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Decision

Matter of: Motorola Solutions, Inc

File: B-409148; B-409148.2

Date: January 28, 2014

Mark D. Colley, Esq., and Dominique L. Casimir, Esq., Arnold & Porter LLP, for the protester.

Debra J. Talley, Esq., David H. Scott, Esq., and J.E. Purcellmarchese, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation is timely where record shows that agency delayed furnishing protester with information that was critical to raising its argument, protester diligently pursued the information, and protester filed within 10 days of being provided the information that was improperly withheld.

2. Protest that agency improperly accepted awardee's proposal is sustained where record shows that the proposal offered to furnish certain equipment that was material to the acceptability of the awardee's proposal, but did not provide evidence of the awardee's ability to obtain the equipment, as required by the solicitation.

DECISION

Motorola Solutions, Inc., of Columbia, Maryland, protests the award of a contract to Harris Corporation, of Lynchburg, Virginia, under request for proposals (RFP) No. W91CRB-13-R-0024, issued by the Department of the Army, U.S. Army Materiel Command, for a land mobile radio (LMR) system for the Detroit Arsenal, Michigan. Motorola maintains that the agency miscalculated Harris's proposal and improperly made award to that firm.

We sustain the protest.

BACKGROUND

The RFP contemplates the award of a fixed-price contract on a “best value” basis to provide the Army with a turnkey LMR system. The system is comprised of various land-based and mobile radio units, as well as associated hardware and software to make the system fully operational. Firms were advised that proposals would be evaluated based on price, as well as several non-price factors which, collectively, were deemed significantly more important than price. RFP at 40. The non-price evaluation factors, in descending order of importance, were: technical solution, information assurance solution, management plan and past performance.¹

The agency received two proposals in response to the solicitation, from Motorola and from Harris. The Army evaluated proposals, engaged in discussions, and solicited, obtained and evaluated revised proposals. The Army assigned the following ratings to the proposals:

Offeror	Technical Solution	Information Assurance Solution	Management Plan	Past Performance²	Price
Motorola	Highly Satisfactory/Low Risk	Highly Satisfactory/Low Risk	Satisfactory/Low Risk	Very Relevant	\$1,933,365
Harris	Highly Satisfactory/Low Risk	Highly Satisfactory/Low Risk	Highly Satisfactory/Low Risk	Very Relevant	\$2,488,326

Agency Report (AR) exh. 12a, Source Selection Decision, at 3, 10, 11. On the basis of these evaluation results, the agency made award to Harris, concluding that its proposal represented the best value to the government. After being advised of the agency’s source selection decision and requesting and receiving a debriefing, Motorola filed the instant protest.

¹ The RFP advised offerors that the agency would assign the first three non-price evaluation factors adjectival ratings of highly satisfactory, satisfactory or unsatisfactory, and risk ratings of low, medium or high risk. RFP at 40-42. For the past performance factor, the RFP advised offerors that the agency would evaluate past performance examples based on relevancy, and also would assign adjectival ratings for past performance of substantial confidence, satisfactory confidence, limited confidence, no confidence or unknown (neutral) confidence. RFP at 43.

² Notwithstanding the rating scheme outlined in the RFP, the agency did not assign confidence ratings to either firm’s past performance.

PROTEST

Motorola raises several challenges to the agency's evaluation of the Harris proposal. We note at the outset that, in considering protests relating to an agency's evaluation, we do not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. We have considered all of Motorola's challenges and sustain its protest for the reasons discussed below.

Motorola's principal challenge to the agency's evaluation of the Harris proposal relates to the acceptability and availability of the radios offered by Harris. By way of background, the RFP included a customer requirements statement (CRS) which, in effect, was the statement of work and specifications for the LMR system. The RFP required all proposed services and equipment to be in accordance with the CRS and all appendices to the CRS. RFP at 32. The CRS, in turn, included detailed specifications, and also referenced various requirements in the appendices included with the CRS. As is relevant here, the CRS expressly provided as follows:

The proposed system solution shall meet all of the technical requirements as identified in the CRS, General Requirements for a Land Mobile Radio System (Appendix A), and the Michigan Public Safety Communication System (MPSCS) Bulletin #2013-01 "Radios Approved for use on the MPSCS" (Appendix B).

AR, exh. 1b, CRS, at 1. For purposes of this protest, the requirement that all radios proposed be on the list of radios approved by the Michigan Public Safety Communications System (MPSCS) is relevant.

