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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Vehicle Data Science, Inc.

File: B-413205; B-413205.2

Date: August 15, 2016

J.D. Margulici for the protester.

Brian Fischenich, Esq., Department of Transportation, for the agency.

Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that the agency's consensus evaluation report did not accurately reflect the underlying evaluation is denied where the agency's evaluators attested that the consensus report accurately represented their views, and where the content of the report reasonably reflects the merit of the protester's proposal.

2. Protest challenging agency's decision not to remove evaluator alleged to be biased is dismissed as untimely where the protester failed to protest within ten days of learning of the agency's decision.

DECISION

Vehicle Data Science, Inc. (VDSI), a small business located in Oakland, California, protests the United States Department of Transportation's (DOT) decision not to fund the protester's proposal submitted under topic 14.1-FH2 of a Small Business Innovation Research (SBIR) Program phase II solicitation, solicitation No. DTRT57-14-R-SBIR1. VDSI primarily asserts that one of the agency's evaluators was biased or lacked impartiality and that the agency's consensus evaluation process was flawed.

We deny the protest in part and dismiss it in part.

BACKGROUND

The SBIR program is conducted pursuant to the Small Business Innovation Development Act of 1982, 15 U.S.C. § 638, which requires certain federal agencies to reserve a portion of their research and development funds for awards to small

businesses. As part of its SBIR program, DOT invites small businesses to submit innovative research proposals that address high priority requirements of the agency and that have the potential for commercialization. See Solicitation at 1.

Under phase I, small businesses were invited to provide support for the conduct of feasibility-related experimental or theoretical research, or research and development efforts, on research topics provided by DOT in the solicitation. See id. at 2. Under the solicitation, all phase I awardees were eligible to submit a phase II proposal. Id. During phase II, the objective was to continue the research or research and development effort from the completed phase I, with funding to be based upon the results of phase I, and the scientific and technical merit, and commercial potential, of the phase II proposal. Id. at 2. During phase III, firms are expected to obtain funding from non-SBIR sources and typically work towards the commercialization of the research or technology. Id. at 3.

The phase II solicitation sought a product to assist in the creation of a marketplace that would enable consumers to collect and share their own driving data linked to crash risk--including data relating to driving time, conditions (e.g., related to congestion and time of day), and vehicle handling (e.g., prevalence of hard braking)--which would enable insurance carriers to offer competitive and comparable pay-as-you-drive insurance rates. See id. at 48-49.

VDSI submitted a successful proposal under phase I. Contracting Officer Statement of Facts (COSF) at 3. The phase I proposal stated that VDSI would capitalize on its subcontractor's existing relationships with many of the largest insurers in the country, and work with such insurers to begin the process of defining a data set and scoring algorithm. See Agency Report (AR), Tab 2, Phase I Proposal, at 8, 12. Following VDSI's successful completion of phase I, the company submitted a phase II proposal that was largely based on its initial phase I proposal. See AR, Tab 4, August 11, 2015 Phase II Proposal.

Subsequent to the submission of this proposal, however, VDSI's subcontractor decided not to participate further in the proposal process. As part of this split, the former subcontractor hired VDSI's chief executive officer (CEO), who had been identified in the phase I proposal as VDSI's principal investigator. See COSF at 5. As a result of these changes, DOT requested that VDSI submit a new phase II proposal detailing its revised approach. See id. at 5. Additionally, following the split, the former subcontractor contacted DOT and claimed that it, not VDSI, should submit the phase II proposal. See id. After further communications with the subcontractor, DOT rejected its claim and found that VDSI was the entity entitled to submit a follow-on proposal for phase II. See id. at 6.

On February 17, 2016, the president of the former subcontractor sent an email to VDSI's new CEO attempting to negotiate the purchase of VDSI's right to submit a phase II proposal. See Protest, attachment, February 17, 2016 Email. The email

represented that there had been communications between the chairperson of the agency's technical evaluation team and the subcontractor. It also referenced communications between the agency and VDSI to which the subcontractor was not a party. Further, the email ascribed various positions to the chairperson, asserting, for instance, that he was "just going through the motions" and had no intention of funding a phase II proposal submitted solely by VDSI. Id. The email also stated that the chairperson had suggested that either VDSI and its former subcontractor reconstitute their team, or that VDSI sell its right to submit a phase II proposal to the subcontractor. In his email, the subcontractor's president stated, in apparent reference to these two options, that the chairperson's "interests are my interest long term." Id.

