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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Mercury Data Systems, Inc.

File: B-413217

Date: September 9, 2016

John Taylor for the protester.

Robert M. Webb, Esq., for Department of Homeland Security, for the agency.

Gabriel D. Soll, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision not to fund proposal under phase I of Department of Defense Small Business Innovation Research Program is denied where the evaluation was consistent with solicitation and there is no evidence that agency acted in bad faith or violated regulations.

DECISION

Mercury Data Systems, Inc. (MDS) of Lexington, Kentucky, protests the determination by the Department of Homeland Security (DHS) not to fund MDS's phase I proposal under DHS's Small Business Innovation Research (SBIR) program¹ request for proposals (RFP) No. HSHQDC-16-R-00012 (RFP), Topic

¹ The SBIR program is designed to increase the participation of small business concerns in federally funded research or research and development (R&D). See Small Business Innovation Research Program Act of 1982, 15 U.S.C. § 638. Pursuant to this authority, certain federal agencies, including DHS, 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 generally, Id. Under the program, firms first apply for a 6-month phase I award to test the scientific, technical, and commercial merit and feasibility of a certain concept. If this is successful, the firm may be invited to apply for a phase II award to further develop the concept. 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. This protest involves the award of phase I contracts.

H-SB016.1-004, for research projects to develop autonomous indoor navigation and tracking units for first responders.

We deny the protest.

BACKGROUND

DHS issued the RFP seeking proposals for phase I efforts concerning 12 distinct research topic areas. RFP § 1.1. The topic at issue here sought proposals to design a wearable system for autonomous indoor navigation and accurate tracking for first responders inside buildings where they might be acting in an emergency situation. RFP, App. A at 7 (Topic 4).

With respect to phase I, Topic 4 requires the following:

Develop a high level concept of operations for a next-generation indoor tracking capability that includes: a listing of the various connected wearable sensors and tools targeted, as well as relevant first responder use cases for their application. The concept of operations for this tracking capability shall include a conceptual, scalable, next-generation architecture that supports multiple communications networks (e.g., Land Mobile Radio (LMR), Commercial as well as Public Safety Broadband, Satellite, Long-Term Evolution (LTE) deployable, Wi-Fi, etc.) connected to existing and theoretical first responder devices. It shall also embrace a standards-based approach (e.g., Open Geospatial Consortium, BlueTooth, Zigby). Finally, the concept of operations shall also include a section outlining the technical feasibility and potential first responder operational improvement areas.

Id.

The RFP contemplated funding awards for phase I to be made on a competitive basis after an evaluation of each proposal “on its own merit and the relevance of the specific concept as it relates to the SBIR topic.” Id. at § 4.0. DHS reserved the ability to fund “several or none” of the proposals for any of the topics within the program, and explicitly noted that it was under no obligation to fund any proposal or a specific number of proposals for a given topic. Id. Phase I proposals were to be evaluated under the following three criteria, listed in descending order of importance: technical merit, staff qualifications and capability, potential for commercialization, and cost/price. Id. at § 4.1.

DHS evaluated a total of 34 proposals submitted for Topic 4, including the protester’s. Memorandum of Law (MOL) at 2. MDS was informed on April 19, 2016 that its proposal was not among the four that were the most highly-rated and

selected for funding. Agency Report (AR), Tab G, Contracting Officer's Letter of Apr. 19, 2016. MDS requested feedback on its proposal, and on May 22, 2016, the agency provided MDS the consensus evaluation report for MDS's proposal. AR, Tab F, Source Selection Evaluation Board (SSEB) Summary. That report detailed MDS's summary ratings and documented the strengths and weaknesses assessed by the SSEB. MDS's proposal was evaluated as good under the technical merit criterion, very good under staff qualifications and capability, and good under commercialization. The SSEB found MDS's price of \$99,919 to be acceptable.² Id.

The SSEB identified a number of strengths and weaknesses under each evaluation criterion. For the first criterion, technical merit, the SSEB identified several strengths, including recognizing that the protester's approach was to "enhance a proven, existing product"; noting that the technology to be employed was "not tied to any one radio model, and uses a mesh network"; and remarking that the technology had the benefits of being accurate within one meter with the ability to correct for "drift." The SSEB also identified a number of weaknesses, such as a high unit cost, a potential difficulty in using the operating system described, a decrease in functionality due to a requirement to "root" the device,³ and the proposal's failure to include a high-level concept of operations. Id.

For the next criterion, staff qualifications and capability, the SSEB found strengths in MDS's principal investigator's years of experience as well as MDS's available research and development facilities. However, the SSEB also noted a weakness due to one of the proposed researchers possessing a J1 visa, with "plans" to obtain an H-1B visa within the year; this was viewed as potentially impacting the ability of this person to continue the work, should the visa status not be changed. Id.

Regarding the final criterion, potential for commercialization, the SSEB found strengths in MDS's solution to provide "needed capabilities to first responder organizations" and noted that the proposal took steps to address the problem of the commercial market being fragmented when it comes to public safety devices. However, the SSEB assessed weaknesses because the proposed approach had several barriers to commercialization, including high unit costs, a strategy contingent on the success of one item of research, and a reliance on partnerships with manufacturing companies that were not sufficiently demonstrated in the proposal. Id.

² The solicitation established that price was to be rated as acceptable or unacceptable. RFP § 4.1.

³ The agency explains that "rooting" is a process by which users gain access to subsystems on the device to permit a user to install and operate applications outside of known, system sources. MOL at 11.

After reviewing the agency's evaluation report, MDS filed this protest with our Office.

DISCUSSION

MDS protests that its proposal was not evaluated in accordance with the solicitation, alleging 11 specific errors in the evaluation. Protest at 2-5. In its comments, MDS also alleges bias on the part of the agency. Comments at 2.

Technical Evaluation Challenges

MDS challenges each weakness assessed by the SSEB, as well as the overall ratings assigned to its proposal. Based on our review of the record, we find no basis to conclude that the agency acted improperly in deciding not to select MDS's proposal for funding.

It is well-established that agencies have substantial discretion to determine which proposals they will fund under an SBIR procurement. NW Systems, B-401352, July 13, 2009, 2009 CPD ¶ 152 at 2, citing Higher Power Eng'g, B-278900, Mar. 18, 1998, 98-1 CPD ¶ 84 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. Id. In reviewing protests against an allegedly improper evaluation, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria. Science, Math & Engineering, Inc., B-410509, Jan. 7, 2015, 2015 CPD ¶ 31 at 5. The protester's disagreement with the agency's judgment, by itself, does not establish that an evaluation was unreasonable. Id., citing UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

MDS challenges the five weaknesses assessed in MDS's proposal under the technical merit criterion. Protest at 2-3. This aspect of the evaluation was to generally consider the soundness, technical merit, and innovation of the proposed approach and its incremental progress toward the topic or subtopic solution. The following specific elements were to be considered:

- Soundness of the technical concept and the likelihood the research is achievable as proposed;
- Demonstrated understanding of the scope of the problem, research objectives, and performance goals;
- Degree of innovation and potential to offer a significant increase in capability or a significant reduction in cost commensurate with the

potential risk of the innovative (i.e., not incremental) proposed approach; and

- Details of the technology development strategy to be followed for the proposed concept. Clarity, fidelity, and completeness of the proposed work plan to achieve research objectives, to include: identification of a schedule and milestones, identification of risks and mitigation strategies, and method for assessing technical progress.

RFP at § 4(a).

