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# Decision

**Matter of:** EH Group, Inc.

**File:** B-419946.2

**Date:** March 25, 2022

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Isabelle P. Cutting, Esq., and Colonel Frank Yoon, Department of the Air Force, for the agency.  
Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. Protest challenging an agency's consideration of "importance to agency programs" and "fund availability" as unstated evaluation criteria is denied where the procurement was conducted as a commercial solutions opening and the relevant authority requires consideration of those factors.
  2. Protest challenging the agency's decision not to transfer to another agency the protester's non-funded phase I proposal submitted in response to a small business innovation research solicitation is denied where the protester fails to show that the agency acted in bad faith or violated any law or regulation.
  3. Protest challenging the agency's evaluation of the protester's proposal under one of three primary evaluation factors is denied where there is no possibility of competitive prejudice to the protester.
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## DECISION

EH Group, Inc., a small business of Eclectic, Alabama, protests the decision by the Department of the Air Force to not fund its proposal under small business innovation research (SBIR) commercial solutions opening No. X20.3, Topic No. AF203-CSO2, Space Force pitch day. The protester challenges the agency's evaluation of its proposal, and raises other challenges to the agency's handling of the procurement.

We deny the protest.

## BACKGROUND

The SBIR program is conducted pursuant to the Small Business Innovation Development Act. 15 U.S.C. § 638. The statute requires certain federal agencies to reserve a portion of their research and development (R&D) funding for awards to small business concerns. *Id.* §§ 638(e)(4), (f). The program has three phases. In phase I, firms submit proposals to conduct research or R&D on specified topics. *Id.* § 638(e)(4). Phase I awardees may become eligible to compete for phase II awards which would involve prototyping, *id.* § 638(e)(4)(B), and phase III awards which would involve further pursuit of work derived from, extending, or completing efforts made under prior SBIR funding. *Id.* § 638(e)(4)(C).

The use of commercial solutions openings (CSOs) as a form of general solicitation was permanently authorized under section 803 of the fiscal year (FY) 2022 National Defense Authorization Act (NDAA).<sup>1</sup> NDAA for FY 2022, Pub. L. No. 117-81, § 803, 135 Stat. 1541, 1814-1816 (2021). Department of Defense (DOD) guidance on the use of CSOs is found in Class Deviation-Defense Commercial Solutions Opening, 2022-O0007, Feb. 4, 2022.<sup>2</sup> Under a CSO, the agency competitively selects proposals received in response to the general solicitation based on a review of proposals by scientific, technological, or other subject-matter expert peers. Proposals are not evaluated against each other since they are not submitted in response to a common performance work statement or statement of work. *Id.* Rather, each proposal is evaluated against the criteria specified in the solicitation, with primary focus being given to the following factors: (1) technical; (2) importance to agency programs; and (3) fund availability. *Id.*

On August 25, 2020, the Air Force pre-released the CSO seeking phase I and direct to phase II proposals from small business concerns.<sup>3</sup> AR, Tab 3, CSO at 1, 16, 34-35, 38. The CSO sought proposals for “innovative, commercial technologies proposed to create new [Air Force] solutions or potential new capabilities fulfilling requirements, closing capability gaps, or providing potential technological advancements.” *Id.* at 5, 16. The

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<sup>1</sup> CSOs were introduced in the FY 2017 NDAA under a pilot program. NDAA for FY 2017, Pub. L. No. 114-328, § 879, 130 Stat. 2000, 2312-2313 (2016).

<sup>2</sup> At the time the protest was filed, Class Deviation-Defense Commercial Solutions Opening Pilot Program, 2018-O0016, June 26, 2018, was in effect. See Agency Report (AR), Tab 12, Class Deviation, June 2018. We cite the February 2022 class deviation here as it superseded the June 2018 class deviation. However, our analysis references the June 2018 class deviation as that was the guidance in effect over the period of time relevant to this matter. The portions of the two class deviations relevant to our analysis contain identical language.

