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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: Dismas Charities, Inc.

File: B-292091

Date: June 25, 2003

Alex D. Tomaszczuk, Esq., and Daniel S. Herzfeld, Esq., Shaw Pittman, for the protester.

J. Mark Taylor, Esq., Moore, Taylor & Thomas, for Alston Wilkes Society, an intervenor.

Mary E. Carney, Esq., and Aaron T. Marshall, Esq., U.S. Department of Justice, Federal Bureau of Prisons, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency applied an evaluation scheme other than that established by the solicitation, failed to evaluate all of protester's proposal, failed to evaluate past performance in a consistent manner and as specified by the solicitation, and failed to permit protester to address adverse past performance information.

2. Where contemporaneous record reflects multiple procurement flaws, and the agency's post-protest reevaluation of offerors' proposals--which was conducted "in the heat of an adversarial process"--includes, among other things, an increase to the awardee's rating which is unsupported by objective documentation, GAO declines to afford any material weight to the reevaluation activities and rejects the assertion that the reevaluation demonstrates that protester was not prejudiced by the agency's errors in the conduct of the procurement.

DECISION

Dismas Charities, Inc. protests the Department of Justice, Federal Bureau of Prisons' (BOP) award of a contract to Alston Wilkes Society (AWS) pursuant to request for proposals (RFP) No. 200-0724-SE to establish, operate, and maintain a community

corrections center for federal offenders in Charleston, South Carolina.¹ Dismas protests, among other things, that the agency failed to evaluate proposals in a manner consistent with the RFP's stated evaluation criteria and failed to conduct meaningful discussions.

We sustain the protest.

BACKGROUND

The RFP at issue here was published on January 10, 2002 and contemplated award of a fixed unit-price requirements contract for a 2-year base period and three 1-year option periods. Offerors were advised that proposals would be evaluated on the basis of cost/price² and the following non-cost/price factors, listed in descending order of importance: past performance, community relations, technical, and management.³ The RFP further provided that the agency's evaluation under the technical factor would reflect consideration of three subfactors-- reports/policy/procedures, facility, and overall programs approach; no relative weights were assigned to these subfactors. Finally, offerors were advised that the non-cost/price evaluation factors, combined, were "significantly more important than cost[/price]," and that cost/price would become a "major factor" only if "evaluations result in substantially 'technically equal' scores." Agency Report, Tab 1, RFP, at 64.

Initial proposals were submitted by three offerors, including Dismas and AWS, by the June 7, 2002 closing date. These proposals were evaluated by the agency's source selection evaluation board (SSEB) and, thereafter, written and oral discussions were conducted with each offeror.⁴ Following discussions, the agency requested that each offeror submit its final proposal revisions (FPR). The SSEB evaluated the FPRs and assigned the following scores:

¹ Community corrections centers are frequently referred to as "halfway houses." Agency Report, Contracting Officer's Statement, at 1.

² With regard to cost/price, offerors were required to propose a fixed rate per "inmate day."

³ The solicitation provided that technical and management factors were of equal importance.

⁴ By letter dated September 20, 2002, the agency advised Dismas that it was "within the competitive [r]ange for further discussions and negotiations." Agency Report, Tab 4, at 1.

	AWS	Dismas	Offeror X
Past Performance ⁵ (400 max.)	[deleted]	[deleted]	[deleted]
Community Relations (350 max.)	[deleted]	[deleted]	[deleted]
Technical (250 max.)	[deleted]	[deleted]	[deleted]
Management (250 max.)	[deleted]	[deleted]	[deleted]
Cost/Price (250 max.)	[deleted]	[deleted]	[deleted]
Total (1500 max.)	[deleted]	[deleted]	[deleted]

Agency Report, Tab 8, at 4.

The contracting officer states that, based on this evaluation, Dismas's and AWS's proposals were determined to be "substantially equal overall," Agency Report, Contracting Officer's Statement, at 12-13, and that, "based on the overall equality of the technical proposals" AWS's proposal, which offered the lowest cost/price, was selected for award.⁶ Id. This protest followed.

DISCUSSION

Dismas challenges the agency's evaluation of its and AWS's proposal under several of the stated evaluation factors. Overall, Dismas protests that the agency failed to adhere to the RFP's evaluation scheme for evaluation of the technical factor; failed to consider all of Dismas's proposal information with regard to the community relations factor; failed to obtain past performance information in a consistent

⁵ The record shows that the agency based its past performance ratings on references' responses addressing [deleted] Dismas contracts, [deleted] AWS contracts, and [deleted] Offeror X contracts. Agency Report, Tab 12, at 1, 3, 5.