The record shows that MDS's proposal was focused on research to enhance an existing product, resulting, predominantly, in a reduction in unit cost. The SSEB saw several weaknesses in the proposal, all of which are linked to the evaluation criterion noted above. The record reflects DHS's concern that the technology being harnessed had inherent limitations impacting its potential usage in this context. MOL at 7-8, 11-12. The SSEB concluded that MDS did not sufficiently explain its proposed innovation to allow the evaluators to conclude that the protester's innovative approach could achieve the anticipated reduction in cost, were it to be funded. MOL at 6-7. MDS argues that this weakness is directly contradicted by a strength assigned for use of the same technology, suggesting that the evaluation was unreasonable. Comments at 3-4. We disagree; in our view, aspects of a proposal may provide both benefits and detriments, and technical evaluators may note both without being internally inconsistent. See Amyx, Inc., B-410623, B-410623.2, Jan. 16, 2015, 2015 CPD ¶ 45 at 9. MDS's arguments regarding these weaknesses essentially amount to disagreement with the agency and do not provide a reason to question DHS's evaluation. In this regard, the agency provides reasonable explanations to support its concerns about the soundness of MDS's approach.

MDS also challenges the sole weakness identified in its proposal under the staff qualifications criterion, which involved the visa status of one of MDS's proposed researchers. Protest at 3. The RFP provided that DHS would consider the "ability to perform" the research and development. RFP § 4.1(b). The agency assessed a weakness because MDS relied on a proposed researcher who had not yet been granted a long-term work visa. MOL at 12-13. As MDS's proposal was silent regarding when the individual's then-current immigration status would expire, the legal ability of this individual to perform the work was reasonably called into question. In this regard, it was incumbent on MDS to demonstrate its ability to perform. NW Systems, supra, at 3.

MDS also protests the weaknesses assessed under the potential for commercialization criterion. Protest at 4. This aspect of the evaluation was to consider the proposed commercialization plan, the general benefit the research was likely to have on commercialization of the effort, and the ability of the team to

commercialize the results of the research. RFP § 4.1(c). The proposal instructions included the following description of the commercialization strategy requirement for phase I proposals:

(1) Explicitly describe the company's strategy (vision) for commercializing the proposed technology and how it will transition to the specific operational component in DHS, other Federal Agencies, and/or private sector markets. (2) Provide specific information on what related technologies, if any, already exist in the market and why the technology being proposed will be superior and how this information was ascertained. (3) Include a discussion on the Offeror's current capability to commercialize previously developed technologies, as well as how the Offeror intends to develop the proposed technology all the way to the market.

Id. at § 3.3.

The weaknesses assessed under this factor reflect the agency's concerns regarding MDS's approach to commercialization. DHS noted that the commercialization potential of MDS's approach hinged solely on the success of the research, and faced initial price-related barriers as well. MOL at 14-15. In explaining this weakness, the agency also noted that MDS lacked agreements with manufacturers, and expressed concerns about price barriers to commercialization. Id. at 15-16.

As shown above, the agency identified and documented various weaknesses in MDS's proposal, consistent with the solicitation's stated evaluation criteria. A protester's disagreement with the agency's conclusions regarding the technical merit of the protester's proposal, by itself, does not invalidate the reasonableness of the agency's evaluation. This is particularly true under an SBIR procurement, which is not based on design or performance specifications for existing equipment, but rather emphasizes scientific and technical innovation and has as its objective the development of new technology. It is precisely because of the experimental and creative nature of this type of procurement that the contracting agency is given substantial discretion in determining which proposals it will fund. See, e.g., Noise Cancellation Technologies, Inc., B-246476, B-246476.2, Mar. 9, 1992, 92-1 CPD ¶ 269.⁴ On this record, we conclude that the agency's evaluation of MDS's proposal was reasonable and consistent with the solicitation.

Finally, with regard to MDS's allegations of bias, we note that government officials are presumed to act in good faith, and a protester's claim that contracting officials

⁴ MDS also protested weaknesses assessed regarding its cost proposal. However, we do not need to consider these allegations, since MDS's proposal was given the highest-available rating (acceptable) under this factor.

were motivated by bias or bad faith must be supported by convincing proof. Our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Fantastic Data, B-299076, Feb. 5, 2007, 2007 CPD ¶ 32 at 6. Here, we find no evidence of bias towards MDS. To the contrary, the record reflects that MDS's proposal was not funded due to legitimate concerns related to the evaluation criteria set forth in the RFP.

This protest is denied.

Susan A. Poling
General Counsel