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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: The Salvation Army Community Corrections Program--Costs

File: B-298866.3

Date: August 29, 2007

Luke Levasseur, Esq., Mayer, Brown, Rowe & Maw LLP, for the protester.
Tracey L. Printer, Esq., Department of Justice, for the agency.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Government Accountability Office (GAO) recommends that protester be reimbursed the costs of filing and pursuing a protest where the agency unduly delayed taking corrective action in response to clearly meritorious protest.

2. In determining whether claimed protest costs should be severed, GAO generally considers all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore generally will recommend reimbursement of the costs associated with both successful and unsuccessful evaluation challenges.

DECISION

The Salvation Army Community Corrections Program requests that the Government Accountability Office (GAO) recommend that the Salvation Army be reimbursed the costs of filing and pursuing various protests challenging the award of a contract to Paladin East Side Psychological Services, Inc. under request for proposals (RFP) No. 200-0888-NC, issued by the Department of Justice, Federal Bureau of Prisons (BOP), for a "Comprehensive Sanctions Center" (CSC).¹

We recommend that the Salvation Army be reimbursed the reasonable costs of filing and pursuing its initial and supplemental protests, as well as the costs of pursuing this request.

¹ The CSC was to house approximately 175 inmates. Protester's Comments at 9.

The RFP, issued on November 15, 2005, sought proposals for providing CSC services for male and female offenders held under the authority of the United States and located in the greater Chicago metropolitan area. The CSC is to provide comprehensive community-based services for offenders, including confining offenders in a controlled and appropriately secure environment, and providing work and other self-improvement opportunities to assist federal offenders in becoming law-abiding citizens. The RFP contemplated the award of a fixed-price requirements contract for a base period with 3 option years.

The award was to be based upon a “comparative” assessment of proposals in three areas: past performance, technical/management, and price. Past performance was said to be more important than technical/management, and when combined these two areas were significantly more important than price.

The RFP stated that past performance would be judged as follows:

The Past performance area addresses the Government’s confidence in the offeror’s probability of successfully performing the effort as proposed based on their record of performance in current and past relevant contract efforts. The Past Performance evaluation will be accomplished by reviewing aspects of an offeror’s relevant present and recent past performance, focusing on and targeting performance that is relevant to the Past Performance factors [(1) accountability, (2) programs,² (3) community relations, (4) personnel, and (5) communications and responsiveness].

The recency and relevancy of Past Performance information is critical to the Government’s evaluation. More recent, more relevant performance information will have a greater positive impact on the Past Performance evaluation than less recent, less relevant performance.

RFP at 43. The RFP requested past performance information regarding the offeror’s five most relevant contracts and or subcontracts that were or are currently being

² The programs factor was to evaluate:

The offeror’s record of performance and level of success in assisting offenders in successfully reentering the community. The offeror’s ability to leverage and network with other relevant community resources to offer offenders a more comprehensive and robust support structure.

RFP at 45.

performed in the past 3 years. The RFP explained that “[r]elevant’ refers to contracts, which are of similar size, scope and complexity [as] being acquired under this solicitation.” In addition, the RFP cautioned that “[o]fferor’s past performance evaluations may be negatively impacted if they submit contracts in response to these instructions which are considered less relevant or irrelevant.” RFP § J.

There were five factors in the technical/management evaluation area: site location, accountability, programs, facility, and personnel. The site location factor was the most important factor, followed by accountability, and then followed by the equally important programs, facility, and personnel factors. The site location factor was comprised of two equally important subfactors: site validity and suitability, and community relations program. The RFP advised that the site validity and suitability subfactor considered proposed site location, the validity of the offeror’s right to use the site and zoning approval, and the suitability of the site location with regards to environmental impact and the responsiveness to proximity requirements defined in the RFP statement of work (SOW). In this regard, the SOW required the contractor to locate the facility in an area where the commuting time to the general area of work is no more than one and one-half hours each way via public or contractor provided transportation. RFP SOW at 25. The RFP also called for a risk assessment considering the proposal risks of any aspect of the proposed technical/management solution that could pose potential adverse impacts on price, schedule or performance of the effort.