<sup>3</sup> The agency explains that the pre-release period allowed interested firms the opportunity to “engage in direct discussion with topic technical points of contact” prior to submitting a proposal. See Memorandum of Law (MOL) at 4. The agency began accepting proposals on September 23, 2020. CSO at 1.

CSO listed seven topic areas. Relevant here, topic No. AF203-CSO2 (Space Force pitch day) sought innovative technology in the areas of sensors, electronics, space platform, materials, information systems, human systems, and battlespace. *Id.* at 67.

The CSO explained that all phase I awards would be fixed-price purchase orders with a maximum value of \$50,000, and that the total number of phase I awards was dependent on available funds. *Id.* at 16. Offerors submitting phase I proposals for the Space Force pitch day topic were instructed to submit their proposals in five volumes. *Id.* at 19. The CSO explained that proposals would undergo an initial screening for responsiveness. *Id.* at 34. Responsive proposals would then be reviewed by engineers or scientists to determine technical merit. *Id.*

The CSO included three primary evaluation factors and eight “other factors” to be considered during the selection process. The three primary factors are listed below in descending order of importance:

1. The potential for Government or private sector commercialization application and benefits expected to accrue from commercialization. The [small business concern’s] record of commercializing SBIR or other research and Phase II follow-on commitments for the subject research are evidence of commercialization potential. [(Commercialization potential factor)].
2. The appropriateness, relevance, and specificity of an identified Defense Need. Adequacy of the proposed effort and its relationship to fulfilling the identified Defense Need. [(Appropriateness factor)].
3. The soundness, technical merit, and innovation of the proposed approach and its incremental progress toward fulfilling the identified Defense need. Includes the proposed Principal Investigators/Project Managers, supporting staff, and consultant qualifications to execute the proposed approach. [(Technical merit & innovation factor)].

*Id.* Price reasonableness and realism were to be considered “to the extent appropriate.”

*Id.* Proposals were due on November 5. CSO at 1.

The Air Force received 366 proposals in response to the Space Force pitch day topic. Contracting Officer’s Statement (COS) at 2. Responsive proposals were evaluated in accordance with the evaluation factors to assess technical merit. *Id.* at 3. The agency assigned each proposal an adjectival rating under each of the three primary evaluation factors, where the adjectival ratings translated to numerical point scores. Supp. COS at 4-6. The four possible adjectival ratings were excellent, good, marginal, or poor. *Id.* at 5. If a proposal was rated as marginal or better under each factor, it was considered to be “selectable.” *Id.* at 5-6.

Proposals were then ranked from best to worst based on their overall point scores and price. *Id.* at 6. The top 50 proposals were selected to receive funding.<sup>4</sup> *Id.* at 11. EH Group's proposal was ranked 189 out of 366. AR, Tab 15, Source Selection Ranking List. EH Group's proposal was considered "selectable" but it did not rank highly enough to receive funding. See Protest, attach. C, Unsuccessful Offeror Notice, Jan. 2021.

On January 28, 2021, EH Group learned that its proposal was considered selectable based on technical merit, but that it would not receive funding. *Id.* At this time, the contracting officer communicated that the Air Force could not fund EH Group's proposal but that it was possible for another DOD agency to supply funding. See Protest at 7-8; COS at 8. In response to this communication, EH Group contacted the Department of the Navy, Office of Naval Research, to inquire about possible funding. Protest at 8. Over the following 3 months, EH Group pursued a transfer of its proposal from the Air Force to the Navy. *Id.*

On May 5, the contracting officer emailed EH Group regarding the status of the transfer. Protest, attach. E, Email from Agency to EH Group, May 5, 2021. In short, the contracting officer's email explained that there was a misunderstanding on the agency's part, and that the relevant statute precluded a transfer of EH Group's proposal to the Navy. *Id.* The email was accompanied by a notice dated May 5, 2021, which stated that EH Group's proposal was found "not selectable" and would not receive further consideration.<sup>5</sup> Protest, attach. D, May 5 Notice. On May 6, EH Group requested a debriefing. Protest, attach. F, Email from EH group to Agency, May 6, 2021. The contracting officer explained that a debriefing would not be provided. *Id.*, Email from Agency to EH Group, May 6, 2021.

