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Decision

Matter of: Mistral Inc.
File: B-411291.4
Date: February 29, 2016

David W. Lease, Esq., Smith, Lease & Goldstein, LLC, for the protester.
Nicole L. Carter, Esq., and Theodore P. Watson, Esq., Watson & Associates, LLC, for Tactical Micro, Inc., the intervenor.
Andrew K. Lieberman, Esq., Stephen C. Edinger, Esq., and Jodi L. Silcox, Esq., Department of Homeland Security, United States Customs and Border Protection, for the agency.
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's evaluation of protester's technical proposal is denied where the evaluation was reasonable, consistent with the stated evaluation factors, and adequately documented.

DECISION

Mistral Inc., of Bethesda, Maryland, protests the award of a contract to Tactical Micro, Inc., of Fredericksburg, Virginia, under request for proposals (RFP) No. HSBP1012-R-0054, issued by the Department of Homeland Security, United States Customs and Border Protection (CBP), to acquire new, non-developmental mobile video surveillance systems (MVSS).¹ Mistral asserts that the agency unreasonably evaluated its technical proposal.

We deny the protest.

¹ MVSS is a mobile surveillance system used by the United States Border Patrol (Border Patrol) in border area operations that are more accessible by 4x4 trucks. RFP Statement of Work (SOW) at 3; MVSS Definitions Acronyms at 7.

BACKGROUND

The RFP, issued on April 30, 2013 as a total small business set-aside, contemplated the award of an indefinite-delivery, indefinite-quantity contract with fixed-price delivery/task orders for a base year with four 1-year options. RFP amend. 4 at 23, 33. The RFP established that award would be made on the basis of a best-value tradeoff process, considering three factors (technical, past performance, and price). The technical factor was slightly more important than the past performance factor and, when combined, the technical and past performance factors were approximately equal to price. Id.

Under the technical factor, the RFP identified three equally-weighted subfactors: (1) operational utility and system capability; (2) system sustainment; and (3) management. Id. at 103. As relevant to the protest, under the operational utility and system capability subfactor, the RFP provided that the agency would evaluate the offerors' proposed MVSS to determine the "degree to which the proposed system and its design . . . supports the Border Patrol mission elements described in the SOW of detecting, tracking, identifying and classifying [items of interests]." Id. at 105. The agency would also evaluate the degree to which the proposed MVSS "meets or exceeds the requirements set forth in the Government MVSS Functional Requirements Matrix (FRM) and Environmental Requirements Matrix (ERM)," including any additional "capabilities beyond the Government's FRM and ERM." Id. 105-106.

The RFP provided that the agency would assign adjectival ratings to the offerors' proposals under each evaluation factor and subfactor, and included definitions for each rating. Under the technical factor, the RFP indicated that the agency would identify significant strengths, strengths, weaknesses, significant weaknesses, deficiencies and risks of each offeror's proposal.² Id. at 104. The ratings for the technical factor were superior, good, satisfactory, marginal, or unsatisfactory, reflecting the degree to which the offeror's technical approach conformed to the requirements of the SOW, FRM, and ERM associated with this factor and subfactors.³

² The RFP provided for assigning overall risk ratings of low, medium, or high. A medium risk rating would be assigned if an undesirable event can "potentially cause some disruption of schedule or cause degradation of technical or contract performance. However, special contractor emphasis will probably be able to overcome difficulties." A high risk rating would be assigned if an undesirable event is "likely to cause significant serious disruption of schedule or degradation of performance even with special contractor emphasis." RFP amend. 4 at 104.

³ A rating of satisfactory under the technical evaluation factor would be assigned if the proposal "demonstrates an understanding of mission and applies that knowledge through a solution that meets operational needs. Plans, claims and

(continued...)

As it relates to the protest, offerors were required to substantiate all MVSS performance claims and other relevant characteristics. Offerors were informed that the agency would evaluate the substantiating evidence furnished in offerors' proposals. Id. at 88, 91, 105.

Ten offerors submitted proposals by the June 13, 2013 closing date, including Mistral and Tactical Micro. RFP amend. 2 at 3. The agency evaluated proposals, established a competitive range comprised of seven offerors, including Mistral and Tactical Micro, and conducted discussions. Following receipt and evaluation of final proposal revisions (FPRs), the agency initially awarded a contract to Mistral on July 31, 2014.

After receiving debriefings, two of the unsuccessful offerors, Tactical Micro and Strongwatch Corporation, filed timely protests with our Office challenging the propriety of the award to Mistral.⁴ In response to these protests, the agency advised our Office that it intended to take corrective action. Specifically, the agency represented that it would establish a new competitive range, conduct discussions, request and evaluate final proposal revisions, and make a new source selection decision. Based on the agency's proposed corrective action, we dismissed both protests as academic. Tactical Micro, Inc., B-411291.2, May 12, 2015 (unpublished); Strongwatch Corp., B-411291.3, May 12, 2015 (unpublished).

On June 3, 2015, the agency notified Mistral, Tactical Micro, and two other offerors that the agency was establishing a second competitive range and initiating a new round of discussions. Contracting Officer Statement of Facts at 2. In its notice of a new competitive range, the agency disclosed the previous total evaluated prices of the initial competitive range offerors in order to "equalize any competitive advantages in regards to pricing." AR exh. 6, Agency Notice of Second Competitive Range at 2 (June 3, 2015). Along with the notice of a new competitive range, the agency provided Mistral written discussion questions and requested a FPR. Id. exh. 7, Mistral Discussion Questions (June 3, 2015). The deadline for submission of FPRs was June 29.

During discussions, the agency identified six areas of concern regarding Mistral's technical proposal. As relevant here, the agency asked the protester to address the following concern:

(...continued)

documents are defined, supported, executable, and reflect an acceptable understanding of the operational environment." Agency Report (AR) exh. 11, Mistral Debriefing Letter at 11 (Oct. 29, 2015).

⁴ During the debriefing held with each disappointed offeror, the agency disclosed Mistral's evaluated prices and overall technical evaluation ratings. Agency Memorandum of Law at 4.

On page 153-155 of the proposal, the Offeror provided a very brief discussion on System Availability . . . The Offeror provided a table of LRUs and their associated MTBFs, MTTR, Critical Failures per 10⁶ hours, MTBCF, MTBM, MMT, Inherent Availability and Achieved Availability; however, the Offeror did not provide an analysis on how the following System Performance Parameters were actually determined.

Please provide an analysis and calculations using the provided RAM data along with any assumptions and constraints that substantiate the performance claims for Critical Failure Rate and Achieved Availability as prescribed in Section L of the solicitation.

Id. exh. 7, Mistral Discussion Technical Question No. 4 at 4 (emphasis in original).⁵

Mistral responded, in relevant part:

Please see the detailed calculations in the Excel spreadsheet (all formulas embedded) of Mean Time Between Critical Failure (MTBCF), duration period for 2 Critical Failures and Achieved Availability in **Section II.D.XX**. Refer to the Volume II CD submitted with this Volume to access the embedded formulas for the calculations.

Id. exh. 8, Mistral FPR Vol. II: Technical at 157 (emphasis in original).

In evaluating the protester's FPR, the evaluators could not access the Excel spreadsheet and the embedded formulas for these calculations, which Mistral stated, were on its Volume II CD. In searching this CD, the evaluators only located a copy of the proposal in a portable document format (pdf) which included a table with calculations for the identified parameters. The evaluators, however, could not access the table in the spreadsheet in order to view any embedded formulas which

⁵ The RFP included a list of MVSS definitions and acronyms. As relevant, the RFP set forth the following definitions: (1) Inherent Availability refers to critical failures that prevent the MVSS from effectively supporting the Border Patrol mission; (2) MTBF, mean time before failure, refers to the length of time the MVSS is used by Border Patrol until a critical failure occurs or the MVSS is in scheduled or preventive maintenance; (3) MTTR, mean time to repair, refers to the length of time required to repair the item to full mission capability status; and (4) LRUs, line replacement units, refers to a modular component or an essential support item which is removed and replaced at the field level. MVSS Definitions Acronyms at 2, 6, 7.

Mistral stated were used to determine Achieved Availability or Critical Failure Rate. Id. exh. 2, Technical Evaluation Team (TET) Chairman Statement of Facts at 2.

