



Decision

Matter of: Wang Electro-Opto Corporation

File: B-418523

Date: June 4, 2020

Paul H. Butler, for the protester.
Thomas L. Clark, Esq., and Wade L. Brown, Esq., Department of the Army, for the agency.
Paula A. Williams, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's decision not to fund proposal under phase I of Department of Defense Small Business Innovation Research Program solicitation is denied where the evaluation was reasonable and consistent with solicitation.
 2. Protest alleging that the agency's source selection plan used in this procurement was obsolete and contradicts the Small Business Innovation Research solicitation provisions is dismissed for failure to state valid bases for protest.
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DECISION

Wang Electro-Opto Corporation (Wang), a small business located in Marietta, Georgia, protests the decision by the Department of the Army, Army Contracting Command, (Army) not to select its phase I proposal under the Department of Defense's (DOD) Small Business Innovation Research (SBIR) program broad agency announcement (BAA) No. DOD SBIR-A19-153, which invited proposals for research and development projects. The protester challenges the agency's evaluation of its phase I proposal as unreasonable and decision not to select its proposal for funding.

We deny the protest.

BACKGROUND

The SBIR program is conducted pursuant to the Small Business Innovation Development Act of 1982, 15 U.S.C. § 638 (2011), which requires certain federal agencies to reserve a portion of their research and development (R&D) funds for

awards to small business concerns. See 15 U.S.C. §§ 638(e)(4), (f). As part of its SBIR program, DOD components¹ invite small businesses to submit innovative research proposals that address high priority requirements of the DOD components and have the potential to commercialize the results of that research and development. See SBIR Solicitation at 3.

The SBIR program has three phases. Under phase I, small businesses are invited to submit proposals to conduct research or research and development on one or more topics specified in the annual SBIR program solicitation. See 15 U.S.C § 638(e)(4)(A). Under phase II, firms that received phase I awards may be invited to submit proposals for further research or research and development work on the topic to produce a well-defined prototype. *Id.* § 638(e)(4)(B). Phase III contemplates that, unlike phases I and II, firms are required to obtain funding from either the private sector, a non-SBIR government source, or both, to develop the concept into a product for sale in private sector or military markets. Only firms that are awarded phase I contracts are eligible to participate in phase II or phase III. *Id.* § 638(e)(4)(C); see also, SBIR Solicitation at 5.

The Army issued the SBIR solicitation on August 23, 2019, seeking phase I proposals for DOD Topic No. A19-153, Army SBIR Topic CERDEC-193-008, entitled “Low-Cost Low-Probability-Detection Low-Probability of Intercept ‘Noisy’ RF [Radio Frequency] Communication System.” Agency Report (AR) exh. 4, DOD Topic A19-153, Army SBIR Topic CERDEC-193-008. In broad terms, the objective of this topic was to solicit proposals from small business concerns for the development and commercialization of a clandestine communication system, and to research the optimal frequencies, bandwidth constraints and other relevant factors affecting a clandestine RF based mobile communication network. *Id.* at 3. The SBIR solicitation required the phase I offeror to demonstrate its knowledge and understanding of state-of-the-art noisy RF systems, their practical application, and the offeror’s understanding of operational parameters facing the dismounted and mounted soldier, as it relates to communication in the modern Army. *Id.*

The SBIR solicitation included Army specific instructions regarding the preparation of proposals. Specifically, the phase I proposals were to consist of six separate volumes, including a technical volume, a cost volume, and a company commercialization report volume. SBIR Solicitation at 21-27. As relevant, the phase I proposal instructions required offerors to provide as part of their technical proposals a commercialization strategy addressing their strategy for commercializing this technology (*i.e.*, the Low-Cost Low-Probability-Detection Low-Probability of Intercept “Noisy” RF Communication System) in the government and/or private sector markets. *Id.* at 22. Additionally, in the company commercialization report volume, offerors were to provide, among other things, the commercialization results of their prior phase II projects. *Id.* at 24.

¹ The solicitation identified the Department of the Army as one of the participating DOD components. SBIR Solicitation at 1, 3.

