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Decision

Matter of: Quantum Ventura, Inc.

File: B-422340.2; B-422341.2

Date: May 28, 2024

James C. Fontana, Esq., and L. James D’Agostino, Esq., Fontana Law Group, PLLC, and David R. Warner, Esq., and Heather Mims, Esq., Warner, PLLC, for the protester. Colonel Patricia W. Lenz, Christian H. Robertson II, Esq., Jeremy W. Robinson, Esq., and John S. Osborn, Esq., Department of the Air Force, for the agency. Jacob M. Talcott, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of the solicitation as ambiguous and unduly restrictive is denied where the language was clear and reasonably defined the agency’s needs.
 2. Protest raising additional challenge to the terms of the solicitation is dismissed as untimely where the protester did not raise argument until after the filing of the agency report despite having knowledge of the purported ambiguity prior to filing its protest.
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DECISION

Quantum Ventura Inc., a small business of San Jose, California, protests the terms of the Department of Defense’s Small Business Innovation Research (SBIR) 24.1 program broad agency announcement. The protester contends that the solicitation’s requirements are ambiguous and unduly restrict competition.

We deny the protests in part and dismiss them in part.

BACKGROUND

The Small Business Innovation Development Act of 1982 established the SBIR program to assist small business concerns in undertaking and achieving research and

development tasks.¹ 15 U.S.C. § 638. The SBIR program consists of three statutory phases. Under phase one, the agency evaluates the merit and feasibility of ideas that appear to have commercial potential. 15 U.S.C. § 638(e)(4)(A). Under phase two, proposals that meet programmatic needs are further developed; award here is based on the considerations made under phase one.² 15 U.S.C. § 638(e)(4)(B). Phase three continues work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program. 15 U.S.C. § 638(e)(4)(C). Funding for phase three must come from a source outside the SBIR program. See 15 U.S.C. § 638(e)(4)(C)(i) and (ii).

DOD is one of the agencies that administers the SBIR program on behalf of the SBA; the Air Force participates in the SBIR program as a participating component under DOD. Agency Report (AR), Tab 1, Contracting Officer's Statement (COS) at 2. One of the methods by which DOD administers the SBIR program on behalf of its participating components is through the issuance of a triannual joint broad agency announcement (BAA). *Id.* DOD compiles a list of research/research and development topics on behalf of various military departments and publishes them as part of the BAAs. *Id.*

The BAA here consists of three sections of increasing specificity: first, the text of the BAA applicable to all components; second, component-specific instructions that are applicable only to proposals submitted to a particular DOD component, such as the Navy and the Air Force; and third, a description of and instructions for each specific topic for which the DOD components are seeking proposals. See *generally*, AR, Tab 16, SBIR BAA 24.1 amend. 0002. The guidance for the Air Force component includes submission instructions for D2P2 proposals and a list of D2P2 topics. *Id.* at 340-357

The issuance of the solicitation was split into two periods: a pre-release period and an open period. *Id.* at 23; COS at 3. During the pre-release period, which ran from November 29, 2023, to January 2, 2024, firms were permitted to submit technical questions about the BAA topics. AR, Tab 16, SBIR 24.1 BAA amend. 0002 at 23. The open period, which was the period during which firms were to submit their proposals, was originally set to run from January 3 to February 7. COS at 3. The agency initially amended the due date for proposals to February 14 due to extenuating circumstances. *Id.*; AR, Tab 10, SBIR 24.1 BAA amend. 0001 at 1.

¹ The Small Business Administration (SBA) is the coordinating agency for the SBIR program and provides guidance to participating federal agencies for the administration of their own SBIR and Small Business Technology Transfer (STTR) programs on behalf of the SBA. Agency Report (AR), Tab 3, SBIR and STTR Policy Directive at 3.

² As relevant here, Congress enacted a pilot program named "Direct-to-Phase-II" (D2P2) that permits the Department of Defense (DOD) to award phase two SBIR contracts to small businesses that completed the requirements of phase one but did not receive an award under phase one. 15 U.S.C. § 638(cc). As explained in greater detail below, the protests here concern solicitation language pertaining to Air Force D2P2 awards. Protest at 1.

On February 7, Quantum Ventura filed two protests with our Office, alleging several terms of the BAA were ambiguous and unduly restricted competition. COS at 3. On February 8, the Air Force notified our Office that it intended to take corrective action by amending the solicitation language to clarify the alleged ambiguities and extending the deadline to submit proposals. AR, Tab 13, Notice of Corrective Action in B-422340; AR, Tab 14, Notice of Corrective Action in B-422341. On February 15, the agency issued the amendment, which, among other things, extended the open period to February 21. AR, Tab 16, SBIR 24.1 BAA amend. 0002 at 1. We dismissed the protests as academic on February 22. *Quantum Ventura, Inc.*, B-422340.1, Feb. 22, 2024 (unpublished decision); *Quantum Ventura, Inc.*, B-422341.1, Feb. 22, 2024 (unpublished decision).

On February 21, Quantum Ventura filed the subject protests with our Office, alleging that while the amendment addressed some its complaints, the BAA still contained terms that were ambiguous and unduly restrictive of competition.

DISCUSSION

Quantum Ventura objects to language in the section of the BAA that provides instructions for the submission of Air Force D2P2 proposals. Specifically, the protester challenges language under the heading “Military Applications” that requires offerors to explain if any DOD agency has expressed interest in, or commitment to, a federally funded phase three effort on the project. Protest at 4. Quantum Ventura objects to the language as it pertains to two topics in particular: topic AF241-D003 (Securing AI [Artificial Intelligence]/ML [Machine Learning] Models Against Adversarial Threats for Advanced Command and Control (ACD) Missions) and topic AF241-D012 (Mandatory Declassification Review (MDR) Natural Language Processing (NLP) Tool).³ Quantum Ventura argues that the requirement to list any DOD agency or organization that has “[expressed] interest in, or commitment to, a non-SBIR, Federally funded Phase III effort” is ambiguous. *Id.* at 4. It also argues that this requirement unduly restricts competition. *Id.* In its comments, Quantum Ventura argues that the term “[DOD] agency/organization” is ambiguous and unduly restricts competition. Comments at 2. For reasons discussed below, we deny the protests in part and dismiss them in part.⁴

Our decisions provide that an ambiguity exists where two or more reasonable interpretations of the terms or specifications of a solicitation are possible. *ConsortiEX, Inc.*, B-422078, B-422078.2, Dec. 22, 2023, 2024 CPD ¶ 13 at 5. When alleging that a

³ In B-422340.2, Quantum Ventura objects to the language in question as it applies to topic AF241-D012; in B-422241.2, it objects to the same language as it applies to topic AF241-D003. The protests are otherwise identical. Likewise, the agency reports are identical except insofar as they address the specific topics. Rather than including citations to the records of both protests, we include citations to the record in B-422340.2 only where the pertinent content in both records is the same.

⁴ Although we do not address every argument raised by the protester, we have considered them and find none to be meritorious.

solicitation's language is ambiguous, the protester typically must identify language in the solicitation that is subject to two or more reasonable interpretations. *Id.* Here, Quantum Ventura argues that the ambiguity lies not in the possibility of alternate interpretations, but in an overall lack of information. See Protest at 4. In this regard, our Office has concluded that a contracting agency must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. *Fluor Fed. Sols., LLC*, B-414223, Mar. 29, 2017, 2017 CPD ¶ 109 at 4. There is no legal requirement, however, that a competition be based on specifications drafted in such detail as to eliminate any risk for the contractor, or that the procuring agency remove all uncertainty from the mind of every prospective bidder. *Id.* at 4-5.

Here, Quantum Ventura first argues that the requirement to identify whether a DOD agency or organization has expressed interest in a non-SBIR federally funded phase three effort is ambiguous because it fails to define (1) what qualifies as a non-SBIR, federally funded phase three effort, (2) the required level of expressed interest or commitment, and (3) whether the interest must be in writing.⁵ Protest at 4. The agency argues that the plain meaning of the language is clear given the context of the rest of the solicitation. Memorandum of Law (MOL) at 10-12.

Based on the record, we conclude that Quantum Ventura has not demonstrated that the cited language is ambiguous. 15 U.S.C 638(e)(4)(C) defines a non-SBIR federally funded phase three effort as work that involves “commercial applications of SBIR-funded research or research and development . . . funded by non-Federal sources of capital” or “products or services intended for use by the [government]” that receive funding by a federal source that is not part of the SBIR program. The solicitation itself provides that firms are required to obtain funding for these efforts “from either the private sector, a non-SBIR [g]overnment source, or both, to develop the prototype into a viable product or non-[research and development] service for sale in military or private sector markets.” AR, Tab 16, SBIR 24.1 BAA amend. 0002 at 7. Per the foregoing criteria, a non-SBIR federally funded phase three effort is any work that involves funding from the private sector or a non-SBIR government source. As such, the solicitation is not ambiguous for the reason advanced by the protester and this aspect of the protester's argument is without merit.

The record also provides no basis to sustain the protester's argument that the term “expressed interest” is “inherently vague and susceptible to multiple interpretations.” Comments at 2. In this regard, the protester argues expressed interest also could mean “trivial conversations.” *Id.* As the agency points out, however, Quantum Ventura reads

⁵ In its protest, Quantum Ventura also argued that it was unclear whether the interest expressed by the DOD agency or organization was to be evaluated as part of the phase two selection process. Protest at 4. The agency explained that this interest would be evaluated as part of phase two. See COS at 11. In its comments on the agency report, the protester failed to rebut the agency's response, so we treat this argument as abandoned. *RRRS Enters., Inc.*, B-241512, B-241512.2, Feb. 12, 1991, 91-1 CPD ¶ 152 at 4.

into the solicitation documentation and intent requirements. COS at 10. The solicitation did not seek a specific level of interest but sought any level of an expression of interest. *Id.* Additionally, this expression of interest could be either verbal or written. *Id.* Accordingly, this ground of protest also is without merit and is denied.

Quantum Ventura also argues that demonstrating whether a DOD agency or organization has expressed interest in a non-SBIR federally funded phase three effort unduly restricts competition because companies without the preexisting connections will be disadvantaged compared to the companies that have connections. Protest at 5. The agency contends that the challenged language does not restrict competition and is reasonably necessary to determine the commercial potential of the proposed technology. MOL at 15. As discussed below, we have no basis to sustain this protest ground.

Agencies must specify their needs in a manner designed to permit full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy the agency's needs or as otherwise authorized by law. 41 U.S.C. § 3306(a). Where a protester challenges a solicitation provision as unduly restrictive of competition, the agency must establish that the provision is reasonably necessary to meet the agency's needs. *Science & Tech. Corp.*, B-420216, Jan. 3, 2022, 2022 CPD ¶ 1 at 7. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. *Id.* Our Office will not sustain a protest challenging an agency's determination of its needs unless the protester presents clear and convincing evidence that the requirements are in fact impossible to meet or unduly restrict competition. *Second Street Holdings, LLC*, B-417006, Jan. 17, 2019, 2019 CPD ¶ 63 at 3.

Here, we first note that the BAA does not require firms to have a preexisting relationship with DOD agencies or organizations; it requires that firms identify whether any agency or organization has expressed interest in, or commitment to, a non-SBIR, federally funded phase three effort. In other words, there is no restriction of competition. Additionally, whether any other DOD agencies or organizations have expressed interest in the firm's proposed technology clearly has a bearing on the likelihood of it receiving phase three funding from a source outside the SBIR program, and, more generally, on its potential usefulness to the government. We thus have no basis to conclude that it is unreasonable for the Air Force to request this information.

In its comments, Quantum Ventura argues that the term "[DOD] agency/organization" is also ambiguous and undefined. Comments at 3. The agency requests dismissal of this argument on the basis that it is untimely. Req. for Dismissal at 1-2.

Our Regulations provide that protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals shall be filed prior to that time. 4 C.F.R. § 21.2. Additionally, our Regulations do not contemplate the piecemeal presentation or development of protest issues. *CapRock Gov't Sols., Inc. et al.*, B-402490 *et al.*, May 11, 2010, 2010 CPD ¶ 124 at 24. When a protester raises a

broad ground of protest in its initial submission but fails to provide details within its knowledge until later, these later issues will not be considered. *Id.* Here, Quantum Ventura did not allege the term “DOD agency/organization” was ambiguous until the filing of its comments on April 1, 2024, which was 40 days after the filing of its initial protest.

In response to the agency’s request for dismissal, Quantum Ventura argues that, contrary to the agency’s position, it raised this argument in its initial protest. Resp. to Req. for Dismissal at 1. We disagree. Quantum Ventura’s initial protest specified that it was challenging the “provision requiring the offeror to identify DoD ‘interest in, or commitment to, a non-SBIR, Federally funded Phase III effort.’” Protest at 4. Furthermore, its initial protest failed to provide any explanation as to how the term “agency/organization” was ambiguous; this explanation appears for the first time in its comments. See Protest at 4-6; see also Comments at 2. Accordingly, this argument is dismissed as untimely.

The protests are denied in part and dismissed in part.

Edda Emmanuelli Perez
General Counsel