DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218600 **DATE:** July 19, 1985

MATTER OF: Lanier GmbH

DIGEST:

1. Protester's allegation, that it submitted late proposals based on oral advice that the solicitation's requirements were changed, provides no basis for consideration of the proposals where the advice was not given by a procurement official with authority to change the solicitation requirements and the solicitation expressly warned that oral advice would not be binding.

2. Fact that a firm submits a pre-closing-date protest alleging unduly restrictive specifications does not preserve for that firm the right to submit a proposal after the closing date for receipt of proposals, except to the extent GAO may recommend reopening competition to include the firm.

Lanier GmbH protests the rejection of two proposals it submitted in response to the Department of the Air Force's (Air Force) request for proposals (RFP) No. F61546-84-R-0406. Lanier submitted the proposals after the closing date for receipt of initial proposals, but contends that it was responding to changed requirements and that it had preserved the right to submit a proposal by previously protesting allegedly restrictive specifications.

The protest is denied.

The RFP, for word processing equipment, was issued on May 18, 1984, and the closing date for the receipt of proposals was August 10, 1984. Lanier did not submit a proposal by the August 10 deadline, but, on August 8, did submit a protest to this Office alleging that the specifications unduly restricted competition. While the protest included challenges to many of the RFP's requirements, only one requirement, contained in the contracting officer's written responses to questions posed by potential offerors,

is germane to the current protest. That requirement is that the word processing system's primary data processors must have 512 kilobytes (KB) of memory regardless of whether the word processing equipment is engaged in a shared logic system (having one central data processor) or a distributed logic system (utilizing interconnected processors where each has its own memory). Lanier, interested in offering a distributed logic system, argued that the Air Force had not shown any reason why a distributed logic system having an aggregate memory of 512 KB, instead of 512 KB for each processor as required by the RFP, would not meet the agency's needs as well as a shared logic system having one central processor with a memory of 512 KB.

Lanier alleges that during a bid protest conference at this Office on February 7, 1985, regarding Lanier's initial protest, the Air Force counsel told Lanier to ignore the contracting officer's response that 512 KB of memory was required for each primary processor of a distributed processing system. Lanier asserts that it therefore assumed the requirement was deleted and Lanier would have the opportunity to submit a proposal under the Air Force's changed requirements.

Lanier submitted proposals to the Air Force on April 3 and 10. The Air Force rejected the proposals because they were late and because they did not meet any of the circumstances set forth in the RFP permitting the consideration of late proposals.

This Office subsequently issued a decision regarding Lanier's initial protest. Lanier GmbH, B-216038, May 10, 1985, 85-1 C.P.D. ¶ 523. While we agreed that the Air Force had not provided any rationale for requiring each primary data processor to have 512 KB of memory, we did not recommend corrective action with respect to Lanier, because we denied in part and dismissed in part all of Lanier's challenges to the other specifications, and Lanier had provided us with no reason to believe that the 512-KB requirement alone prevented it from competing. We therefore recommended only that the Air Force reevaluate the need for the 512-KB requirement for future procurements.

Lanier argues that the Air Force should be required to cancel the RFP and resolicit proposals, or to accept Lanier's proposal, since the Air Force allegedly changed its

requirements. In Lanier's view, its position is bolstered by the fact that our initial decision questioned the 512-KB requirement. Lanier also asserts that by protesting allegedly restrictive specifications before the August 10 closing date for the receipt of proposals, the protester preserved its right to submit a proposal at a later date.

We find no merit to Lanier's contentions. There is no legal basis for the protester's argument that it submitted its proposal in response to changed requirements. Even assuming that the Air Force counsel told Lanier at the bid protest conference to ignore the requirement for 512 KB of memory, which the Air Force denies, the Air Force counsel was not authorized to change the RFP. It is well established that the government cannot be bound beyond the scope of the actual authority conferred upon its agents. E.g., DBA Systems, Inc.--Reconsideration, B-212101.2, Aug. 23, 1983, 83-2 C.P.D. ¶ 244. Further, the RFP expressly advised offerors that oral explanations would not be binding. Our Office has held on numerous occasions that offerors rely on oral explanations of solicitation requirements at their own risk where the solicitation contains such advice. E.g. Eastern Marine, Inc., B-213945, Mar. 23, 1984, 84-1 C.P.D. ¶ 343. At best, the statements attributed to the counsel might constitute an admission that the 512-KB requirement exceeded the agency's actual needs, the only legal effect of which would be as evidence in the initial protest.

