



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Loral Defense Systems--Arizona

File: B-240537

Date: November 16, 1990

James F. Price, Esq., and Alvin A. Simon, Esq., for the protester.

C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester offered cost-sharing arrangement for equipment in its alternate cost proposal that was not permitted by solicitation, protester was on constructive notice that agency would not consider its alternate cost proposal when agency issued request for best and final offers (BAFO) that did not provide other offerors the opportunity to propose cost-sharing or similar arrangements, and protest filed several weeks after request for and receipt of BAFOs is untimely.

DECISION

Loral Defense Systems--Arizona protests the award of a contract under a classified solicitation. The protester objects to the agency's failure to consider an alternate cost proposal that it submitted or to advise the protester during discussions that it would not consider that proposal.

We dismiss the protest.

On April 2, 1990, the agency issued a request for proposals (RFP) for a cost-plus-incentive-fee (CPIF) contract for certain complex computerized processing equipment, tailored for use in a classified, special access program. The solicitation required that title to the equipment pass to the agency, with delivery in place for use in performing additional tasking under the contract.

On May 21, Loral submitted two cost proposals with its technical and management proposals. One cost proposal offered the CPIF arrangement that the solicitation requested, and its alternate proposal offered a cost-sharing arrangement, by

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which the protester would retain title in the equipment and loan it to the agency for use in the program. Under the alternate proposal, the protester offered the agency an option to purchase the equipment "for an amount equal to actual cost incurred."1/

The agency evaluated both Loral proposals; not only did the evaluators find that a cost-sharing arrangement would not meet the agency's needs, but their cost calculations, using the protester's apparent cost of \$6 million for the equipment, indicated that a cost-sharing arrangement would cost \$1.5 million more than award to the other competing offeror, if as anticipated the agency did purchase the equipment. In its discussion questions, the agency did not address the protester's alternate proposal, but it did advise the protester that the agency would make the selection "on the basis of the criteria set forth in the RFP without further discussions." On June 14, the agency requested best and final offers (BAFO), without having amended the solicitation to permit the cost-sharing arrangement (or a similar arrangement) proposed by Loral in its alternate proposal.

On July 10, the agency awarded the contract to another firm in an estimated amount of \$13.8 million, \$4 million less than the protester's compliant proposal and \$4.5 million more than its cost-sharing offer, exclusive of equipment costs. This protest followed on July 23.

The protester argues that under other solicitations, the agency had agreed to cost-sharing contracts involving a departure from stated solicitation requirements and contends that its alternate proposal was most advantageous to the agency and would in fact cost less than the awardee's. The protester contends that by failing to advise the protester during discussions that its alternate proposal was unacceptable, the agency deprived Loral of a meaningful opportunity to compete for award. The protester argues that if the agency had conducted discussions, it would have clarified its intention to offer the equipment at its depreciated value (rather than actual cost), making its offer much lower in price than the awardee's.

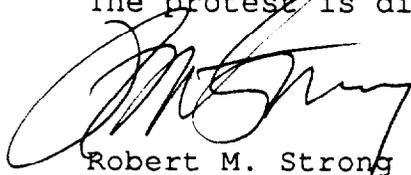
We find that the protest is untimely. The protester acknowledges that its alternate proposal constituted a departure from the stated solicitation requirements. Under Federal Acquisition Regulation § 15.606(c) (FAC 84-16), if the

1/ The protester also used the phrase "at Loral's cost." The record shows that the protester knew that its alternate cost proposal involved a material departure from stated solicitation terms.

proposal considered most advantageous to the government involves a departure from the stated requirements, the contracting officer shall provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements. See Sperry Marine, Inc. et al., B-227106 et al., Sept. 14, 1987, 87-2 CPD ¶ 241. We therefore believe that, as an experienced contractor, the protester knew or should have known that the agency would not consider its alternate cost-sharing offer when the agency requested BAFOs without providing all offerors, by amendment, the opportunity to propose cost-sharing or similar arrangements.^{2/}

Under our Bid Protest Regulations, 4 C.F.R. §§ 21.2(a) (1) and (2) (1990), protests based on improprieties that are incorporated into a solicitation after the receipt of initial proposals must be filed not later than the next closing date for receipt of proposals; in other cases, protests must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. Loral's protest, filed on July 23, more than 5 weeks after the agency issued its request for BAFOs and a month after the agency received BAFOs on June 21, without the agency having issued an amendment to permit offerors to propose alternate cost-sharing arrangements, is therefore untimely.

The protest is dismissed.



Robert M. Strong
Associate General Counsel

^{2/} The protester also argues that only the source selection official, not the contracting officer, had the authority under Air Force regulations to eliminate its proposal from the competitive range. The record here shows that the evaluators did inform the source selection official of the alternate proposal and their conclusions, and that the official showed no interest in pursuing the matter further.