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Decision

Matter of: Morpho Detection, Inc.

File: B-410876

Date: March 3, 2015

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David R. Cutler, Esq., and Daniel Potucek, Esq., Department of Homeland Security, Transportation Security Administration, 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 challenging agency's evaluation of protester's proposal is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation, as well as applicable statutes and regulations.
 2. Protester is not an interested party to challenge eligibility of awardee to receive task order where record shows there is another offeror that would be in line for award if protester's allegations concerning awardee are correct.
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DECISION

Morpho Detection, Inc., of Newark, California, protests the issuance of a delivery order to Implant Sciences Corporation (ISC), of Wilmington, Massachusetts, under delivery order request for proposals (RFP) No. HTHS04-14-R-CT2050, issued by the Department of Homeland Security, Transportation Security Administration, for explosive trace detection (ETD) units. Morpho alleges that TSA misapplied the RFP's evaluation scheme, used unstated evaluation factors, and treated it and ISC disparately in evaluating proposals and making its award decision. Morpho also maintains that ISC is ineligible for issuance of the delivery order, and that the agency unreasonably found ISC responsible.

We deny the protest in part and dismiss it in part.

BACKGROUND

The solicitation was issued on June 18, 2014, in connection with underlying multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. The RFP provided for the issuance of a delivery order to the firm that offered the best value to the government considering two non-price factors--technical capability and deployment capability--and price.¹ Agency Report (AR) Exh. 20, Delivery Order RFP, at BATES 471-473. Technical capability was more important than delivery capability, and the two non-price factors, when combined, were significantly more important than price. Id. at BATES 473.

The agency received three proposals in response to the RFP. After evaluating initial proposals, engaging in discussions, and soliciting, obtaining and evaluating final proposal revisions, the agency made award to ISC as the firm whose proposal offered the best value to the government. The award decision was based on the following evaluation results:

	Technical Capability	Delivery Capability	Price
Morpho	Good	Outstanding	[\$deleted]
ISC	Outstanding	Good	\$23,332,925
Offeror A	Outstanding	Outstanding	[\$deleted]

AR, exh. 35, Source Selection Decision Document (SSDD), at BATES 655.

The agency assigned Morpho's proposal a weakness and a risk based on a concern relating to the false alarm rate associated with the latest version of its product's software. The record shows that Morpho proposed version 8.94k of its software, which its proposal stated would resolve an outstanding false alarm rate issue identified in connection with earlier versions of its software. AR, exh. 28, Morpho Revised Proposal, at BATES 570.

In evaluating Morpho's proposal, the agency found that, during field testing of version 8.94k of Morpho's software, Morpho's false alarm rate did not meet the

¹ The agency assigned adjectival ratings under the non-price factors of outstanding, good, acceptable or unacceptable. Agency Report, exh. 27, Source Selection Plan (SSP), at BATES 559-560. (The record includes two exhibits identified as the SSP, exhibits 21 and 27. They are identical except that exhibit 27 is an amended version of the SSP that substituted one individual for another as the source selection authority (SSA).) The SSP also provided for the agency to assign proposals major strengths, strengths, weaknesses, significant weaknesses, deficiencies and risks. Id. at BATES 560.

RFP's minimum requirements. AR, exh. 29, Morpho Proposal Evaluation Report, at BATES 611. TSA assigned the proposal a weakness because of this failure to meet the RFP's requirements. Id. The agency assigned the Morpho proposal a risk for this same reason, finding that the unacceptable false alarm rate, while potentially correctible, could have a negative impact on airport operations. The agency also found that additional software development and potential engineering change proposals would be required to improve performance of the Morpho product to an acceptable level. Id. at BATES 611-612.

The record shows that, on the basis of this weakness and risk associated with the Morpho proposal, the SSA specifically found that he would make award either to ISC or to Offeror A ahead of Morpho, notwithstanding the price premium associated with those two proposals. AR, exh. 35, SSDD at BATES 657, 659. Morpho was notified of the award decision on November 10, and this protest followed.²

DISCUSSION

Morpho challenges TSA's issuance of the delivery order to ISC on several bases. Broadly, Morpho challenges the agency's evaluation of its proposal and maintains that the agency both misevaluated its proposal, and then used the evaluation results in a manner that was inconsistent with the weighting identified in the RFP's evaluation scheme. Morpho also raises several contentions relating to the eligibility of ISC to receive award of the delivery order, including that ISC was improperly placed on the agency's qualified products list; that ISC was improperly given an underlying IDIQ contract for ETDs; and that ISC should have been found nonresponsible by the agency. We have considered all of Morpho's allegations. For the reasons discussed in detail below, we deny Morpho's allegations about the agency's evaluation of its proposal, and we dismiss its remaining allegations.

