



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Allied-Signal Aerospace Company

File: B-240938.2

Date: January 18, 1991

Karen F. Botterud, Esq., for the protester.

John J. Nichols, Esq., for Motorola Inc., an interested party.

Lt. Col. William J. Holland, Department of Air Force, for the agency.

John W. Van Schaik, Esq., and John G. Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where it is not clear from solicitation that agency was required to make multiple awards, protester that claims it should have been entitled to one of two awards was not prejudiced by failure to award multiple contracts because even if solicitation required multiple awards, agency's only obligation when it decided that a single award would meet its needs was to amend solicitation to permit a single award and it is unlikely that protester would have been in line for single award under amended solicitation.

2. Protest allegation raised for first time in comments on agency report must independently satisfy timeliness requirements.

DECISION

Allied-Signal Aerospace Company, Bendix Communications Division protests the award of a contract to Motorola Inc. and the failure to award a contract to it under request for proposals (RFP) No. F08635-90-R-0039, issued by the Air Force for a research and development effort to provide an updated compatible ordnance package for the AIM-120 Advanced Medium Range Air-to-Air Missile and the Advanced Air-to-Air Missile.

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

The solicitation stated that the ordnance package development effort is to include three phases under a cost-plus-incentive-fee contract. Phase I will consist of a study of the

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programmable ordnance package requirements of the two missiles, development of an ordnance plan concept and program plan and formulation of an initial design for the new ordnance package subsystem. Phases II and III, which are options under the initial contract, will consist of testing, further design and fabrication of an actual programmable ordnance package.

The solicitation stated that "[t]he Government contemplates award of multiple contracts for Programmable Ordnance Technology with a down select after Phase I to a single contract for the remainder of the effort. In the event that only one (1) acceptable proposal is received, the Government reserves the right to make a single award." Awards were to be made to the offeror or offerors that could accomplish the requirements in a manner most advantageous to the government, considering cost and other listed technical evaluation factors. The solicitation reserved the right to make award to other than the low cost offeror. Along with a list of technical evaluation factors, which were to be considered more important than cost, the solicitation also stated that the agency would evaluate proposal and performance risk.

Four firms submitted proposals. After evaluating them, the agency included all four in the competitive range, held discussions and requested best and final offers (BAFO) from each firm. Motorola was ranked first technically; the protester was ranked third. Based on the final evaluation of the BAFOs, the agency source selection authority (SSA) decided to award a single contract to Motorola at an estimated cost-plus-incentive-fee of \$13,179,094. This figure represented the estimated cost of all three phases. The SSA's selection decision states that while all of the proposals were adequate, Motorola's provided the best overall value. According to the SSA, Motorola offered the most comprehensive approach, with superior warhead and safe, arm and fire design capabilities. Although the total cost of Motorola's offer was not the lowest of the four competitive range offerors, the SSA stated that the additional cost of an award to Motorola was offset by the superior characteristics of Motorola's approach, its low technical risk and its excellent past performance record. The Air Force states that while multiple awards were permitted under the solicitation, only a single award was made because funding constraints did not permit multiple awards.

Allied-Signal's principal contention is that the solicitation required the Air Force to make multiple awards unless only a single acceptable proposal was submitted and therefore the

single award to Motorola was inconsistent with the solicitation since more than one proposal was technically acceptable. The protester notes that the solicitation stated that the government "contemplates award of multiple contracts" and in the following sentence, the RFP reserved the right to make a single award if only one proposal was acceptable. According to Allied-Signal, the word "contemplates" in this context is mandatory since the RFP stated only one situation under which a single award would be allowed and did not otherwise reserve the right to make a single award. The protester also argues that award of more than one contract would be consistent with the purpose of the project and the agency's conduct throughout the procurement. The protester refers to an Air Force document titled "Programmable Ordnance Technology" which states that the agency's objective in this research and development effort was to explore alternative technologies under multiple contracts in the first phase of the program in order to obtain a variety of designs and to allow competition for the second phase.

It is not clear that the protester's interpretation of the RFP is correct. On the one hand, the government's clear intention was to award more than one contract, and it only explicitly reserved the right to make a single award only in the situation where one acceptable proposal was received. On the other hand, we have recognized that even where an RFP specifically states an intention to award two contracts, the agency is not required to do so where the outcome of proposal evaluation dictates that only one contract should be awarded. See Goodyear Aerospace Corp., B-202722, July 24, 1981, 81-2 CPD ¶ 59. Moreover, solicitation award provisions generally must be read in the context of available funding--regardless of an agency's intention, it cannot, in making contract awards, exceed the funds available. See, e.g., Alcon Div. of Boyles Brothers Drilling Co., B-241058, Jan. 16, 1991, 91-1 CPD ¶ ____.

We need not decide whether the protester's interpretation of the RFP is correct, however, because even if it is, the protester would not prevail here. If we assume that the RFP required multiple awards, the agency's obligation, upon determining that it could make only one award, would have been to amend the RFP appropriately and request new BAFOs. Federal Acquisition Regulation (FAR) § 15.606; Essex Electro Eng'rs, Inc., B-238207; B-238207.2, May 1, 1990, 90-1 CPD ¶ 438. The protester does not suggest, nor does anything else in the record indicate, that in response to an amended RFP the protester would have revised its proposal such that its technical standing would have improved. Thus, under the evaluation criteria it appears unlikely that the protester would have been in line for the single award provided for

under the amended RFP.^{1/} Therefore, we believe the protester would not have been prejudiced by the agency's failure to amend the RFP and we would not sustain the protest on this issue. See Julie Research Laboratories, Inc., B-240885, Dec. 31, 1990, 90-2 CPD ¶ ____; International Transcription Servs., Inc., B-240488, Nov. 28, 1990, 90-2 CPD ¶ 437.