In response to the RFP, the BOP received proposals by the February 6, 2006 closing date from the Salvation Army (the incumbent contractor) and Paladin. The Salvation Army proposed to continue providing the services at its current location in downtown Chicago. Paladin proposed to construct a new facility in Hopkin’s Park, Illinois, which is located approximately 75 miles from downtown Chicago. Paladin’s proposal offered the lower price at \$28,114,122.75, while the Salvation Army’s proposal was priced at \$32,344,054.75.

In the final evaluation, the Salvation Army’s proposal was assigned an overall rating of green/acceptable under the past performance factor, based on its performance under the incumbent contract. While the Salvation Army’s past performance was highly relevant and generally regarded as strong (particularly in community relations), it also received a number of deficiency reports and improvements were found to be needed in certain areas. One of the observations made by the evaluators regarding the Salvation Army’s past performance was that it “needs to continue working on maintaining the 1 to 10 ratio of case manager to inmates.” Agency Report, Tab 9, Past Performance Evaluation, at 5. In contrast, Paladin’s proposal received a blue/very good rating under the past performance factor. This rating, unlike the Salvation Army’s, was not based on a contract for CSC services, but was based on a single contract with the state of Texas for substance abuse treatment at a 74-bed facility, which Paladin had been performing for less than a year and for which its performance was considered exemplary. Id. at 6-7.

With respect to the technical management area, the evaluators assigned both Paladin's and the Salvation Army's proposals an overall rating of green/acceptable and determined them to be "substantially technically equal" under this area. Both the Salvation Army's and Paladin's proposals were rated blue/very good under the site location factor, receiving a green/acceptable rating for the site validity and suitability subfactor and a blue/very good rating for the community relations program subfactor. According to the evaluation record, the proposals' green/acceptable ratings for the site validity and suitability subfactor were based solely on the offerors' submission of valid right-to-use permits, zoning approvals, and effective plans for mediating community concerns. Both proposals also received a blue/very good rating for the accountability factor and green/acceptable ratings for the other three factors of the technical management area. Agency Report, Tab 7, SSEB Technical Evaluation, at 2-6.

The source selection official determined that Paladin's proposal was the more advantageous to the government of the two proposals received, based on its lower price, higher past performance rating, and substantially technically equal technical/management rating. Agency Report, Tab 12, Source Selection Decision, at 10. The BOP awarded Paladin the contract on August 30. The Salvation Army then filed several protests.

In its September 25 protest, the Salvation Army challenged the reasonableness of the relative ratings of the two proposals on a variety of bases. For example, the Salvation Army questioned the BOP's rationale for assigning the Salvation Army only a green/acceptable rating under past performance despite its successful incumbent performance and Paladin a blue/very good rating based on operating a much smaller facility offering more limited services in a very different area. The protester also argued that the BOP had unreasonably evaluated, and failed to make a meaningful assessment of the risks of, the technical/management proposals, because the Salvation Army proposed an existing facility located where a majority of the population was to be served, while Paladin's proposal was to build a facility more than 75 miles from Chicago. The protester also asserted that the BOP applied an unstated evaluation criterion, by holding the Salvation Army to a more stringent (1 to 10) staffing requirement than Paladin. In a supplemental protest filed October 4, the Salvation Army contended that the BOP failed to reasonably evaluate Paladin's ability to finance construction of a new facility and the level of Paladin's community support.

On October 24, the BOP filed a report responding to the protest allegations and defending the propriety of the award. On November 3, the Salvation Army filed its comments on the agency report in which it reiterated its protest allegations and supplemented these arguments based upon its review of the evaluation documentation. While the protester asserted that some of these arguments might constitute additional protest grounds, our Office did not treat them as such and did not request a supplemental agency report.

Instead, on December 4, the GAO attorney assigned this case advised the parties that a hearing was scheduled on December 8 to receive testimony regarding the protest issues. The GAO attorney explained that the hearing was necessary because the evaluation record did not support the reasonableness of the evaluation of Paladin's proposal in certain areas, and the hearing would provide the agency with the opportunity to explain, among other things, whether the BOP conducted a reasonable evaluation of the proposals with regard to past performance, whether the BOP reasonably evaluated site validity and suitability, whether the BOP evaluated staffing ratio equally between the two proposals, and whether the BOP reasonably considered risks associated with Paladin's proposal to construct a new facility.

On December 6, the BOP advised that "[i]n response to the new grounds identified in the November 3, 2006 Salvation Army response, [BOP] has decided to take corrective action. Specifically, BOP will re-evaluate the proposals submitted by the Salvation Army and Paladin in the area of Past Performance." BOP Letter, Dec. 8, 2006, at 1. On December 13, we dismissed the protest in light of the agency's decision to take corrective action.

The Salvation Army requests reimbursement of its protest costs, arguing that the BOP unduly delayed taking corrective action in response to a clearly meritorious protest by not taking corrective action until after submission of the agency report.

Where a procuring agency takes corrective action in response to a protest, our Office may recommend that the agency reimburse the protester its protest costs, where based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. AAR Aircraft Servs., B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3.

The BOP does not deny that the corrective action was in response to a clearly meritorious protest, but claims that the corrective action was "prompt" because it was only undertaken in response to the new protest allegations concerning past performance contained in the protester's comments before the hearing was conducted or the agency submitted a report on these issues.

Our review of the record confirms that the protests were clearly meritorious. As indicated to the agency when the hearing was scheduled, there was no reasonable

explanation in the record for the BOP's evaluation in a number of areas.³ Specifically, Paladin's blue/very good rating for past performance was not reasonably supported by the record for a variety of reasons: (1) notwithstanding the RFP's statement that the relevance of past performance information would be evaluated, the only Paladin contract found relevant by the agency involved performance that was at a facility significantly smaller than the solicited facility, that did not involve CSC services (but only substance abuse treatment), and that had been ongoing for less than a year; (2) the services performed at the Paladin facility did not include any contemplated by the programs factor; and (3) the evaluation documentation supporting the exemplary past performance rating appeared to consist of quotes from Paladin's self-assessment included in its proposal.⁴ In addition, the record confirmed the validity of the Salvation Army's allegations that the evaluation of the site validity and suitability subfactor of the site location factor considered only the offerors' submission of valid right-to-use permits, zoning approvals, and effective plans for mediating community concerns, even though such issues as the relative suitability and location of the sites and commuting time to the general area of work were also required to be considered under this factor. Specifically, as noted by the protester, whereas the Salvation Army's existing incumbent contract facility was in Chicago, Paladin's facility had yet to be constructed (which posed risks) and was located 75 miles outside Chicago, yet the evaluation documentation did not evidence that the significance or risks of the different proposed locations was considered.

With respect to the promptness of the agency's corrective action under the circumstances, we review the record to determine whether the agency took appropriate and timely steps to investigate and resolve the impropriety. See Chant Eng'g Co., Inc.--Costs, B-274871.2, Aug. 25, 1997, 97-2 CPD ¶ 58 at 4; Carl Zeiss, Inc.--Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 at 4. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is

³ While we would ordinarily not regard a protest as clearly meritorious where resolution of the protest required further record development such as a hearing to complete and clarify the record, New England Radiation Therapy Mgmt. Servs., Inc.--Costs, B-297397.3, Feb. 2, 2006, 2006 CPD ¶ 30 at 4, there are cases, as here, where corrective action has been taken by an agency in response to a protest after a hearing has been scheduled and our review of the record establishes, even without further record development, that the protest was clearly meritorious. See, e.g., AAR Aircraft Servs.--Costs, supra, at 4.

⁴ We also question the propriety of the SSEB requiring the Salvation Army to maintain a 1 to 10 ratio of case manager to inmate under the personnel subfactor of the past performance factor, when there was no specific staffing composition required by the RFP, and Paladin was not held to a similar staffing requirement.

taken after that date. See CDIC, Inc.–Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.

Here, the Salvation Army's initial protest contested the past performance and site validity and suitability subfactor evaluation of Paladin's proposal, and it raised the essential grounds that turned out to be clearly meritorious. Our review of the record indicates that if the BOP had conducted a prompt and reasonable inquiry at the outset with regard to the Salvation Army's protest allegations, it would have disclosed the absence of a defensible legal position. See York Bldg. Servs., Inc.; Olympus Bldg. Servs., Inc.–Costs, B-282887.10, B-282887.11, Aug. 29, 2000, 2000 CPD ¶ 141 at 5. Instead, the agency submitted a report defending the award. While the BOP asserts that it was the allegations in the protester's comments, which the Salvation Army labeled a supplemental protest, that caused it to take corrective action, the BOP has not identified the specific additional allegations in these comments that caused it to take corrective action, and our review of the comments reveals that they essentially expand upon the issues initially raised based upon the information disclosed in the agency report. We regard the BOP's corrective action here as unduly delayed because it was taken after the report and the protester's comments thereon were submitted, and only after GAO scheduled a hearing after advising the parties that the record did not reasonably support the evaluation. Thus, we recommend that the Salvation Army be reimbursed its costs of pursuing its protests.

The BOP alternatively argues that the corrective action should be limited to the costs associated with pursuing the past performance issue only. We have limited the award of protest costs to successful protesters where a part of their costs is allocable to a protest issue which is so clearly severable as to essentially constitute a separate protest. See Sodexo Mgmt., Inc.–Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136 at 29. As a general rule, however, we consider a successful protester should be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it prevails. This is true because limiting recovery of protest costs to only those issues on which the protester prevailed would be inconsistent with the broad remedial congressional purpose behind the cost reimbursement provisions of the bid protest provisions of the Competition in Contracting Act of 1984 (CICA). 31 U.S.C. § 3554(c)(1)(A) (2000). Consistent with this view, we generally consider all issues concerning the evaluation of proposals to be intertwined—and thus not severable—and therefore generally will recommend reimbursement of the costs associated with both successful and unsuccessful evaluation challenges. See Blue Rock Structures, Inc.–Costs, B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190 at 3; AAR Aircraft Servs.–Costs, *supra*, at 5. Accordingly, and especially here since, as discussed above, we found that there were other clearly meritorious protest issues in addition to past performance, we find no basis to limit the Salvation Army's recovery of its protest costs.

Finally, the Salvation Army requests that we recommend that an upward adjustment to the \$150 statutory cap rate applicable to attorneys' fees incurred by other than

small businesses be made. Under CICA, where, as here, our Office recommends that a successful protester's costs, including reasonable attorneys' fees, be reimbursed, those fees may not exceed \$150 per hour "unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." 31 U.S.C. § 3554 (c)(2)(B); see Department of the Army; ITT Fed. Servs., Int'l Corp.--Costs, B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72 at 2; Sodexo Mgmt., Inc.--Costs, supra, at 37-43. At this juncture, the Salvation Army's request is premature, since it has not yet submitted its claim for costs to the agency on this basis.⁵

Accordingly, we recommend that the Salvation Army be reimbursed the reasonable costs of filing and pursuing its protests, including those incurred here, i.e., requesting a recommendation for costs. See AAR Aircraft Servs.--Costs, supra, at 5-6. The Salvation Army should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the BOP within 60 days of receipt of this decision.

Gary L. Kepplinger
General Counsel

⁵ In our Office's recent decisions, we have found that the justification for an upward departure from the \$150 per hour cap for attorneys' fees is self-evident if the claimant points to an increase in the cost of living, as measured by the Department of Labor's Consumer Price Index. For that reason, we have declined to impose a requirement that a claimant do more than request an adjustment and present a basis upon which the adjustment should be calculated; where the claimant meets this standard, and an agency does not articulate any objection, we will grant a claimant's request for a recommendation in favor of a cost-of-living adjustment to the fee cap. See, e.g., EBSCO Publ., Inc.--Costs, B-298918.4, May 7, 2007, 2007 CPD ¶ 90 at 3.