Morpho maintains that, in evaluating its proposal, the agency "double counted" the concern associated with its false alarm rate. Although Morpho does not take issue with the substance of the agency's finding, it maintains that it was unreasonable for the agency to have assigned its proposal both a weakness and a risk for this concern.

In reviewing protests challenging an agency's evaluation of proposals, our Office does not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3,

² The delivery order is valued at \$23,332,925. As its value exceeds \$10 million, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B).

B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2. Our review of the record affords us no basis to object to the agency's evaluation here.

The SSP defined a weakness as "a flaw in the proposal that increases the risk of unsuccessful contract performance." AR, exh. 27, SSP, at BATES 560. The record shows that the weakness was assigned to Morpho's proposal because, based on data derived from the agency's field testing of the Morpho ETD, the product as proposed did not meet the RFP's false alarm rate requirement. AR, exh. 29, Morpho Proposal Evaluation Report, at BATES 611. Morpho does not challenge the substance of the agency's finding.³ We conclude that, because Morpho's proposed ETD did not meet this aspect of the RFP's requirements, the agency reasonably assigned this weakness.

In contrast to the definition of weakness, the SSP defined a risk as follows:

"Risk" is a measure of the inability to achieve program objectives within defined cost and schedule constraints. Risk is associated with all aspects of the program, e.g., threat, technology, design processes, or Work Breakdown Structure (WBS) elements. It has two components, the probability of failing to achieve a particular outcome, and the consequences of failing to achieve that outcome.

AR, exh. 27, SSP, at BATES 560.

The record shows that in addition to its concern relating to the empirical fact that Morpho's ETD did not meet the RFP's false alarm rate requirement, the agency had separate concerns associated with the probability of Morpho being able to rectify the problem with its false alarm rate during contract performance.

Specifically, TSA was concerned that the false alarm rate failure (along with several other minor performance issues associated with the Morpho ETD), while correctible, would require additional software development and tweaking of the software and hardware after award to improve performance of the system, and also would require engineering change proposals and deployment of the software to fielded systems.

³ Morpho's proposal included preliminary test data generated by the firm that, it maintains, demonstrates that its product meets the false alarm rate. The record shows that TSA did not rely on this information, and instead relied on its own test data generated during field testing of the latest version of Morpho's software, data in which the agency had a high degree of confidence. AR, exh. 29, Morpho Proposal Evaluation Report, at BATES 611. In the final analysis, Morpho concedes that TSA reasonably evaluated its proposed system's current capabilities, and also concedes that it was reasonable for TSA to rely on test data it generated in arriving at its evaluation conclusion. Protester's Supplemental Comments, Jan. 21, 2015, at 6.

AR, exh. 29, Morpho Proposal Evaluation Report, at BATES 611-612. The agency concluded that this presented what amounted to a potential post-award risk to the government because the Morpho ETD demonstrated numerous operational issues that would impact performance of the Morpho ETDs, and also would need to be corrected by future system updates. Id. We find that the agency reasonably also assigned a risk to the Morpho proposal because, as proposed, the Morpho ETD would not perform in accordance with the requirements of the RFP, and there was a reasonable possibility that there would be negative performance consequences (as well as difficulties and uncertainties) associated with correcting the problem.

Morpho also alleges that the agency assigned exaggerated importance to the concern associated with its nonconforming false alarm rate. Morpho argues that the agency failed adequately to give it credit for the significant strengths and strengths also assigned to its proposal under the technical capability evaluation factor. Morpho maintains that this amounted to a misapplication of the RFPs evaluation weighting scheme.

We find no merit to this aspect of Morpho's protest. The agency's assignment of a weakness to the Morpho proposal was under the technical capability evaluation factor, the most important evaluation factor included under the RFP. In contrast, there were no weaknesses identified under the technical capability factor for either of the other two proposals. AR, exh. 30, Evaluators' Tradeoff Recommendation, at BATES 625, 627, 631. In addition, all three firms were assigned major strengths and strengths under the technical capability factor. Id. Since Morpho was the only firm with a weakness/risk under this evaluation factor, it was reasonable for the agency to use this consideration as a discriminator for award purposes. While the protester is correct that its proposal was only assigned a single weakness/risk, it nonetheless proved to be the key discriminator for award purposes. See generally, SGT, Inc., B-405736, B-405736.2, Dec. 27, 2011, 2012 CPD ¶ 149 at 10 (there is no requirement that the key award discriminator also be the most heavily weighted evaluation consideration). We therefore deny this aspect of Morpho's protest.

Morpho next alleges that the agency improperly used an unstated evaluation factor in making its source selection decision. Specifically, Morpho alleges that the agency improperly considered its past performance under previous delivery orders in ranking the proposals.