In its initial protest, Motorola alleged that the agency improperly relaxed this requirement for Harris because Harris did not have a radio included on the MPSCS list of approved radios. In connection with this allegation, the record shows that the protester had requested during its debriefing (as well as in a follow-up e-mail to the contract specialist) that it be provided information concerning the specific model of radio Harris proposed. Motorola based its request on the fact that this was a commercial acquisition, and, in Motorola's view, it was entitled to this information pursuant to the requirements of Federal Acquisition Regulation (FAR) § 15.506(d)(5).³

³ FAR 15.506(d)(5) requires, in connection with acquisitions for commercial items, that the agency provide an offeror in its debriefing the make and model number of commercial items that the successful offeror will deliver to the procuring agency.

The agency's contract specialist declined to provide the requested information to Motorola. Nonetheless, he offered his opinion that the RFP did not require that the radios proposed had to be approved by the MPSCS at the time of contract award, but, rather, only had to be approved in "a timely manner." AR, exh. 16e, Oct. 17 E-mail from the contracting specialist to Motorola. He further opined that there was no basis for him to conclude that Harris could not meet the requirement in accordance with the proposed project schedule. Id.

Based on the information at hand at the time, Motorola argued in its protest that the Army had relaxed the requirements of the RFP by allowing Harris some unspecified interval after contract award to obtain MPSCS approval of its proposed radio.

In response to the protest, the Army filed its agency report which included, among other things, a copy of the Harris proposal, along with a combined legal memorandum and contracting officer's statement (LM/COS) that made numerous references to the contents of the Harris proposal, and identified the model of radio that Harris had offered. These documents were provided to Motorola's counsel under a protective order issued by our Office.

The record shows that protester's counsel prepared a redacted version of the agency's LM/COS that included the information regarding Harris's proposed use of the Motorola APX 7000 radio and provided it to counsel for the agency, seeking her approval for its release to Motorola. Agency counsel declined to approve the redacted version of the LM/COS. Motorola's counsel subsequently wrote to our Office seeking resolution of this disagreement. Motorola Letter, Dec. 3, 2013. Motorola's counsel continued to maintain that the model of radio being furnished by Harris properly was releasable in light of the requirements of FAR § 15.506(d)(5). Before our Office could rule on the dispute, counsel for the agency and Motorola arrived at a compromise concerning the redacted version of the LM/COS, and the model of radio offered by Harris was provided to Motorola directly. E-Mail from Agency Counsel, Dec. 3, 2013.

Of significance, both the LM/COS as well as the Harris proposal showed that, in order to satisfy the requirements of the RFP relating to providing MPSCS approved radios, Harris had offered the Motorola APX 7000 radio as its principal solution, and had proposed, as an alternate solution, use of the Harris XG 100 radio, should it be approved by the MPSCS in time for Harris to provide it during performance of the contract.

On December 13, Motorola supplemented its original protest, maintaining that the agency could not properly have accepted the Harris proposal offering the Motorola APX 7000 radio because Harris had no way to obtain the radios from Motorola, and also had not demonstrated in its proposal that it had the necessary means of obtaining the radios.

Timeliness

As a threshold matter, the agency argues that Motorola's supplemental protest is untimely because it was not filed within 10 days of Motorola's counsel receiving the agency's report. According to the agency, since the protester's counsel had the information necessary to advance the allegation--the fact that Harris intended to furnish the Motorola APX 7000 radio--the allegation, to be timely, had to be filed within 10 days of counsel's receipt of the agency report. The agency contends that protester's counsel stands in the shoes of his or her client for purposes of using information furnished under a protective order, and that information known to the client--such as company policies--is imputed to counsel for purposes of meeting our timeliness rules. According to the agency, "Motorola cannot legitimately hide behind the ignorance of its attorneys as to its asserted corporate practices to evade the timeliness rules applied to protests." Agency Supplemental Report at 1.

We agree with the agency that, in most instances, counsel must effectively stand in the shoes of the client where information is covered by a protective order and counsel cannot properly obtain the benefit of his or her client's input. See generally, Columbia Research Corp., B-247073, Sept. 17, 1992, 92-2 CPD ¶ 184. This is not such a case. First, and most importantly, the record shows that Motorola diligently pursued the information in question at all relevant times. As noted, when it received its debriefing, as well as immediately thereafter, Motorola not only specifically requested the information, but also provided an underlying legal basis for its belief that it was entitled to the information.

