



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Higher Power Engineering

File: B-278900

Date: March 18, 1998

Ronald Cooper for the protester.

Lis B. Young, Esq., Department of the Navy, for the agency.

Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's decision not to fund protester's proposal under Small Business Innovation Research Program procurement was proper where evaluation was consistent with terms of solicitation and there is no showing of agency bad faith or violation of regulations.

DECISION

Higher Power Engineering (HPE) protests the rejection of its proposal by the Department of the Navy under Small Business Innovation Research (SBIR) Program solicitation No. N97-142. HPE alleges that the Navy improperly evaluated its proposal.

We deny the protest.

The solicitation sought phase I proposals on the topic, "Integrated Control of a Powered Causeway Ferry." Offerors were to submit proposals for development and demonstration of a "commercially viable integrated, intuitive operator friendly controller that will increase maneuverability of causeway ferries while reducing the need for highly skilled operators" and will "simultaneously control from two to four . . . thrusters."¹ The solicitation contained four evaluation criteria as follows:

¹Navy causeway ferries are used to transport materiel from ships to shore where a ship is unable to dock directly at a pier. Existing ferries are composed of a powered unit and one or more nonpowered units, but are not fully capable of maneuvering alongside ships and piers in higher sea states. As explained in the solicitation, this deficiency is considered to be the result of the fact that there currently are only two thrusters available to power and maneuver the ferry, both
(continued...)

(1) soundness and technical merit of the proposed approach and its incremental progress toward topic solution; (2) potential for commercial (government or private sector) application and the benefits expected to accrue from commercialization; (3) adequacy of the proposed effort for the fulfillment of the research topic's requirements; and (4) qualifications of the principal/key investigators, supporting staff, and consultants, in terms of both their ability to perform the research and their ability to commercialize the results.

The agency received 12 proposals. Based on the evaluation, the protester's proposal was ranked tenth, with 24 of a possible 48 points. The agency made award to American GNC Corporation based on that firm's highest-rated proposal (42 points). Following award, HPE submitted an agency-level protest. In response, the agency reevaluated the firm's proposal and increased its score 1 point (to 25 points) on the basis of one evaluator's initial incorrect determination that the protester had proposed two thrusters instead of four, as required; however this did not change the relative ranking (tenth out of 12 proposals received) of the firm's proposal.²

HPE argues that the Navy misevaluated the firm's proposal as inferior to the awardee's and was biased against the firm, and that the awardee's proposed system is not operator friendly, as required.

Where an agency is conducting an SBIR procurement, it has the discretion to determine which proposals it will fund. See Small Business Innovation Research Program Policy Directive, 58 Fed. Reg. 6144, 6149 (1993); Microexpert Sys., Inc., B-233892, Apr. 13, 1989, 89-1 CPD ¶ 378 at 2. In light of this discretion, our review of an SBIR procurement is limited to determining whether the agency violated any applicable regulations or solicitation provisions, or acted in bad faith. Bostan Research, Inc., B-274331, Dec. 3, 1996, 96-2 CPD ¶ 209 at 2.

¹(...continued)

located in the stern of the powered unit. (Each thruster has separate controls for engine rpm and nozzle direction.) The Navy now is developing causeway ferries with bow thrusters (in addition to the stern thrusters) to provide greater maneuverability. A ferry that utilizes two bow and two stern thrusters will require eight controls (engine rpm and nozzle direction for each thruster), and the current solicitation is part of an attempt to develop a simplified control system, in the form of an "intuitive joy stick control system."

²In its reevaluation, the agency also acknowledged that the evaluated deficiency statement that the firm lacked "any marine background" was inaccurate and too generalized, but that it had no effect on the evaluation since it actually was the underlying absence of evidence of "marine background with experience in small craft similar to the causeway ferries" that led to the downgrading.

There is no basis for disturbing the award here. First, there is no showing of a violation of regulations. Further, the considerations which led the Navy to downgrade HPE's proposal (during the original evaluation and the reevaluation)--primarily failure to sufficiently address the hydrodynamics of the ferry (technical merit factor), lack of apparent integrated control of multiple thrusters (adequacy of proposed effort factor), and lack of resume for the proposed senior electrical engineer and lack of marine experience with small craft similar to the causeway ferries here (qualifications of principal/key investigators, supporting staff, and consultants factor)--all were consistent with and encompassed by the stated criteria, and the award decision was based on the relative ranking of the proposals under these criteria. Consequently, we conclude that the evaluation was consistent with the solicitation.

Although HPE's protest focuses on its disagreement with the evaluation conclusions, in light of the discretion afforded agencies under the SBIR program, the evaluation judgments that go into award decisions generally are not subject to legal objection. In any case, the agency's evaluation conclusions appear unobjectionable. For example, under the technical merit factor, HPE's proposal was evaluated as deficient for failure to address hydrodynamics of the ferry, and HPE does not dispute the agency's determination that the firm's proposal did not indicate the design assumptions for its integrated control system regarding the forces of the water on the side of the ferry hull or the validity of the assumptions.

As another example, under the qualifications of principal/key investigators, supporting staff, and consultants factor, HPE's proposal was found deficient for failure to provide the resume of the senior electrical engineer. The protester argues that it provided the resume of the principal investigator, as required by the solicitation, but does not rebut the agency's position that the additional resume was needed for the evaluation because the firm's proposal provided that a senior electrical engineer (in addition to the principal investigator) would have a significant role in the project. In this regard, we note that, although the solicitation did not specifically require resumes for key personnel other than the principal investigator, it specifically requested that the offeror "[i]dentify key personnel who will be involved in the Phase I effort including information on directly related education and experience." We see nothing unreasonable in the agency's downgrading the proposal for failing to provide required information concerning an individual who would play a significant role in performance of the contract.

HPE alleges that it was misled by agency personnel as to the number of thrusters required, and that this improperly affected the evaluation of its proposal. However, the agency denies misleading HPE and, in any case, there is no indication that any misunderstanding as to the number of thrusters affected the evaluation. As discussed above, while one evaluator initially downgraded HPE's proposal for

proposing only two thrusters, this evaluation defect was corrected in the reevaluation.³

HPE's allegation of bias also is without merit. When a protester alleges bias or bad faith on the part of contracting officials, it must provide convincing proof that the officials intended to harm the protester, since contracting officials are presumed to act in good faith. ACS Sys. & Eng'g, Inc., B-275439.3, Mar. 31, 1997, 97-1 CPD ¶ 126 at 5. HPE notes the error corrected in the reevaluation, reiterates its disagreement with the evaluation, and concludes, with no further proof, that the "incomplete review" shows bias. This unsupported allegation does not constitute the proof required to establish agency bad faith.

Since HPE's proposal was ranked tenth, and therefore is not in line for award, HPE is not an interested party eligible to challenge the evaluation of the awardee's proposal. See Bid Protest Regulations, 4 C.F.R. §§ 21.0(a); 21.1(a) (1997); Virginia Accelerators Corp., B-271066, May 20, 1996, 97-2 ¶ 13 at 3 n.2.

The protest is denied.⁴

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³In any case, we note that the government is not bound by or liable for the erroneous advice of its employees. A.D. Roe Co., Inc., 54 Comp. Gen. 271, 275 (1974), 74-2 CPD ¶ 194 at 6; Reach All, Inc., B-229772, Mar. 15, 1988, 88-1 CPD ¶ 267 at 5.

⁴HPE requests reimbursement of the costs of filing and pursuing its protest and proposal preparation costs. However, there is no legal basis for allowing an unsuccessful protester to recover such costs. See 4 C.F.R. § 21.8(d). The protester also seeks recovery of lost profits. There is no legal basis for allowing recovery of lost profits under any circumstances in connection with a bid protest. CFM Equip. Co.--Recon., B-251344.2, Aug. 30, 1993, 93-2 CPD ¶ 134 at 5.