We find no merit to this aspect of Morpho's protest. Agencies properly may evaluate proposals based on considerations not expressly stated in the solicitation where those considerations are reasonably and logically encompassed within the stated evaluation factor, and where there is a clear nexus between the stated and unstated criteria. Exelis Sys. Corp., et al., B-407111, Nov. 13, 2012, 2012 CPD ¶ 340 at 18. Here, the record shows that the agency made several references to Morpho's ability to successfully implement past software upgrades in considering the risk that would be associated with its having to correct the nonconforming false

alarm rate after award. For example, the SSA stated as follows in comparing the Morpho proposal to the ISC proposal:

TSA [Transportation Safety Administration] operational assessments do not support this claim [Morpho's claim in its proposal that it meets the false alarm rate requirement of the RFP] and found that [software version] 8.94k false alarm is actually [deleted] than the currently fielded version (8.93). It should be noted that the currently fielded baseline of 8.93 also does not meet the TSA requirement despite being fielded some 14 months ago due to urgent mission needs. Despite the fact that the false alarm rate requirement for this technology has not changed since at least 2007, MDI [Morpho] has been unable to meet the false [alarm rate] requirement The technical evaluation team (TET) concluded that the risk associated with MDI being able to successfully upgrade their software to sufficiently reduce false alarm rates to meet the TSA requirement was 'Moderate', which[,] given the definition of the evaluation criteria[,] automatically lowers their maximum score to a 'good'. MDI's inability to adequately meet this requirement demonstrates that the moderate risk identified by the TET is valid and is of major concern to TSA. I, as the Source Selection Authority, have very little confidence that MDI will be able to meet the false [alarm] requirement in a quick manner.

AR, exh. 35, SSDD, at BATES 659.

We have no reason to object to the agency's evaluation on this basis. While Morpho is correct that TSA referred to its earlier efforts to implement a software solution that met the false alarm rate requirement, those considerations were discussed in the context of the SSA's assessment of the future risk associated with making award to Morpho and did not constitute an evaluation of the firm's past performance. As noted, Morpho proposed to use a version of its software that was not yet approved by the agency, and that did not conform to the RFP's false alarm rate requirement; the agency was assessing the prospective consequences or risk associated with awarding to Morpho under those circumstances. The agency's reference to Morpho's earlier, unsuccessful, efforts to implement a solution to the very same problem associated with its proposed software was a reasonable and logical consideration bearing on the agency's assessment of the future risk associated with making award to Morpho.

Morpho also raises a number of allegations concerning ISC's eligibility for issuance of the delivery order. These allegations center around the timing of ISC's ETD being added to the qualified products list (QPL), as well as the propriety of its being issued an underlying IDIQ contract that enabled it to compete for this delivery order. Morpho also contends that it was unreasonable for the agency to have found ISC responsible, and that the agency treated ISC and Morpho disparately.

We dismiss these allegations because we conclude that Morpho is not an interested party to maintain them. In this connection, our Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2014), define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract, or failure to award a contract. See also, CACI Dynamic Systems, Inc., B-406130, Feb. 28, 2012, 2012 CPD ¶ 77 at 7-8 (protester is not an interested party to challenge agency's evaluation of awardee where there is another intervening offeror that would be in line for award if the protest allegations were correct).

The record shows that Morpho does not have the direct economic interest necessary to maintain these assertions. The record shows that TSA specifically found that it would issue the delivery order to ISC or Offeror A ahead of Morpho because of the weakness and risk associated with Morpho's false alarm rate. In this regard, after describing the features of both the Morpho proposal and the Offeror A proposal, the SSA expressly found that, "[o]verall, [Offeror A's] proposal represents the better value to the Government due to significant risk associated with the [Morpho] system, and superior technical capabilities that outweigh the price premium." AR, exh. 35, SSDD, at BATES 657. Morpho has not challenged the agency's substantive evaluation of Offeror A, and as discussed above, we find no merit to Morpho's challenge of the evaluation of its own proposal. It follows that, even if Morpho's allegations challenging the award to ISC are correct, Offeror A, rather than Morpho, would be in line for issuance of the delivery order. Thus, we therefore conclude that Morpho is not an interested party for purposes of maintaining its remaining protest allegations.⁴

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

⁴ We note that Morpho's challenges to the inclusion of ISC on the QPL, as well as its challenge to the award of ISC's underlying IDIQ contract in order to enable ISC to compete here, effectively amount to protest allegations that have the purpose or effect of reducing competition to the benefit of the protester. As a general rule, our Office does not consider such arguments as stating a valid basis for protest. See Phaostron Instrument & Electric Co., B-284456, Apr. 20, 2000, 2000 CPD ¶ 65 at 3-4 n.4 (allegation that protester was prejudiced because it did not know awardee was included on QPL fails to state a basis for protest); see also, Rexnord Corp., B-244573, Oct. 2, 1991, 91-2 CPD ¶ 284 at 2-3 (protest that awardee should be removed from approved sources list dismissed because our Office will not review a protest having the purpose of reducing competition to the benefit of the protester).