On May 14, EH Group filed an agency-level protest challenging the agency's classification of EH Group's proposal as not selectable and the refusal to transfer its proposal to the Navy. Protest, attach. I, First Agency-level Protest at 1. The record reflects that EH Group sent follow-up correspondence to the agency on May 20 and June 22. Protest, attach. J, First Feedback Request; Protest, attach. K, Second Feedback Request. The record does not reflect a decision by the agency on this agency-level protest.

On June 27, EH Group filed a protest at GAO challenging, among other things, the Air Force's determination that its proposal was not selectable and the refusal to transfer its

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<sup>4</sup> The agency had a total phase I award budget of \$2.5 million, providing for a total of 50 phase I awards. Supp. COS at 10-11. Due to issues not relevant to this protest, only 46 of the top 50 proposals were funded. *Id.* at 11.

<sup>5</sup> The contracting officer explains that a proposal labeled as "selectable, not funded," and a proposal labeled as "not selectable" result in the same outcome; that is, no award is made to the offeror. COS at 6-7. Due to a change in agency policy, proposals that were once labeled as selectable, not funded (as EH Group's proposal was following the initial evaluation), were required to be labeled as not selectable going forward. *Id.*

proposal to the Navy. Protest, attach. M, GAO Protest, June 2021. On July 14, the Air Force filed a notice of corrective action. Protest, attach. O, Corrective Action Notice. The agency committed itself to reevaluating EH Group's proposal and to making a new funding decision if appropriate. *Id.* at 1. On July 23, our Office dismissed the protest as academic. *EH Group, Inc.*, B-419946, July 23, 2021 (unpublished decision).

In implementing the corrective action, the Air Force reevaluated EH Group's proposal using a new technical evaluation team. COS at 3; AR, Tab 16, Declaration of Technical Evaluator at ¶ 7. The reevaluation results are shown below, along with the ratings and prices of the top-ranked proposal and the lowest-ranked proposal selected for funding:

	<b>EH Group</b>	<b>1st Place Offeror</b>	<b>50th Place Offeror</b>
<b>Commercialization Potential</b>	Marginal	Excellent	Excellent
<b>Appropriateness</b>	Excellent	Excellent	Excellent
<b>Technical Merit &amp; Innovation</b>	Good	Excellent	Excellent
<b>Total Point Score</b>	69 Points	99 Points	99 Points
<b>Price</b>	\$49,972	\$40,208	\$50,000

AR, Tab 5, Reevaluation at 2-4; AR, Tab 15, Source Selection Ranking List.

Based on the results of the reevaluation, EH Group's proposal was now ranked 238 out of 366. AR, Tab 16, Declaration of Technical Evaluator at ¶ 8. Again, the agency chose not to fund EH Group's proposal.<sup>6</sup> *Id.*; AR, Tab 5 Reevaluation at 4.

On October 15, the Air Force provided EH Group with the results of the reevaluation. Protest, attach. Q, Email from Agency to EH Group, Oct. 15, 2021. On October 17, EH Group requested a debriefing and asked whether the Air Force would be able to transfer its proposal to the Navy for funding. Protest, attach. S, Email from EH Group to Agency, Oct. 17, 2021. Prior to receiving a response from the Air Force, on October 24, EH Group filed an agency-level protest challenging, among other things, the agency's reevaluation of its proposal and the refusal to transfer its proposal to the Navy. Protest, attach. T, Second Agency-level Protest at 11-12. On December 7, the Air Force denied EH Group's agency-level protest. AR, Tab 9, Agency-level Protest Decision at 7. On December 17, EH Group filed the instant protest with our Office.

