

**United States Government Accountability Office  
Washington, DC 20548**

## Decision

**Matter of:** Complere Inc.

**File:** B-406553

**Date:** June 25, 2012

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Dr. F. Kevin Owen for the protester.

Richard J. McCarthy, Esq., National Aeronautics and Space Administration, for the agency.

Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

GAO will not review an agency's decision not to enter into a noncompetitive phase III funding agreement under the Small Business Innovation Research Program.

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### DECISION

Complere Inc., of Pacific Grove, California, protests the decision of the National Aeronautics & Space Administration (NASA) not to enter into a Small Business Innovation Research (SBIR) program phase III funding agreement with the firm. Complere also complains that NASA will violate the firm's intellectual property rights.

We dismiss the protest.

NASA awarded Complere contracts under SBIR phases I and II for research involving the National Transonic Facility, one of NASA's wind tunnels. Following Complere's successful completion of its phase II contract, Complere submitted an unsolicited proposal to continue its research under phase III of the SBIR program. NASA reviewed Complere's proposal, but decided not to enter into a phase III funding agreement with the firm. NASA instead decided to do its own research on this topic within the agency. Contracting Officer's Statement at 3-5, 7, 8.

Complere challenges the agency's decision not to enter into a phase III funding agreement with the firm. Complere complains that the agency will violate its intellectual property rights by using its research in-house. Protest at 8.

The statutory authority of our Office to decide bid protests is set forth in the Competition in Contracting Act of 1984 (CICA). Under CICA, and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award of contracts for procurement of property or services. See 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R § 21.1(a) (2012). Here, we find, as explained below, that we do not have jurisdiction to review an agency's decision declining to enter into a noncompetitive phase III funding agreement.

Congress created the SBIR program to assist small business concerns in obtaining and performing research and development work. See Small Business Innovation Research Program Act of 1982, 15 U.S.C. § 638 (2006). Pursuant to this authority, certain federal agencies (such as NASA) with research and development (R&D) "extramural" budgets in excess of \$100 million are required to provide a program under which a portion of the agency's research or R&D effort is reserved for award to small business concerns through a three-phased process. See 15 U.S.C. §§ 638(e)(4), 638(f). Under phase I, small businesses are invited to submit proposals to conduct research on one or more topics specified in the annual SBIR program solicitation. Under phase II, firms that received phase I awards may submit proposals for further development work on the topic. The Act provides that, "where appropriate," there may be a phase III for work that derives from, extends, or logically concludes efforts performed under phases I or II. Unlike phases I and II, phase III work does not receive SBIR funds; rather the Act contemplates that phase III work will be funded by commercial sources or non-SBIR federal funding. 15 U.S.C. § 638(e)(4)(C). Funding agreements under the Act may be contracts, grants, or cooperative agreements. 15 U.S.C. § 638(e)(3).

The Act requires the Small Business Administration (SBA) to provide policy guidance for the SBIR program within the federal government. 15 U.S.C. § 638(j)(1)-(3). Pursuant to this requirement, SBA issued the SBIR Program Policy Directive. See 67 Fed. Reg. 60,072 (Sept. 24, 2002). For phases I and II, this directive extensively addresses specific eligibility and proposal requirements, the funding process, considerations for agencies' award decisions, and the terms of any agreements under awards made. Id. at 60,084-089. The policy directive provides little guidance, however, with respect to phase III funding agreements.

We conclude from our review of the SBIR Program Act and SBA's policy guidance that an agency decision not to enter into a phase III funding agreement is generally not subject to our bid protest review, given the broad discretion accorded agencies to determine whether, and with whom, to enter into phase III funding agreements. Unlike phases I and II of the program which provide a process under which small business concerns compete for a portion of the agency's SBIR funds, a phase III

funding agreement, if an agency chooses to enter into one, does not make use of SBIR funds.<sup>1</sup> See 15 U.S.C. §§ 638(e) and 638(f); 67 Fed. Reg. at 60,084. In this respect, an agency is not required to enter a phase III funding agreement with a phase II awardee, see 67 Fed. Reg. at 60,075, and may even enter into a phase III funding agreement with an entity other than the phase II awardee, requiring only that the agency notify the SBA of such action. See id. at 60,085. The Court of Federal Claims and the Court of Appeals for the Federal Circuit have found that the SBIR Program Act imposes no duty upon an agency to make a phase III award to a concern that successfully completed a phase II contract. See Night Vision Corp. v. United States, 68 Fed. Cl. 368 (2005); aff'd, 469 F.3d 1369 (2006), cert. denied, 550 U.S. 934 (2007).

Our view that we have no jurisdiction to review NASA's decision not to enter a phase III funding agreement in the absence of a competitive procurement is not altered by the fact that NASA considered Complere's unsolicited proposal for phase III funding. We have long held that an agency's decision not to make a noncompetitive award based upon an unsolicited proposal is within the agency's discretion, which we will not review. See S. T. Research Corp., B-231752, Aug. 16, 1988, 88-2 CPD ¶ 152 at 1-2.

We also dismiss Complere's speculation that NASA may violate the firm's intellectual property rights. Unsupported allegations that amount to mere speculation do not establish a valid a basis of protest. See Medical Serv. Corp. Int'l, B-252801, Apr. 19, 1993, 93-1 CPD ¶ 335 at 2-3. Moreover, to the extent that Complere complains that NASA will violate the terms of its phase I or phase II contracts with respect to the firm's intellectual property, Complere's complaint concerns a contract dispute, which is not reviewed by our Office but is for review by a cognizant board of contract appeals or the Court of Federal Claims under the Contract Disputes Act of 1978. 4 C.F.R. § 21.5(a).

We dismiss the protest.

Lynn H. Gibson  
General Counsel

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<sup>1</sup> We recognize that the SBIR Program Act allows an agency to use non-SBIR federal funds to enter into a phase III funding agreement, and make no comment regarding our jurisdiction if an agency chooses to conduct a competition to determine who to select for such funding.