

N. Gilhooly



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** KOR Electronics, Inc.

**File:** B-238484

**Date:** April 5, 1990

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Sidney R. Kuperberg, Esq., for the protester.  
Karl J. Abert, Esq., for Hughes Aircraft Company, an interested party.  
Douglas P. Larson, Jr., Esq., and Charles J. McManus, Esq., Office of the General Counsel, Department of the Navy, for the agency.  
Kathleen A. Gilhooly, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest based upon protester's knowledge of allegedly improper and allegedly prejudicial best and final offer request to competitor is untimely where filed more than 10 days after protester learns of contents of request.

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### DECISION

KOR Electronics, Inc., protests the award of a contract to Hughes Aircraft Company under request for proposals (RFP) No. N00123-89-R-0714, issued by the Naval Regional Contracting Detachment, Long Beach, California, for a coherent technique generator. KOR contends that improper discussions were conducted with Hughes. KOR also contends that it had been awarded the contract under the RFP and this award has been improperly rescinded.

We dismiss the protest.

The RFP, which was issued on June 16, 1989, advised that award would be made to the technically acceptable low offeror. By the August 1 deadline for submission of initial proposals, the Navy received four proposals. Only KOR and Hughes were included in the competitive range. After conducting discussions with KOR and Hughes, the Navy, requested that best and final offers (BAFO) be submitted by November 14. On November 1, KOR notified the Navy that it had received the October 30 BAFO request letter addressed to

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Hughes. KOR returned that letter to the Navy, but kept a copy.

On December 4, the Navy contract specialist telephoned KOR to advise KOR that it had received the award at that time as the low-priced acceptable offeror. The contract specialist provided KOR a contract number and its effective date. On that date, the Navy also sent a letter to KOR referencing the contract number and explaining the Value Engineering Change Proposal (VECP) program, and advised Hughes it was unsuccessful.

Hughes telephoned the contract specialist on December 7, questioning why it did not receive the award since its offered price was lower than KOR's. The negotiator reviewed Hughes' BAFO and discovered Hughes proposed a price reduction, which had been overlooked by the Navy and which resulted in Hughes' offered price being \$169,998 less than KOR's price. The Navy notified KOR on December 8 that the information regarding the award that was conveyed on December 4 was mistaken; that no contract award had been made; and that KOR should disregard the December 4 VECP letter.

On December 11, the Navy received a telecopied letter from KOR dated December 8 contending that the award to KOR be honored. The contracting officer responded by telecopy on December 14, reiterating its position that no award had occurred since no written contract had been executed, and that the solicitation was "still in the preaward process." Hughes was awarded a contract under this solicitation on January 19, 1990, and KOR protested the award to our Office on February 1.

KOR contends that the October 30 BAFO letter addressed to Hughes contained improper instructions advising Hughes of the specific areas and range by which its proposed design exceeded the government's basic requirements. KOR claims this resulted in the government improperly suggesting to Hughes to submit a price reduction on those particular design areas. According to KOR, the October 30 BAFO letter can be viewed as "reverse" technical leveling which precluded KOR from a fair and equitable evaluation.

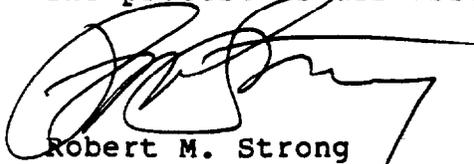
We will not consider this basis of protest since it is untimely raised. Our Bid Protest Regulations require that protests based on other than apparent solicitation improprieties be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1989);

Advanced Sys. Tech., Inc., B-235327, Aug. 29, 1989, 89-2 CPD ¶ 184. KOR was aware of the BAFO instructions to Hughes by November 1, when it notified the Navy that it had received a BAFO letter addressed to Hughes. However, KOR raised no questions at that time, but continued to participate in the procurement, only protesting on February 1, 1990, 2 weeks after the award to Hughes. Although KOR argues that it did not know what effect the BAFO instructions would have until award was made and therefore was entitled to wait to protest until after the contract was awarded, KOR's protest concerns the alleged impropriety of the instructions to the awardee, of which KOR was fully cognizant, and of the possibility of their prejudicial effect on the evaluation. Compare ACR Indus. Inc., B-235465, Aug. 31, 1989, 89-2 CPD ¶ 199, and Raytheon Ocean Sys. Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134 (where protests of the content of discussions filed within 10 working days of award were found timely, because the protesters were not aware of the content of discussions with the awardee and the protests were based upon facts arising out of the award itself). Therefore, KOR was required to file a protest within 10 working days of that date since it thought the Hughes BAFO instructions were improper.

KOR also contends that contract award to it was effective November 30, as evidenced by the contract specialist's December 4 telephone call advising KOR of the award, the December 4 letter from the Navy stating "Contract N00123-90-C-0238 with your firm provides for the submission of Value Engineering Change Proposals," and telephone calls from the technical office allegedly requesting KOR's immediate contract performance.

KOR's contention that it was awarded a contract is also untimely raised. The record indicates that KOR received the December 14 telecopy from the Navy stating that "the Government's position is that no award has been made" on that date. Since KOR did not protest to our Office until February 1, well beyond the 10-day period provided for in our Regulations, its protest on this basis is also untimely and will not be considered.

The protest is dismissed.



Robert M. Strong  
Associate General Counsel