In subsequent communications with the agency, VDSI raised concerns regarding this email, as well as concerns about other comments made by the chairperson, and asked DOT to remove the chairperson from the evaluation team. Protest at 4. On March 29, 2016, DOT's contracting officer (CO) responded to VDSI's request. See AR, Tab 19, March 29, 2016 Email. The CO stated that while the chairperson had discussed the dispute between the subcontractor and VDSI with the former subcontractor, he had never represented that VDSI was required to reach an accommodation with the former subcontractor in order to receive phase II funding. Id. at 2. The email also stated that:

After discussing the concerns raised by [VDSI] with all relevant government personnel, we have determined, in consultation with our legal office, that all government personnel involved in this process will be able to act [with] objectivity and with impartiality. Should that conclusion with respect to any specific individual(s) change at any future date, we will ensure that person is removed from the process.

Id. at 5. In reference to this response, VDSI contends that it did not protest the decision not to remove the chairperson because it anticipated that its proposal would win the award on its own merit and did not want to appear adversarial. VDSI Response to Dismissal Request, June 13, 2016, at 3.

On April 1, VDSI submitted a revised phase II proposal which substantially altered its approach from phase I. See AR, Tab 21, April 1, 2016 Phase II Proposal. For instance, VDSI proposed its new CEO to serve as the principal investigator and proposed to use a new subcontractor as VDSI's commercialization launch partner. Id. at 7. The revised proposal also anticipated the creation of a system that would focus on one data variable, rather than multiple data variables, as initially proposed. Id. at 5. Additionally while VDSI's phase I proposal anticipated leveraging its former subcontractor's insurance connections to obtain "buy in" from insurance companies, VDSI's revised phase II proposal relied on teaming partners who could then introduce the developed process to their insurance customers. See id. at 20.

On May 13, the agency notified VDSI that the agency had decided not to award a phase II contract to the company. COSF at 8. Following a debriefing, VDSI filed this protest.

DISCUSSION

VDSI filed its protest on May 27th, alleging that the agency's consensus evaluation document did not accurately reflect the underlying evaluation, and that the chairperson should have been removed from the evaluation panel due to his bias against VDSI or "balanced by someone with equivalent project expertise." Protest at 4. Following the agency report, VDSI filed comments and a supplemental protest alleging that the agency improperly communicated with VDSI's former subcontractor without advising VDSI, improperly prepared the consensus evaluation of VDSI's phase II proposal in bad faith, and failed to adequately investigate and respond to VDSI's concerns about bias on the part of the chairperson.¹

Protest Grounds Relating to the Consensus Evaluation Report

VDSI argues that the consensus evaluation report does not reflect a proper synthesis of the views of the evaluation team, and instead was improperly influenced by the chairperson's bias against VDSI. We deny these protest grounds for the reasons discussed below.

Our Office has held that where an agency is conducting an SBIR procurement, it has substantial discretion to determine whether it will fund a proposal. RDAS Corp., B-294848, Dec. 23, 2004, 2004 CPD ¶ 253 at 2. In light of this discretion, our review of an SBIR procurement is limited to determining whether the agency violated any applicable regulations or solicitation provisions, or acted in bad faith. R&D Dynamics Corp., B-285979.2, Nov. 14, 2000, 2000 CPD ¶ 193 at 4. With respect to a consensus evaluation document, our overriding concern is not whether such document tracks each individual evaluator's ratings, but whether the consensus report reasonably reflects the relative merit of the proposal, consistent with the solicitation. See I.S. Grupe, Inc., B-278839, Mar. 20, 1998, 98-1 CPD ¶ 86 at 6.

Here, we conclude that the content of the consensus evaluation report reasonably reflects the merit of VDSI's proposal. For instance, VDSI received a non-responsive rating for scientific and technical merit based on the fact that its phase II proposal deviated significantly from its phase I proposal, especially as related to the issue of insurance industry engagement. See AR, Tab 23, Technical Evaluation Team

¹ While we do not address in detail all of the arguments raised by VDSI in its protest, we have reviewed each, and conclude that none of these other protest grounds provides a basis to sustain the protest.

Summary Sheet, at 1. While VDSI disagrees with the agency's judgment that the new approach warranted a weakness, a protester's disagreement with the agency's evaluation judgment, without more, does not establish that the evaluation was unreasonable. See HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 5. In reviewing the evaluation record, we find no basis to conclude that the agency acted unreasonably in expressing its concern that failure to work with insurance companies in the development stage could have a negative impact on the ultimate success of the approach.

Similarly, VDSI takes issue with the consensus report's statement that the phase II proposal does not identify a "subcontractor well connected to the insurance industry and work-scope to utilize such connections." AR, Tab 23, Technical Evaluation Team Summary Sheet, at 1. In support of this argument, VDSI asserts that it proposed a new subcontractor with ties to the insurance industry. However, later in the consensus report, the agency further explains its concern that the proposal fails to engage insurance companies with the project until the very end, and even then "[the new subcontractor] has no role in such engagement." Id. As discussed above, we find no basis to question the reasonableness of this concern.

We also see no basis to question the process followed by the agency to create the consensus report. While the content of the consensus report tracks closely with the chairperson's individual report, the consensus report is signed by all three evaluators. In addition, the other evaluators submitted affidavits attesting that the consensus report accurately represents the group's views and that there was no undue pressure on the part of the chairperson. See AR, Tab 34, Chairperson Affidavit, at 1; Tab 35, Individual Evaluator Affidavit, at 1; Tab 36, Individual Evaluator Affidavit, at 1. Moreover, while the two other evaluators recommended making a phase II award to VDSI, they also found that VDSI's proposal was marginal in the scientific and technical merit category, and had notable weaknesses. See AR, Tab 25, Individual Evaluator Report, at 5; Tab 26, Individual Evaluator Report, at 6.

With respect to the chairperson's alleged bias or lack of impartiality, we find that the protester has failed to provide convincing proof of any such bias or lack of impartiality. In this regard, our Office has held that a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof and that we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Fantastic Data, B-299076, Feb. 5, 2007, 2007 CPD ¶ 32 at 6; InkiTiki Corp., B-291823.4, B-291823.5, May 16, 2003, 2003 CPD ¶ 104 at 5. As discussed above, the evaluation record supports the concerns raised by the chairperson. Additionally, we find it significant that the company the chairperson is asserted to be biased in favor of--i.e., the former subcontractor--did not submit a proposal in response to the solicitation. Our Office has held, in an analogous case, that the record did not support a protester's assertions of bad faith or bias, where the agency was alleged

to be biased in favor of a company that did not submit a proposal under the procurement at issue. See KAES Enters., LLC, B-407964.4, Aug. 21, 2013, 2013 CPD ¶ 196 at 6.

Further, with respect to the protester's concerns about the representations made by the president of the former subcontractor in his February 17 email (which was sent in an effort to convince VDSI to sell its proposal submission right), the protester itself advises that, in VDSI's view, the subcontractor's president is a "fabricator and we don't put a lot of trust in his statements." Comments at 10. In short, we see nothing concrete in the evaluation record to support the protester's claim of bias.

Remaining Protest Grounds

VDSI also contends that the chairperson should have been removed from the evaluation panel due to his lack of impartiality.² We dismiss this protest ground as untimely.

Our timeliness rules specifically require that a protest not based on solicitation improprieties be filed within 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). In this case, VDSI concedes that it knew, based on DOT's assurances, that the agency did not intend to remove the chairperson from the evaluation team. See VDSI Response to Dismissal Request, June 13, 2016, at 3. The last such assurance was provided by the CO via email on March 29, 2016. See AR, Tab 19, March 29, 2016 Email, at 5. Accordingly, VDSI should have protested the agency's non-removal decision within 10 days of that date. See National Mailing Sys., B-251932.3, Aug. 4, 1993, 93-2 CPD ¶ 78 at 2, 3 n.2 (dismissing as untimely an allegation that an evaluator was biased, where the information upon which the allegation was based was known by protester several months before award).

VDSI additionally argues that the agency's exchanges with VDSI's former subcontractor amounted to an improper disclosure of contractor bid or proposal information. See Federal Acquisition Regulation § 3.104-4(a). We also dismiss this protest ground as untimely because the agency disclosed these discussions in its March 29 email to VDSI. See AR, Tab 19, March 29, 2016 Email, at 3.

² The protester's argument, in this regard, challenges the agency's decision not to remove the chairperson based on the appearance of a conflict of interest. Comments at 10. As discussed below, this argument is untimely. With regard to the question of any actual bias, we note, as discussed above, that the evaluation record does not contain convincing proof of bias or bad faith on the part of the technical evaluation chairperson.

Even if this ground was not untimely, however, the protester has failed to demonstrate that the agency's communications with the former subcontractor resulted in competitive prejudice. Competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper. edCount, LLC--Protest and Costs, B-407556.3 et al., Aug. 15, 2013, 2013 CPD ¶ 195 at 6. Specifically, the protester has not shown how it could have been prejudiced by the agency's communications with an entity that did not submit a proposal in response to the phase II solicitation.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel