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**Comptroller General
of the United States**

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

Decision

Matter of: SeaArk Marine, Inc.

File: B-292195

Date: May 28, 2003

John McClendon for the protester.

B. J. Braun, Esq., Department of Homeland Security, for the agency.

Sharon L. Larkin, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency need not hold discussions with offerors concerning product demonstration test results in order to permit design changes, where the solicitation provides that remediation will not be permitted and agency provided results only to ensure that testing was properly performed.
 2. Awardee did not receive unfair competitive advantage from prior contract experience where there was no evidence of unfair or preferential treatment, improper discussions, or involvement in developing solicitation.
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DECISION

SeaArk Marine, Inc., protests the award of a contract to SAFE Boats International, LLC under request for proposals (RFP) No. DTICG23-02-R-DNQ131, issued by the Department of Homeland Security, for small commercial boats modified to U.S. Coast Guard specifications. SeaArk contends that the agency failed to conduct meaningful discussions and provided SAFE with an unfair competitive advantage.

We deny the protest.

The solicitation, issued under the commercial item procedures in Federal Acquisition Regulation Part 12, provided for award of a 7-year fixed-price indefinite-delivery/indefinite-quantity (ID/IQ) contract with an economic price adjustment. RFP at 5. Award was to be made to the offeror whose proposal provided the "overall best value" to the government, based upon the following factors: vessel operational capabilities and physical characteristics, production capability, quality assurance and management, warranty, construction data rights and technical support, past

performance, and price. Vessel operational capabilities and physical characteristics was “significantly more important than all other factors,” and all of the technical factors combined with past performance were “significantly more important than price.” RFP at 40-42.

Offerors were informed that the agency intended to evaluate proposals and make awards without conducting discussions. Evaluation was conducted in two phases. Phase one involved evaluation of proposals and resulted in the selection of three offerors (including SeaArk and SAFE) to deliver one boat each to the agency for further testing. Phase two involved “hands on, boat in the water” testing and evaluation of the delivered boats and selection of one of the three offerors to receive production orders for up to 700 boats. RFP at 41-42; Contracting Officer’s Statement at 3. With respect to the phase two testing, the RFP stated that test and evaluation results would be provided, but not for the purpose of discussions and that proposal revisions would not be permitted.

Phase two testing was performed over a 3-week period by “a diversely qualified” technical evaluation team (TET), which tested the offerors’ boats under similar conditions to validate each boat’s performance under the vessel operational capabilities and physical characteristics factor. The test results were then used to re-evaluate this factor and the final standing for award. Contracting Officer’s Statement at 3.

After completing testing, the agency rated SAFE blue (superior) with low risk for the operational capabilities and physical characteristics factor, and SeaArk yellow (marginal) with high risk. The agency found that SeaArk’s boat presented 3 significant performance weaknesses relating to “seakeeping” and “maneuvering” issues that the agency determined would involve significant redesign, 22 mission effectiveness weaknesses involving “transportability” issues that also required redesign, and 17 “service life” and “reliability” issues relating to construction quality. In contrast, SAFE’s boat was found to meet or exceed the RFP’s requirements and presented only minor weaknesses, which the agency determined to be “insignificant.” Agency Report (AR), Tab H, TET Report, at 2. The agency found that SAFE’s boat provided exceptional maneuverability, better stability, and superior construction quality to SeaArk’s. AR, Tab I, Source Selection Authority Decision, at 1.

The agency determined that SAFE’s evaluated price was approximately \$132 million and SeaArk’s evaluated price was approximately \$125 million, based on a maximum ordering quantity of 700 boats.¹ However, given the technical superiority of SAFE’s boat, the agency found that this 5% differential (or approximately \$7 million) did not

¹ Each SeaArk boat was \$14,176.98 less expensive than SAFE’s. Protest, attach. 5, Phase One Post-Award Conference Meeting Minutes, at 4.

outweigh SAFE's technical superiority. The agency awarded the contract to SAFE, and this protest followed.

SeaArk contends that the agency failed to provide it "meaningful feedback" regarding unfavorable test results and that, had it received such feedback, it could have remedied many of the boat's weaknesses through "simple redesign." In this regard, the RFP specifies that phase two test and evaluation findings "will be provided to the [offerors] by electronic mail, who will then respond in a timely manner."

Although it is true that the RFP informed offerors that they would be informed of the test results, the solicitation also provided that "[t]he purpose of the test and evaluation is NOT to reveal deficiencies or significant weaknesses for possible remediation through discussions," and that "[n]o part of a Contractor's proposal will be changed as a result." RFP at 41-42. As the agency explains, test results were to be provided to offerors for the sole purpose of ensuring that the boats were being operated properly during testing.² Contracting Officer's Statement at 3. Given the RFP's warning that remediation would not be permitted, we find no basis to question the agency's decision not to conduct discussions with SeaArk or to permit the firm to redesign its boat or to otherwise remedy the weaknesses identified in testing.

SeaArk next contends that SAFE benefited from an unfair competitive advantage because SAFE is currently manufacturing an "almost identical" boat under a separate contract with the agency. According to SeaArk, SAFE may have been able to use this position to obtain "feedback" from the agency and knowledge of the agency's "preferences" regarding style, design, and other boat features, which was information that SeaArk could not receive.³ Protest at 3.

Even if it is true that SAFE received an advantage due to its prior contract experience, similar to an advantage of incumbency, there is no evidence in the record of unfair or preferential treatment. As the agency explains, it did not tailor the specifications to accommodate SAFE's boat features, SAFE did not assist the agency with drafting the RFP, and the agency did not have communications with

² In this regard, the agency contacted SeaArk to discuss a heeling problem (*i.e.*, maneuverability issue) with SeaArk's boat, and SeaArk provided the agency with instructions on how to trim the boat to ensure proper handling. Contracting Officer's Statement at 3-4. The remaining weaknesses identified in SeaArk's boat, however, were found to be "endemic" to the boat and did not involve issues of whether a particular test was properly performed. Legal Memorandum at 4.

³ Additionally, SeaArk also alleges that SAFE benefited from congressional influence on homeland security projects. There is no evidence in the record to support this allegation.

SAFE concerning this procurement outside the procurement. Contracting Officer's Statement at 2. Given that there is no evidence of preferential or improper conduct, any advantage that SAFE may have received from the firm's prior contractual performance need not be equalized. Crofton Driving Corp., B-289271, Jan. 30, 2002, 2002 CPD ¶ 32 at 6; Pacific Consol. Indus., B-250136.5, Mar. 22, 1994, 94-1 CPD ¶ 206 at 4.

We deny the protest.

Anthony H. Gamboa
General Counsel