Second, the record shows that Motorola's counsel not only timely and properly followed the procedures outlined in the protective order in seeking to obtain the information for release to their client but, in fact, went beyond what was required. In this connection, protester's counsel provided agency counsel with a proposed redacted version of the agency's LM/COS within 2 days of receiving the agency report. Thereafter, pursuant to the terms of the protective order, protester's counsel waited two business days before tentatively concluding that agency counsel did not object to the proposed redacted version of the LM/COS. However, out of an abundance of caution, protester's counsel still did not release the information to their client, as they legally were entitled to do under the terms of the protective order. Instead, protester's counsel attempted to contact agency counsel to obtain her concurrence to the release of the redacted LM/COS.

Agency counsel waited yet another day before advising protester's counsel that she objected to the release of the proposed redacted LM/COS. By the time protester's counsel heard from agency counsel, a federal holiday was upon us. The following Monday, protester's comments were due to be filed. Those comments were timely filed without protester's counsel having the benefit of the client's input. Nonetheless, the very next day, after protester's counsel sought the assistance of our Office in resolving the dispute, agency counsel acquiesced and made the

information available outside of the protective order. Motorola filed its supplemental protest allegation within 10 days of receiving the information.

In the final analysis, the record shows that Motorola diligently and persistently sought the information in question, and its counsel went beyond what was required under the protective order in order not to release information that the agency may have thought was properly protected. Ultimately that information was provided to Motorola by the agency, in apparent recognition of the fact that Motorola legally was entitled to the information under the FAR in the first instance.⁴ The agency now seeks unfairly to benefit from its own dilatory behavior, since it is clear from the record that Motorola would (and did) advance this argument as soon as it had the relevant information. We decline the agency's request to dismiss the issue, conclude that it is timely, and consider it on the merits.

Acceptability/Availability of the Harris Offered Radios

Motorola argues that the agency unreasonably accepted the Harris proposal because it included the Motorola APX 7000 radio in order to meet the RFP's requirement that the offeror propose a radio approved by the MPSCS.⁵ Motorola contends that it would not have sold the radios to Harris for this requirement because it is in direct competition with Harris for the instant contract. Motorola further asserts that Harris could not have obtained the radios without its consent because the radios are mission critical (meaning they are only for use by people who have a critical need to communicate at all times on specific officially licensed

⁴ We agree with the protester that the information should have been provided to Motorola directly during its debriefing pursuant to the requirements of FAR § 15.506(d)(5).

⁵ In its first report, the Army argued that the RFP did not require Harris to offer an MPSCS approved radio at the time of proposal submission, or even prior to award. According to the Army, this requirement is in the nature of a licensing requirement that the contractor may satisfy during performance. We disagree. First, as noted above, the RFP expressly required that the "proposed system solution" be compliant with the terms of the RFP, including the requirement that any offered radios be MPSCS approved. AR, exh. 1b, CRS, at 1. This language effectively required offerors to propose systems that were compliant at the time they submitted their proposals. Second, the record shows that the agency did not interpret the solicitation as allowing compliance with this requirement after award. For this very reason, the agency assigned the initial Harris proposal a significant weakness, rated it unsatisfactory under the technical solution evaluation factor, and, during discussions, required Harris to propose the Motorola radio in lieu of the Harris radio, precisely because the Harris radio was not MPSCS approved at the time Harris submitted its initial proposal. AR, exh. 7b, Harris Discussion Questions, at 8.

frequencies), and Motorola does not sell mission critical products on the open market. Motorola's account manager explains as follows:

In the Federal Market space, Motorola sells its radios through an Independent Reseller Channel. Motorola does not provide these Independent Resellers with a set price book for Motorola brand radios. Instead, Motorola requires the Independent Resellers to collect specific information about the resale opportunity (e.g., customer name, program name, etc.) and request pricing from Motorola on a case-by-case basis. Under no circumstances can an Independent Reseller quote a Motorola P25 radio (such as the APX 7000) to a potential customer without prior authorization from Motorola. Motorola reserves the right to issue a quote or to deny issuance of a quote.

In the non-Federal market, Authorized Resellers sell lower-tier Motorola brand radios at prices set forth in a price book. The Authorized Resellers can sell the Motorola radios in the price book to anyone they choose. However, Motorola's P25 Mission Critical products are not included in the Standard Authorized Reseller portfolio.