We therefore view Lanier's proposals as having been submitted in response to the original RFP. Applicable procurement regulations provide that any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered except as provided under the solicitation's standard "Late Submissions, Modifications, and Withdrawals of Proposals" clause. Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.412 (1984), referencing the standard clause at FAR, 48 C.F.R. § 52.215-10. The RFP's late proposal clause (which actually was a predecessor clause to the cited FAR clause, but contained the same provisions) provided that a late proposal would not be considered unless it was sent by registered or certified mail at least 5 days before the specified due date, it was received late due solely to government mishandling after receipt at the government installation, or it was the only proposal received. Lanier does not even argue that its late proposals meet any of these conditions.

The general rule is that late proposals may be considered only under the conditions stated in the solicitation, and that offerors otherwise are responsible for delivering proposals to the designated place at the designated time. E.g., Chemical Waste Management, Inc., B-215382, Sept. 10, 1984, 84-2 C.P.D. ¶ 274. Since Lanier's proposals were filed after the closing date for receipt of proposals and do not meet any of the circumstances listed in the RFP as permitting the consideration of late proposals, the Air Force properly rejected them.

The protester's argument that by filing a protest, alleging unduly restrictive specifications, it preserved the right to submit a proposal is without merit. Adoption of the protester's position would render the late proposal rules practically meaningless since those rules could be avoided merely by filing a protest.

We have recognized that some solicitation defects may preclude a potential offeror from competing, and that if the offeror desires to preserve its right to compete under a corrected solicitation, it must show: (1) that the defects were so material that the offeror was reasonably deterred or prevented from submitting a competitive offer; and (2) that correcting the defects would allow the offeror to submit a competitive offer. PRC Government Information Systems, division of Planning Research Corp., 61 Comp. Gen. 614 (1982), 82-2 C.P.D. ¶ 261. The cited language concerns the burden of proof necessary to prevail on the merits of a protest filed in accordance with our Bid Protest Regulations, 4 C.F.R. part 21 (1985). As a remedy for a meritorious protest, this Office can recommend that the contracting agency recompete its requirements or issue a new solicitation. See Bid Protest Regulations, 4 C.F.R. § 21.6(a). Short of obtaining such a remedy, however, a protester has no right to enter the competition except in accordance with the same rules as any potential offeror.

On this point, we emphasize that Lanier filed a protest alleging that the RFP's specifications were defective and failed to prevail on the merits. While we did recommend that the Air Force consider whether the requirement for 512 KB of memory overstated its needs, we expressly held that even if the Air Force determined that the requirement was defective, there was no reason to believe that this defect alone prevented Lanier from competing and, therefore,

conducting a new competition to include the firm would not be warranted. Lanier GmbH, B-216038, supra. If Lanier took exception to our recommendation, it was incumbent upon Lanier to request reconsideration of our prior decision, see Bid Protest Regulations, 4 C.F.R. § 21.12, which Lanier never did.

Only in conjunction with the current protest did Lanier raise the argument that its late proposals should be considered based on its having previously protested the unduly restrictive nature of the 512-KB requirement, and Lanier did not submit that argument until June 6. Therefore, even if we construed the June 6 submission as a request for reconsideration of our prior decision, dated May 10, the request would be untimely since it was not filed within 10 working days after the basis for reconsideration was known or should have been known, as required by our Bid Protest Regulations. 4 C.F.R. § 21.12(b); Marker-Modell Associates--Reconsideration, B-215049.2, July 26, 1984, 84-2 C.P.D. ¶ 117 (applying a presumption that the protester received our decision within 1 calendar week of its issuance where the date of actual receipt is unknown).

The protest is denied.

Harry R. Van Cleve
General Counsel