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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Spaltudaq Corp.

File: B-400650; B-400650.2

Date: January 6, 2009

Jason A. Carey, Esq., John M. Clerici, Esq., and Matthew T. Crosby, Esq., McKenna Long & Aldridge LLP, for the protester.
Judith L. Richardson, Esq., and William H. Anderson, Esq., Defense Threat Reduction Agency, for the agency.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably discontinued negotiations under a Broad Agency Announcement is denied, where the agency reasonably determined, after four months of negotiations, that the parties could not reach agreement on contract terms concerning intellectual property rights.

DECISION

Spaltudaq Corp. protests the Defense Threat Reduction Agency's (DTRA) decision to terminate negotiations with the firm and to not award Spaltudaq a contract under Broad Agency Announcement (BAA) No. HDTRA1-CBMEDICAL-TMTI-BAA, for medical research and development program support.

We deny the protest.

DTRA's Chemical Biological Technologies Directorate manages and integrates the development, demonstration, and transition of chemical and biological defense solutions for the Department of Defense. The Directorate includes a Medical Science and Technology Division, which issued the BAA here.[1] The BAA sought

[1] A BAA is a contracting method by which agencies can acquire basic and applied research to fulfill requirements for scientific study and experimentation directed towards advancing the state of the art or increasing knowledge and understanding, rather than focusing on a specific system or hardware solution.

proposals to "span a wide spectrum of possible technical and business solutions" in response to the specific technology topics that were listed in the BAA. BAA at 85.[2] The topics related to advancing innovative chemical and biological defense medical countermeasures to pathogens and other threat agents, and included such things as developing a "threat agent spectral database," developing therapeutic countermeasures against Centers for Disease Control "Category A and B" threat agents, and developing systems biology platforms for the determination of therapeutic targets. Id. at 118-121.

The BAA announced that proposals would be evaluated under the following evaluation criteria: scientific and technical merit, relevance to program goals, offeror capabilities, and cost realism and reasonableness. Id. at 122-23. However, the BAA also stated that "[o]ther factors . . . may be considered," including "the impact of any asserted data/software restrictions or patents." Id. at 123.

The BAA contemplated multiple awards, each for a 3-year duration. Id. at 84. All awards were subject to available funding. Id. In this regard, the agency "reserve[d] the right" to fund "all, some, or none of the proposals, or any part of any proposal," and to "create and maintain a reserve list of proposals for potential funding, in the event that sufficient funding becomes available." Id. at 85-86, 123. The BAA provided that firms whose proposals were accepted for funding would be contacted before award to obtain additional information required for award, and that the agency "may establish a deadline for the close of fact-finding and negotiations that allows a reasonable time for award of a contract." Id. at 93. The BAA advised that firms "may also be removed from award consideration should the parties fail to reach agreement on contract terms, conditions and cost/price within a reasonable time," or if the offerer failed to timely provide requested information. Id.

On March 18, 2008, the agency selected five firms for contract negotiations and award. Although not initially selected, Spaltudaq's proposal, which was to develop antibodies effective against the Junin and Marburg viruses by using Spaltudaq's proprietary In-Situ Therapeutic Antibody Rescue (I-Star) platform, was placed on the agency's "reserve list."[3] Subsequently, additional funding became available and, on June 12, the agency issued to Spaltudaq the first of several informational requests and commenced negotiations with the firm.[4] The agency advised that the Defense

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[2] Page citations refer to the "bates" numbers listed on the record documents.

[3] When it notified Spaltudaq that its proposal was not selected but was placed on the reserve list, the agency also provided Spaltudaq with a summary of its proposal evaluation and a written debriefing. Contracting Officer's Statement at 7.

[4] In the request for information, the contracting officer stated that this was "not an opportunity to revise other portions of [Spaltudaq's] proposal." Agency Report (AR), Tab 15, Email from Contracting Officer to Spaltudaq (June 12, 2008), at 3.

Contract Auditing Agency (DCAA) would be auditing Spaltudaq's proposal, and further advised that DTRA intended to negotiate and award a contract with Spaltudaq "as soon as possible" upon receipt of the information. AR, Tab 15, Email from Contracting Officer to Spaltudaq (June 12, 2008), at 2-3.

Extensive negotiations between Spaltudaq, its legal counsel, and the agency took place from June until September. The record shows that there were continuing issues with Spaltudaq's failure to provide adequate proposal information for DCAA to perform an audit, and continuing negotiations about intellectual property rights. With regard to the DCAA audit, the agency advised Spaltudaq repeatedly in June and July that its proposal remained inadequate for audit. Although Spaltudaq provided DCAA with requested information on July 21, the firm revised its proposal on July 23 to increase the proposal cost to $31,470,873, which was approximately 20 percent over the cost of the original proposal. Contracting Officer's Statement at 8-12.

