

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

MORPHOTRUST USA, INC.

Solicitation No. DOC-62682

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CAB No. P-0924

For the Protester: Daniel E. Chudd, James C. Cox, and Damien C. Specht, Jenner & Block LLP. For the Intervenor: Warren W. Hamel and Dismas N. Locaria, Venable LLP, and Andrea Leahy-Fucke and Steven DeSmet, Leahy & DeSmet, LLC. For the District of Columbia Government: Howard Schwartz and Janice N. Skipper, Assistant Attorneys General.

Opinion by: Administrative Judge Maxine E. McBean with Chief Administrative Judge Marc D. Loud, Sr. and Administrative Judge Monica C. Parchment concurring.

OPINION

Filing ID #48009987

MorphoTrust USA, Inc. (“MorphoTrust” or “protester”) has filed a protest alleging that the specifications set forth in Solicitation No. DOC-62682 (the “Solicitation” or “RFP”) for a centralized security credentialing system to produce drivers’ licenses for the Department of Motor Vehicles (“DMV”) are overly restrictive because they exceed the District’s minimum needs and would likely result in a de facto sole source award. The District denies MorphoTrust’s allegations and contends that the specifications set forth in the RFP by the District’s Office of Contracting and Procurement (“OCP”) are necessary to meet the District’s legitimate minimum requirements.

The Board rejects protester’s arguments for the following reasons. First, MorphoTrust has failed to demonstrate that the District’s minimum requirements in the Solicitation were unreasonable. Second, the Solicitation did not result in a de facto sole source award as shown by the fact that [REDACTED] offerors submitted responsive proposals. Finding that the District did not violate procurement laws or regulations in establishing the Solicitation’s minimum requirements, the Board denies the instant protest.

BACKGROUND

On May 18, 2012, OCP, on behalf of the DMV, issued the Solicitation for “an Offeror to provide a Centralized Security Credentialing System (“System”) for update and production of secure digitized drivers’ licenses (DL) and identification (ID) cards.” (Agency Report (“AR”) at Ex. 1, § 3.1.1.) The stated purpose of the centralized security credentialing system was “to improve and increase card security to deter fraud and deter attempts to illegally duplicate identity credentials by criminals and counterfeiters.” (AR at Ex. 1, § 3.2.1.1.) Initially, the deadline to submit proposals was June 8, 2012, with contract performance to begin on December 15, 2012. (AR 3.) After a number of amendments, the deadline to submit proposals was extended to August 17, 2012, with [REDACTED] offerors submitting proposals. (AR 3-4.)¹

¹ According to the District, the deadline to submit proposals was extended after prospective vendors initially declined to submit proposals for the following reasons unrelated to the specification requirements at issue: (a) the short timeframe within which to submit proposals; (b) an aggressive implementation deadline; and (c) a challenging LSDBE subcontracting requirement. (AR 3.)

On July 27, 2012, prior to the deadline for receipt of proposals, MorphoTrust timely filed the present protest with the Board, in accordance with Board Rule 302.2(a), alleging improprieties in the Solicitation. Protester is the incumbent provider of drivers' licenses and identification cards in the District. (Protest 2.) According to protester, the specifications contained in the Solicitation are overly restrictive so as to prevent it from submitting a "compliant proposal." (Protest 1.) It argues that the specifications exceed the District's minimum needs and, further, would likely result in a de facto sole source award to [REDACTED].² (Protest 19-21.) The protest focuses on the secure card requirements and the secure facility requirements contained in the RFP's Sections 3.4.12 and 3.4.16 respectively. (Protest 5-7.)

I. Requirements of the Solicitation

A. Secure Card Requirements

The Solicitation's secure card features, as required by the DMV, are described in Section 3.4.12. (AR at Ex. 1.) Offerors were required to "propose and price seventeen (17) security features outlined in section 3.4.12.[14]." (AR at Ex. 1, § 3.4.12.3.) Offerors were also given "the option to propose and price up to 10 additional security features." (*Id.*) The 17 required secure card features are as follows:

1. *Solid Polycarbonate Card*
2. *Laser Engraved Primary Photo Image*
3. *Integrated window with clear Laser Engraved Secondary Ghost image of the customer*
4. 2-D/3-D barcodes
5. *Laser Engraved Tactile data fields including signature image*
6. *Laser Engraved Clear Tactile Feature*
7. Non-Linear Wave Feature
8. Redundant Data
9. Micro lettering
10. Rainbow printing
11. Card inventory #s
12. Real-ID compliant feature (Logo)
13. Custom-formulated colors
14. Fine-line guilloche patterns
15. Reverse micro lettering & Deliberate error in micro lettering
16. IR Transparent and opaque inks
17. UV Patterns with fluorescence

(AR at Ex. 1, § 3.4.12.14 (emphasis added).)

MorphoTrust challenges the above list of 17 secure card requirements for allegedly being overly restrictive, in particular, the first, second, third, fifth, and sixth requirements. (Protest 4-6, 13-18.) Protester asserts that the District should have permitted offerors to propose alternative methods of producing an equally, if not more, secure card. (*Id.*) MorphoTrust also alleges that the District merely [REDACTED] (Protest 17.) In other words, protester alleges that the Solicitation's requirements are uniquely tailored for [REDACTED] (Protest 19.)

B. Secure Facility Requirements

² [REDACTED] was one of [REDACTED] offerors to the Solicitation. (Status of Procurement at Exs. A-D.)

In Sections 3.4.8 and 3.4.16, the Solicitation details the secure facility requirements. (AR at Ex. 1.) Section 3.4.8 lists the primary facility requirements whereby offerors need to provide “a ‘hardened’ facility with security procedures for all modes of physical and technical access.” (AR at Ex. 1, § 3.4.8.4.) Proposed facilities are also required to “be either ISO/IEC 27001 certified or NASPO certified.” (AR at Ex. 1, § 3.4.8.3.) Section 3.4.16 of the RFP includes the following additional secure facility requirements:

1. Physical security (live monitoring on site, live video monitoring);
2. Key card access entries per sections;
3. *Outside security to include fences, distance from entrance to parking, etc.;*
4. Access to printers must be secure and hardened (refer to Real ID act for further information);
5. Access control systems to limit access to its central card processing facility to authorized personnel and authorized visitors;
6. The Contractor shall control and secure hardware, software and cardstock; and
7. The Contractor shall notify the District of any breach in security. Any costs incurred by DMV in responding to and providing assistance to resolve the breach . . . shall be the responsibility of the Contractor.

(AR at Ex. 1, § 3.4.16.1 (emphasis added).)

MorphoTrust alleges that these seven additional secure facility requirements, in particular the third feature, are overly restrictive. (Protest 6-8, 18-19.) In fact, the protester argues that these additional secure facility features are not actually required by the District but, instead, “notably mirror the security features of [REDACTED]” (Protest 18.)

II. Agency Report

On August 20, 2012, the District submitted the Agency Report in response to MorphoTrust’s protest. In its report, the District argues that the specifications contained in the RFP are reasonably necessary to satisfy the District’s legitimate minimum needs for a centralized security credentialing system. (AR 4-5.) It contends that “the security needs of DMV are justified based on the singular status of the District of Columbia as the nation’s capital.” (AR 9.) The District states that it received [REDACTED] proposals in response to the RFP. (AR 4.)

The District also explains that DMV had “conducted extensive market studies over a three year period in order to determine the District’s minimum needs.” (AR 5.) Moreover, it justified the secure card requirements by describing the non-delaminable and durable nature of polycarbonate cards. (AR 6-7.) The District stated that the laser engraving and ghost window requirements are “concomitant features of the polycarbonate card.” (AR 6.) With respect to the secure facility requirements, the District responded that “the variety of private information obtained from individuals and used in the manufacture of ID cards mandate a production facility that is at least as secure as the District’s own DMV facilities.” (AR 7.)

III. Other Filings

In response to the Board’s inquiry concerning the status of the [REDACTED] offers to the Solicitation, on October 9, 2012, the District provided the Board with an update on the evaluations stating that “[t]he Technical Evaluation Committee and the contracting officer evaluated the [REDACTED] offers and concluded that all [REDACTED] offers were technically compliant with the scope of work and within the competitive range.” (Letter from the District (Oct. 9, 2012).)

