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**Comptroller General
of the United States**

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

Decision

Matter of: Gamut Electronics, LLC

File: B-292347; B-292347.2

Date: August 7, 2003

John Hibbs for the protester.

Lt. Col. Thomas L. Hong, Department of the Army, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of solicitation terms more than 4 months after closing date, and after protester submitted proposal and participated in product demonstration, is untimely and not for review.
2. Protest that agency improperly rejected protester's product as unsuitable is denied where agency evaluation was conducted in accordance with stated evaluation criteria and protester does not allege any specific errors in evaluation.

DECISION

Gamut Electronics, LLC protests the rejection of its proposal under solicitation No. DABJ47-03-R-ONDCP, issued by the Department of the Army for state-of-the-art counterdrug equipment. Gamut challenges both the terms of the solicitation and the rejection of its proposal.

We deny the protest.

The Army, acting as technical agency for the Office of National Drug Control Policy (ONDCP), Counterdrug Technology Assessment Center (CTAC), issued the solicitation, a broad agency announcement (BAA), as a "sources sought" notice in FedBizOpps to obtain proposals of state-of-the-art counterdrug equipment that CTAC would provide to state and local law enforcement agencies under the

Technology Transfer Program (TTP).¹ The procurement was conducted in a phased manner. In Phase I, offerors were to submit proposals for a single product meeting the following initial qualifying criteria:

(1) product shall have a specific counterdrug application such as, but not limited to: Miniature digital covert audio/video surveillance; portable narcotic detection systems; advanced miniature audio or video-based body-wire devices; command, control, communication, computer, intelligence systems (C4I); covert vehicle tracking system, case management system, data-sharing and analysis systems, telephone/fax/internet intercept systems; and data mining or advanced internet/database/unstructured data search engines. (2) product must have a verifiable and established performance record with U.S. law enforcement agencies and (3) the product must be packaged as a fully integrated turn-key system and require no further development or enhancement effort.

Solicitation at 2. Products were required to meet all three criteria in order to be considered for further evaluation under Phase II.

Candidates selected for Phase II were to demonstrate and brief their proposed products to a panel of law enforcement personnel, who would evaluate the proposal for applicability and viability for the TTP. This Phase II evaluation was to be based on the following criteria, listed in descending order of importance: overall technical merit/feasibility of proposed equipment; potential contribution, relevance, and impact to the agency's mission and support of the TTP; and cost and schedule. The agency reserved the right to select all, some, or none of the responses to the solicitation for demonstration or contract award. Under Phase III, demonstration results were to be analyzed, recommendations of technologies for inclusion in the TTP were to be made, and contract(s) were to be awarded as applicable.

Gamut submitted a proposal for its "Code Five System," a wireless remote-controlled surveillance system. Gamut's proposal passed the Phase I evaluation and the firm was invited to demonstrate its product in Phase II. Based on this demonstration, the agency determined that Gamut's product did not meet the TTP's needs. After receiving notice of its proposal's rejection, Gamut filed this protest challenging the terms of the solicitation and the evaluation of its product.

¹ CTAC, which serves as the central counter-drug technology research and development organization in the U.S. government, and the TTP were established under the Office of National Drug Control Policy Reauthorization Act of 1998. 21 U.S.C. §§ 1701 et seq. (2000).

THE SOLICITATION

Gamut asserts that the solicitation was actually an improper sole-source, indefinite-delivery/indefinite-quantity procurement. In Gamut's view, the agency could only use a solicitation like this one to conduct market research, and then was required to issue a request for proposals (RFP) or request for quotations (RFQ), based on full and open competition, identifying the specific products desired by the CTAC. Gamut also identifies a number of alleged flaws in the solicitation based on Federal Acquisition Regulation (FAR) § 12.205. For example, while market research includes a review of product literature, the solicitation here prohibited submission of product literature. FAR § 12.205(a). Similarly, while FAR § 12.205(b) allows the proposal of more than one item meeting the agency's needs, the solicitation here permitted the proposal of only one product. The agency responds that the solicitation met full and open competition requirements because it was a BAA, conducted in accordance with FAR part 35, but Gamut asserts that the agency merely used the BAA procedures to circumvent the requirement for full and open competition.

Under our Bid Protest Regulations, protests of alleged improprieties apparent on the face of the solicitation must be filed no later than the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2003). Gamut's challenges to the manner in which the agency solicited this requirement concern alleged solicitation improprieties; that is, these protest arguments are based on information that was available from the solicitation itself. For example, to the extent that Gamut believed it was improper for the agency to conduct a competitive procurement based solely on the FedBizOpps notice, without issuing an RFP or RFQ, the firm should have been aware of this from the BAA, which explained how the agency intended to proceed. Because Gamut did not challenge the solicitation until some 3 months after the closing time, and after it participated in two of the three phases, this aspect of its protest is untimely. Demusz Mfg. Co., Inc., B-290575, Aug. 5, 2002, 2002 CPD ¶ 141 at 3.

Gamut maintains that its protest was timely because it did not notice the improprieties prior to its proposal's rejection, which then prompted it to perform a "detailed analysis of the solicitation," and because it was unaware that the agency considered the solicitation a BAA until after Gamut had filed its original protest. Response to Motion to Dismiss, June 6, 2003; Gamut Letter, June 11, 2003 at 1.

This argument is without merit. The solicitation plainly laid out all aspects of the requirement that Gamut now protests: the phased nature of the procurement, the evaluation criteria, and the agency's significant discretion in selecting all, some, or none of the proposals for demonstration or awards. Thus, Gamut was, or should have been, fully aware of all the matters it now challenges, and could not delay protesting until it completed its "detailed analysis." While Gamut may not have been aware that the solicitation was a BAA, the essence of its protest--that the agency's substantive approach to the procurement was flawed--was not dependent upon this

information, and the fact that the protest incorporated this information therefore did not render it timely.²

Gamut asserts that we should consider its untimely arguments under the significant issue exception to our timeliness requirements. 4 C.F.R. § 21.2(c). Under this exception, we may consider a protest notwithstanding its untimeliness when, in our judgment, doing so would be in the interest of the procurement system. ABB Lummus Crest Inc., B-244440, Sept. 16, 1991, 91-2 CPD ¶ 252 at 4. The exception is limited to protests that raise issues of widespread interest to the procurement community, and that have not been considered on the merits in a previous decision. Id. We find no basis for applying the exception here since, while the protest is of interest to Gamut, there is no reason to believe that the issues raised would be of widespread interest to the procurement community. DSDJ, Inc., B-288438 et al., Oct. 24, 2001, 2002 CPD ¶ 50 at 3.

TECHNICAL EVALUATION

Gamut asserts that the evaluation of its product as not meeting the agency's needs was not reasonable, noting that its product is made up of commercial, off-the-shelf components, and is "the most widely used wireless remote controlled surveillance camera in California law enforcement." Comments at 2.

In reviewing a protest of an agency's proposal evaluation, it is not our role to reevaluate proposals. Rather, we will consider only whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. CWIS, LLC, B-287521, July 2, 2001, 2001 CPD ¶ 119 at 2.

The evaluation here was reasonable. As indicated above, the determination of whether a product would be recommended for inclusion in the TTP as part of Phase III depended primarily upon the Phase II evaluation of technical merit, potential contribution, and cost schedule. Ten of the 15 evaluators concluded that Gamut's product was "marginal" and 5 concluded that it was "unacceptable." Agency Report (AR), Tab 4. Under the overall technical merit/feasibility factor, Gamut's product was found to have some surveillance application, but limited use, since it was configured to fit in a large vehicle and not considered a covert surveillance system. AR, Tab 1. With regard to the potential contribution, relevance,

² Expressed differently, Gamut was not prejudiced by any alleged violation of the requirements for a BAA. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In this regard, Gamut does not argue, and there is no reason to assume, that Gamut would have prepared its proposal differently had it been aware that the agency considered this a BAA-type procurement, or if it had not deviated from the BAA requirements as alleged.

and impact factor, the contracting officer found that the product had quality, potential, and relevance, but that it had many limitations due to its size and limited concealment. Id. As for the cost/schedule factor, the contracting officer observed that the TTP generally conducts classes with more than 30 students and has a maximum lead time of 4 months. Because Gamut stated it would require a 60-day lead time and could only produce one unit per week, the contracting officer concluded that Gamut would require 9 months to provide enough units to meet the agency's class size requirements, so that the proposal did not meet the agency's needs. Id.

Gamut "disagrees" with the contracting officer's negative comments, but asserts that it would be of "little benefit in arguing the perceptions of the contracting officer." Comments at 2. Gamut's disagreement with the agency's judgment, alone, is not sufficient to render the evaluation unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7. With regard to the agency's doubts about Gamut's ability to timely furnish its products, the protester states that "[t]here would be no problem providing training, warranty repair, fast delivery, expanding the workforce, etc." Comments at 2. However, Gamut did not make this representation at the time of its product demonstration; when questioned about delivery, Gamut's representative did not state that the firm could or would improve its offered time schedule. AR, Tab 1.

The protest is denied.

Anthony H. Gamboa
General Counsel