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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Dismas Charities, Inc.

File: B-291868

Date: April 23, 2003

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

Kevin M. Cox, Esq., Joseph A. Camardo, Jr., Esq., and Nancy M. Camardo, Esq., for Bannum, Inc., an intervenor.

Tracey L. Printer, Esq., Federal Bureau of Prisons, for the agency.

Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer has authority to decide when negotiation and offer stage of a procurement is finished and an offeror has no legal right to insist that negotiations be reopened to permit a site substitution—a substantial and material proposal modification—after final revised proposals have been submitted.

2. Agency may not accept protester's site change request as a late modification to an "otherwise successful proposal that makes its terms more favorable to the Government" where record fails to show that protester's proposal was in line for award, and where proposal no longer offered an acceptable facility.

DECISION

Dismas Charities, Inc. protests the rejection of its proposal under request for proposals (RFP) No. 200-0723-SC, issued by the Federal Bureau of Prisons for residential community corrections center services in Corpus Christi, Texas.

We deny the protest.

The RFP, issued on January 22, 2002, contemplated the award of a fixed-price, requirements contract for a 2-year base period with up to three 1-year option periods. The contractor would be required to provide residential community corrections center services for male and female federal offenders in the Corpus Christi area. The solicitation provided that the evaluation would be based on past performance, technical, management, and cost factors, with past performance being

the most important factor and the remaining factors being of equal weight. The technical factor included consideration of the proposed facility's suitability, age, condition, location, and compliance with National Fire Protection Association life/safety standards. In this regard, the RFP required offerors to provide documentation regarding their right to use the facility, evidence of notifications to law enforcement and elected officials, and floor plans. RFP § L.8(a). The RFP further provided that the agency would conduct an on-site evaluation of an offeror's location and facility before any negotiations to ascertain if the site was in compliance or capable of being brought into compliance with contractual requirements. The RFP also provided that only one request for a change in an offeror's proposed facility would be approved and that the request had to be received by the contracting officer prior to submission of the firm's final proposal revision. RFP § L.8(g)(3). A site change request was to include all site information documentation required by the RFP. Award was to be made on the basis of the proposal determined to represent the best value to the government.

Only two firms, Dismas and Bannum, Inc., submitted initial proposals by the March 22, 2002, closing date and the agency conducted written technical discussions with both offerors from May to July 2002. By letter dated October 8, 2002, both offerors were advised that the evaluation of technical proposals was complete and that final proposal revisions were due by October 15. After receipt of final proposal revisions, the technical evaluation panel evaluated prices and past performance and forwarded the results to the technical evaluation chairperson for review and final scoring.¹ The post-protest agency report to our Office states that at this time, Dismas "was apparently in line for award, and the recommendation was being reviewed." Legal Opinion and Contracting Officer's Statement at 2.

On December 19, Dismas notified the agency that the firm was unable to maintain control of its proposed site because the property had been sold to another buyer; Dismas asked to change its proposed site, stating that its new site made its proposal more favorable because the property: (1) was more centrally located and closer to downtown Corpus Christi and essential employment, emergency and social services, as well as numerous potential employers, (2) offered excellent access to public transportation, (3) did not diminish the community support Dismas had worked to achieve, and (4) would allow Dismas to reduce demolition and renovation work. Dismas, however, did not include all the site documentation with its request as required by the RFP.

¹ On November 13, amendment No. 6 was issued postponing the start date of the performance period from February 1, 2003 to May 1, 2003. The actual length of the performance period was not changed. Further proposal revisions were not solicited or submitted in response to the amendment.

By letter dated January 2, 2003, Dismas was advised that its request for a site change could not be accepted and that its proposal was excluded from the competitive range because it no longer had an acceptable facility, and it would further delay the award of the contract to allow the change of site. The agency subsequently recommended Bannum, which proposed an acceptable site and a lower price than Dismas, for award. No award has been made pending resolution of this protest.

On January 16, Dismas protested to our Office its proposal's exclusion from the competition. Dismas primarily challenges the agency's decision not to permit Dismas to modify its proposal to substitute its new site after submission of final proposal revisions.

It is the contracting agency's right to determine when the negotiation and offer stage of a procurement is finished, and an offeror has no legal right to insist that negotiations be reopened after final proposal revisions have been submitted. Independent Bus. Servs. Inc., B-235569.3, Nov. 2, 1989, 89-2 CPD ¶ 413 at 3. The record shows that more than 2 months after submission of final proposal revisions Dismas requested a site change on the basis that its proposed site was unavailable and had been sold to another party. Nothing in the record suggests that the agency acted unreasonably or in a way inconsistent with the solicitation in deciding not to accept Dismas's proposal revision.

First, the solicitation specifically notified offerors that, to be considered, a request for a site change had to be received by the contracting officer prior to receipt of final proposal revisions. Denial of Dismas's request to replace its proposed site was thus consistent with the solicitation. Second, if it had entertained Dismas's request to propose a different site, the agency would have had to perform an entirely new technical evaluation and site inspection for the new proposed site with no certainty that the site would meet all RFP requirements. As the agency asserts, there is no question that consideration of the new site would have further delayed an already extended negotiation. Moreover, when it asked to change its proposed facility, Dismas had failed to submit the site documentation required by the solicitation, and submission of that documentation could have delayed the procurement even longer. Finally, the agency had a firm with a lower priced, technically, acceptable proposal remaining in the competition. In these circumstances, we think the agency's decision not to reopen negotiations to permit a site substitution--a substantial and material proposal modification--was reasonable.

Dismas also contends that even if its request for a site change was late pursuant to § L.8(g)(3) of the solicitation, the agency was still required to consider it pursuant to the solicitation provision that states that "a late modification of an otherwise successful proposal that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted." RFP § L.2(c)(3)(ii)(B). We disagree.

A late proposal modification may be accepted only if the late modification makes the terms of an otherwise successful proposal more favorable to the government. Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175 at 4. Here, notwithstanding the statement in the agency report that Dismas was “apparently in line for award,” there is nothing in the contemporaneous evaluation record showing that the agency had concluded that the Dismas revised proposal was the “otherwise successful” proposal. Since, as the agency report to our Office indicates, a recommendation concerning Dismas “was being reviewed,” it is not clear from the record which offeror was actually in line for award based on revised proposals. The documents referred to by the agency in its report do not identify any “otherwise successful” proposal. Agency Report, Tab 9B. More importantly, at the time Dismas requested the site change, its revised proposal was no longer acceptable because its proposed facility was no longer available. Thus, under these circumstances, the RFP provision cited by Dismas does not provide a basis to accept Dismas’s request for a site change.²

The protest is denied.

Anthony H. Gamboa
General Counsel

² Dismas argues that the agency’s failure to timely evaluate proposals and award the contract contributed to the loss of its original site. However, there is nothing in the record that shows that the agency unduly delayed the evaluation and award decision. Dismas does not even allege that the agency was aware that Dismas’s original proposed site would not be available until Dismas requested a site change on December 19, 2 months after the closing date for final proposal revisions. Furthermore, an agency’s delay in meeting procurement milestones is a procedural deficiency, which does not provide a basis of protest, because it has no effect on the validity of the procurement. Trim-Flite, Inc., B-229926.4, July 28, 1988, 88-2 CPD ¶ 124 at 2.