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Decision

Matter of: Made in Space, Inc.

File: B-414490

Date: June 22, 2017

Paul W. Bowen, Esq., Amy M. Conant, Esq., and Erica L. Bakies, Esq., K&L Gates LLP, for the protester.

Gregory P. Olson, Esq., Law Office of Gregory P. Olson, and Robert L. Kenny, Esq., Law Office of Robert L. Kenny, for FOMS, Inc., the intervenor.

Victoria H. Kauffman, Esq., and D. Evelyn Lyon, Esq., National Aeronautics and Space Administration, for the agency.

Noah B. Bleicher, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not an interested party to challenge a Small Business Innovation Research (SBIR) phase II award where the protester did not receive an SBIR phase I award for the development of the technology at issue, and where the protester has not established that it would be in line for an award outside of the SBIR program if the protest were sustained.

DECISION

Made in Space, Inc. (MIS), a small business of Moffett Field, California, protests the award of an SBIR phase II contract to FOMS, Inc., of San Diego, California, by the National Aeronautics and Space Administration (NASA) under subtopic No. H14.01, International Space Station (ISS) Utilization, for the research and development of optical fiber manufacturing in space. MIS contends that the award was improper because MIS has developed a similar technology, which renders FOMS' technology insufficiently innovative to qualify as research and development under the SBIR program.

We dismiss the protest.

BACKGROUND

The SBIR program was established under the Small Business Innovation Development Act of 1982, which is codified in section 9 of the Small Business Act. The program is

designed to increase the participation of small business concerns in federally funded research or research and development (R/R&D). See 15 U.S.C. § 638. Pursuant to this authority, certain federal agencies, including NASA, are required to provide a program under which a portion of the agency's R/R&D effort is reserved for award to small businesses. See generally id. As part of its SBIR program, NASA periodically issues SBIR solicitations listing the research topics for which it will consider SBIR program awards.

In accordance with the Small Business Act, the NASA SBIR program has three phases. First, firms apply for a phase I award to test the scientific, technical, and commercial merit and feasibility of a certain concept. See 15 U.S.C. § 638(e)(4)(A). Phase I awardees may apply for a phase II award to further develop work from phase I.¹ During phase II, the SBIR awardee performs further research and development, often resulting in a well-defined, deliverable prototype.² See 15 U.S.C. § 638(e)(4)(B). In phase III, the small business must obtain non-SBIR private or public funding to develop the prototype into a viable commercial product for sale to government and/or private sector markets, or continue its R/R&D effort. See 15 U.S.C. § 638(e)(4)(C); Photonics Optics Tech, Inc., B-402967, July 28, 2010, 2010 CPD ¶ 173 at 1-2; SBIR Solicitation at Bates 6.

The SBIR solicitation here, issued on November 12, 2015, listed 28 topics, including topic No. H14, ISS Demonstration and Development of Improved Exploration Technologies and Increased ISS Utilization, and subtopic No. H14.01, ISS Utilization. SBIR Solicitation at Bates 1, 110-12. In broad terms, the subtopic sought SBIR proposals for the “development of highly-desirable systems and technologies that provide innovative ways to leverage existing ISS facilities for new scientific payloads and to provide on orbit analysis to enhance capabilities.” Id. at Bates 111. Of relevance here, one of the specific capabilities desired was “[i]nnovative technologies and flight projects that can enable significant terrestrial applications from . . . in-space manufacturing and lead to private sector and/or government agency product development within a number of discipline areas. . . .” Id.

Prior to the February 1, 2016, submission deadline, FOMS submitted a phase I proposal, titled Space Facility for Orbital Remote Manufacturing (SPACEFORM), under subtopic No. H14.01. Contracting Officer's Statement (COS) at 4. FOMS'

¹ Here, the phase I contract served as the request for proposals for the phase II follow-on project. SBIR Solicitation at Bates 20. Among other things, the phase II proposal was to “provide the planning for a focused project that builds upon [p]hase I results and encompasses technical, market, financial and business factors relating to the development and demonstration of the proposed innovation, and its transition into products and services for NASA mission programs and other potential customers.” Id.

² The NASA phase II contracts are for a period of 24 months with a maximum value of \$750,000. SBIR Solicitation at Bates 6. Under the solicitation here, phase II was limited to contractors that received funding under phase I. Id.

SPACEFORM proposal involved the development and deployment of a capability to manufacture optical fibers in space. Agency Report (AR), Tab 3, FOMS Phase I SBIR Proposal, at Bates 213. On April 27, 2016, NASA selected FOMS' SPACEFORM proposal for phase I funding, and the contract was awarded on June 1. COS at 9-10.

After completing phase I, FOMS submitted its phase II proposal in December 2016. Id. at 10. NASA evaluators assessed FOMS' phase II proposal and assigned it the maximum evaluation score. Id. at 12. On March 1, 2017, NASA selected FOMS' phase II proposal for funding. The agency publicly announced its phase II selections on March 8, and MIS filed a protest with our Office of the phase II award to FOMS on March 20.³ See NASA 2016 SBIR Program Phase II Selections, available at https://sbir.nasa.gov/prg_selection/node/58008 (last accessed June 19, 2017).