The Board requested additional information, such as reports and bid tabulation spreadsheets from the contracting officer and the Technical Evaluation Panel and, in response, on October 19, 2012, the District submitted contemporaneous and other documents which demonstrated that the [REDACTED] offers had been evaluated and found to be technically compliant and within the competitive range. (*See* Status of Procurement at Exs. A-D.)

MorphoTrust argues that the documents submitted by the District on October 19, 2012, do not provide the Board with “sufficient information to confirm that the offerors meet the requirements of the RFP.” (MorphoTrust’s Mot. for Leave to File Resp. to District’s “Status of Procurement Filing” 3.) It further contends that the documents submitted by the District “indicate[] that none of the offerors’ proposals met all the Solicitation requirements” (*Id.* (emphasis removed).) MorphoTrust challenges the evaluation scores assigned to the offerors by the Technical Evaluation Panel. (*Id.* 5-7.) However, it did not submit a proposal in response to the RFP.³ (District’s Mot. for Leave to Reply to Protester’s Mot. for Leave to File a Resp. to District’s “Status of Procurement Filing” 1.)

DISCUSSION

I. Jurisdiction

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011).

II. Standing

MorphoTrust asserts that it has been aggrieved in connection with the solicitation of the contract and therefore requests that the District change the terms of the Solicitation. (*See* Protest 21.) Under Board Rule 100.2(a), an aggrieved person is defined as “an actual or prospective bidder or offeror (i) whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, or (ii) who is aggrieved in connection with the solicitation of a contract.” The Board recognizes that the rule imposes different standards in analyzing whether a protester has standing: (i) the standard for protests of awards, and (ii) the standard for protests of alleged improprieties in the solicitation. *See M.C. Dean, Inc.*, CAB No. P-0528, 45 D.C. Reg. 8746, 8750 (Apr. 16, 1998). As such, MorphoTrust, in challenging alleged improprieties in the Solicitation, “must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action.” (*Id.*)

“Sufficient injury can be found, for example, in an adverse agency action which . . . denies the person the opportunity to compete, or precludes the person’s product or services from being considered due to defects in the government’s specifications.” *Recycling Solutions, Inc.*, CAB No. P-0377, 42 D.C. Reg. 4550, 4575 (Apr. 15, 1994); *see also Micro Computer Co.*, CAB No. P-0226, 40 D.C. Reg. 4388, 4391 (May 12, 1992). MorphoTrust, the current provider of drivers’ licenses/ID cards in the District, contends that it would have submitted a proposal if the specifications contained in the Solicitation were not overly restrictive. (Protest 2.) Thus, MorphoTrust has standing because it was allegedly denied the opportunity to compete for the contract, and thereby continue to provide services to the District, due to the purportedly overly restrictive specifications in the Solicitation.

³ Protester does not claim to be an actual or prospective offeror, having asserted that it lacks the capability to provide the services requested under the RFP; therefore, it lacks standing to challenge the scores of the actual offerors. *24/7 Computer Doctors, LLC*, CAB No. P-0909, 2012 WL 4753873 (Sept. 17, 2012).

III. Standard of Review

The protester alleges that the District failed to promote competition by setting forth solicitation requirements that exceeded the minimum needs of the District. In support of its argument, protester cites D.C. Mun. Regs. tit. 27, § 2500.1 (2002) which states that the District “shall specify [its] procurement needs in a manner designed to promote competition to the maximum extent possible.” Accordingly, solicitations may only include restrictive specifications “to the extent necessary to satisfy the *minimum needs* of the District.” *Id.* § 2500.3 (Emphasis added.)

When protesters allege that the specifications contained in a solicitation are overly restrictive, the Board applies a *de novo* standard of review. *KOBA Associates, Inc.*, CAB No. P-0325-A, 40 D.C. Reg. 5023, 5031-5032 (Mar. 12, 1993). And although the Board “will not take issue with an agency’s narrowing of competition in pursuit of legitimate agency needs, . . . we will overturn those requirements that improperly limit competition.” *Id.* at 5032.

