U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE
The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: PredictiveIQ LLC

File: B-421436.2

Date: July 7, 2023

Kevin T. Barnett, Esq., Annie B. Hudgins, Esq., Eric A. Valle, Esq., and Katherine B. Burrows, Esq., Piliero Mazza PLLC, for the protester.
Erika Whelan Retta, Esq., Christian H. Robertson, Department of the Air Force, for the agency.
Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of proposal is denied where protester has not demonstrated any possibility of competitive prejudice.

DECISION

PredictiveIQ LLC, a small business of Boston, Massachusetts, protests the decision by the Department of the Air Force not to award it a contract for its proposal submitted in response to small business innovation research (SBIR) commercial solutions opening (CSO) direct to phase II, solicitation No. AFX234, Topic DCSO1, Orbital Prime.[1] The protester complains that the agency unreasonably evaluated its proposal.

We deny the protest.

[1] The use of a CSO as a form of general solicitation was permanently authorized under section 803 of the fiscal year (FY) 2022 National Defense Authorization Act (NDAA). NDAA for FY 2022, Pub. L. No. 117-81, § 803, 135 Stat. 1541, 1814-1816 (2021). Under a CSO, the agency competitively selects proposals received in response to the general solicitation based on a review of proposals by scientific, technological, or other subject-matter expert peers. Proposals are not evaluated against each other since they are not submitted in response to a common performance work statement or statement of work. *Id.* Rather, each proposal is evaluated against the criteria specified in the solicitation, with primary focus being given to the following factors: (1) technical; (2) importance to agency programs; and (3) fund availability. *Id.*

BACKGROUND

The SBIR program is conducted pursuant to the Small Business Innovation Development Act. 15 U.S.C. § 638. The statute requires certain federal agencies to reserve a portion of their research and development (R&D) funding for awards to small business concerns. *Id.* §§ 638(e)(4), (f). The program has three phases. In phase I, firms submit proposals to conduct research or R&D on specified topics. *Id.* § 638(e)(4). Phase I awardees may become eligible to compete for phase II awards which would involve prototyping, *id.* § 638(e)(4)(B), and phase III awards which would involve further pursuit of work derived from, extending, or completing efforts made under prior SBIR funding. *Id.* § 638(e)(4)(C). Direct to phase II awards are solicited under a congressionally approved pilot program. This program allows the Department of Defense (DOD) the flexibility to award phase II SBIR contracts or Other Transaction Authority agreements to small business concerns that complete the requirements of a phase I project, despite not having received a phase 1 award. 15 U.S.C. § 638(cc).

On October 25, 2022, the Air Force released the CSO seeking direct to phase II proposals from small business concerns. The CSO identified two separate topics-AFX234-DCSO1-Orbital Prime and AFXDCSO2 (Open Topic)-Innovative Defense-Related Dual Purpose Technologies/Solutions with a Clear Air Force Stakeholder need. AR, Tab 3, CSO at 58-63. The instant protest concerns the orbital prime topic.[2] The solicitation provided that proposals that were responsive to the solicitation requirements would be evaluated against the following criteria: potential for government or private commercialization; defense need; and technical approach.[3] *Id.* at 49-50.

The agency received 145 proposals in response to the orbital prime topic by the November 22 due date and evaluated 137 proposals.[4] The agency assigned a peer reviewer from a pool of engineers or scientists to evaluate each proposal based on technical merit without regard to other proposals received. Contracting Officer's Statement at 7-8; CO Declaration, May 22, 2023, at 3. The reviewers assigned adjectival ratings (excellent, good, acceptable, marginal, poor) for each of the three evaluation criteria based on features of the proposal and areas in which the evaluator believed the proposal needed improvement. *Id.* at 4; AR, Tab 19, Proposal Rankings.

---

[2] The orbital prime topic sought proposals that could effectively explore innovative defense-related dual-purpose technologies related to the mission of in-space servicing, assembly, and manufacturing, and to grow the U.S. Space Force's industrial base. CSO at 58.

