



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ABB Lummus Crest Inc.

File: B-244440

Date: September 16, 1991

Irvin Becker, Esq., for the protester.
Sophie A. Krasik, Esq., and Robert H. Swennes II, Esq.,
Office of Naval Research, for the agency.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Protest allegations that agency improperly solicited for basic and applied research using broad agency announcement (BAA) instead of request for proposals, that BAA was ambiguous because it appeared to require primarily applied research instead of the basic research actually required, and that project cannot be completed within agency's stated budget are untimely since they concern alleged solicitation improprieties and therefore should have been filed before proposals were due.
2. Untimely protest issues relating to apparent solicitation defects will not be considered under significant issue exception to General Accounting Office (GAO) timeliness requirements where issues either relate solely to instant procurement and thus are not of widespread interest to the procurement community, or previously have been considered by GAO.
3. Protest alleging that agency improperly evaluated proposals based on unstated criterion--access to rights in offerors' proprietary data--is denied where evaluation record contains no evidence thereof.
4. Agency's rejection of protester's research proposal was reasonable where record supports agency's conclusion that protester's proposal was weak in the area of basic research; protester's disagreement with agency's view that more basic research was required does not render agency's judgment unreasonable.

DECISION

ABB Lummus Crest Inc. protests the rejection of its proposal, and the proposed award to General Atomics, under broad agency announcement (BAA) No. 91-05, issued by the Defense Advanced Research Projects Agency (DARPA) on behalf of the Office of Naval Research (ONR) for research in the use of supercritical fluid processing for the destruction of toxic chemicals. ABB alleges that the agency's use of a BAA instead of a request for proposals (RFP) was improper and that the agency improperly evaluated its proposal.

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

On January 16, 1991, DARPA published in the Commerce Business Daily a BAA soliciting preproposals for research, design, fabrication and testing of a pilot scale plant using supercritical water oxidation (SCWO) for destruction of chemical warfare agents and other hazardous or toxic materials. In accordance with the procedures set forth in Federal Acquisition Regulation (FAR) § 35.016, the BAA contained a description of the agency's research interest, instructions for the preparation and submission of proposals, and the criteria for selecting proposals. The BAA also stated that a budget of \$9.28 million had been allocated for the program.

The BAA provided that full proposals would be requested from those offerors submitting preproposals judged most relevant to the program objectives. Twenty firms or teams responded to the BAA with preproposals, five of which were invited to submit full proposals. Four offerors--including ABB and General Atomics--submitted full proposals, which were evaluated by a six-member scientific peer review team. General Atomics received the highest technical score and offered a cost within the \$9.28 million stated budget. ABB was ranked second technically, but its proposed cost of at least \$11.26 million (the proposal stated it could cost as much as \$17.26 million) exceeded the stated budget. The evaluators therefore recommended award to General Atomics, and the contracting officer adopted the recommendation. ABB learned of the agency's decision during a telephone conversation with one of the evaluation team members and subsequently filed this protest. Award has not been made.

UNTIMELY ISSUES

ABB alleges that the agency's use of a BAA instead of an RFP was improper. First, ABB notes that the FAR distinguishes between basic research and applied research,^{1/} and asserts that the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2302(2)(B) (1988), only authorizes use of special procedures for procuring basic research. ABB contends that the instant procurement is for applied research and that use of the BAA procedure therefore was unlawful. ABB asserts that it was prejudiced by the agency's use of a BAA because the BAA procedures do not require the agency to conduct discussions with offerors; ABB maintains that its proposal would not have been rejected if ONR had conducted discussions with it.

ABB's argument is untimely. A protest of an agency's choice of procurement procedures concerns a solicitation impropriety which, under our Bid Protest Regulations, must be protested prior to the time set for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Fiber-Lam, Inc., 69 Comp. Gen. 364 (1990), 90-1 CPD ¶ 351 (protest of agency's decision to use negotiated procedures rather than sealed bidding was untimely filed after closing date for receipt of proposals). As ABB did not protest the agency's decision to conduct the procurement using BAA procedures until after award, the protest in this regard is untimely.

A further argument by ABB--that the BAA itself was ambiguous because it appeared to require applied research rather than the basic research the agency stated was required in downgrading ABB's proposal--also is untimely. Since ABB

^{1/} Under FAR § 35.001,

"'Applied research' means the effort that (a) normally follows basic research, but may not be severable from the related basic research; (b) attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques, and (c) attempts to advance the state of the art.

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'[B]asic research' means research directed toward increasing knowledge in science. The primary aim of basic research is a fuller knowledge or understanding of the subject under study, rather than any practical application of that knowledge."

believes that BAA procedures are only appropriate for basic research, the alleged ambiguity, which is based on ABB's reading of the solicitation as requiring applied research, should have been apparent to ABB prior to the time set for receipt of proposals and had to be protested then. 4 C.F.R. § 21.2(a)(1) supra.

ABB argues that General Atomics' proposed cost, which was within the \$9.28 million stated budget, must be unrealistically low because, in ABB's view, the project cannot be completed within the stated amount. This argument also is untimely. The BAA stated that \$9.28 million was available for the program; if ABB believed that this amount was inadequate for the required effort, again, it should have protested on this basis prior to the initial closing date.

ABB asserts that we should consider its untimely arguments under the significant issue exception to our timeliness requirements. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.2(c)). Under this exception, we may consider a given case notwithstanding its untimeliness when, in our judgment, the circumstances are such that our consideration of the protest would be in the interest of the procurement system. DynCorp, B-240980.2, Oct. 17, 1990, 70 Comp. Gen. ____, 90-2 CPD ¶ 310. The exception is limited to protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a previous decision. Id.

There is no basis for applying the exception here. The argument that the BAA procedure should not have been used because the requirement in issue is one for applied rather than basic research essentially is no more than a dispute as to the nature of the work under the requirement. While we understand the protester's interest in the matter, such a dispute over the subject matter of a particular contract does not satisfy the "widespread interest" prerequisite to invoking the significant issue exception. See Crouse-Hinds Joy Molded Prods., Inc.--Recon., B-242237.2; B-242238.2, Jan. 30, 1991, 91-1 CPD ¶ 96. Further, as we have previously considered protests concerning allegedly ambiguous solicitation requirements and unrealistically low proposed costs, see, e.g., C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279; Zeiders Enters., Inc., B-230261, June 20, 1988, 88-1 CPD ¶ 583, we do not consider these to be significant issues under our Regulations. DynCorp, supra.

EVALUATION

ABB alleges that ONR improperly evaluated its proposal. Specifically, ABB contends that the agency considered an unannounced factor--access to offerors' proprietary rights--in the evaluation, and that it placed more emphasis on basic research than indicated in the BAA.

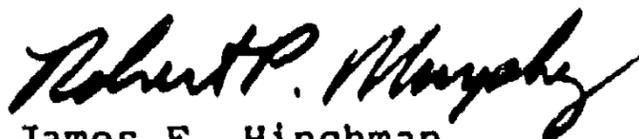
The determination of the relative merits of proposals is primarily a matter of agency discretion which we will not disturb unless it is shown to be unreasonable or inconsistent with the stated evaluation criteria. Systems & Processes Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441. A protester's mere disagreement with the agency's judgment does not render that judgment unreasonable. Id.

We find no support in the evaluation record for ABB's allegation that the agency improperly considered its access to ABB's proprietary rights in the evaluation. ABB asserts that the chairman of the evaluation team told ABB's project manager during a post-award telephone conversation that the agency was concerned during the evaluation about contractor-imposed restrictions on the government's use of proprietary data. The chairman denies that he made such a statement about the evaluation, and the individual team members' evaluation forms support that position. The forms list the evaluation factors, which generally correspond to the factors set forth in the BAA, along with the number of points allocated to each factor; beneath each factor, there is a short list of points to consider, and a space designated for evaluator comments. At the end of the form is a space for total points and an overall recommendation. These forms, including the comments and recommendations, show that the evaluators considered only the stated factors and that ABB's proposal was not downgraded based on any restriction on use of its proprietary data. As the award decision was based on the offerors' total evaluation scores and proprietary rights were not a factor in the award decision, ABB's protest on this ground is without merit.

ABB's contention concerning the allegedly improper emphasis in the evaluation on basic research similarly is without merit. While the BAA did not characterize the type of research required as basic or applied, ABB does not dispute that it required some basic research. Indeed, ABB acknowledged in its proposal that some basic research was necessary in the areas of reaction kinetics and salt formation in the SCWO process. Although ABB asserts that it proposed the amount of basic research necessary to complete the agency's objective, the agency specifically concluded otherwise. In this regard, the agency determined both that construction of the pilot scale plant is contingent upon successful resolution of the basic research issues identified in ABB's proposal, and that the

basic research proposed by ABB did not completely address these issues. For example, ABB stated that it would carry out salt formation studies, but offered very few details about how the studies would be conducted or what types of results would be sought. This led the evaluators to conclude that the proposal did not contain sufficient emphasis on the necessary basic research; in the words of one evaluator, ABB "seems to believe that [many] of the basic issues are worked out." We find the agency's position reasonable; basic research was required and ABB did not adequately address it in its proposal. ABB's disagreement with the agency about how much basic research was necessary does not render the agency's judgment unreasonable. Systems & Processes Eng'g Corp., supra. We conclude that the agency reasonably downgraded ABB's proposal in this area.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel