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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: InkiTiki Corporation

File: B-291823.4; B-291823.5

Date: May 16, 2003

Dr. Susanna Tsai for the protester.

Brian Kau, Esq., Department of the Navy, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's decision not to invite the protester to submit a Phase II proposal under the Department of Defense Small Business Innovation Research program is denied where the agency reasonably determined, based on the lack of details in the protester's Phase I written products and post-award conference, that it could not be determined whether the protester's approach was innovative or feasible.

DECISION

InkiTiki Corporation protests the Department of the Navy's determination not to invite it to submit a Phase II proposal under the Department of Defense's (DOD) Small Business Innovation Research (SBIR) program.

We deny the protest.

The SBIR program is conducted pursuant to the Small Business Innovation Development Act, 15 U.S.C. § 638 (2000), which requires certain federal agencies to reserve a portion of their research and development (R&D) funds for awards to small businesses. It is a three-phased process of soliciting proposals and awarding funding for R&D to small businesses for stated agency needs. Phase I is to determine, insofar as possible, the scientific, technical, and commercial merit and feasibility of ideas submitted under the SBIR program. Phase II is the principal R&D effort demonstrating the Phase I technology, including the delivery of a prototype. Phase III contemplates that non-SBIR funds will be used to develop the prototype into a viable product or non-R&D service for sale to the military or in commercial markets.

To commence the program, the agency issues an SBIR solicitation that sets forth R&D topics and subtopics that emphasize the need for proposals with advanced concepts to meet specific agency R&D needs, without providing detailed specifications to prescribed solutions of the problems. SBIR Program Policy Directive ¶ 7.b. Here, DOD issued FY 2002 SBIR Program Solicitation 02.1 on October 1, 2001, which included the Department of the Navy's solicited topic, "Innovative Reverse Engineering Protection for Software." Under this topic, a contractor was required to "develop usable and novel approaches to protecting software from reverse engineering." DOD Fiscal Year 2002 SBIR Program Solicitation 02.1, Department of Navy Topic N02-100.

According to the solicitation, the awards of Phase I contracts were to be based on the following technical evaluation factors:

- a. The soundness, technical merit, and innovation of the proposed approach and its incremental progress toward topic or subtopic solution.
- b. 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.
- c. The potential for commercial (Government or private sector) application and the benefits expected to accrue for this commercialization.

Where technical evaluations were essentially equal in merit, cost was to be considered in determining the successful offerors. *Id.* ¶ 4.2.

Under this solicitation, the same Phase I evaluation factors were to be used to evaluate Phase II proposals. *Id.* ¶ 4.3. The solicitation also provided that the Phase II awardees were to be selected from firms that had received Phase I awards on the "basis of results of their Phase I effort and the scientific, technical, and commercial merit of the Phase II proposal," and that the "Phase II proposal evaluation may include on-site evaluations of the Phase I effort by Government personnel." *Id.* ¶¶ 1.2, 4.3. The solicitation further stated that "[o]nly those Phase I awardees which have been **invited** to submit a Phase II proposal by that activity's proper point of contact . . . during or at the end of a successful Phase I effort will be eligible to participate for a Phase II award." *Id.*, Department of the Navy Proposal Submission Instructions, at 2-3 (emphasis in original).

InkiTiki and two other firms received Phase I awards under the Navy topic in question here. InkiTiki proposed software protection measures using innovative artificial intelligence techniques. InkiTiki's contract required the delivery of a number of reports, including monthly status reports, a Phase I preliminary report, a

Phase I final report, and a Phase II plan. InkiTiki Contract, attach. J.1. The record shows that InkiTiki furnished the monthly status reports, a Phase II plan and a Phase I preliminary report; InkiTiki has not submitted a Phase I final report.¹

Prior to receiving the Phase I final reports, the technical monitor and two other evaluators reviewed, among other things, the Phase I contractors' Phase II plans, monthly reports, and Phase I preliminary reports to decide whether to invite the contractors to submit a Phase II proposal. In so doing, the evaluators considered the following evaluation criteria (not listed in the solicitation): quality of communications to the government; innovativeness of approach to solution and/or product; past performance during Phase I; clearness of plans and ability to perform or execute the plans; usefulness of final product to the government and in commercial applications; best value to the government; best price and/or return on investment; and ability to work under classified procedures in Phase II. Based on its evaluation, the agency decided, on November 14, that it would not invite InkiTiki to submit a Phase II proposal.

The agency's determination not to invite InkiTiki to submit a Phase II proposal was due in large part to its conclusion that InkiTiki's approach, as described in InkiTiki's written products and discussed at a Phase I mid-term conference, did not demonstrate the innovativeness promised in its Phase I proposal with respect to the use of artificial intelligence in "obfuscation techniques" to make software tamper-proof. In this regard, the agency noted that InkiTiki's written submissions and monthly progress reports lacked detail, and made it impossible to determine whether InkiTiki's approach was in fact innovative or feasible, or what progress, if any, the contractor had achieved on its project. Specifically regarding the required monthly status reports, the evaluators concluded that they were "very vague and limited in details." Agency Supplemental Documents (Feb. 13, 2003), Tab 3a, InkiTiki's Proposal Evaluation, at 1. The evaluators also found that InkiTiki failed to provide substantial information evidencing an application of artificial intelligence to current obfuscation techniques, which was what was supposed to have been new and innovative about InkiTiki's approach; that InkiTiki had provided "[n]o details on [its artificial intelligence] approach such as [artificial intelligence] algorithms, theories, reasoning engine details, etc., [so that it was] [d]ifficult to assess innovativeness [, and that InkiTiki had] [g]reat ideas for obfuscation techniques, but again no obvious innovations with [artificial intelligence]." Agency Supplemental Documents (Feb. 13, 2003), Tab 3a, InkiTiki's Proposal Evaluation, at 1. The agency's technical monitor also stated that regardless of what InkiTiki knew about artificial intelligence, its discussion and presentation of its proposed use of artificial intelligence during the mid-term conference was "superficial and lacking in

¹ The agency granted an InkiTiki request for an extension of the delivery date for its final report. InkiTiki did not meet the extended due date and, as noted, has never provided a final Phase I report.

substantive details,” and “more tutorial” with “[n]ot enough detail to assess true progress or to communicate real product or design to [agency].” Id.; Agency’s Technical Monitor’s Memorandum (Mar. 3, 2003) at 5.

InkiTiki protests the agency’s failure to invite it to submit a Phase II proposal. Our review of a protest involving an SBIR procurement is limited to determining whether the agency violated any applicable regulations or solicitation provisions, or acted in bad faith. Intellectual Properties, Inc., B-280803.2, May 10, 1999, 99-1 CPD ¶ 83 at 5-6; Microexpert Sys., Inc., B-233892, Apr. 13, 1989, 89-1 CPD ¶ 378 at 2.

While InkiTiki generally disputes this evaluation, arguing for example that its Phase I proposal demonstrated its innovativeness and that the evaluators lacked expertise to understand its artificial intelligence approach, it has not shown that the agency’s evaluation judgment, as detailed above, was unreasonable.² The record shows that the agency reasonably concluded that the few details provided by InkiTiki during Phase I did not show its proposed approach was sound, had technical merit, or was innovative, or that InkiTiki was making progress towards a solution.

InkiTiki argues that to the extent that the agency determined that its written submissions lacked detail and therefore did not show innovation, this was due to instructions received from the agency’s technical monitor to include only “minimal information” in its monthly reports and preliminary report due to security considerations, and to hand deliver the actual detailed research findings only to the technical monitor. InkiTiki contends that the agency officials acted in bad faith when they instructed InkiTiki to submit documents with minimal information and then during evaluation downgraded InkiTiki for not providing more information and detail in its written submissions.

The agency specifically denies that it instructed or encouraged InkiTiki to put minimal information in its submissions, and supports this denial with a number of affidavits from the pertinent agency representatives. The agency’s technical monitor stated that in fact InkiTiki’s written monthly status reports assumed greater importance to the agency due to the geographical distance between the agency’s location in Virginia and the contractor’s location in Hawaii, and the significant time zone difference between those two areas, which made communication by telephone difficult. The technical monitor contends that InkiTiki has fabricated this allegation to “account for the lack of detail in its monthly reports and other submitted documents (which was obvious in comparison to the submissions of the other

² The protester claims that its work was characterized by the agency’s technical monitor as important to the government. The technical monitor has persuasively responded in detail to the protester’s attacks on the evaluation, and asserts that he did not compliment InkiTiki’s demonstrations or submissions during Phase I. Agency’s Technical Monitor’s Affidavit (Apr. 14, 2003) at 6.

contractors and evident on their face even to lay persons).”³ Agency’s Technical Monitor’s Affidavit (Apr. 14, 2003) at 8.

In response, InkiTiki asserts that the agency representatives’ statements should be disregarded because they are false. However, the protester has provided no evidence that supports its version of these events.⁴ We have reviewed the record and find no support for InkiTiki’s allegation of bad faith on the part of Navy officials in the evaluation of its proposal. In this regard, prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference, or supposition. Matrix Int’l Logistics, Inc., B-277208, B-277208.2, Sept. 15, 1997, 97-2 CPD ¶ 94 at 13 n.9.

InkiTiki also asserts that it was unfair to consider the mid-term conference as part of the evaluation for Phase II, or to decide which Phase I contractors to solicit for Phase II prior to receiving the final Phase I reports, because the agency did not give InkiTiki proper notice that it would do so. However, the solicitation clearly put InkiTiki on notice that its Phase I contract performance would be considered in the Phase II evaluation and that the decision of which contractors to solicit for Phase II could be made during Phase I prior to the submission of the final report. DOD Fiscal Year 2002 SBIR Program Solicitation 02.1 ¶¶ 1.2, 4.3; Department of the Navy Proposal Submission Instructions, at 2-3.

The protester finally argues that the agency’s use of unstated evaluation criteria to determine which contractors to solicit Phase II proposals from was improper and inconsistent with the SBIR solicitation evaluation scheme. While it is true that the criteria used to determine whether to solicit the contractors for Phase II were not stated in the solicitation, the agency explains that it regarded these criteria as “relevant subsets” of the evaluation factors listed in the solicitation. Agency’s Technical Monitor’s Memorandum (Mar. 3, 2003) at 2. Regardless of whether the specific criteria used were all encompassed by the solicitation’s evaluation scheme, the record shows that the reasons InkiTiki was not solicited to submit a proposal for Phase II clearly fell under the first Phase II factor listed in the solicitation, “the soundness, technical merit, and innovation of the proposed approach and its incremental progress toward topic or subtopic solution.”

³ Consistent with the technical monitor’s view that InkiTiki may not have developed the details supporting its approach is the fact that, as noted above, InkiTiki has never submitted its final Phase I report, even though it was granted an extension. See Agency Submission (April 14, 2003) at 8 n.4.

⁴ We attempted to develop this issue further by means of a hearing where the credibility of the parties could be directly assessed. InkiTiki declined to participate. Therefore, this issue was further developed by means of questions by our Office, to which the agency and InkiTiki responded.

In sum, we find no basis to question the agency's determination not to solicit InkiTiki for Phase II.

The protest is denied.

Anthony H. Gamboa
General Counsel