[3] The solicitation also noted other factors that would be considered during the evaluation process including national security concerns, whether the proposal advanced innovation in U.S. small business manufacturing, and energy efficiency. CSO at 50.

[4] The remaining eight proposals were eliminated by the agency during its initial review of the proposals for compliance with the CSO instructions.

After the peer review was completed the agency's managing organization program manager (lead evaluator) ranked each proposal based on its individual ratings, and informed the contracting officer of the recommended proposals based on the funding available. *See* CO Declaration, May 22, 2023, at 4.[5] Subsequently, the contracting officer notified the offerors of the funding selection decisions. *Id.*

PredictiveIQ submitted its proposal, which was titled Physics Informed Machine Learning for Improved Maneuverability to Support In-Space Servicing, Assembly, & Manufacturing, in response to the orbital prime topic.[6] The peer reviewer who evaluated the proposal rated it good under the commercialization potential factor, acceptable under the defense need factor, and excellent under the technical approach factor. COS at 12, AR, Tab 8, First Evaluation of Proposal at 1-2. PredictiveIQ's proposal was ranked 80 out of the 137 proposals that were evaluated. CO Declaration, May 22, 2023, at 5. The agency had funds available for the 30 top ranked proposals. *Id.*

On January 20, 2023, PredictiveIQ was notified that its proposal was evaluated as "Selectable/Not Funded" which meant that it was ranked high enough to be selectable, but that it was not within the top 30 proposals and therefore there was no funding available. The agency notified PredictiveIQ that the agency reserved the option to retain the proposal for 180 calendar days. The agency explained that further SBIR funding was not anticipated for additional awards, but that if another Air Force organization or DOD agency expressed interest in the proposal PredictiveIQ would be notified. AR, Tab 9, First Notice of Non-Selection. On January 30, PredictiveIQ protested the decision not to fund its proposal to our Office. In response, the agency agreed to take corrective action by re-evaluating the proposal and determining if it should be funded. AR, Tab 12, Notice of Corrective Action. GAO dismissed the protest since the agency's corrective action rendered it academic. *PredictiveIQ LLC,* B-421436, Feb. 16, 2023 (unpublished).

A new peer reviewer was appointed to reevaluate PredictiveIQ's proposal without regard to the prior evaluation. COS at 13; AR, Tab 11, Corrective Action Memorandum. The new peer reviewer rated the proposal marginal for commercialization potential and defense need, and acceptable for technical approach. AR, Tab 13, Final Technical Evaluation. PredictiveIQ's proposal was now ranked 124 of the 137 proposals that were rated. CO Declaration, May 22, 2023, at 5 n.1. On March 22, the agency notified the protester that its proposal was evaluated as "Not Selected." This notice did not contain the same language as the prior one regarding the agency retaining the protester's proposal for 180 days or notifying PredictiveIQ if another organization or agency was

[5] There is no formal source selection authority as this is not a Federal Acquisition Regulation 15 procurement. *Id.*

[6] The proposal was submitted by Front End Analytics, LLC, which subsequently changed its name to PredictiveIQ LLC. Protest at 1.

interested in the proposal. After being notified that its proposal would not be funded PredictiveIQ submitted this protest.

DISCUSSION

PredictiveIQ protests that the ratings the agency assigned to its proposal in the final evaluation significantly departed from the ratings that were assigned during the first evaluation.[7] The protester asserts that the agency is required, but has failed, to provide a rational explanation for the difference in ratings.[8] The protester also complains that the agency unreasonably assigned ratings of marginal to its proposal under the commercialization potential and defense need factors.[9] As discussed below, we deny the protest.[10]

Competitive prejudice is an essential element of every viable protest. *CBF Partners JV, LLC*, B-419846.2 *et al.*, Dec. 14, 2021, 2022 CPD ¶ 10 at 13. Where the protester fails to demonstrate that, but for the agency's actions, it would have a substantial chance of

---

[7] The evaluation record consists primarily of the technical evaluation report, which contains the findings of the peer reviewer that evaluated the proposals. AR, Tab 13, Final Technical Evaluation; Tab 8, First Evaluation of Proposal. The agency has also provided responses to the protest elaborating on the technical evaluation, which we find consistent with the contemporaneous record. COS/MOL; AR, Tab 13, Final Technical Evaluation, Peer Reviewer Declaration, May 22, 2023; CO Declaration, May 22, 2023; Response to Third RFI, .