The Board also recognizes that “[t]he determination of the agency’s minimum needs and the best method of accommodating them are business judgments primarily within the agency’s discretion and we will not question such a determination unless the record clearly shows that the determination was made without a reasonable basis.” *Recycling Solutions, Inc.*, CAB No. P-0434, 42 D.C. Reg. 4990, 4995 (June 30, 1995); *see also Silver Spring Ambulance Service, Inc.*, CAB No. P-0218, 40 D.C. Reg. 4913, 4922 (Jan. 15, 1993) (holding that the determination of what constitutes the minimum needs of the government is a matter primarily within the jurisdiction of the procuring agency); *Beretta U.S.A. Corp.*, CAB No. P-0177, 38 D.C. Reg. 3098, 3120 (Aug. 23, 1990). Therefore, the Board will defer to the agency’s determination so long as the restrictive specifications “are reasonably related to achieving the government’s actual minimum needs.” *See JBH Associates*, CAB No. P-0228, 39 D.C. Reg. 4333, 4334 (Sept. 30, 1991).

As a result, the protester bears a “heavy burden,” *American Motohol*, 38 D.C. Reg. 2998, 3002 (DCCAB Nov. 21, 1989),⁴ of demonstrating, “by a preponderance of the evidence, that the agency has impermissibly narrowed competition,” *KOBA*, CAB No. P-0335-A, 40 D.C. Reg. at 5032. In other words, the protester must establish that the “allegedly excessive restrictions” are unreasonable. *See General Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. 3059, 3060-3061 (Apr. 20, 1990). And, in particular, if the protester can show that the specifications will result in a sole source award, the Board will more closely scrutinize the agency’s determination of its minimum needs. *See Beretta U.S.A. Corp.*, CAB No. P-0177, 38 D.C. Reg. at 3121.

IV. The Specifications Contained in the Solicitation Are Not Overly Restrictive

The Board finds that the protester has not established that the specifications contained in the Solicitation are overly restrictive so as to constitute a violation of the District’s procurement regulations. We have previously held that “the determination of what constitutes the government’s actual minimum needs is one which allows [the District] great discretion.” *American Motohol*, 38 D.C. Reg. at 3002. In light of that standard, protester has failed to meet its burden of demonstrating, by a preponderance of the evidence, that the specifications contained in the RFP are unreasonable. *See KOBA*, CAB No. P-0325-A, 40 D.C. Reg. at 5032.

⁴ Citing Government Accountability Office (“GAO”) precedent, protester argues that the District bears the burden of proving that the requirements of the RFP are consistent with its “minimum needs” without being duly restrictive. (Protest 9.) Notwithstanding, this Board has consistently held that it is the protester that bears the burden of proving that the District, by a preponderance of the evidence, has impermissibly narrowed competition. *See, American Motohol*, 38 D.C. Reg. at 3002; *Beretta U.S.A. Corp.*, CAB No. P-0177, 38 D.C. Reg. at 3120.

A. Secure Card Requirements

1. *List of Seventeen Requirements*

MorphoTrust challenges the Solicitation's 17 secure card requirements. (Protest 11-13.) Protester provides examples of similar secure card solicitations in Maryland and New York to illustrate that other states generally allow offerors greater flexibility in their proposals for comparable services. (Protest 11-12.) MorphoTrust argues that the District should permit offerors to propose alternative methods of producing secure cards, rather than require offerors to produce one particular type of secure card. (Protest 12-13; Comments on the Agency Report [hereinafter, Comments] 3-4.) MorphoTrust contends that the District should specify "the level of security necessary" rather than require "specific methods of producing ID cards." (*See* Comments 4 (emphasis removed).)

In response, the District maintains that it developed the specifications "after an extensive technical market study of available security devices and the availability of companies that could perform a contract based on the specifications." (AR 5.) After three years of research, including attendance at networking events and conferences, the District determined that its minimum need for the most secure credentials could only be met by the 17 identified secure card requirements. (AR 6.) The District also asserts that, as the nation's capital, it has a heightened need for security. (AR 5.)

While it may be true that other states provide offerors with greater flexibility in proposing secure card features, nevertheless, the District is allowed to determine at the outset which security card features will best meet its minimum needs. Thus, the District may specify certain required specifications as long as they are reasonable. *See American Motohol*, 38 D.C. Reg. at 3001. And, in fact, the regulations state that in developing these specifications, the District shall rely on "market research." D.C. Mun. Regs. tit. 27, § 2500.2 (2002). In this case, the District undertook the requisite market research to determine that this particular type of secure card would be its desired method of achieving the District's minimum needs.

2. *Specific Requirements: Polycarbonate Card and Laser Features*

MorphoTrust specifically challenges five of the 17 required features for being overly restrictive. (Protest 13-18.) These five features are: (i) solid polycarbonate card, (ii) laser engraved primary photo image, (iii) integrated window with clear laser engraved secondary ghost image, (iv) laser engraved tactile data fields including signature image, and (v) laser engraved clear tactile feature. (*See* AR at Ex. 1, § 3.4.12.14.) In sum, protester has argued that these specifications "are far more restrictive than the District's actual minimum need for production of a very secure ID Card." (Comments 6.)

With respect to the solid polycarbonate card requirement, protester argues that "[p]olycarbonate is not the only material that provides for a secure ID card" and asserts that Virginia is the only state that currently uses polycarbonate ID cards.⁵ (Protest 13.) Protester also challenges the market research upon which the District relied in determining that it required polycarbonate cards. (*See* Comments 7-9 (arguing that the research was not evenhanded); Opp'n to District's Mot. for Leave to File a Response to Comments 4-6 (arguing that documents cited in District's Reply to Protester's Comments were impermissible post hoc rationalizations).) On the matter of the four laser requirements, protester contends that these requirements are not truly security features and that at least one of the requirements could only be produced by a single firm, [REDACTED] (Protest 15-18.) In addition, protester maintains that these

⁵ According to protester, [REDACTED]
[REDACTED] (Protest 17, 21.)

features do not provide any additional security because they are, in effect, design features that can be counterfeited. (Comments 13-17.)

In rebuttal, the District contends that the polycarbonate card requirement is “reasonably justified as the District’s minimum need and that the inclusion of laser engraving . . . constitute[s] concomitant features of the polycarbonate card.” (AR 6.) It also claims that polycarbonate cards are necessary because of their non-delaminable nature, meaning that it is impossible to separate the layers of the card. (AR 6-7.) Through market research, the District ascertained that polycarbonate cards are “the most secure and durable cards.” (AR at Ex. 5.) Furthermore, the District determined that “most new-generation identity documents . . . now use or are preparing to use polycarbonate cards.” (*Id.*) Thus, the District concluded that polycarbonate cards, with their additional security features, are necessary to meet the District’s unique security needs. (*See* District’s Reply to Protester’s Comments 5.)

When reviewing solicitation requirements, the Board will defer to the District as long as it has a “reasonable basis” for achieving the District’s minimum needs. *See Beretta*, CAB No. P-0177, 38 D.C. Reg. at 3121. In this case, the District provided sufficient justification to support its need for state-of-the-art polycarbonate cards and laser engraving features. According to the District, “polycarbonate cards are the gold standard in the secured credentialing industry and it is the card of the future that will be used by an increasing number of jurisdictions world-wide.” (District’s Reply to Protester’s Comments 4.) Moreover, 14 national identity card programs, 10 national passport programs and 13 national driving license programs utilize polycarbonate. (*Id.* at Ex. 2.) Therefore, having conducted its own market research, the District determined that such cards are “the most secure and durable.” (*See* AR at Ex. 5.)

Conversely, the protester failed to demonstrate that the District impermissibly narrowed the competition due to unreasonable solicitation requirements as underscored by the fact that at least [REDACTED] offerors submitted responsive proposals to the RFP. Therefore, protester’s argument that alternative card features may be as secure, if not more secure, than the card features required by the District is unavailing. Finding the District’s requirements reasonable, the Board will not second guess the District’s determination of its minimum needs.