In a July 14 email, Mistral was asked to provide the agency “with the correct reference in the proposal where [the calculations and formulas] can be found.” Id. exh. 9, Agency Email to Mistral (July 14, 2015). That same day, Mistral replied to the agency’s email, which included an attached excel spreadsheet. Specifically, Mistral’s email message indicated that the “table at page 159 of Volume II shows the Critical Failure Rate and Achieved Availability, Aa.”⁶ The formulas for the two sets of calculations: Critical Failure Rate and Achieved Availability are embedded in the attached excel spreadsheet.” Id. exh. 10, Mistral’s Reply Email (July 14, 2015).

Despite Mistral’s reply, the evaluators still could not locate the missing calculations or formulas in Mistral’s June 29 FPR. As a result, the evaluators could not verify the calculations, methodology, or approach used by Mistral to determine its Achieved Availability or Critical Failure Rate; therefore, the evaluators assigned a medium risk rating to the protester’s FPR. Id. exh. 18, Agency Memorandum to the File at 3 (Aug. 21, 2015). The evaluators did not consider the Excel spreadsheet furnished by Mistral on July 14, since this information was not provided with the protester’s June 29 FPR and therefore was considered untimely. Id. exh. 2, TET Chairman Statement of Facts at 2-3; exh. 18, Agency Memorandum to the File at 2-3 (Aug. 21, 2015).

Mistral’s FPR received an overall rating of satisfactory under the technical evaluation factor, and a rating of satisfactory for past performance, and was ranked 4th. Mistral’s total evaluated price of \$35,796,781 was determined to be fair and reasonable. Id. exh. 15, Source Selection Decision at 5 (Aug. 24, 2015); exh. 11, Mistral Post-Award Debriefing at 2-5 (Oct. 29, 2015). Tactical Micro’s FPR which was ranked 1st, was assigned an overall rating of satisfactory under the technical evaluation factor and its total evaluated price of \$30,218,845 also was determined fair and reasonable. Id. exh. 11, Mistral Post-Award Debriefing at 2, 5 (Oct. 29, 2015). The agency determined that Tactical Micro’s proposal represented the best value to the government and award was made to Tactical Micro on October 26. Contracting Officer’s Statement of Facts at 3 (Dec. 24, 2015).

Upon learning of the award and receiving a debriefing, Mistral filed this protest challenging the evaluation of its proposal under the technical evaluation factor.

DISCUSSION

⁶ The referenced table is actually located on page 158, not page 159, of Mistral’s FPR. AR exh. 8, Mistral FPR Vol, II: Technical at 158.

Mistral contends that the agency's evaluation of its technical proposal was flawed for three primary reasons: (1) the agency erroneously downgraded its proposal for failing to provide calculations used to derive its proposed achieved availability and critical failure rate; (2) the agency unreasonably lowered its technical rating because of the poor performance of [DELETED]; and (3) the agency erroneously determined that the protester introduced a new risk in its FPR related to [DELETED] for certain components. Protest at 9-12. The protester also alleges that it was competitively prejudiced during the corrective action phase of the recompetition by the agency's refusal to disclose the technical and past performance ratings of its competitors. Id. at 13-14.

The evaluation of proposals, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 12. In reviewing an agency's evaluation, we will not reevaluate the proposals, but we will examine the record of the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria as well as with procurement statutes and regulations. Integrated Sci. Solutions, Inc., B-406987, B-406987.2, Oct. 10, 2012, 2012 CPD ¶ 290 at 9. In this case, we find the agency's evaluation of Mistral's technical proposal was reasonable and that the protester's arguments represent little more than disagreement with the agency's evaluative conclusions.

Discussion Request for Calculation Data

Mistral asserts that its FPR included a table which provided the "requisite information from which the calculations [for its proposed achieved availability and critical failure rate] could be derived." Protest at 10. According to the protester, although this table "was not the native copy of the excel spreadsheet," the only difference between the information provided in the table and the excel spreadsheet was "the Excel spreadsheet could be accessed to review the embedded calculation formulas." Id. Moreover, the protester argues, the RFP did not require the firm to furnish the underlying formulas used in its calculations and the agency impermissibly downgraded its technical proposal for failure to provide this data. Id.; Protester's Comments at 2.

We disagree. As noted above, the RFP expressly required offerors to substantiate all performance claims and other relevant characteristics of their proposed MVSS. The RFP also informed offerors that the agency would evaluate the substantiating evidence provided by offerors to support their performance claims. The record shows that in evaluating Mistral's proposal, the agency evaluators found that Mistral had provided a system availability table of LRUs and associated performance claims but failed to provide substantiating evidence in support. This became the basis for the agency's discussion request, set forth above, that Mistral provide the

calculations used, together with any assumptions and constraints made by the protester, for the performance parameters listed in the system availability table included in its proposal.

The protester insists that the agency could have derived the calculations and formulas from the information provided in Mistral's FPR in order to verify Mistral's performance claims for critical failure rate and achieved availability. However, the protester does not explain how this could or should be done. It is an offeror's responsibility to submit adequately detailed information in its proposal to clearly demonstrate its compliance with the solicitation and to allow a meaningful review by the agency. American Sys. Corp., B-409632, June 23, 2014, 2014 CPD ¶ 188 at 4. Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to either omitted or merely inadequate information addressing fundamental factors. Id.

More importantly, we have repeatedly held that an agency is not required to perform calculations or adapt its evaluation to comply with an offeror's submission in order to determine whether a proposal was compliant with stated solicitation requirements. Stated differently, the question is not what the agency could possibly do to cure a noncompliant submission, but rather, what it was required to do. Herman Constr. Group, Inc., B-408018.2, B-408018.3, May 31, 2013, 2013 CPD ¶ 139 at 3; Johnson Controls, Inc., B-407337, Nov. 20, 2012, 2012 CPD ¶ 323 at 4. Based on our review of the record, we agree with the agency's conclusions that without the substantiating evidence to support Mistral's performance claims as required by the solicitation, and requested by the agency during discussions, it was reasonable to assign a medium risk to Mistral's proposal in this area. Phoenix Mgmt. Inc., B-299477, May 16, 2007, 2007 CPD ¶ 95 at 6.

Next, Mistral asserts that the agency's July 14 email communication reopened discussions with Mistral. Having reopened discussions, the protester alleges, the agency improperly failed to evaluate the information that the firm provided, resulting in an improper technical evaluation. Protest at 10-11; Protester's Comments at 3.

Mistral's argument is without merit. Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Federal Acquisition Regulation (FAR) § 15.306(d). In contrast, clarifications are "limited exchanges" that agencies may use to allow offerors to clarify certain aspects of their proposals or to resolve minor or clerical mistakes. FAR § 15.306(a)(2); see Hughes Network Sys., LLC, B-409666.5, B-409666.6, Jan. 15, 2015, 2015 CPD ¶ 42 at 9.

Here, the record reflects that the agency's July 14 email did not seek any new information from Mistral. Rather, the agency sought the location of information believed to be contained within Mistral's FPR. When Mistral sought to supplement

its proposal with new information by attaching the omitted excel spreadsheet, the agency declined to consider Mistral's unilateral effort to revise its proposal. Given that the agency did not seek to obtain new information essential to determine the acceptability of Mistral's proposal, or offer Mistral with an opportunity to revise or modify its proposal in some material respect, the agency's communications with Mistral fell squarely within the rubric of clarifications as opposed to discussions.

Poor Performance of Mistral's [DELETED]

Mistral alleges that the agency misevaluated its technical proposal under the operational utility and system capability subfactor. As support, the protester points to the extensive narrative in the evaluation record regarding the poor performance of its [DELETED], arguing that such an extensive discussion certainly affected Mistral's technical rating. Protester's Comments at 3-4. This allegation lacks merit and is factually inaccurate.

As stated previously, the RFP informed offerors that under the operational utility and system capability subfactor, the agency would evaluate their proposed MVSS to determine the "degree to which the proposed system and its design . . . supports the Border Patrol mission elements described in the SOW of detecting, tracking, identifying and classifying [items of interests]." RFP amend. 4 at 105. The agency would also evaluate the degree to which the proposed MVSS "meets or exceeds the requirements set forth in the Government MVSS Functional Requirements Matrix (FRM) and Environmental Requirements Matrix (ERM)" including any additional "capabilities beyond the Governments FRM and ERM." *Id.* at 105-106.

