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Decision

Matter of: R&D Dynamics Corporation

File: B-285979.2

Date: November 14, 2000

William T. Welch, Esq., Maurice J. Mountain, Esq., and Keith L. Baker, Esq., Barton, Baker, McMahon & Tolle, for the protester.
Maj. Cynthia M. Mabry, and Alvin E. Prather, Esq., Department of the Army, for the agency.
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that government personnel discouraged protester from pursuing the “Fast Track” process under the Department of Defense’s Small Business Innovation Research program, and had an improper conflict of interest with the awardee, is denied where the allegations are not supported by the record.

DECISION

R&D Dynamics Corporation protests the Department of the Army’s determination to award Phase II funding to Mohawk Innovative Technology, Inc. (MITI) for a project both firms proposed under the Department of Defense (DOD) Small Business Innovation Research (SBIR) program. R&D alleges that government personnel improperly advised the firm that it need not pursue “Fast Track” procedures in order to obtain phase II funding for the “Oil-Free Auxiliary Power Unit and Propulsion System Technology” project, and that these government personnel had an improper conflict of interest with MITI and should not have participated in the evaluation process.¹

We deny the protest.

¹ R&D has filed an additional protest in response to the agency report which will be decided by a separate decision.

The SBIR Program is conducted pursuant to the Small Business Innovation Development Act, 15 U.S.C. § 638 (1994 & Supp. IV 1998), which requires certain federal agencies to reserve a portion of their research and development funds for awards to small businesses.

As part of its SBIR program, DOD issues an SBIR solicitation twice a year listing the research topics for which it will consider SBIR program admission. Firms first apply for a 6-month phase I award of \$60,000 to \$100,000 to test the scientific, technical, and commercial merit and feasibility of a certain concept. If phase I is successful, the firm may be invited to apply for a 2-year phase II award of \$500,000 to \$750,000 to further develop the concept. Proposals are judged competitively on the basis of scientific, technical, and commercial merit. After the completion of phase II, firms are expected to obtain funding from the private sector and/or non-SBIR government sources to develop the concept into a product for sale in private sector and/or military markets. <<http://www.acq.osd.mil/sadbu/sbir/overview.html>> at 1 (DOD's SBIR website).

Historical data shows that approximately 40 percent of phase I projects are awarded a phase II contract. Id. However, DOD also offers a "Fast Track" process for phase II contracts. If the phase I contractor attracts outside investments in accordance with established requirements, its proposal is evaluated for phase II award under a separate, expedited process. Id. at 2. Historical data from between September 1997 and July 2000 shows that 95 percent of the phase I projects that qualified for the Fast Track by attracting the required outside investment were selected for phase II award. <<http://www.acq.osd.mil/sadbu/sbir/fsttrack.html>> at 5.

DOD Fiscal Year (FY) 1999 SBIR Program Solicitation 99.2 listed the available SBIR topics for FY 1999 for phase I proposals. At issue here, the Army Research Laboratory (ARL) solicited topic A99-019, "Oil-free Auxiliary Power Unit and Propulsion System Technology," which called for a contractor to "develop innovative oil-free compliant foil bearing and seal technology in a size class suitable for application in the oil-free auxiliary power unit and gas turbine turbomachinery systems used in Army vehicles." Solicitation at Army-25. A foil bearing replaces the traditional ball bearing and lubricant system with a series of lightweight foil strips that hold the rotating assembly in place when at rest. As the rotating assembly turns, it creates an air cushion between the assembly and the foil strips, which significantly reduces friction. The air cushion spreads the foil strips away from physical contact with the rotating assembly in a way that nearly eliminates physical wear on the foil bearings and reduces the failure rate of the bearing. Protest at 4-5.

Both R&D and MITI received phase I funding for this topic in January 2000 and began considering the upcoming phase II proposal process.

Section 4.3 of the solicitation set forth the following evaluation criteria for phase II proposals:

- a) The soundness, technical merit, and innovation of the proposed approach and its incremental progress toward topic or subtopic solution;
- b) the qualifications of the proposed principal/key investigators, supporting staff, and consultants; and
- c) the potential for commercial application and the benefits expected to accrue from this commercialization.

The first criterion was to be weighted slightly more than the second two, which were to be equally weighted. Phase II Proposal Instructions at 34. The solicitation advised that the reasonableness of the proposed costs was to be examined to determine those proposals that offered the best value. Where technical evaluations were essentially equal in merit, cost to the government was to be considered in determining the successful offerors. Solicitation § 4.3. The solicitation stated that DOD could elect to fund several or none of the projects. Id. § 4.1.

Section 4.3 of the solicitation also advised that DOD was to evaluate Fast Track phase II proposals under a separate, expedited process in accordance with the above criteria, and was to select these proposals for phase II award provided:

- (1) they meet or exceed a threshold of “technically sufficient” for criteria (a) and (b); and
- (2) the project has substantially met its phase I technical goals.

Since Fast Track proposals had, by definition, attracted matching cash from an outside investor, they presumptively met criterion (c). Id. § 4.3. Firms were advised that “this process should result in a significantly higher percentage of Fast Track projects obtaining Phase II award than non-Fast Track projects.” Id. In this regard, the phase II proposal instructions appended to the phase I funding awards stated that, “[b]ecause Fast Track proposals show direct evidence of high commercialization potential, it is expected that these will have a much higher probability of selection for award than other Phase II proposals, on average--leading to a greater priority for Phase II awards.” Phase II Proposal Instructions at 28.

In April, the agency invited both R&D and MITI to submit phase II proposals. Both firms submitted regular--not Fast Track--phase II proposals in May. These proposals were initially evaluated by four technology experts in the Army Laboratories and Centers. One of the experts, an ARL employee, was R&D’s technical representative during its phase I performance. Another of the experts, a NASA employee, provided similar assistance. Both of these individuals are also government civil service engineers working on the government’s Oil-Free Turbomachinery Program.

The maximum technical score for proposals was 100 points. R&D's proposal received a consensus rating of [DELETED] points, and MITI's proposal 100 points. The results of this initial evaluation were forwarded to the cognizant Technology Area Chief (TAC) for a second, independent review. The forwarding cover letter advised that both proposals were highly recommended for phase II contract award and ranked MITI's proposal first and R&D's proposal second in order of merit.

The TAC examined the evaluations of [DELETED] proposals for the various topics in his area, including this topic, based on scientific and technical evaluation aspects, possible duplication of on-going research, program balance, budget constraints, and the additional factors set forth in the solicitation. TAC Statement at 2. Based on his overall analysis, he provided an overall prioritized list of these proposals and placed the proposals in one of four bands--Band I for "must fund"; Band II for "fund if money is available"; Band III for "marginal proposal"; and Band IV for "do not fund." The TAC placed MITI's proposal in Band I and R&D's proposal in Band II. Id. The selection evaluation board (SEB) reviewed the priority lists submitted by all of the TACs and, based on estimates of the annual SBIR budget and TAC recommendations, selected the projects for award. The SEB did not revise the priority list submitted by the TAC for this technology area. Army SBIR Program Manager's Statement at 8. The SEB's findings were forwarded to the Deputy Assistant Secretary of the Army for Research and Technology for his review and approval; he concurred with the SEB's findings.

After it was notified that its phase II proposal would not be funded, R&D filed an agency-level protest alleging that the two evaluators referenced above improperly discouraged it from submitting a Fast Track proposal, and that an improper conflict of interest existed between MITI and these two evaluators. When the agency denied the protest, R&D raised the same allegations in its protest to our Office.

Where an agency is conducting an SBIR procurement, it has the discretion to determine which proposals it will fund. See SBIR Program Policy Directive, 58 Fed. Reg. 6,144, 6,149 (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; see also Intellectual Properties, Inc., B-280803.2, May 10, 1999, 99-1 CPD ¶ 83 at 5-6. The protester has not provided any basis to question the agency's conduct in this procurement.

R&D contends that it expected to participate in the Fast Track program in order to “guarantee award” of a phase II contract.² R&D asserts that its president had separate discussions in February with these two evaluators regarding its expected phase II proposal and its intention to use the Fast Track process. R&D asserts that its technical representative, the ARL employee, discouraged R&D’s president from pursuing the Fast Track process, saying that R&D “didn’t have to” go that route. Protest at 7. R&D asserts that both evaluators told its president that all he needed to do was to line up a partner that manufactured turbocharged engines for his phase I proposal and meet his goals, and that they would make the presentation directly to headquarters and highly recommend his award for phase II. Based upon this advice, R&D contends, although it was capable of pursuing the Fast Track process it did not do so. R&D has not submitted a statement from its president to support the account provided by the firm’s counsel, but has merely appended copies of his notes of these conversations.

In contrast, both evaluators have submitted signed statements in which they specifically deny the protester’s account of these conversations. The ARL evaluator states that he did say that it would not be necessary for R&D to pursue the Fast Track process to receive a phase II award, but that the statement was made in the context of their general discussion of the Fast Track process. The ARL evaluator states that his comment that phase II proposals were not required to pursue the Fast Track process was not misleading, but a statement of fact. He states that he never discouraged R&D from pursuing the Fast Track process but, instead, encouraged the firm to do so. The NASA evaluator also states that he strongly encouraged R&D to pursue and take advantage of the Fast Track process. He adds that he made it clear that he was not well versed in the specific details of the process and that the firm must read the regulations. The NASA evaluator states that he was in the room with the ARL evaluator during the latter’s telephone conversation with R&D’s president, and that the ARL evaluator provided the same information. He states that R&D has taken the ARL evaluator’s statement out of context by indicating that he only told them “R&D didn’t have to go that route.” Both evaluators state that they never discussed, indicated or agreed to make a presentation directly to headquarters and highly recommend award.

The weight of the evidence leads us to conclude that the evaluators’ first-hand account of the contents of these conversations more credible than the second-hand account provided by the protester. The comments by protester’s counsel contain no specific rebuttals to the accounts provided by the evaluators themselves, and the

² Notwithstanding R&D’s apparent expectations, it is clear from the solicitation, phase II proposal instructions, and DOD’s SBIR website that the Fast Track process does not “guarantee” funding of a phase II proposal.

notes relied upon by the protester as contemporaneous evidence are so ambiguous that they could support either account.³

In any event, even if the evaluators had discouraged R&D from pursuing the Fast Track process, R&D's reliance on this advice would not have been reasonable. Oral advice given by government personnel which is contrary to the terms of a solicitation does not bind the government, and an offeror relies on such advice at its own risk. See TRS Research, B-274845, Jan. 7, 1997, 97-1 CPD ¶ 6 at 3; see also Higher Power Eng'g, B-278900, Mar. 18, 1998, 98-1 CPD ¶ 84 at 4 n.3.

Here, section 4.3 of the solicitation clearly set forth the contrasting evaluation and award processes that were to be used for regular and Fast Track phase II proposals and, as noted above, clearly stated that the Fast Track process should result in a "significantly higher percentage of Fast Track projects obtaining Phase II award than non-Fast Track projects." This information was underscored by the advice that "it is expected that [Fast Track phase II proposals] will have a much higher probability of selection for award than other Phase II proposals, on average--leading to a greater priority for Phase I awards." Phase II Proposal Instructions at 28. It could not have been more clear to a prospective phase II offeror that its proposal stood a much greater chance of receiving phase II funding if it could meet the Fast Track requirements. The phase II proposal instructions also expressly stated that proposals were to be subject to a detailed technical evaluation by technology experts and by a second, independent review. Phase II Proposal Instructions at 35. This information put R&D on notice that the evaluators could not provide any guarantee that R&D's non-Fast Track phase II proposal would receive funding because the decision was not theirs to make. Since R&D's decision to forgo the Fast Track process based upon the advice it says it received was contrary to the terms of the solicitation, the firm itself is responsible for the consequences.

R&D also alleges that an improper conflict of interest existed between MITI and these two evaluators and that they should not have participated in the evaluation process. Referring to the fact that the evaluators work on the government's Oil-Free Turbomachinery Program, R&D asserts that since MITI is the only foil bearing research facility involved in the Program, the evaluators have a "special relationship, even special reliance upon MITI as their sole source of foil bearings for Government testing" and, thus, had a stake in the outcome of the award here. Comments at 7. We do not agree.

³ Since we find the evaluators' account of these conversations credible and not misleading, we need not consider R&D's argument that the standards for meaningful discussions under Federal Acquisition Regulation (FAR) Part 15 should apply to these alleged communications. We note, however, that this solicitation did not contemplate discussions and these conversations took place prior to the submission of phase II proposals.

The Oil-Free Turbomachinery Program is a NASA and Army research activity for the development and application of oil-free foil bearing technology to high-speed rotating equipment. The program involves in-house, university grant, and industry-contracted research and serves as an independent testing laboratory for foil bearing technology. As the NASA evaluator explains, of the five producers of foil bearings worldwide, including R&D, MITI is the only one that has been willing to sell the government foil bearings for testing and coating development. As a result, all of the Program's research publications to date have included data on bearings from MITI.

The fact that the Program has been compelled to use MITI's bearings for its testing and development purposes does not, by itself, create a "special relationship" with MITI, nor does it create a "special reliance" on the firm. In fact, R&D's apparent position that the evaluators had an interest in fostering a sole-source supply relationship with MITI is belied by the facts. The record shows that when it was determined that R&D would not receive phase II funding, the technical evaluators offered to fund the firm's \$50,000 phase I option with their own mission money to, among other things, deliver bearings for testing. ARL SBIR Program Coordinator's Statement at 6; NASA Evaluator's Statement at 3. R&D refused the funding and the option exercise. Id. Unlike in the case cited by R&D in support of its position, DZS/Baker LLC; Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19 (where there was the appearance that government employees might be unable to perform an impartial evaluation because of the potential impact of the evaluation on their jobs), the record is devoid of any evidence that either evaluator had any stake in the outcome of the award decision. See DRI/McGraw-Hill, B-261181, B-261181.2, Aug. 21, 1995, 95-2 CPD ¶ 76 at 3.

The protest is denied.

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Acting General Counsel