Accordingly, although the Motorola APX 7000 radio is a commercial radio, Harris cannot acquire that radio for the Detroit Arsenal Land Mobile Radio System from an authorized Independent Reseller absent express authorization from Motorola.

Motorola Supplemental Protest, exh. 1, at 1.

The agency responds that it reasonably accepted Harris's proposal that included the Motorola APX 7000 radios. The agency contends that there would have been no way for it to know that Harris could not obtain the radios.

The record does not support the Army's position. The RFP required offerors to include an original equipment manufacturer (OEM) attestation with their proposals in the event that they were furnishing a LMR system manufactured by them, but also required firms to provide specific, written agreements where the equipment being furnished was not manufactured by the concern submitting the proposal. Specifically, the RFP provided: "All Offerors shall provide written proof that they either are a Land Mobile Radio System OEM or have a business partnership/agreement, specifically for the Detroit Arsenal, MI LMR effort, with an LMR OEM." RFP at 35.

Here, the record shows that Harris provided only a written attestation that it was, in general, an OEM of LMR systems. AR, exh. 9i, Harris Revised Proposal, at 1. However, to the extent that Harris was furnishing equipment that it did not

manufacture, the RFP required it to provide written proof that the firm had a business relationship--specifically to furnish equipment for the Detroit Arsenal acquisition--with the OEM that manufactured the equipment.

The agency argues that Harris was not required to provide a separate written agreement with Motorola because Harris was furnishing predominantly Harris equipment, and its blanket OEM attestation was all the RFP required. However, the RFP provision at issue clearly is intended to provide the agency with assurances that the equipment being proposed can, in fact, actually be furnished by the offeror. It follows that, to the extent an offeror--even an OEM of LMR systems--was proposing equipment manufactured by another, different OEM, the RFP provision required that the offeror provide written evidence of a relationship with the other OEM.

The record shows that there is nothing in the Harris proposal to demonstrate that it has an agreement with Motorola to purchase the Motorola APX 7000 radios. However, the agency was required, under the express terms of the RFP, either to seek and obtain written proof that Harris, in fact, had a business relationship with Motorola that would allow it to purchase the APX 7000 radios, or to reject the Harris proposal for not meeting the requirement to provide MPSCS approved radios. This was especially true in view of the fact that Motorola is a direct competitor of Harris in the Detroit Arsenal acquisition offering the identical radio. Accordingly, we sustain Motorola's protest on this basis.

As a final matter, the protester also notes--correctly--that the agency gave Harris credit during its evaluation both for features of the Harris radio that is not MPSCS approved, as well as for the Motorola radio that is not available to Harris. AR, exh. 11a, Final Technical Evaluation Report, at 4-5. The record also shows that these same considerations were specifically identified in the source selection decision as discriminators in favor of awarding to Harris at a price premium. AR, exh. 12a, Source Selection Decision, at 4, 12. For the reasons discussed above, it was improper for the agency to give Harris evaluation credit for either radio, since the Harris radio was not MPSCS approved at the time Harris submitted its proposal, and since Harris failed to demonstrate in its proposal that it could furnish the Motorola radio. Correspondingly, relying on these considerations as a basis for awarding the contract to Harris at a price premium also was improper. We therefore also sustain Motorola's protest on this basis.

RECOMMENDATION

In view of the foregoing discussion, we recommend that the agency reevaluate proposals in manner consistent with the discussion above.⁶ We further recommend that, in the event the agency concludes that Harris is not properly in line for award, it terminate Harris's contract for the convenience of the government, and make award to Motorola, if otherwise proper. Finally, we recommend that Motorola be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2013). Motorola's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel

⁶ Motorola's protest also challenges the agency's past performance evaluation. As noted above, the record also shows that the agency never assigned adjectival ratings to the offerors under the past performance evaluation factor. Moreover, the evaluation record shows that the agency included word-for-word identical narrative discussions of the two offerors' past performance. AR, exh. 11a, Final Technical Evaluation Report, at 12; exh. 12a, Source Selection Decision, at 10. In addition, the contracting officer represents in the agency report that she never contacted the past performance references included in the Harris proposal. LM/COS at 8-9. We need not consider in detail Motorola's allegation, since we sustain its protest for the reasons outlined above. Nonetheless, the agency may want to consider performing a meaningful evaluation of past performance during its reevaluation, or be prepared to explain why word-for-word identical narrative assessments of the vendors' past performance is reasonable.