



Decision

Matter of: nanoPrecision Products, Inc.

File: B-404297

Date: January 14, 2011

Michael K. Barnoski, for the protester.
Ana Smith, Esq., Department of the Navy, for the agency.
Frank Maguire, Esq., and David Ashen, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest alleging that agency treated offerors unequally by advising protester of closing date for receipt of revised proposals 3 days after it provided closing date to awardee is denied where record shows that request for revised proposals was initially issued without a closing date. When date was subsequently provided, protester was advised 3 days later than awardee. In our view, protester was not prejudiced because both offerors were on notice to begin preparing final revised proposals, both received same amount of time to prepare proposals, and, ultimately, agency extended closing date an additional 7 days at protester's request.

DECISION

nanoPrecision Products, Inc., (nPP), of El Segundo, California, protests the Department of the Navy's decision not to fund its proposal under Small Business Innovation and Research (SBIR) Phase II solicitation No. 08.1, Research Topic #N08-090, entitled "Miniaturized Modular Fiber Optic/Copper Hybrid Circular Connector." The protester challenges the conduct of the competition and the evaluation of its proposal.

We deny the protest.

BACKGROUND

The SBIR program is conducted pursuant to the Small Business Innovation Development Act, 15 U.S.C. § 638 (2006), 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 periodically issues SBIR solicitations

listing the research topics for which it will consider SBIR program admission. The SBIR program has three phases: Phase I, to determine the scientific, technical, and commercial merit of ideas; Phase II, to perform the principal research and development effort resulting in a well-defined, deliverable prototype; and Phase III, during which the small business must obtain private and public funding to develop the prototype into a viable commercial product for sale to military and/or private sector markets. See Photonics Optics Tech, Inc., B-402967, July 28, 2010, 2010 CPD ¶ 173 at 1-2.

SBIR Solicitation 08.1, issued on November 13, 2007, listed various topics, including Topic #N08-090. The objective of this topic was to identify and develop technologies to miniaturize hybrid fiber optic/copper curricular connectors for the next generation Buoyant Cable Antenna System. AR, exh. 1, at Navy-113. The solicitation included Navy-specific instructions, which informed offerors that Phase II proposal submission would be by invitation only, and instructed them to use each Navy activity's specific instruction for Phase II submissions. AR, exh. 1, at Navy-1-3.

In June 2008, the Navy awarded Phase I SBIR contracts under Topic #N08-90 to nPP and to Physical Optics Corporation (POC). AR, exhs. 3, 4. During Phase I performance, the Navy tasked nPP and POC to co-develop and assess the feasibility of a combined connector design using POC's connector housing/shell design and nPP's electrical/optical pins. AR at 5; see AR exh. 5. On January 25, 2010, the Navy invited nPP and POC to submit separate Phase II proposals addressing a collaborative design. AR at 5; see AR, exh. 7. Both firms submitted timely initial Phase II proposals. AR at 6; see AR, exhs. 12, 13. On June 4, however, the Navy informed both firms that since the initial Phase II proposals failed to provide adequate foundation for the joint design work, the offerors instead were to discontinue their joint work and deliver new proposals focused on developing independent designs. AR, exh. 14. The closing date for revised Phase II proposals responding to the revised Phase II solicitation was July 1. AR at 7. In response to a request from nPP, the Navy extended the deadline to July 8. AR at 8; see AR, exh. 17. Both vendors submitted timely revised proposals on July 8. AR at 9; see AR, exhs. 23, 24.

DISCUSSION

The protester challenges the conduct of the Phase II competition and the evaluation of its proposal. Where an agency is conducting an SBIR procurement, it has substantial discretion to determine whether it will fund a proposal. RDAS Corp., B-294848, Dec. 23, 2004, 2004 CPD ¶ 253 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. R&D Dynamics Corp., B-285979.2, Nov. 14, 2000, 2000 CPD ¶ 193 at 4. We have considered all of nPP's arguments and find that none provides a basis to object to the failure to select nPP for award of a Phase II contract. We address nPP's most significant, timely arguments below.

Proposal Closing Date Notification

The request for revised Phase II proposals, issued to nPP and POC on June 4, 2010, did not specify a closing date for proposals. AR, exh. 15. After its inquiry, POC was notified of the July 1 closing date by email on June 7. *Id.* nPP, however, was not notified of the proposal closing date until June 10. AR, exh. 17. nPP asserts that the agency improperly delayed advising it of the closing date and that as a result, it was prejudiced by the “head start” that this delay afforded POC.