## DISCUSSION

EH Group challenges the agency's evaluation of its proposal, and argues that the Air Force acted improperly by refusing to transfer its proposal to the Navy for funding. Protest at 21-28; Comments at 3-9. The Air Force argues that the evaluation of EH

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<sup>6</sup> At the time of the reevaluation of EH Group's proposal, the Air Force had funded 46 phase I proposals, leaving funding available for 4 more awards. Supp. COS at 11.

Group's proposal was conducted reasonably and in accordance with the CSO and applicable guidance and regulations. MOL at 18-27. Further, the Air Force argues that there is no statutory authority allowing it to transfer EH Group's non-funded phase I proposal to the Navy. *Id.* at 28. As explained below, we find no basis to sustain the protest.<sup>7</sup>

It is well-established that agencies have substantial discretion to determine which proposals they will fund under an SBIR procurement. *Wang Electro-Opto Corp.*, B-418523, June 4, 2020, 2020 CPD ¶ 187 at 5; *NW Sys.*, B-401352, July 13, 2009, 2009 CPD ¶ 152 at 2. In light of this discretion, our review of an SBIR procurement is limited to determining whether the agency acted in bad faith or violated any applicable regulations or solicitation provisions. *Wang Electro-Opto Corp.*, *supra*.

#### The Agency's Evaluation of EH Group's Proposal

EH Group contends that the agency applied unstated evaluation criteria to its proposal, resulting in an improper evaluation. In this regard, after reevaluating EH Group's proposal, the new technical evaluation team made the following overall evaluation decision:

In descending order of importance, [the commercialization potential factor] is rated *Marginal* (13), [the appropriateness factor] is rated *Excellent* (33), and [the technical merit & innovation factor] is rated *Good* (23) for a combined score of 69 out of a possible 99. This technical score places the proposal in the "Selectable" pool. When further considered in accordance with importance to agency programs and fund availability, the proposal is determined to be *Selectable – Not Funded*.

AR, Tab 5, Reevaluation at 4.

EH Group argues that "importance to agency programs" and "fund availability" are unstated evaluation criteria and therefore evaluating its proposal based on these criteria was unreasonable. Protest at 19-20; Comments at 6-7. The Air Force argues that it views CSOs as a variant of Federal Acquisition Regulation (FAR) part 35 broad agency announcements, and that the FAR and the relevant DOD class deviation require procuring agencies to consider importance to agency programs and fund availability when making a selection decision under a CSO. MOL at 8-12, n.4. As explained below, we agree with the agency and deny this protest ground.

As previously discussed, this procurement was conducted as a CSO under the SBIR program. See CSO at 1. The class deviation pertaining to the use of CSOs requires that when using a CSO for R&D acquisitions, as here, contracting officers "shall use the procedures in [the] class deviation in conjunction with FAR part 35." AR, Tab 12, Class

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<sup>7</sup> EH Group raises other collateral arguments. While our decision does not address each argument, we have reviewed them all and find no basis to sustain the protest.

Deviation, June 2018, at 1. In turn, FAR section 35.016(e) and the class deviation both explain that the “primary evaluation factors for selecting proposals for award shall be technical, importance to agency programs, and fund[] availability.” FAR 35.016(e); AR, Tab 12, Class Deviation, June 2018, at 2.

Given this framework, we conclude that the agency’s consideration of “importance to agency programs” and “fund availability” was reasonable, consistent with the solicitation, the FAR, and the relevant class deviation, and did not constitute the use of unstated evaluation criteria. Accordingly, we deny this protest ground.

Next, the protester argues that to the extent the agency considered importance to agency programs and fund availability in making its award decisions, the record is inadequately documented. Comments at 6-7. As explained below, we disagree.

In reviewing an agency’s evaluation, we do not limit our review to contemporaneous evidence, but consider all of the information provided, including the parties’ arguments and explanations. *Netizen Corp.*, B-418281 *et al.*, Feb. 21, 2020, 2020 CPD ¶ 85 at 6-7 n.5. Although we generally give little weight to reevaluations and judgments prepared in the heat of litigation, *see Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detained rationale for contemporaneous conclusions and simply fill in previously unrecorded details will generally be considered, so long as those explanations are credible and consistent with the contemporaneous record. *Remington Arms Co., Inc.*, B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 12.

In response to EH Group’s protest, the agency provided more explanation regarding how it evaluated proposals submitted in response to this CSO.<sup>8</sup> The agency first determined a proposal’s technical merit by evaluating it under the three criteria established in the solicitation and assigning it adjectival ratings--which translated to point scores--under each evaluation criterion.<sup>9</sup> Supp. COS at 4-5. The points assigned to a proposal were added together to reach a total point score, with a maximum of 99 points if the proposal was assigned a rating of excellent for each criterion. *Id.* at 6. Once all proposals were reviewed and scored, the proposals were ranked in accordance with the total point scores and price. *Id.* Here, EH Group’s proposal earned adjectival ratings of marginal, excellent, and good, which translated to 69 points; this score represented its technical merit. *Id.* at 10; AR, Tab 5, Reevaluation at 4.

The agency explains that it used this ranking system based on technical merit and price to determine importance to agency programs. Supp. COS at 6. In this regard, higher

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<sup>8</sup> The agency explains that this general process applied to all of its evaluations of proposals submitted in response to the CSO.

<sup>9</sup> The agency states that it used the following equal numerical score for each adjectival rating: excellent received 33 points, good received 23, marginal received 13, and poor received 3. Supp. COS at 5.

ranked proposals were considered more important to agency programs than lower ranked proposals. Essentially, proposals were ranked higher by demonstrating high levels of technical merit--which translated to a higher total point score--at favorable prices. *Id.* at 6-7. The greater a proposal's technical merit, the more important it was to agency programs. Where proposals earned the same point score for technical merit, they were differentiated based on price. *Id.* at 6. For example, the agency explains:

[W]here two proposals receive a total score of 59, the lower cost proposal would be ranked above the higher cost proposal. However, where two proposals receive different scores--69 and 59 for example--the prices of those proposals are not [compared] by the agency. The higher scored proposal is ranked above the lower scored proposal.

*Id.*

Once the ranked proposals established each proposal's importance to agency programs, the agency considered fund availability. Supp. COS at 7-8. In the instant matter, the Air Force had a total budget of \$2.5 million to fund any resulting phase I contracts. *Id.* at 10. Since each phase I award would be valued at no more than \$50,000, the agency determined that it had fund availability to support 50 phase I awards. *Id.* at 11. The ranking list was used to identify the top 50 most important proposals, and the agency extended funding to the offerors who submitted those top-ranked proposals. *Id.* at 11-12. Since EH Group's reevaluated proposal was ranked 238 out of 366, it was not funded. *Id.* at 10-13. The agency maintains that had EH Group's proposal ranked highly enough after the reevaluation, it would have been funded. See *id.* at 13; AR, Tab 16, Declaration of Technical Evaluator at ¶ 8 ("despite available funding for four additional awards under this topic, EH Group's proposal was [ranked] far below the funding cut line.").

We find the agency's explanation of how it assessed importance to agency programs and fund availability to be credible and consistent with the contemporaneous record. For example, the record included an evaluation of EH Group's proposal that explained the adjectival ratings and point scores assigned to the proposal under each of the three criteria as well as a spreadsheet showing the rankings of all the proposals. We conclude that the record is sufficiently documented to allow our Office to meaningfully review the agency's consideration of importance to agency programs and fund availability. *Global Aerospace Corp.*, B-414514, July 3, 2017, 2017 CPD ¶ 198 at 10 ("it is a fundamental principle of government accountability that an agency be able to produce a sufficient record to allow for a meaningful review where its procurement actions are challenged."). Based on our review, we find nothing unreasonable about the agency's approach here. It is well-established that agencies have substantial discretion to determine which proposals they will fund under an SBIR procurement. *Wang Electro-Opto Corp.*, *supra*. Accordingly, we deny this protest ground.