[8] GAO has found that under certain unique circumstances an agency is obligated to explain the reasons why an evaluation changed during corrective action. *See eAlliant, LLC*, B-407332.6, B-407332.10, Jan. 15, 2015, 2015 CPD ¶ 229 at 10. In *eAlliant, LLC*, we found that where an SSA was personally involved with reviewing proposals and affirmed specific conclusions about an offeror's proposal, and the record provided no other explanation for the difference in ratings, the SSA was obligated to reconcile or explain in the award decision why that evaluation differed so starkly from prior evaluation conclusions she had personally affirmed. *Id.* at 11-12. We do not address whether our decision in *eAlliant* is relevant here since we conclude that even if it is, PredictiveIQ was not prejudiced by the agency's failure to reconcile the evaluations of PredictiveIQ's proposal that took place before and after corrective action.

[9] PredictiveIQ also protested that the agency provided some offerors with information that was not provided to the protester. The agency denied this allegation in its report, and in its comments responding to the report the protester did not dispute the agency's position. We therefore consider this argument abandoned. *See South Dade Air Conditioning and Refrigeration, Inc.*, B-421406, Apr. 25, 2023, 2023 CPD ¶ 106 at 4 n.5.

[10] PredictiveIQ raises multiple collateral arguments. While our decision does not address each argument, we have reviewed them all and find no basis to sustain the protest.

receiving an award, there is no basis for finding prejudice, and our Office will not sustain the protest. *Id.* In this regard, our Office will not sustain a protest where the possibility of prejudice is remote. *See The Arcanum Group, Inc.*, B-413682.3, B-412683.5, Aug. 14, 2017, 2017 CPD ¶ 335 at 11.

Here, as discussed above, the agency had funds available for 30 proposals. In response to the protest, the agency produced a spreadsheet that showed the ratings and rankings for each of the proposals submitted. *See* AR, Tab 19, Proposal Rankings. That spreadsheet showed that the top 23 proposals received ratings of excellent for all three factors, and that the proposals ranked 24-42 received ratings of excellent on at least two factors and a rating of good for the third factor.[11] The proposal ranked 43 was the first proposal not to receive ratings of excellent for at least two factors. The proposal ranked 45 received ratings of excellent for two factors and acceptable for the remaining factor.

After the first evaluation PredictiveIQ's proposal was rated good for commercialization potential, acceptable for defense need, and excellent for technical approach. The proposal was ranked 80 out of 137 proposals that were evaluated. After the final evaluation, PredictiveIQ's proposal was rated marginal for the commercialization and defense need factors, and acceptable for the technical approach factor; the proposal was ranked 124 of the 137 proposals that were evaluated. If GAO agreed that the agency was required to reconcile the ratings from the first and final evaluations, at best, PredictiveIQ's ranking would return to its prior ranking of 80, and still would not be not among the top 30 proposals that the agency funded.

In addition, if GAO sustained PredictiveIQ's challenge to the evaluation of its proposal under the commercialization and defense need factors (PredictiveIQ has not challenged the evaluation of its proposal as acceptable under the technical approach factor),[12] and

[11] The three evaluation factors were of equal importance. CSO at 49. The 45th ranked proposal received a rating of acceptable under the defense need factor, and excellent under each of the commercialization potential and technical approach factors. AR, Tab 19, Proposal Rankings. Whether PredictiveIQ's proposal would be ranked 45th or 46th would depend on whether the protester displaced the 45th ranked proposal.