This protest ground is without merit. nPP and POC had the same amount of time to prepare revised proposals. nPP and POC both received the revised Phase II solicitation on June 4 and were aware, as of that day, that revised proposals were required. Although nPP asserts that the 3-day delay in advising it of the initial July 1 closing date was prejudicial, we note that nPP initially had 21 days after being notified of the initial closing date to prepare its proposal. Furthermore, at the request of nPP, the closing date was extended for another 7 days to July 8. nPP does not explain, nor is it otherwise evident from the record, how in these circumstances nPP was prejudiced by the 3-day delay in advising it of the initial closing date. TELESIS Corp., B-299804, Aug. 27, 2007, 2007 CPD ¶ 150 at 7 (prejudice is an essential element of every viable protest, and where none is shown or otherwise apparent, GAO will not sustain a protest). Furthermore, if nPP believed that it had insufficient time to prepare its Phase II proposal, it was required to protest the lack of time prior to the July 8 closing time.¹ Bid Protest Regulations, 4 C.F.R. § 21.5(a)(1) (2010).

Evaluation Challenges

nPP also challenges the evaluation of its proposal. As set forth below, however, these protest grounds are academic and therefore will not be considered on the merits.

The SBIR solicitation here required that offerors provide as part of their technical proposals a “Commercialization Strategy,” addressing intended commercial

¹ Similarly, nPP asserts that it was not permitted sufficient interaction with Navy technical personnel and end users during Phase I performance to permit it prepare an adequate Phase II revised proposal. In this regard, according to the protester, POC was afforded a meeting with Navy personnel during Phase I while nPP was denied a similar meeting. If nPP believed it had insufficient information from the agency to prepare an adequate Phase II revised proposal, it was required to file a protest in this regard not later than the closing time for receipt of revised Phase II proposals. 4 C.F.R. § 21.5(a)(1).

products, customers, financing, marketing expertise, and competitors. AR, exh. 1 at 10. In addition, the applicable “SPAWAR Guidelines for Preparation and Submission of SBIR Phase II Proposals” (SPAWAR Guidelines), attached to the Phase II revised request for proposals, advised as follows:

Commercialization Strategy. Describe in approximately two pages your company’s strategy for commercializing this technology in DoD, other Federal Agencies, and/or private sector markets. Provide specific information on the market need the technology will address and the size of the market. Also, include a schedule showing the quantitative commercialization results from the SBIR project that your company expects to achieve and when (i.e., amount of additional investment, sales revenue, etc.).

AR, exh. 14, at 3.

In its evaluation of nPP’s proposal, the Navy found that “no adequate commercialization strategy or planning for this specific project was provided (e.g. expected commercialization results from project, identifying specific markets or customers, planning to move beyond phase II, etc.)” AR, exh. 25. In this regard, Section 6.0 of nPP’s proposal, “Commercialization Strategy,” included only a statement that “[t]his section is submitted online.” AR, exh. 23, at 36. The record indicates that the online submission referenced in the proposal, however, was not the commercialization strategy required by the solicitation, but rather was nPP’s Company Commercialization Report, which was separately required by the solicitation. As found by the agency, nPP’s Company Commercialization Report did not satisfy the requirements for a commercialization strategy as set forth in the SBIR Solicitation and the SPAWAR Guidelines. For example, it did not include specific information on the market need for nPP’s proposed technology or the expected quantitative commercialization results for that proposed technology. AR, exh. 14; see Supp. Comments encl. A.

Although nPP did not timely challenge the evaluation finding that it had failed to furnish the required commercialization strategy, it questions whether this failure rendered its proposal unacceptable. The SBIR solicitation, however, provided that the required commercialization strategy had to be “acceptable to the government if a contract is to be awarded.” AR, exh. 14, at 6. Such clearly stated solicitation requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Outdoor Venture Corp., B-288894.2, Dec. 19, 2001, 2001 CPD ¶ 13 at 2-3. Given that nPP failed to furnish the required commercialization

strategy, its proposal was reasonably viewed as unacceptable; as a result, nPP's other challenges to the evaluation of its technical proposal are therefore academic and will not be considered. B&S Transport, Inc., B-402695, July 9, 2010, 2010 CPD ¶ 161 at 7 n.2.

The protest is denied.

Lynn H. Gibson
General Counsel