The contemporaneous record shows that Mistral proposed to meet the functional requirements for detection, tracking, identification, and classification through a system that included both [DELETED]. Although Mistral's [DELETED] poor performance was discussed, the evaluators did not assign a negative rating to Mistral's FPR; instead, the agency found that Mistral was capable of meeting all the detection, identification, and classification requirements with its [DELETED]. On this record, Mistral has given us no reason to find the agency's evaluation unreasonable.

[DELETED]

An area of concern identified by the agency during discussions with Mistral pertained to material planning. The protester was asked to "**provide additional discussion on how risk will be managed or mitigated with respect to [DELETED].**" AR exh. 7, Mistral Discussion Technical Question No. 5 at 5 (emphasis in original).

In response to this discussion question, the protester included a new material planning approach in which the protester differentiated between base period

deliveries and option period deliveries. Mistral explained that for base period deliveries, the firm had already procured [DELETED] at no cost to the government. Id. ex. 8, Mistral FPR Vol. II: Technical at 212, 215. As to option period deliveries, Mistral proposed [DELETED] after receipt of order for MVSS units, id. at 215, and [DELETED] for other components such as the [DELETED]. Id. at 212.

The evaluators considered this new approach [DELETED] to increase the risk of successful performance by Mistral, finding a greater potential for [DELETED]. The evaluators therefore assigned a high risk rating to Mistral's FPR in this area. Id. ex. 2, TET Chairman Statement of Facts at 3-5. Although Mistral disagrees with the agency's assessment that the distinctions between base period deliveries and option period deliveries coupled [DELETED] for certain components creates a greater risk of disruption in performance, its arguments constitute nothing more than disagreement with the agency's judgment, which is insufficient to establish that the agency acted unreasonably. Ashland Sales & Serv. Co., B-408010.6, B-408010.7, Mar. 28, 2014, 2014 CPD ¶ 113 at 6.

Disclosure of Ratings of Competitors

Finally, we dismiss as untimely Mistral's protest argument that it was competitively prejudiced by the agency's refusal to disclose the technical and past performance ratings of the offerors in the initial competitive range. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on alleged improprieties in a solicitation must be filed prior to the time established for receipt of proposals, 4 C.F.R. § 21.2(a)(1), and all other protests must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

Here, the record shows that on June 3, 2015, the agency implementation of corrective action included notifying Mistral, Tactical Micro, and two other offerors that it was establishing a second competitive range and initiating a new round of discussions. In its notice to these firms, the agency indicated that it was equalizing any competitive advantages stemming from prior award announcement by disclosing the total evaluated prices of the initial competitive range offerors. The agency also established a due date for FPRs of June 29. That same day, the protester contacted the agency requesting release of "the pricing and the evaluation ratings of the unsuccessful bidders who will now be submitting new proposals and are in possession of Mistral's pricing and evaluation ratings." AR ex. 4, Mistral's Letter to Agency at 2 (June 3, 2015). By email that same day, the agency stated that while it had released the total evaluated prices of all offerors in the initial competitive range, the agency would "not provide Offerors with the technical or past

performance evaluation ratings of the Offerors in the initial competitive range.” Id. exh. 5, Agency Email to Mistral (June 3, 2015). In our view, Mistral’s challenge of the agency’s failure to further level-the-playing-field of the competition by releasing the technical and past performance information of all the remaining competitors is a protest of the ground rules of the competition such that our timeliness rules regarding solicitation improprieties apply. Accordingly, the protester had until June 29, the date for the receipt of final proposal revisions to raise the issue; its post award challenge filed on November 20 is untimely and will not be considered.⁷ Serco Inc., B 405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 13 n.13.

The protest is denied.⁸

Susan A. Poling
General Counsel

⁷ To the extent Mistral’s June 3 letter to the agency constituted an agency-level protest, the agency’s response of the same day denied the protest, and any subsequent protest to our Office should have been filed within ten days. See 4 C.F.R. § 21.2(a)(3).

⁸ We will not consider the protester’s allegation that the agency had no authority to make award to Tactical Micro until it terminated the original award to Mistral. The termination of a contract is a matter of contract administration and is not subject to review under our bid protest function. 4 C.F.R. § 21.5(a).