The SBIR solicitation provided that the phase I selection would be based on the best value to the government, considering the following three evaluation criteria, listed in descending order of importance:² (1) the soundness, technical merit, and innovation of the proposed approach and its incremental progress toward topic or subtopic solution; (2) the qualifications of the proposed principal/key investigators, supporting staff, and consultants. Qualifications include not only the ability to perform the research and development but also the ability to commercialize the results; and (3) the potential for commercial (government or private sector) application and the benefits expected to accrue from this commercialization.³ *Id.* at 28.

The SBIR solicitation did not include adjectival ratings or numerical scores for the evaluation criteria. Instead, numerical scoring points were described in the Army's source selection plan (SSP), which was not provided to offerors. In the SSP, phase I proposals would be evaluated on a 100-point scale, allocating points as follows: the first evaluation criterion was worth 50 points, the second evaluation criterion was worth 30 points, and the third evaluation criterion was worth 20 points. AR exh. 5, Army SSP at 32. In support of the numerical scores, the SSP instructed evaluators to identify the various strengths, weaknesses, uncertainties, and deficiencies under each technical evaluation criterion. As is relevant here, the SSP defined a weakness as "[a] flaw in the proposal that increases the risk of unsuccessful contract performance." *Id.* at 34.

Also as relevant, the SBIR solicitation stated that the agency was "not obligated to make any awards under Phase I, Phase II, or Phase III" and that all awards were "subject to the availability of funds." SBIR Solicitation at 3. The SBIR solicitation also stated that "[t]he number of Phase I awards will be consistent with the [Army's] RDT&E [research development test and evaluation] budget, the number of anticipated awards for interim Phase I modifications, and the number of anticipated Phase II contracts." *Id.* at 14.

The Army received 20 phase I proposals in response to this topic, including one from Wang, by the October 23, 2019 closing date. In general terms, Wang proposed developing a stealthy RF communication system (SRCS) to provide voice and data communications across several systems and detailed the use of three new technologies--ultra wideband (UWB) system, multiple input multiple output (MIMO) technology, and UWB platform-compatible antennas and beam steering arrays. AR exh. 6, Wang's Technical Proposal at 7. Of relevance to this protest, Wang's proposal included the following statement: "[s]oftware and firmware to be used in SRCS from

² This procurement uses a peer or scientific review process for evaluation of proposals as specified in the Army's source selection plan (SSP). AR exh. 5, Army SSP.

³ The SSP provided, among other things, that the commercial potential would be assessed based on the offeror's commercialization strategy and the offeror's record of commercializing its prior SBIR projects as listed in its company commercialization report. AR exh. 5, Army SSP at 32.

external sources will be non-proprietary to ensure that no intellectual property (IP) such as patent and trade secret is involved.” *Id.* at 8.

The Army evaluated the proposals under a two-tier process. Under tier 1, a 2-member technical evaluation team (TET) with scientific and technical knowledge in the topic area conducted a scientific review and technical assessment of proposals. The TET then forwarded the best proposals to the second level of review.⁴ Under tier 2, a source selection evaluation board reviewed and validated the tier 1 recommendations and then provided analyses and recommendations of those proposals that merit consideration for funding to the source selection authority. See AR exh. 5, Army SSP at 27.

In its evaluation of Wang’s technical proposal, the TET assigned three strengths and one weakness. *Id.* exh. 7, Evaluation of Wang’s Proposal at 1-3. The TET provided the following rationale for assigning a weakness to Wang’s proposal under the first evaluation criterion, the soundness, technical merit, and innovation of the proposed approach and its incremental progress toward topic or subtopic solution:

The offeror has decided that any software and firmware to be used in SRCS from external sources will be non-proprietary to ensure that no intellectual property (IP) such as patent and trade secret is involved. The perception here is that there is a large amount of very innovative technologies that are being developed in industry and we (the Army) are decidedly pushing to buy commercial as much as we can. The offeror is basically saying they will not consider any existing IP that is not open source. This is a negative, and could actually introduce more risk. The offeror then goes on to say that they recently made pivotal breakthrough in UWB [ultra wideband] platform-compatible antennas and beam-steering array based on its patented Traveling-Wave Antenna Array (TWAA) technology, and it is key to the design. So it is ok if [it’s] their own IP, but nobody else’s. I would not have had an issue if they just proposed their own IP, but adding the statement about specifically NOT using outside IP is very short sided and is to the detriment lowering risk by studying existing solution space for the trade space would could help potentially reduce cost and risk.

