.

⁴ The TMEP chairperson's notes of the call state that the zoning administrator "did not know how many beds [AWS was] originally approved for." AR, Tab 30, TMEP Chairperson Decl. ¶ 3, attachs., at 3.

expanding or changing the use of its facility because (a) its current certificate of occupancy permitted up to 65 persons in the facility--a number significantly above 45; and (b) AWS's proposal represented that no major renovations were necessary or anticipated for performance. See AR, Tab 30, TMEP Chairperson Decl. ¶¶ 6-8; see also AR, Tab 30, TMEP Chairperson Decl., attachs., at 8 (pre-protest e-mail of TMEP chairperson summarizing determination of AWS zoning compliance). Based on this conclusion, the TMEP chairperson determined that AWS's proposal met the solicitation's zoning approval requirement. AR, Tab 30, TMEP Chairperson Decl. ¶¶ 9-10.

The TMEP chairperson discussed her determination--and the background findings--with the contracting officer. AR, Tab 30, TMEP Chairperson Decl. ¶ 10. The contracting officer agreed with and adopted the TMEP chairperson's determination. Supp. Contracting Officer's Statement ¶ 1.

On November 22, the agency made award to AWS. AR, Tab 19, Contract No. DJB200171, at 1. On November 26, WAC received a written debriefing. AR, Tab 22, WAC Debriefing. On November 29, WAC filed a protest with our Office.

DISCUSSION

WAC challenges the agency's evaluation of AWS's proposal under the zoning-related provisions of the solicitation. We have considered all of WAC's arguments and conclude that none has merit. Below we discuss WAC's chief contentions.

WAC argues that the agency's award to AWS was unreasonable because AWS allegedly is "not in compliance with the zoning regulations of the City of North Charleston" and, therefore, AWS's proposal allegedly is "noncompliant and nonresponsive to the solicitation." Comments at 1, 6.

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 Public Facility Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2, May, 4, 2005, 2005 CPD ¶ 170 at 1, 3; SDA, Inc.--Recon., B-249386.2, Aug. 26, 1992, 92-2 CPD ¶ 128 at 2-3. 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. TRS Design & Consulting Servs., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168 at 4; William S. Stiles, Jr.; Piazza Constr., Inc., B-215922, B-215922.2, Dec. 12, 1984, 84-2 CPD ¶ 658 at 2. 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) (2013); Public Facility Consortium I, LLC; JDL Castle Corp., supra, 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. Federal Acquisition Regulation § 9.104-2; Firma Hermann Leis, B-295956, B-295956.2, May 19, 2005, 2005 CPD ¶ 102 at 3; 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 204. Additionally, the solicitation stated that the agency would evaluate the "validity" and "legality" of the offeror's zoning approval. Id. at 44, 204. 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." Id. at 204. We construe these provisions to collectively constitute a definitive criterion rather than a general standard of responsibility. See 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. 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.

Here, the agency's conclusion that AWS met the solicitation's zoning approval requirement was based on the North Charleston zoning administrator's January 25 letter to AWS, which, on its face, was an official "verification" of AWS's zoning approval. Accordingly, we find that AWS submitted evidence from which the agency reasonably could conclude that the solicitation's zoning requirement had been met. See Firma Hermann Leis, supra, at 4; Carter Chevrolet Agency, Inc., supra.

WAC points out that the zoning administrator's January 25 letter stated that AWS's facility could continue to operate only as "originally intended" and if "the existing use [is not] changed to another use or expanded in any manner so as to increase the nonconformity." Comments at 2-4 (quoting AR, Tab 11, AWS Discussions Response, at 8); Supp. Protest at 3-4 (same). WAC argues that the increase from a maximum of 38 inmates under the AWS' current contract to a maximum of 45 inmates as required by this solicitation constitutes a change or expansion of the facility's existing use, which, according to WAC, nullifies AWS's zoning approval. Comments at 4-10; Supp. Protest at 2-3, 6-10; Supp. Comments at 4-6.

As an initial matter, WAC's position hinges on WAC's self-serving conclusion that a potential increase of seven inmates in AWS's facility necessarily constitutes a change or expansion of use under the relevant local ordinances, even though AWS's certificate of occupancy permits up to 65 persons to occupy the facility. Nothing in the zoning administrator's January 25 letter supports WAC's position, and it remains unclear from the record whether an increase in inmates that does not exceed the 65 persons permitted by the certification of occupancy would be determined by zoning authorities to constitute a nonconformity.⁵ Further, the Government Accountability Office is not the proper forum to make this zoning determination; while it is possible that authorities having jurisdiction over North Charleston zoning matters may at some point in the future agree with WAC, the record contains no evidence that this determination has been made.⁶

As stated above, our review is limited to ascertaining the reasonableness of the agency's determination of compliance with the definitive responsibility criterion based on information available to the agency at the time the determination was made. The record here reflects that the TMEP chairperson analyzed AWS's zoning approval prior to award and determined that notwithstanding the increase from a maximum of 38 to 45 inmates, AWS would not be expanding or changing the use of its facility. AR, Tab 30, TMEP Chairperson Decl., attachs., at 8. The basis for her determination was that AWS's current certificate of occupancy permitted 65 persons in AWS's facility (a number significantly higher than the maximum 45 inmates) and that AWS's proposal represented that no major renovations were necessary or anticipated for performance. AR, Tab 30, TMEP Chairperson Decl., attachs., at 8 (TMEP chairperson pre-protest e-mail summarizing determination of AWS zoning

⁵ We note that although the October 18, 2012 letter to the contracting officer from the North Charleston mayor included an assertion that AWS proposed to expand its current facility, the letter did not provide any basis for or detail about this assertion, and it did not address the issue of zoning. See AR, Tab 6, AWS Technical/Management Proposal, at 111. We note also that although the March 22, 2013 e-mail to the contracting officer from the North Charleston mayor's special assistant included the assertion that AWS's facility "does not meet necessary requirements for [an RRC]," the reason given for this assertion was that AWS's facility was in an area designated as blighted. AR, Tab 33, E-Mails Regarding Zoning, at 33. The January 25 zoning verification letter--which had the appearance of being more authoritative on the issue than the March 22 e-mail by virtue of being issued by the city's zoning administrator--provided that AWS's "nonconforming facility" was "legal" and could "continue to operate" notwithstanding the area's blighted designation. AR, Tab 11, AWS Discussions Response, at 8.

⁶ Moreover, such a future determination is a matter of contract administration, which is not for our consideration. 4 C.F.R. § 21.5(a); SDA, Inc.--Recon., supra, at 2.

compliance); see also AR, Tab 30, TMEP Chairperson Decl. ¶¶ 6-8. The contracting officer agreed with this determination, and this determination is further supported by the zoning administrator's January 25 letter stating that AWS's nonconforming use was legal and that AWS could continue to operate. Based on the record here, and the broad discretion afforded to contracting agencies in determinations of whether an offeror meets definitive responsibility criteria, we find the agency's determination to be reasonable.⁷

The protest is denied.

Susan A. Poling
General Counsel

⁷ WAC also argues that certain post-protest communications--including a January 24, 2014 letter from the North Charleston deputy city attorney to the agency, and a February 27, 2014 e-mail from the North Charleston deputy city attorney to WAC's counsel--support its position that the potential increase from a maximum of 38 to 45 inmates constitutes a change or expansion of the use of AWS's facility. Supp. Comments at 3; WAC Ltr. to GAO (Feb. 27, 2014) at 1. We do not view these post-protest communications as having bearing on the outcome of this protest because the relevant information for purposes of our review is the contemporaneous information that the agency reviewed to determine that AWS's proposal met the solicitation's definitive responsibility criterion for zoning.