The protester also argues that the funding constraints cited by the Air Force--\$3.4 million for Phase I and \$15.1 million for the entire project--did not prevent multiple awards. For instance, the protester says that multiple Phase I awards to it at \$1,002,111 and the second highest technically rated offeror at \$1,078,421 would not have exceeded the funding limitations.^{2/}

Based on the estimated BAFO costs including incentive fees, we do not agree that multiple awards could have been made within the available funding. The only purpose in awarding multiple contracts was to take advantage of competing ordnance package concepts in Phase I by exercising the Phase II and III options on whichever Phase I contract offered the design that best met the agency's needs. Thus, multiple awards would be reasonable only if the Phase II and III options could be exercised on either of the two competing Phase I contracts within the total available funding. Any other result would defeat the purpose of awarding multiple Phase I contracts.

^{1/} Allied-Signal also argues that it was prejudiced by the agency's actions since it would not have competed under the solicitation had it known that only a single award would be made and it therefore would have saved the costs of preparing its proposal. The agency determined that multiple awards could not be made because of the funding constraints only after the BAFOs were submitted and at that time, when the agency should have issued an amendment, Allied-Signal had already expended whatever costs were involved in preparing its proposal. Under the circumstances, we do not see how the protester was prejudiced by the agency's failure to issue an amendment.

^{2/} Allied also argues that the funding constraints referred to by the Air Force "are simply budgeting tools" and that the Air Force could have obtained additional funds for multiple awards from elsewhere in its budget. We will not review the Air Force's decision to allocate current funds for purposes other than this procurement since that decision depends on the agency's judgment concerning which projects or activities shall receive funding. Tektronix, Inc., B-219981.4, June 12, 1986, 86-1 CPD ¶ 545.

Here, there is no combination of two awards that would permit the Phase II and III options to be exercised on either Phase I contract within the funding limits. Mathematically, as Allied-Signal argues, the Air Force could have awarded Phase I contracts to it and the offeror ranked second technically and then exercised the Phase II and III options on Allied-Signal's contract at an estimated cost-plus-incentive-fee of \$12,460,694 for the entire project (that figure includes all three phases of a contract with Allied-Signal and Phase I of a contract with the other firm). Nonetheless, the second and third phase options could not be exercised on the second ranked offeror's contract because the estimated project cost (all three phases) of an award to that firm was greater than the \$15.1 million total contract funding limit. There would be no purpose in such a multiple award since the funding limitation would not permit the agency to take advantage of whichever of the two Phase I design concepts proved more promising.^{3/}

Thus, within the available funding, no combination of multiple awards was consistent with the purpose of the solicitation which was to allow various Phase I design concepts to compete for the second and third phases. Under the circumstances, and since the RFP evaluation scheme placed a premium on technical merit, the agency's decision to award only a single contract to the highest technically rated offeror was reasonable.

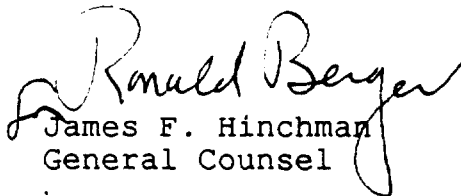
Allied-Signal also argues that the award to Motorola was improper because the agency failed to follow the RFP source selection scheme which made "cost or price a substantial factor in the Source Selection Authority (SSA) decision." Although under the solicitation cost was to be a substantial factor in the selection decision, the RFP also stated that technical quality was more important than cost. Thus, an award based on Motorola's higher cost, but superior technical proposal was consistent with the solicitation so long as the contracting agency reasonably determined that the technical difference was sufficiently significant to outweigh the cost

^{3/} It also would not have been possible to award Phase I contracts to Motorola and Allied-Signal because the cost of those two contracts would have exceeded the funds available for Phase I.

advantage of the lower cost proposals. Midwest Research Inst., B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364. The SSA determined that Motorola's higher cost was "more than offset by the superior characteristics of Motorola's approach, their low technical risk, and their excellent past performance record." The Air Force properly considered cost in the selection decision.^{4/}

Finally, in its comments on the agency's administrative report, for the first time Allied-Signal argued that the score it was given on the warhead subsystem portion of its proposal "may not have been proper." Under our Bid Protest Regulations, a protest must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1990). Where as here, a protester supplements a timely protest with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements. Holmes & Narver, Inc., B-239469.2; B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210. Allied-Signal's allegation regarding the evaluation of its technical proposal is based on evaluation documents given to that firm on October 3 and an Air Force debriefing which it was given on October 12. The protester did not raise this new contention until more than 10 working days later when it filed its comments on the agency report on November 1. Consequently, this issue is untimely and will not be considered.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel

^{4/} The protester argues that the agency should have considered the proposals in the context of the clause set forth at FAR § 52.215-34 which was incorporated into the RFP. That clause states that offers will be evaluated on the basis of the advantages and disadvantages of multiple awards and sets out a figure of \$500 as the cost for administering each contract. This standard form clause, which contemplates a solicitation under which award of various line items is to be made on the basis of price, is not relevant in a solicitation such as this where technical considerations are paramount. In any event, the agency specifically determined that Motorola's higher rated technical proposal justified its higher cost.