Id. exh. 7, Technical Evaluation of Wang’s Proposal at 2-3.

Wang’s proposal was ranked 16th of the proposals received, with a total technical score of 59.5 out of 100 total possible points. The evaluators did not recommend Wang’s

⁴ After completing its evaluation of proposals, the TET prepared a proposal order of merit list, ranking proposals using the technical numerical scores. AR exh. 5, Army SSP at 27.

proposal for tier 2 review and selection.⁵ Combined Contracting Officer's Statement and Legal Memorandum at 3.⁶

By letter dated January 17, 2020, the Army notified Wang that its phase I proposal was not selected for funding. AR exh.9, Agency's Non-Selection Letter. After requesting and receiving a debriefing, Wang filed a timely agency-level protest challenging the evaluative assessment of its technical proposal and the decision not to select its proposal for award. *Id.* exh. 11, Wang's Agency Protest (Jan. 31, 2020). On February 19, the Army denied the agency-level protest. This protest followed.

DISCUSSION

Wang raises several challenges to the agency's evaluation of its technical proposal and the decision not to select its proposal for phase I funding. First, the protester contends that the agency unreasonably assessed a weakness based on a single statement in its technical proposal. Second, the protester alleges that the assessed weakness in its phase I proposal should not have been considered within the context of the SBIR phase I program. Third, the protester contends that the Army should have selected at least two qualified awardees for the phase I program. Protest at 2-3. Based upon these alleged flaws, Wang asks that we sustain the protest and require the Army to select its phase I proposal for award.

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. 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 & Eng'g, 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. See *Glatz Aeronautical Corp.*, B-405851, B-405851.2, Jan. 6, 2012, 2012 CPD ¶ 19 at 4. 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 technological innovation and has as its objective the development of new technology. It is precisely because of the scientific and innovative nature of this type of procurement that the contracting agency is given substantial discretion in determining

⁵ Ultimately only one proposal was recommended for selection and SBIR funding. Combined Contracting Officer's Statement and Legal Memorandum at 3.

⁶ The Combined Contracting Officer's Statement and Legal Memorandum provided to our Office does not contain page numbers. Our Office assigned consecutive page numbers to this document for purposes of citing to this document herein.

which proposals it will fund. See, e.g., *Noise Cancellation Techs., Inc.*, B-246476, B-246476.2, Mar. 9, 1992, 92-1 CPD ¶ 269 at 3.

For the reasons discussed below, from the initial protest, we deny the protester's first and third allegations and dismiss the second. We also dismiss the three additional protest arguments raised in Wang's comments on the agency report.

In its initial protest, Wang argues that the agency improperly assessed a weakness based on a single statement in its technical proposal that "[s]oftware and firmware to be used in SRCS from external sources will be non-proprietary to ensure that no intellectual property (IP) such as patent and trade secret is involved." Protest at 2. Wang asserts that the assessed weakness was based entirely on the "evaluators' speculations, twisting, misunderstanding, and misinterpretations on possible legal and business issues on IP." *Id.* at 3. Based on this argument, the protester alleges that the agency's decision not to select its phase I proposal for award was unreasonable.

In response, the Army argues that the evaluators reasonably assessed Wang's proposal with a weakness under the first evaluation criterion. As explained above, the evaluators found that the protester's approach to exclude proprietary IP would preclude "a large amount of very innovative technologies . . . being developed in industry" as the agency was "decidedly pushing to buy commercial as much as we can." See AR exh. 7, Evaluation of Wang's Technical Proposal at 2. As a result, the evaluators concluded that this approach would introduce more risk and assessed a weakness in the protester's technical proposal. Combined Contracting Officer's Statement and Legal Memorandum at 4-5.