B. Secure Facility Requirements

1. *List of Seven Requirements*

Protester challenges the list of seven secure facility requirements in the RFP. (*See* Protest 18.) It argues that “most states [only] identify International Organization for Standardization (“ISO”) or North American Security Products Organization (“NASPO”) standards as the basis for determining if a facility is secure.” (*Id.*) MorphoTrust alleges that by listing additional secure facility requirements the District exceeded its minimum needs. (Protest 18-19.)

The District defends its secure facility requirements as being necessary to meet its minimum needs and explains that “the variety of private information obtained from individuals and used in the manufacture of ID cards mandate a production facility that is at least as secure as the District’s own DMV facilities.” (AR 7.) It further states that the District’s DMV facilities meet the heightened security requirements set forth by the American Society of Industrial Security (“ASIS”). (*Id.*) The Board finds that while other states may require ISO or NASPO certification for its facilities, the District may reasonably impose heightened secure facility requirements given the sensitivity of the information contained at such facilities.

2. *Specific Requirement: Fencing*

Protester specifically challenges the secure facility requirement for “outside security to include fences, distance from entrance to parking.” (See AR at Ex. 1, § 3.4.16.1; Protest 18-19.) MorphoTrust alleges that this feature, in particular, is overly restrictive and states that “[t]his is the first time that [it] is aware of a state RFP requiring fencing from the facility parking lot.” (Protest 19.) MorphoTrust also asserts that the requirement is unreasonable because “there is more than one way to have a secure facility.” (Comments 18.) According to protester, the District should not have required this specific security feature but, instead, should have allowed offerors to propose different ways of achieving secure facilities. (Comments 20.)

The District contends that all of the secure facility requirements listed in the RFP are “the same/similar type of standards that DMV has implemented in [its] own buildings.” (AR at Ex. 5.) The District states that “current DMV employees who have significant knowledge in facility security were consulted” in writing the specifications. (*Id.*) Furthermore, the District asserts that the secure facility requirements “can be easily met” and, based on its own market research, it believes that “there are multiple vendors which can meet these requirements or are willing to meet these requirements.” (*Id.*)

The Board finds the fencing requirement reasonable particularly because the manufacturing facilities will contain confidential information and the District may rationally require the same level of security at the proposed manufacturing facility as exists currently at its DMV facilities. In drafting this requirement, the District relied upon internal and external market research as well as consultations with potential contractors. Thus, we defer to the District using its business judgment to conclude that fencing from the entrance to the parking lot is required to meet the District’s minimum security needs.

V. The Specifications Contained in the Solicitation Do Not Result in a Sole Source Award

Finally, MorphoTrust alleges that the specifications contained in the Solicitation would result in a de facto sole source award to [REDACTED]. (Protest 19-21.) Yet, the District received [REDACTED] proposals in response to the RFP. (AR 4.) OCP, through the contracting officer and the Technical Evaluation Panel, determined each of these proposals to be technically compliant and within the competitive range. (Letter from the District (Oct. 9, 2012); Status of the Procurement at Exs. A-D.) The protester disputes the merit of the District’s evaluations. (MorphoTrust’s Oct. 21 Mot.) In addition, protester argues that the specifications may still be overly restrictive and unreasonable, even if the [REDACTED] proposals are found to be responsive to the Solicitation. (MorphoTrust’s Oct. 21 Mot. 3 fn. 2.)

The Board rejects protester’s arguments. We find that the proposal evaluations submitted by the District adequately document its finding that the [REDACTED] offeror proposals are technically compliant and within the competitive range. (Status of Procurement at Exs. A-D.) These evaluations undermine protester’s contention that the Solicitation’s requirements would result in a de facto sole source award to [REDACTED].⁶ Moreover, the very fact that the District received [REDACTED] responsive proposals bolsters the reasonableness of the specifications contained in the RFP.

CONCLUSION

For the reasons discussed above, we hold that the District did not violate procurement law by requiring overly restrictive specifications in the Solicitation. Accordingly, the present protest is denied.

SO ORDERED.

⁶ The Technical Evaluation Panel [REDACTED] (Status of Procurement at Ex. B.)

DATED: November 28, 2012

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

CONCURRING:

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Chief Administrative Judge

/s/ Monica C. Parchment
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