DISCUSSION

MIS protests that the award to FOMS is improper. MIS' argument is premised on its representation that MIS has already developed the ability to manufacture optical fibers in space. Specifically, MIS explains that through private funding, and pursuant to a user agreement with NASA's Center for the Advancement of Science in Space (CASIS), the firm developed a commercial optical fiber manufacturing facility that will be launched to the ISS in summer 2017 to produce test quantities of optical fiber in microgravity. Protest at 7. In light of MIS' similar technology, MIS protests FOMS' SBIR phase II award on the basis that FOMS' development effort no longer qualifies as innovative R/R&D, and is therefore contrary to the SBIR enabling statute, solicitation, and SBIR policy directive. In other words, according to MIS, because MIS' device to manufacture optical fiber in space allegedly met all of the requirements for technical readiness level (TRL) 7 in January 2017, any NASA investment thereafter in a similar technology pursuant to the SBIR program is improper.⁴

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct

³ As the 10th day following the agency's announcement fell on a Saturday, MIS filed its protest on the next day on which our Office was opened. See 4 C.F.R. § 21.0(d). MIS maintains that its protest is timely and that it had no basis to protest earlier because the firm did not complete development of its comparable facility until after FOMS submitted its phase II proposal. That is, the protest is based on actions taken by the agency subsequent to MIS completing its development. Comments at 6.

⁴ The TRL describes the stage of maturity in the development process from observation of basic principles (TRL 1) through final product operation (TRL 9). SBIR Solicitation at Bates 189. Per the SBIR solicitation, the technology concept at the end of phase I (for subtopic H14.01) should be at a TRL of 3-6, and the technology at the end of phase II should be at a TRL of 6-7. Id. at Bates 112.

economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. A protester is an interested party to challenge a procurement where there is a reasonable possibility that its proposal would be in line for award if the protest were sustained. See TENICA & Assocs., LLC et al., B-411173.10 et al., Mar. 2, 2016, 2016 CPD ¶ 79 at 7. Conversely, a protester is not an interested party where it would not be in line for contract award were its protest to be sustained. See id.

MIS is not an interested party to challenge the phase II SBIR award to FOMS.⁵ Here, NASA issued an SBIR solicitation for phase I listing the research topics for which it would consider SBIR awards, including subtopic No. H14.01, ISS Utilization. While MIS submitted four SBIR phase I proposals, none of its proposals involved the manufacturing of optical fibers in space.⁶ COS at 5. In this regard, MIS made the business decision to develop its optical fiber manufacturing capability outside of the SBIR program. Thus, MIS did not receive SBIR phase I funding to develop its similar technology such that the firm was eligible for a phase II award under subtopic H14.01.⁷ In this respect, as noted above, only firms that receive phase I funding are eligible for a phase II award under the solicitation.⁸ SBIR Solicitation at 20; see 15 U.S.C. § 638(cc); SBIR Program Policy Directive § 4(b)(1).

Consequently, if our Office considered FOMS' phase II award to be improper, MIS would not be in line for a phase II award to further develop its technology. Therefore, MIS does not qualify as an interested party to protest NASA's decision to fund FOMS' phase II proposal. See 4 C.F.R. § 21.0(a)(1); see generally Steridoc Corp., B-225752, Apr. 29, 1987 (dismissing protest for lack of interested party status where protester objected to a contract on the basis that the awardee's technology was of "dubious

⁵ Our Office initially declined NASA's request to dismiss the protest on the basis that the protester is not an interested party. However, after further consideration of the issue, we agree with the agency that the protest should be dismissed.

⁶ None of MIS' proposals were selected for phase I awards. COS at 5.

⁷ Of note, under the SBIR program, an agency can fund several different phase I proposed solutions under the same subtopic. SBIR Program Policy Directive § 4(a)(1); SBIR Solicitation at Bates 31. Thus, both MIS and FOMS could have been awarded phase I funding for their related technologies.

⁸ Agencies are permitted to make a phase II award to a company that did not receive funding under phase I only in limited circumstances not present here. 15 U.S.C. § 638(cc); see also SBIR Program Policy Directive § 4(b)(1).

value, limited in scope, and too expensive to be used as a tool” and where protester was not an offeror under the solicitation).

In addition, we reject the protester’s argument that the agency would have to compete the requirement outside of the SBIR program, using full and open competition, if we were to sustain the protest.⁹ First, such an assertion reflects a misunderstanding of the SBIR program. Under the program, the purpose of phase II is to continue the specific R/R&D effort from phase I. 15 U.S.C. § 638(e)(4)(B); SBIR Program Policy Directive § 2(c)(2). Moreover, under the solicitation here, a phase I awardee’s phase I contract served as the actual request for proposals for the phase II follow-on project. There is no agency-developed work statement articulating agency requirements similar to what an offeror reviews pursuant to a more traditional contracting approach.¹⁰ SBIR Solicitation at Bates 20; see I.S. Grupe, Inc., B-278839, Mar. 20, 1998, 98-1 CPD ¶ 86 at 3 (highlighting the “experimental and creative nature of an SBIR procurement, which is not based on design or performance specifications for existing equipment, but rather emphasizes scientific and technical innovation and has as its objective the development of new technology”). That is, the SBIR awardee’s specific phase I technical concept is what is considered for a phase II award, and only that awardee is eligible to receive its phase II award.¹¹ SBIR Solicitation at Bates 20; SBIR Program Policy Directive

⁹ MIS’ reliance on Designer Associates to establish its status as an interested party is unavailing. In that decision, our Office found that a protester was interested to challenge a contract awarded under the Small Business Administration’s section 8(a) program because the agency would have to compete the requirement outside of the 8(a) program if we sustained the protest, thereby providing the protester--not an 8(a) participant--an opportunity to compete. Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 4. The decision has no application here. In this respect, we disagree with MIS that a sustained protest would result in NASA soliciting bids for FOMS’ SPACEFORM proposal outside of the SBIR program and under full and open competition. That is, as explained herein, if the phase II award to FOMS was improper, MIS would not be able to compete under a different procurement approach, like the circumstances in Designer Associates.

¹⁰ SBIR topics and subtopics do not contain detailed specifications or prescribed solutions but should provide “only that detail sufficient to guide small firms to submit on-target responses.” SBIR Program Policy Directive § 5(a); see Noise Cancellation Techs., Inc., B-246476, B-246476.2, Mar. 9, 1992, 92-1 CPD ¶ 269 at 2.

¹¹ The focus on a phase I awardee’s further development of its concept is consistent with the statutory purposes of the SBIR program. Pursuant to the program, an agency is funding a specific small businesses’ R/R&D and technology. See 15 U.S.C. § 638(a). The goal is for an agency’s investment in R/R&D to result in a viable commercial product for sale to the agency or the commercial sector. See SBIR Program Policy Directive § 1(c). Thus, unlike a more traditional contract vehicle where the agency solicits for particular agency needs, under the SBIR program, NASA is funding a

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§ 4(b)(1). Under NASA's SBIR solicitation, no head-to-head competition between offerors occurs following phase I. Rather, the primary consideration is whether the phase I awardee's concept warrants further investment. See SBIR Program Policy Directive § 4(b)(2). Permitting other companies to propose how they could advance another offeror's particular technical effort--within the constraints of the SBIR program or otherwise--is simply not contemplated.

Thus, the nature of the SBIR program does not support the protester's contention that NASA would take FOMS' SBIR phase I technical concept, remove it from the SBIR program, and allow other firms to compete for further development of FOMS' concept. Instead, NASA determined that FOMS' proposed technology qualified under the SBIR program requirements and merited further funding under phase II of the program. Under these circumstances, we decline to permit a possible competitor to disrupt this determination solely on the basis that it is conducting--or has conducted, as is the case here--parallel development using different funding.

Moreover, we highlight that MIS represents that it has recently completed development of the technology to manufacture fiber optics in space. This being the case, to the extent NASA actually used a different contracting method to support the development of the ability to manufacture fiber optics in space--the focus of FOMS' SBIR phase II award--MIS, by its own representations, would not be in line for that R/R&D contract because it apparently has already developed the technology. Thus, at best, MIS seeks to sell NASA fiber optics manufactured in zero gravity or the ability to do so. Under the circumstances here, such an acquisition is more akin to an SBIR phase III contract, which is not the focus of FOMS' award.¹²

Ultimately, MIS' bid protest is not based on the firm's desire to obtain a government contract to develop its similar technology, which MIS maintains it has already developed and which will be tested in space within months. Rather, in our view, the protester's purpose here is to preclude NASA from funding another firm's development of a similar, nascent technology. Thus, MIS' economic interest in the procurement flows from its concern that another company could eventually develop a similar capability to

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specific small businesses' R/R&D effort with the goal of increasing private sector commercialization of innovations derived from federal R/R&D.

¹² For example, phase III work may be for products, production, services, R/R&D, or any such combination. SBIR Program Policy Directive § 4(c)(4).

manufacture fiber optics in space with comparable commercial application.¹³ Such interest does not qualify the firm as an interested party. See 4 C.F.R. § 21.0(a)(1).

The protest is dismissed

Susan A. Poling
General Counsel

¹³ In assessing FOMS' phase I proposal, a NASA evaluator remarked that "[t]he resulting product could generate billions of dollars per year in revenue and have a multiplying value of billions more in the products and services it enables." AR, Tab 4, Phase I Evaluation of FOMS' Proposal, at Bates 230.