## The Air Force's Decision not to Transfer EH Group's Proposal was Reasonable

On January 28, 2021, EH Group was notified that its proposal was considered to be selectable based on technical merit, but that it would not receive funding. Protest, attach. C, Unsuccessful Offeror Notice, Jan. 2021. At this time, the contracting officer communicated that the Air Force could not fund EH Group's proposal, but that it was possible for another DOD agency to supply funding. See Protest at 7-8; COS at 8. On May 5, the contracting officer notified EH Group that the agency had made a mistake, and that funding from a different DOD agency would not be possible. Protest, attach. E, Email from Agency to EH Group, May 5. The contracting officer explained that when advising about possible funding from another agency, EH Group's phase I proposal was mistaken for a phase II proposal. *Id.* Per the contracting officer, while phase II proposals may be transferred to another agency for funding, non-funded phase I proposals--such as the one submitted by EH Group--cannot be transferred to another agency. *Id.*

EH Group argues that its proposal was "suitable and selectable for a Phase II award[.]" and was eligible for a transfer to the Navy. Protest at 21-22; Comments at 3-4. The protester contends that by not transferring its proposal, the Air Force acted unreasonably. Protest at 21. The Air Force argues that EH Group submitted a phase I proposal, and that the relevant statute does not provide for transfers between agencies of non-funded phase I proposals such as the one submitted by EH Group. MOL at 28; COS at 8. Here, we find no basis to sustain the protest.

The CSO requested phase I proposals and direct to phase II proposals. See CSO at 19-55. Typically, to receive a phase II award, a small business concern would need to be a previous phase I awardee. See 15 U.S.C. § 638(e)(4). Direct to phase II proposals differ from traditional phase II proposals in that they are submitted for SBIR phase II awards without regard to whether the small business concern received a phase I award for the proposed project.<sup>10</sup> Under the CSO, direct to phase II proposals were required to contain different information than phase I proposals. For example, direct to phase II proposals were required to include the results of a phase I feasibility study, to address phase II technical objectives and key results, and to include a phase II work plan. *Id.* at 42-46. Phase I proposals did not have to include such information. See *id.* at 19.

In our view, EH Group submitted a phase I proposal. The protester's proposal included the requirements for phase I proposals but did not include any of the identified requirements for direct to phase II proposals. See Protest, attach. B, EH Group Proposal. Based on our review of the CSO and EH Group's proposal, we disagree with the protester regarding the suitability of its proposal for a direct to phase II award. To

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<sup>10</sup> While the CSO did contain a section discussing phase II proposals, it was "for informational purposes for Phase I awardees." CSO at 35. The CSO explained that a more specific solicitation would be released to phase I awardees at a later time. *Id.*

the extent EH Group argues that the agency should have awarded it a direct to phase II contract, we disagree, and we deny such a challenge.

As to EH Group's argument that its non-funded phase I proposal should have been transferred to the Navy, we again disagree. The protester argues that the agency could have transferred its proposal to the Navy under the authority of 15 U.S.C. sections 638(aa), (bb), or (cc). Protest at 21-22; Comments at 3-4. Based on our review of these sections, none of them require or contemplate the transfer of a non-funded phase I proposal to another agency. Sections (aa) and (cc) address limitations on the size of SBIR awards and issuance by an agency of a phase II award to a small business concern without regard to whether that concern had previously received a phase I award, respectively; neither of them discuss or address the transfer of proposals to different agencies. See 15 U.S.C. §§ 638(aa), (cc). Section (bb) provides authority for a federal agency other than the procuring agency to fund a subsequent phase II award; however, this section applies only where the small business concern involved has already received a phase I award from the procuring agency.<sup>11</sup> *Id.* § 638(bb). As noted above, EH Group has not submitted a proposal for a direct to phase II award, or demonstrated that it already received a phase I award, so this section would not apply to EH Group's phase I proposal.

Accordingly, EH Group has pointed to no authority requiring a procuring agency to transfer to another agency a non-funded phase I SBIR proposal. While the protester urges that the Air Force could have transferred its proposal--which the agency contests--it has not established that the Air Force had to transfer its proposal or otherwise acted in bad faith or violated law or regulation by not transferring the proposal. Based on our review of the record and the relevant authority, we find that this challenge amounts to disagreement with the agency's judgment. Accordingly, it is denied. *Cf. Glatz Aeronautical Corp.*, B-405851, B-405851.2, Jan. 6, 2012, 2012 CPD ¶ 19 at 4-5 (protester's disagreement with agency's judgment, without more, does not provide a basis to sustain a protest).

#### EH Group Cannot Establish Competitive Prejudice with Respect to Remaining Grounds

Finally, EH Group challenges the agency's evaluation of its proposal under the commercialization potential evaluation factor. Protest at 23-28; Comments at 7-9. The protester argues that the agency failed to consider relevant portions of its proposal and otherwise conducted an unreasonable technical evaluation under this evaluation criterion. See *id.* As one example, the protester takes issue with the agency's evaluation finding that states: "Although the proposed technology has strong

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<sup>11</sup> This section states in relevant part that "[a] small business concern that received a Phase I award from a Federal agency under this section shall be eligible to receive a subsequent Phase II award from another Federal agency" should each agency make a written determination that the topics of the awards are the same. 15 U.S.C. § 638(bb). The agency relies on this section to argue that it has the authority to transfer only phase II proposals and not phase I proposals. MOL at 28; COS at 8.

commercialization potential, the offeror does not appear adequately equipped to successfully commercialize the proposed technology and enable the government or private sector to realize its benefits.” Protest at 26-28 (citing AR, Tab 5, Reevaluation at 3). EH Group argues that this evaluation finding disregards “numerous examples” of its experience, and contends that it is inconsistent with the evaluation criterion. *Id.* Here, even if the protester were to succeed in these arguments, we find no possibility of competitive prejudice.

Competitive prejudice is an essential element of every viable protest. *CBF Partners JV, LLC*, B-419846.2 *et al.*, Dec. 14, 2021, 2022 CPD ¶ 10 at 13 (citing *22nd Century Techs., Inc.*, B-412547 *et al.*, Mar. 18, 2016, 2016 CPD ¶ 93 at 9). Where the protester fails to demonstrate that, but for the agency’s actions, it would have a substantial chance of receiving an award, there is no basis for finding prejudice, and our Office will not sustain the protest. *Id.*

Even if we were to agree with EH Group on these grounds, the result would only impact its technical rating under the commercialization potential factor. At best, the protester’s rating under this factor would be upgraded to the highest rating of “excellent.” Based on the agency’s scoring system, an adjectival rating of excellent equals 33 points, and a rating of good equals 23 points. Supp. COS at 5. If successful in these challenges, EH Group’s proposal would have two ratings of excellent and one rating of good, see AR, Tab 5, Reevaluation at 4, resulting in a point score of 89. Based on the ranking list provided by the agency, a point score of 89 would be ranked, at best, 57 out of 366. See AR, Tab 15, Source Selection Ranking List. As previously discussed, the agency had sufficient funding to support only the top 50 proposals.<sup>12</sup>

We conclude that EH Group is unable to demonstrate that it would have a substantial chance of receiving an award, and thus, is unable to demonstrate competitive prejudice with respect to these evaluation challenges. Accordingly, we deny the challenges to the agency’s evaluation of EH Group’s proposal under the commercialization potential factor.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>12</sup> Four of the top 50 proposals were disqualified for reasons not relevant here. See Supp. COS at 13. Even if we were to consider the top 54 proposals as eligible for funding, a score of 89 points would be insufficient for an award. The 54th ranked proposal was rated as excellent under the three primary evaluation factors, resulting in a point score of 99, and was priced at \$49,970. AR, Tab 15, Source Selection Ranking List. Therefore, a score of 89 would not displace the 54th ranked proposal (nor would it displace the proposals ranked 55th or 56th).