[12] PredictiveIQ's protest did not challenge the agency's evaluation of its proposal under the technical approach factor. See Protest at 9-18. Nor is there any challenge to the substantive evaluation of its proposal under the technical approach factor in any other document that the protester submitted. On June 9, PredictiveIQ submitted comments responding to an agency submission regarding whether the protester's proposal was selectable in which PredictiveIQ claimed that it challenged the agency's evaluation of the technical approach factor. Comments on Agency June 9 Submission at 2-3. In that filing, PredictiveIQ points to the statement, "The agency's unreasonable and irrational evaluation . . . under the Technical, Defense Need, and Commercialization factors. . . ."

found that PredictiveIQ should have received ratings of excellent for these two factors, at best, the proposal would be ranked 45 or 46, and would not be among the top 30 proposals that the agency funded.[13] *See* AR, Tab 19, Proposal Rankings. Accordingly, under either scenario, the protester would still be ranked well below the top 30 proposals and therefore the protester has not demonstrated it was prejudiced, *i.e.*, that it had a substantial chance of receiving an award.[14]

PredictiveIQ notes that after the first evaluation, the agency informed PredictiveIQ that the agency would hold its proposal for 180 days in the event additional funding becomes available or another Air Force organization or DOD agency is interested in pursuing an award to PredictiveIQ.[15] PredictiveIQ asserts that it is competitively prejudiced because it will have a better chance of receiving an award under one or both of these circumstances if its proposal is ranked higher. We do not view either of these possibilities as evidencing that PredictiveIQ was competitively prejudiced, that is, that there is a substantial chance that PredictiveIQ's proposal will be funded if GAO concludes that the agency should have reconciled the first and final evaluations or unreasonably evaluated its proposal under the commercialization potential and defense need factors. PredictiveIQ has not demonstrated how a higher ranking that was still

---

Id. This conclusory statement does not constitute a protest of the technical approach factor.

[13] PredictiveIQ also complained that the evaluator was not provided with the definitions used to evaluate its proposal. To the extent PredictiveIQ believes these definitions should have been included in the CSO its protest concerns an alleged apparent solicitation impropriety and is untimely since it was filed after the due date for proposals. *See* 4 C.F.R. § 21.2(a)(1). To the extent PredictiveIQ is challenging the agency's internal SBIR evaluation guidance or policy, our Office does not review allegations that an agency's evaluation did not comply with internal agency evaluation guidance or policies that are not contained in the terms of the solicitation or mandatory procurement regulations. *See General Dynamics Information Technology, Inc.*, B-421290, B-421290.2, Mar. 1, 2023, 2023 CPD ¶ 60 at 15-16.

[14] We also note in this regard that the agency assigned point scores to the ratings. Excellent was worth 33 points and acceptable was worth 17 points. AR, Tab 19, Proposal Rankings. If PredictiveIQ was rated excellent for both the commercialization potential and defense need factors and acceptable for the technical approach factor, its score would be 83 points. The proposals ranked 1 through 23 all had a score of 99 while the proposals ranked 24 through 42 had a score of 91 points. *Id.*

[15] There was some confusion in the record as to whether following the final evaluation PredictiveIQ's proposal was considered selectable/not funded or not selectable. The agency explained that the proposal was selectable/not funded after the reevaluation. *See* COS Declaration, June 8, at 3, 4; AR, Tab 19, Evaluation Rankings.

below 30, would necessarily increase the chances of additional funding becoming available or an Air Force organization or DOD agency showing interest in PredictiveIQ's proposal.

The agency notified PredictiveIQ in its first notice of non-selection that it did not expect to make additional awards because it did not anticipate receiving additional SBIR funds. First Notice of Non-Selection. In response to this protest, the agency has confirmed that it does not expect to receive funding to make additional awards under this CSO, and the protester has provided no information that would lead us to question the agency on this point.[16] Response to Seventh RFI. The agency has also confirmed that it does not plan to make more than 30 awards in response to the orbital prime topic. Agency Response to Eighth RFI at 2.

PredictiveIQ also asserts that it is competitively prejudiced because of the language in the first notice of non-selection that another Air Force organization or DOD agency might be interested in funding its proposal. The agency explains that it included the statement regarding potential interest of another Air Force organization or DOD agency in its notice to PredictiveIQ because it is standard practice to do so. COS Declaration, June 8, 2023 at 5. The Air Force points out that PredictiveIQ submitted its proposal for the orbital prime topic. *See* Protester Proposal at 2. The agency explains that orbital prime is a mission specific to the U.S. Space Force. COS Declaration, June 8, 2023 at 4; CSO at 58. The agency also states that it does not know of any other DOD agency that has an orbital prime mission. COS Declaration, June 8, 2023 at 5. The agency therefore asserts that it is inconceivable that some Air Force organization other than the U.S. Space Force would consider an award to PredictiveIQ based on a proposal submitted in support of the orbital prime mission. *Id.* at 4.

[16] The protester asserts that the agency's statement regarding funding appears inconsistent with an earlier statement that the agency made in a declaration submitted to the United States Court of Federal Claims (COFC). The protester filed suit at COFC for a preliminary injunction to order the Air Force to stay performance of all awards made pursuant to the Orbital Prime CSO. In response, the agency argued that the protester would not suffer harm if the agency did not stay performance of all orders because if the protest was sustained at GAO, and upon re-evaluation the ranking of the protester's proposal moved into the top 30, funding would be made available for an award to PredictiveIQ. ECF 21-2, Memo for Record, at 3. The agency explains, and we agree, that this statement is not inconsistent with the agency's statement in this protest that it did not expect additional funding would be made available in the normal course of business for some or all of the proposals that were submitted in response to the current CSO, and not ranked in the top 30. Agency Resp. to Eighth RFI at 2. The agency has also confirmed that it does not plan to make more than 30 awards in response to the orbital prime topic. *Id.* As noted above, even if the protester's proposal received ratings of excellent for the commercialization potential and defense need factors, it would still be ranked below the top 30 proposals.

We find that PredictiveIQ has not demonstrated that if its proposal was ranked higher, it would have a substantial chance of receiving an award from another Air Force organization or DOD agency. PredictiveIQ asserts that its proposal included a memorandum signed by a member of the Air Force Research Lab expressing interest in its proposal, which is a different organization than the U.S. Space Force. *See* AR, Tab 7, Protester Proposal at 96-99. The protester contends that this demonstrates that an agency other than the U.S. Space Force could be interested in its proposal.
In the cited memorandum, however, the Air Force Research Lab is not identified as the end user and is therefore not an organization that would be interested in funding the protester's proposal for its own use. Rather, the memorandum makes clear the U.S. Space Force would be the end user. *See id*. at 99.

Notably, the member of the Air Force Research Lab that signed the memorandum as a potential customer specifically noted that his role was to facilitate transition to the end user, the U.S. Space Force, and to the next generation of U.S. Space Force Systems. *Id.* Consistent with this note, a member of the U.S. Space Force signed the memorandum as an end user. *Id.* In its proposal, PredictiveIQ also identified the U.S. Space Force as the end user. *See* AR, Tab 7, Protester Proposal at 21. Thus, PredictiveIQ has neither disputed the agency's position that orbital prime is a Space Force-specific mission, nor demonstrated that any Air Force organization other than the U.S. Space Force or any DOD agency would be interested in the orbital prime topic or the subject of its proposal which relates to the orbital prime topic. Accordingly, even if the agency should have rated the protester's proposal higher under the commercialization potential and defense need factors, PredictiveIQ has not established a reasonable possibility that it was competitively prejudiced by any such error.

The protest is denied.

Edda Emmanuelli Perez
General Counsel