Although Wang asserts that the evaluators either speculated, misunderstood or misinterpreted its IP statement, the protester provides no support for this claim. In contrast, the agency explains that an external source's proprietary software or firmware may perform its intended function better, faster, and cheaper than an external source's software or firmware that is non-proprietary. See AR exh. 13, Agency Protest Decision at 2 (Feb. 19, 2020). The agency argues that since the protester indicated that external source's proprietary software and firmware would not be used in its proposed solution, the evaluators reasonably determined that this approach might introduce more risk to the proposed solution and merited the assessment of a weakness in its technical proposal. While Wang ultimately disagrees with the agency's concerns about its proposed approach, such disagreement does not support a conclusion that the agency's exercise of its discretion was unreasonable. *Science, Math & Eng'g, Inc., supra*. As a result, we deny this allegation.

In its initial protest, Wang also argued that the alleged weakness should not have been considered within the context of the SBIR phase I program. Protest at 3. According to the protester, the IP sentence at issue "had been written" in response to the agency's technical point of contact's (TPOC) emphasis on "rapid agile development" and "low

production cost.⁷ *Id.* at 3. The protester further alleged that “[i]t is not a business decision for Phase-I; it is a problem for SBIR Phase-II.” *Id.*

The agency countered that Wang’s arguments were internally inconsistent. The fact that Wang included the IP statement to address the TPOC’s emphasis on rapid agile development and low production cost contradicted its assertion that the information was not properly for consideration under this phase I solicitation. Combined Contracting Officer’s Statement and Legal Memorandum at 6. Moreover, the agency argued that it properly considered the issue under phase I because entry into the phase II program is “necessarily reliant” on selection of an offeror’s phase I proposal. *Id.*

In the comments Wang submitted in response to the agency report, other than voicing its continued objections to the agency’s evaluation, the protester did not meaningfully respond, or otherwise dispute, the agency’s explanations for its evaluative conclusions.⁸ Where an agency provides a detailed response to a protester’s allegation and the protester fails to rebut or respond to the agency’s argument in its comments, the protester fails to provide us with a basis to conclude that the agency’s position with respect to the issue in question is unreasonable, and as a result, the protester abandons that allegation. *See Safeguard Base Operations, LLC*, B-415588.6, B-415588.7, Dec. 14, 2018, 2018 CPD ¶ 426 at 4. Here, as noted above, the agency provided a detailed response to the protester’s arguments and the protester failed to respond or substantively rebut the merits of the agency’s responses. *See generally* Protester’s Comments. As a result, we consider this protest allegation abandoned and will not address it further.

Finally, the protester’s third initial basis of protest alleges that the agency’s failure to select at least two proposals for award contravenes the SBIR program goals and violates other applicable federal laws. Protest at 3. This allegation is without merit.

The SBIR solicitation clearly afforded the Army broad discretion in the number of awards it could make where it stated that the number of phase I awards would be consistent with the Army’s research development test and evaluation budget, the number of anticipated awards for interim phase I modifications, and the number of anticipated phase II contracts. *See SBIR Solicitation* at 14. Additionally, offerors were advised that the agency was not obligated to make any awards under either phase I,

⁷ The protester’s reference is to the TPOC’s responses to technical questions submitted to the agency and were posted on the agency’s program website. *See* Protest exh. F, SBIR Interactive Topic Information System (SITIS) Questions & Answers (Sept. 19, 2019).

⁸ As explained above, the fact that the protester disagrees with the evaluative judgment as to the technical merit of its proposed approach does not invalidate the reasonableness of the agency’s evaluation. *See Glatz Aeronautical Corp.*, B-405851, B-405851.2, Jan. 6, 2012, 2012 CPD ¶ 19 at 4.

phase II, or phase III. *Id.* at 3. While Wang may disagree with the Army's chosen number of awards, it has failed to demonstrate that the agency acted in a manner contrary to the terms of the solicitation or in an unreasonable manner. Accordingly, we deny this allegation.

Other Issues

In its comments, Wang raises new arguments as to why the agency unreasonably evaluated its proposal. First, Wang now alleges that the July 13, 2011, Army SSP that was furnished in the agency's report was obsolete. As support, the protester points to language variances between the 2011 version of the Army SSP, the 2016 Army BAA and the 2017 DOD BAA. Comments at 2. The Army responds that the 2011 Army SSP is the current approved version for the SBIR program, as verified by the Acting Program Manager for the Army SBIR program. See Agency Response to GAO Questions, exh. 16, Army Confirmation Email at 1 (May 6, 2020). As the agency notes, the protester does not provide any evidence that a more current version of the Army SSP exists but relies on--the 2016 Army BAA and the 2017 DOD BAA--documents not related to this procurement to support its allegation that the 2011 version of the Army's SSP was obsolete. Agency Response to GAO Questions at 2 (May 8, 2020).

The protester additionally contends that the evaluation criteria in this allegedly obsolete SSP contradict the evaluation criteria in the SBIR solicitation under which its phase I proposal was evaluated.⁹ Comments at 2. The Army responds that despite minor variations in language, the evaluation criteria in the 2011 Army SSP do not contradict the evaluation criteria in the SBIR solicitation at issue here. Agency Response to GAO Questions at 2-3 (May 8, 2020).

Finally, Wang asserts that the "ill-conceived metric" called commercialization achievement index (CAI) was created by DOD's SBIR program administration a decade ago to evaluate SBIR proposals. Comments at 3. According to Wang, after several revisions, the CAI was abolished by DOD for the phase I evaluation and selection but the Army impermissibly used the CAI to rank its proposal 16th in the proposal order of merit list. *Id.*; Protester's Response to GAO Questions at 2 (May 12, 2020).

Here again, the agency refutes the protester's claim that the CAI was abolished. The agency states that the DOD SBIR program continues to use the CAI when considering the commercialization of proposals received in response to DOD SBIR opportunities, as evidenced by its specific inclusion in the SBIR solicitation at issue here. See SBIR Solicitation at 24-25; Agency Response to GAO Questions at 5. The agency also states that the SBIR solicitation advised offerors that additional information on this process

⁹ According to Wang, phase I proposals submitted in response to this Army topic should have been governed by the evaluation criteria set forth in DOD-19.3 version 7 only. Protester's Response to GAO Questions at 2 (May 12, 2020).

could be accessed on the DOD Office of Small Business Programs website <https://business.defense.gov/Programs/SBIR-STTR/Commercialization/>. Agency Response to GAO Questions at 5. Finally, the agency notes that consistent with the terms of the SBIR solicitation, Wang's technical proposal included a company commercialization report volume in which the protester reported its past SBIR projects.¹⁰ *Id.*

We dismiss in their entirety the allegations raised in the protester's comments because they fail to state valid bases of protest. Our decisions explain that internal agency guidance does not establish legal rights and responsibilities, and by itself does not show that agency actions were inconsistent with the guidance or otherwise were unreasonable. See *Reflectone Training Sys., Inc.; Hernandez Eng'g, Inc.*, B-261224, B-261224.2, Aug. 30, 1995, 95-2 CPD ¶ 95 at 6. Rather, for our purposes, the relevant inquiry is whether the agency adhered to law and regulation by evaluating proposals in accordance with the evaluation scheme announced in the SBIR solicitation, not the SSP. *Id.* Thus, Wang's arguments about which SSP version should have been used to evaluate phase I proposals and its generalized assertions that the evaluation information contained in the SSP used by the Army conflict with the evaluation criteria listed in the SBIR solicitation are irrelevant since the protester has not explained how these alleged errors translated to an Army evaluation that was inconsistent with the evaluation criteria set forth in the SBIR solicitation. Nor do they support a conclusion that the agency's actions violated applicable laws or regulations. Accordingly, we dismiss these allegations for failing to state valid bases of protest. See 4 C.F.R. 21.1(c)(4) and (f).

The protest is denied.

Thomas H. Armstrong
General Counsel

¹⁰ As the agency points out, to the extent Wang contends that the CAI should not have been used in the evaluation of phase I proposals, such a protest to the terms of the SBIR solicitation, raised for the first time after the closing date for submission of proposals, is patently untimely. 4 C.F.R. 21.2 (a)(1); see also, *MicroTechnologies, LLC*, B-417442, May 28, 2019, 2019 CPD ¶ 201 at 7.