With regard to intellectual property rights, the record shows that the agency and Spaltudaq discussed numerous revised clauses and negotiation positions. Spaltudaq proposed several approaches to retain rights to certain intellectual property, to which the government objected; for example, Spaltudaq proposed contract provisions that defined certain work to be excluded from the contract and allocated rights in intellectual property by stating how certain work would be funded. Id. at 8-13. Spaltudaq's counsel asserts that, at one point, agency counsel "led me to believe" that certain terms "would likely be acceptable to" the agency, Declaration of Spaltudaq's Counsel ¶ 8, but the agency denies this and the written record does not reflect the parties' agreement over these disputed intellectual property rights. See Agency's Supplemental Legal Memorandum at 7-9.

On August 7, 2008, the agency sent Spaltudaq a "final negotiation position" letter that addressed intellectual property issues as well as Spaltudaq's revised cost proposal. In that letter, the agency "require[d] a reduction in cost to the original cost" proposed by Spaltudaq and objected to Spaltudaq's attempts to retain certain intellectual property rights. Specifically, the agency objected to Spaltudaq's attempts to "severely restrict Government access to technical data and subject inventions developed with DTRA funding," to provide the government with only "limited rights/modified Government Purpose Rights" in delivered data funded exclusively at the government's expense, and to "greatly limit the Government's use of potential inventions/patents that may be made under the contract." The agency stated that it was "unwilling to consider these most recent proposal changes," which it characterized as a "vast departure from Spaltudaq's original proposal," and advised Spaltudaq that

> in order for the Government to continue negotiations, Spaltudaq must accept the attached modified [intellectual property] clauses and list all the technical data and computer software which will be delivered with less than unlimited rights. Further, Spaltudaq must list all of its

> background inventions which may be used under the proposed contract.

AR, Tab 21, Letter from Contracting Officer to Spaltudaq (Aug. 7, 2008), at 101-02.

On August 13, Spaltudaq responded and reduced its proposal cost to $25,356,409, accepted the agency's proposed intellectual property rights clauses, and provided the requested lists of background inventions and technical data to be delivered with less than unlimited rights. However, Spaltudaq also attached an "amended" statement of work that reflected two revisions: (1) that performance under the contract would be complete upon "IND filing,"[5] and (2) that work to further develop or improve Spaltudaq's I-STAR platform[6] would be outside the scope of the statement of work and would not be required by the contract.[7] AR, Tab 23, Letter from Spaltudaq to Contracting Officer (Aug. 13, 2008), at 129. The amended statement of work included the same terms and restrictions that Spaltudaq proposed 2 weeks earlier that the agency did not accept, plus additional revisions. Compare id. at 137-38 with AR, Tab 20, Email from Spaltudaq's Counsel to DTRA's Counsel (Aug. 1, 2008), at 98.

On September 18, DTRA advised Spaltudaq that it was discontinuing negotiations. The agency stated that this "decision is based primarily on unacceptable changes to the statement of work both from programmatic and cost standpoints and intellectual property rights not in the best interests of the Government." The agency explained that the "reduced" scope of work was unacceptable because it eliminated "most of the utility" of Spaltudaq's proposal and adversely affected the intellectual property rights to which the government would be entitled. In addition, the agency noted that Spaltudaq's final proposal was inadequate for DCAA audit. AR, Tab 27, Letter from Contracting Officer to Spaltudaq (Sept. 18, 2008), at 180.

Upon receipt of DTRA's letter, Spaltudaq revised the statement of work by "reverting to the original language" and expressed a desire to continue with negotiations. AR, Tab 28, Letter from Spaltudaq to Contracting Officer (Sept. 19, 2008), at 183. The

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[5] "IND filing" refers to the "Investigational New Drug Application" that an applicant must file with the Food and Drug Administration (FDA) before a drug or product may be tested on humans. FDA Website, www.fda.gov/Cder/cancer/tour.htm.

[6] Spaltudaq's I-STAR platform isolates and produces monoclonal antibodies that protect against two viruses that cause Marburg and Junin hemorrhagic fevers.

[7] In its letter, Spaltudaq asserted that these revisions were based on prior conversations that Spaltudaq or its counsel had with the agency. However, there is nothing in the record that shows that the agency's counsel agreed with or solicited these revisions.

agency declined to reopen negotiations, and Spaltudaq protested that decision to our Office.

Spaltudaq contends that the agency failed to engage the firm in meaningful discussions. More specifically, it complains that it was misled about the agency's requirements regarding intellectual property rights, and denied a fair and reasonable opportunity to correct proposal deficiencies that led to the agency's decision to terminate negotiations. The protester asserts that the requirement for meaningful discussions, as articulated in Federal Acquisition Regulation (FAR) part 15, applies to the evaluation of proposals under a BAA. Protest at 11-12 (citing Interstate Elec. Corp., B-286466, B-286466.2, Jan. 12, 2001, 2001 CPD ¶ 29).

It is true that in prior cases we have looked to FAR part 15 for guidance in reviewing the agency's conduct of discussions under a BAA when an agency uses negotiated procedures as part of the selection process, in which case the discussions must be meaningful. See Interstate Elec. Corp., supra, at 11. Here, however, the negotiations that occurred between Spaltudaq and the agency were not part of the evaluation and selection process, but occurred after the evaluation had been completed and Spaltudaq's proposal had been selected for award. As discussed more fully below, by the BAA's terms, the negotiations were not intended as discussions as defined in FAR part 15. Thus, the requirement for meaningful discussions as stated in FAR part 15, and in the cases interpreting that part, does not apply.

That is not to say that the agency's conduct of post-selection negotiations under a BAA is not reviewable. Although we find that DTRA had no obligation to follow the specific requirements for discussions set forth in FAR Part 15, agencies may not conduct themselves in an arbitrary manner, and they must negotiate in good faith and in a manner consistent with the BAA. See Health Servs. Mktg. & Dev. Corp., B-241830, Mar. 5, 1991, 91-1 CPD ¶ 247 at 7. As explained below, we find that DTRA met this standard in conducting negotiations with Spaltudaq.

As stated above, the BAA provided for post-selection negotiations with firms that were selected for award. The BAA permitted the agency to discontinue discussions if an offeror failed to provide necessary information in a timely manner, or if the parties failed to reach agreement on contract terms within a reasonable time. Here, the record shows that over a 4-month period, the parties engaged in good faith negotiations in an attempt to reach agreement over the parties' rights to intellectual property, but that no agreement could be reached. The record shows that Spaltudaq proposed a number of approaches that limited or restricted the government's rights, and the agency repeatedly objected to these approaches. The agency articulated its "final negotiation position" regarding intellectual property in its August 7, 2008 letter and unambiguously stated that "the Government is unwilling to consider" recent proposal changes that would limit or restrict the government's rights to data or inventions. Despite this admonition, Spaltudaq responded with a revised statement of work that included previously submitted proposal revisions to restrict the intellectual property rights granted to the agency. In our view, the agency

reasonably determined that the parties had failed to reach agreement within a reasonable time, and the agency could discontinue negotiations on this basis alone.[8]

The protester contends that it was "misinformed" about the agency's intellectual property requirements, specifically with regard to Spaltudaq's I-STAR platform. The protester asserts that, in revising the statement of work, it only intended to "clarif[y]" that that developments and improvements to the I-STAR platform would be excluded from the scope of work, as a result of Spaltudaq's belief that the agency was not interested in this platform. Protester's Comments at 2. The protester asserts that the agency's August 7, 2008 "final negotiation position" letter did not prohibit the revisions that Spaltudaq proposed, and that DTRA's counsel "led Spaltudaq to believe that the proposed clarification would not be objectionable, and would likely be acceptable, to DTRA." Id. at 10-11. However, the contemporaneous record does not support Spaltudaq's arguments.

While the record shows that there were several communications between the agency's counsel and Spaltudaq's counsel concerning the I-STAR platform and related work, the record does not evidence that the agency or its counsel ever agreed to exclude from the scope of work future developments and improvements to the I-STAR platform, or agreed to Spaltudaq's proposed funding allocation approach to exclude subject inventions. Even if the agency or its counsel had indicated a willingness to consider such provisions, DTRA's August 7 letter made clear that such revisions would no longer be considered. As stated above, the agency's "final negotiation position" was that the government "is unwilling to consider [Spaltudaq's]

[8] As a second basis to discontinue negotiations, the agency concluded that Spaltudaq's proposal remained "inadequate" for DCAA to an audit. AR, Tab 27, Letter from Contracting Officer to Spaltudaq (Sept. 18, 2002), at 180. Although Spaltudaq complains in its supplemental protest that this issue should have been more clearly raised during negotiations, Supplemental Protest at 2-3, 5-6, its protest on this basis is untimely because Spaltudaq did not raise this issue within 10 calendar days of receiving the letter from the agency terminating negotiations on this basis. See 4 C.F.R. § 21.2(a)(2) (2008) (protests based on other than solicitation improprieties must be raised within 10 days of when the basis becomes known). In any event, Spaltudaq was advised as early as June 12, 2008 that DCAA would audit its cost proposal, and the record contains numerous subsequent communications between Spaltudaq, DCAA, and DTRA requesting information from Spaltudaq for this audit. Based on this record, Spaltudaq cannot reasonably argue that it was unaware that an auditable cost proposal was required.

most recent proposal changes." The fact that Spaltudaq chose to ignore the agency's warnings does not require the agency to reopen negotiations here.

The protest is denied.

Gary L. Kepplinger
General Counsel