⁶ In responding to this protest, the contracting officer states that the determination of "overall equality" was not based on a "mechanical mathematical evaluation" of point scores. Agency Report, Contracting Officer's Statement, at 13. Rather, the contracting officer maintains that the "the entire scoring process rests on the firm foundation of multiple qualitative assessments of the substance of each proposal," id., and elaborates that, "although numerical scores [were] used, [they were used] only as a means of illustrating qualitative evaluations." Agency Report, Contracting Officer's Statement, at 16.

manner and as specified by the RFP; and failed to permit Dismas to respond to adverse past performance information.

The agency acknowledges that it made various errors in conducting this procurement.⁷ Agency Response to Dismas Comments, May 12, 2003, at 8. For example, the agency acknowledges that, pursuant to the RFP, the technical evaluation subfactors should have been accorded equal weight;⁸ that the agency actually accorded twice as much weight to the first two technical subfactors as it accorded the third;⁹ and that it was “likely improper” for the agency to have accorded the subfactors differing weights.¹⁰ Agency Response to Dismas Comments, May 12, 2003, at 10.

Nonetheless, the agency maintains that, following review of Dismas’s protest, it reevaluated proposals in response to various flaws identified in the protest (including the agency’s failure to accord equal weight to the technical evaluation subfactors) and, based on those reevaluation activities, concluded that the initial award decision was proper and, therefore, that Dismas was not prejudiced by the agency’s errors.¹¹ As discussed below, we conclude that the agency’s evaluation and source selection decision were fundamentally flawed and not reasonably supported by the record; further, we are unpersuaded that the agency’s post-protest

⁷ More specifically, the agency states: “The agency is conceding its errors outright.” Agency Response to Dismas Comments, May 12, 2003, at 8.

⁸ As noted above, the solicitation did not establish differing weights for the technical evaluation subfactors. Agency Report, Tab 1, RFP at 64. Accordingly, offerors were on notice that the subfactors would be accorded equal weight. See, e.g., North-East Imaging, Inc., B-256281, June 1, 1994, 94-1 CPD ¶ 332 at 2.

⁹ The agency acknowledges that it assigned a maximum score of 100 points to each of the first two subfactors (reports/policy/procedures and facility) and assigned a maximum score of only 50 points to the third subfactor (overall programs approach). Agency Report, Contracting Officer’s Statement, at 4.

¹⁰ The agency’s evaluation of the technical subfactors was clearly improper. Procuring agencies are required to evaluate proposals in the manner established by the solicitation. See, e.g., AIU North America, Inc., B-283743.2, Feb. 16, 2002, 2002 CPD ¶ 39 at 7.

¹¹ As discussed further below, the agency performed and completed its reevaluation activities, including the creation of various documents purporting to affirm the initial source selection decision, after the protest was filed, but before the agency submitted its statutorily-required report to our Office. Nonetheless, the agency’s report to our Office, filed on April 18, 2003, neither included the reevaluation documents, nor disclosed their existence.

reevaluation activities provide a credible basis for concluding that Dismas was not prejudiced by the agency's errors.

In addition to challenging the agency's application of technical subfactor weights differing from those established by the RFP, Dismas protests that the agency failed to properly consider all of the information Dismas submitted with regard to the second most important evaluation factor, community relations. Regarding this factor, RFP § M.5 stated that evaluation would "[p]rimarily consider documentation evidencing community support or acknowledgement for the location of the [offeror's proposed] site." Agency Report, Tab 1, RFP, at 65. The agency specifically raised the issue of community support letters with Dismas during discussions and, in response, Dismas submitted [deleted] such letters from community members within the Charleston, South Carolina area. Agency Report, Tab 5.

Nevertheless, the record indicates that, even after discussions and the agency's timely receipt of the [deleted] letters, the agency evaluated Dismas's proposal as containing only [deleted] such letters. The record further establishes that the agency's ultimate source selection decision was based, in part, on Dismas's lower level of demonstrated community support. Specifically, both the SSEB's award recommendation and the source selection decision expressly compare Dismas's and AWS's submissions, stating: "AWS provided [deleted] letters of support, Dismas provided [deleted] letters of support." Agency Report Tab 8, at 3; Agency Report, Tab 9, at 5. Finally, the record suggests that the contracting officer believed Dismas had not submitted any letters of support from the Charleston, South Carolina area. In this regard, Dismas's debriefing document states:

Dismas could enhance [its] proposal by providing the following:

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Community Support letters from the Charleston, South Carolina area.

Agency Report, Tab 16, at 4.

Thus, based on the documentary evidence, we agree with Dismas that, in making its source selection decision, the agency failed to consider information submitted by Dismas demonstrating community support.

The agency responds, in a post-protest submission to our Office, that the agency's references to Dismas's more limited community support resulted from a "typographical error in the SSEB's Recommendation Memorandum . . . which was inadvertently carried over to the Source Selection Decision." Agency Response to Dismas Comments, May 12, 2003, at 13. However, the agency has not identified anything in the contemporaneous evaluation record that supports this assertion. Accordingly, based on the existing documentation that addresses this matter, that is,

the SSEB recommendation and the source selection decision, we can only conclude that the agency failed to consider proposal information submitted by Dismas that addressed the community relations evaluation factor.

Next, Dismas protests the agency's evaluation of offerors' past performance, the most heavily weighted evaluation factor, on the basis that the agency failed to request the same type of information from all references and in a manner consistent with that specified by the RFP. In this regard, the RFP stated: "The Contractor Evaluation Form [CEF], located in Section J, will be used to collect [past performance] information." Agency Report, Tab 1, RFP at 61. The CEF requested references to assign numerical ratings, ranging from 1 to 5,¹² in three contract performance areas—contract compliance, customer satisfaction, and business relations. Agency Report Tab 7, CEF, at 2-3. Of significance, the CEF also contained the following directive to references: "If performance is over and above the minimum requirements of the SOW, add either one, two or three points [to the aggregate point score]." Agency Report Tab 7, CEF, at 2.

The agency does not dispute that it failed to use the RFP-specified CEF for many of Dismas's references. Rather, for any reference other than the Bureau of Prisons, the agency states that it prepared a shorter "letter/questionnaire." Agency Report, Contracting Officer's Statement, at 15. Although the letter/questionnaire sought the same numerical/adjectival ratings for the three contract performance areas identified in the CEF, it did not direct references to increase an offeror's rating "[i]f performance is over and above the [SOW] minimum requirements." Agency Report, Tab 7, Letter/Questionnaire, at 38.

Following submission of Dismas's protest, the contracting officer, apparently recognizing that the past performance evaluation was based on incomplete information, telephonically contacted some (but not all) of the non-BOP references who had provided information in response to the letter/questionnaire.¹³ According to various memoranda in the file, in telephone conversations with the references whom the contracting officer was able to contact, she described the CEF instruction regarding additional credit for performance over and above SOW requirements, and

¹² The CEF associated the various numerical ratings with corresponding adjectival ratings, as follows: (1) very dissatisfied; (2) dissatisfied; (3) satisfied; (4) very satisfied; or (5) extremely satisfied.

¹³ The record establishes that [deleted] of Dismas's [deleted] references provided past performance information in response to the letter/questionnaire. Supplemental Agency Documents, Tab 7, at 229-66. The additional evaluation documents that the agency, ultimately, provided indicate that the contracting officer was unable to contact the individual who had given the initial response regarding [deleted] of Dismas's contracts. Supplemental Agency Documents, Tab 8, at 23-46.

asked these references if they wished to increase the ratings given. Several of Dismas's references stated they would have increased Dismas's rating had they received the CEF instruction. Supplemental Agency Documents, Tab 8, at 23-46. The contracting officer similarly contacted [deleted] of AWS's [deleted] past performance references, who had received the letter/questionnaire; [deleted] of these references stated they would not have increased AWS's rating even if they had received the CEF instruction. Supplemental Agency Documents, Tab 8, at 21-22.

Based on this additional information, the agency performed a "reevaluation" of Dismas's and AWS's past performance ratings, increasing Dismas's past performance score by [deleted] points, from [deleted] to [deleted]. Although none of AWS's references indicated any desire to increase AWS's ratings, the agency's reevaluation reflects a [deleted] point increase to AWS's past performance score, from [deleted] to [deleted].¹⁴ Agency Response to Dismas Comments (May 12, 2003), Attach. 1, at 1. The agency has offered no explanation for this adjustment of AWS's rating, nor any explanation regarding the significantly differing numbers on the revised SSEB scoresheet.

Finally, in a matter related to the agency's past performance evaluation, Dismas protests that the agency failed to comply with the Federal Acquisition Regulation (FAR) requirement that, in conducting discussions with offerors following establishment of a competitive range, the contracting officer must, "at a minimum" discuss "adverse past performance information to which the offeror has not yet had an opportunity to respond." FAR § 15.306(d)(3). In this regard, the record shows that one of Dismas's references rated Dismas's past performance as a "[deleted]," or "[deleted]," with regard to "business relations."¹⁵ Supplemental Agency Documents, Tab 7, at 230. The record indicates that this adverse past performance information

¹⁴ The documents provided by the agency are in conflict regarding the number of points the agency ultimately added to AWS's past performance rating. A revised "source selection decision," signed more than two weeks after Dismas filed its protest, states that AWS's past performance score was increased from [deleted] to [deleted]. Agency Response to Dismas Comments (May 12, 2003), Attach. 1, at 1. However, a revised "SSEB Chairperson Scoresheet" (undated), shows that AWS's past performance score was raised from [deleted] to [deleted]. Agency Response to Dismas Comments (May 12, 2003), Attach. 2. This revised "SSEB Chairperson Scoresheet" also indicates that, rather than increasing Dismas's past performance score by [deleted] points, from [deleted] to [deleted] points, Dismas's past performance score was increased from [deleted] to [deleted] points. Id.

¹⁵ As noted above, references were requested to provide numerical/adjectival ratings for three areas of contract performance—contract compliance, customer satisfaction, and business relations. In explaining the "[deleted]" rating, this reference stated: "[deleted]." Supplemental Agency Documents, Tab 7, at 230.

was specifically considered by the contracting officer in making the source selection decision.¹⁶ Agency Report, Tab 12, at 6.

The agency does not dispute that it failed to provide Dismas an opportunity to discuss this adverse past performance information. Further, the record establishes that, had such an opportunity been afforded, Dismas may well have been able to respond in a meaningful way.¹⁷ Nonetheless, the contracting officer asserts, without explanation, that she did not consider this particular past performance information to be “adverse” and, accordingly, the agency maintains it had no obligation to advise Dismas of the information during discussions. Agency Response to Dismas Comments, May 12, 2003, at 6. In any event, the agency maintains that, due to its post-protest reevaluation, any benefit that Dismas would have gained through discussing this matter would not have been enough to “materially alter the outcome of the competition.” Id.

Based on the record here, we conclude that the agency’s activities with regard to evaluation of offerors’ past performance were materially flawed and contrary to the FAR. As noted above, the past performance references received materially differing instructions with regard to how to score an offeror’s past performance. Specifically, unlike recipients of the CEF, the multiple recipients of the letter/questionnaire were not instructed to assign additional points if the contractor had exceeded minimum requirements. While it is true, as the agency argues, that the ultimate issue in this regard is whether the past performance information was accurately conveyed, see Redcon, Inc., B-285828, Oct. 11, 2000, 2000 CPD ¶ 188, here, the information clearly was not. Specifically, while the RFP clearly contemplated assessment of, among other things, whether an offeror’s past performance exceeded minimum contract requirements, a majority of Dismas’s references were not requested to provide that information prior to the agency’s source selection decision.

Although the agency asserts that its post-protest activities remedied that error, for the reasons discussed above, we do not find those activities to credibly establish an absence of prejudice. Our Office has previously addressed the situation where an agency engages in reevaluation activities while simultaneously defending against an ongoing protest. Boeing Sikorsky Aircraft Support, B-277263, B-277263.2, Sept. 29, 1997, 97-2 CPD ¶ 91. There, we explained that when an agency re-evaluates proposals during a pending protest and relies on information and/or analysis that it has not previously considered, we will generally limit the weight given the post-

¹⁶ The contracting officer’s memorandum summarizing the proposal evaluations, stated: “[deleted].” Agency Report, Tab 12, at 6.

¹⁷ The contracting officer acknowledges that she contacted the reference who provided the above [deleted]. Agency Response to Dismas Comments, May 12, 2003, at 6; Supplemental Agency Documents, Tab 8, at 23.

protest activities “because they constitute reevaluations and redeterminations prepared in the heat of an adversarial process,” and “may not represent the fair and considered judgment of the agency.” *Id.* at 15. We reach the same conclusion here.

On the record discussed above, we find the agency’s post-protest reevaluation to lack credibility. As discussed above, the agency has offered no rational support for having increased AWS’s past performance rating. Further, we find this portion of the agency’s reevaluation particularly troubling in light of the multiple, conflicting numbers that appear in various post-protest documents regarding the adjusted point scores to be awarded to Dismas’s and AWS’s proposals. Similarly, the agency’s summary assertions that Dismas was not prejudiced by the agency’s other procurement errors—including the agency’s failure to consider all of Dismas’s proposal information, and the agency’s failure to permit Dismas to respond to adverse past performance information—are substantially without any documented, objective analysis.¹⁸ On this record, we decline to give any material weight to the agency’s post-protest activities and we reject the assertion that Dismas was not prejudiced. To the contrary, had a proper evaluation been performed, we believe there is a reasonable possibility that Dismas’s proposal could have been rated higher than AWS’s under a majority of the non-cost/price evaluation factors, including the most heavily weighted past performance factor. Since the RFP provided that non-cost/price factors would be “significantly more important than cost[/price],” we conclude that Dismas has a substantial chance of receiving the award in the event the agency properly evaluates Dismas’s and AWS’s proposals. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

The protest is sustained.¹⁹

¹⁸ As noted above, in initially responding to this protest, the contracting officer emphasized the position that the agency had not relied on a “mechanical mathematical evaluation” of point scores but, rather, had performed “multiple qualitative assessments of the substance of each proposal.” Agency Report, Contracting Officer’s Statement, at 13. Accordingly, we do not view the agency’s subsequent assertions, based on projected point scores that, the agency maintains, would have been assigned had the evaluation been properly conducted, as constituting a persuasive basis for concluding that Dismas was not prejudiced by the agency’s various procurement errors.

¹⁹ We are troubled by the manner in which the agency responded to its statutory obligation to provide a complete report to our Office. In this regard, the Competition in Contracting Act of 1984 (CICA) requires that, in responding to a protest, “a Federal agency . . . shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement within 30 days.” 31 U.S.C. § 3553(b)(2) (2000). Here, Dismas filed its protest on March 19, 2003. The Federal Bureau of Prisons provided its report to our Office on April 18. However,
(continued...)

RECOMMENDATION

In light of the record reflecting multiple procurement flaws, including a failure to permit Dismas to provide information responding to adverse past performance information, we recommend that the agency re-open discussions with Dismas, permit it to address this matter as required by the FAR, obtain past performance information in a consistent manner and as specified by the RFP and, thereafter, perform a reevaluation of proposals that is consistent with the provisions of the solicitation and is based on consideration of all proposal information; the agency should then make a new source selection decision based on that reevaluation. In the event Dismas's proposal is selected for award, the agency should terminate AWS's contract, and award a contract to Dismas.²⁰ In light of the record of problematic adjustments to the offerors' scores, the agency may wish to conduct the reevaluation using personnel other than those that participated in the initial evaluation. We also recommend that Dismas be reimbursed its cost of filing and pursuing this protest

(...continued)

this initial report neither included--nor disclosed the existence of--multiple evaluation documents which, according to the dates on the documents themselves, the agency had already prepared. The agency asserts that, at the time it submitted the April 18 report, it did not consider certain documents, including the revised source selection decision executed on April 4, 2003, to be "relevant." Letter from Bureau of Prisons to GAO (May 13, 2003) at 1. Inconsistently, the agency relies on this same "[ir]relevant" document, filed in response to Dismas's comments on the initial agency report, as a basis to argue that GAO should deny the protest for lack of prejudice. On this record, we conclude that the agency failed to comply with the requirements of CICA regarding submission of a "complete report" to GAO.

²⁰ On April 3, 2003, the agency advised our Office that it was continuing with contract performance, notwithstanding the protest. Specifically, the agency relied on FAR § 33.104(c)(2) to determine that continued performance is "in the best interest of the Government." Supplemental Agency Documents, Tab 10, at 2. Accordingly, pursuant to CICA, we are required to make our recommendations "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 31 U.S.C. § 3554(b)(2). In any event, the record indicates that AWS began contract performance on June 1, 2003, Supplemental Agency Documents, Tab 10, at 1; thus, only a small portion of the 2-year base contract period has been performed.

including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2003). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel