

DOCUMENT RESUME

02668 - [A1672669]

[Protest against Location of Contract Performance, Best and Final Notification, Proposal Revision, Type of Contract, and Evaluation Factors]. B-187395. June 8, 1977. 19 pp.

Decision re: Kappa Systems, Inc.; by Robert P. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Systems Consultants, Inc.; Department of the Air Force.

Authority: B-185592 (1976). B-185764 (1976). B-186602 (1976). B-186404 (1976). B-184369 (1977). B-186999 (1977). B-185892 (1976). B-181978 (1974). B-186031 (1976). B-184446 (1976). B-186718 (1976). B-187444 (1976). B-184825 (1975). 4 C.F.R. 20 et seq. A.S.P.R. 3-805.3(d). A.S.P.R. 3-404.7. 53 Comp. Gen. 860. 51 Comp. Gen. 81. 48 Comp. Gen. 536. 50 Comp. Gen. 222. 50 Comp. Gen. 246. 53 Comp. Gen. 593. 55 Comp. Gen. 1151. Aerospace Defense Command Manual 55-4.

A contract award for operations analysis and computer services was protested. Protest that all testing of computer software performance had to be performed onsite was denied; solicitation did not explicitly say so. Objection to lack of best and final notification was rejected. Despite assertion to contrary, protester was informed and had opportunity to revise proposal. Challenges of type of contract (firm-fixed-price) and evaluation factors were untimely. (DJM)

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Gallagher



**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20542

FILE: B-187395

DATE: June 8, 1977

MATTER OF: Kappa Systems, Inc.

**DIGEST:**

1. Protester's contention that RFP required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that proposal, read as whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis.
2. Offeror, aware of problem with agency's request for revised proposals, protested alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest--furnished later at GAO's request--alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantageous to Government," and cannot be properly regarded as entirely separate ground of protest.
3. Where protester alleges it was told or persuaded in oral discussions not to submit revised proposal and agency's account of facts contradicts protester's, protester has failed to affirmatively prove its assertions, and based upon record GAO concludes that protester was informed of and in fact had opportunity to submit revised proposal.
4. Prior to discussions, agency's letter advised offerors of opportunity to submit revised proposals after discussions. Same advice was repeated in oral discussions. Agency failed to fully comply with ASPR § 3-805.3(d) (1976 ed.), because

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there was no subsequent written notification to offerors that discussions were closed and that best and final offers were being requested. However, award will not be disturbed, because protester was advised of and in fact had opportunity to revise proposal, common cutoff date existed, and circumstances of procurement strongly suggested that such opportunity was final chance to revise proposal before agency proceeded with award.

5. Protest after award challenging type of contract contemplated by RFP is untimely, because under GAO Bid Protest Procedures apparent solicitation improprieties must be protested prior to closing date for receipt of proposals. Protester's need to consult with counsel does not operate to extend protest filing time limits, and untimely objection does not raise significant issue under provisions of 4 C.F.R. § 20.2(c) (1976).
6. Where RFP as amended contained detailed statement of evaluation factors and indicated their relative importance, objections made after award that statement was deficient involves apparent solicitation impropriety, and is untimely under GAO Bid Protest Procedures. Protester should have sought clarification from agency prior to closing date for receipt of revised proposals rather than relying on its own assumption as to meaning of evaluation factors. Untimely objection does not raise significant issue under 4 C.F.R. § 20.2(c) (1976).

Kappa Systems, Inc. (Kappa), has protested against the award of a contract to Systems Consultants, Inc. (SCI), under request for proposals (RFP) No. F05604-76-09143, issued by the Department of the Air Force. The \$125,655 contract is for operations analysis and computer programming support services for the Air Force's Ballistic Missile Early Warning System (BMEWS). Kappa seeks a termination for convenience of SCI's contract and a reopening of negotiations or a resolicitation.

Kappa contends (1) that the Air Force should have found SCI's proposal technically unacceptable; (2) that the Air Force failed to properly request best and final offers; (3) that the use of a firm-fixed-price, level of effort type contract was improper; and (4) that the RFP's statement of evaluation factors was deficient. The Air Force and SCI maintain that all of Kappa's contentions are without merit.

I. Acceptability of SCI Proposal

Kappa has contended at length that SCI's proposal was technically unacceptable. The main issue involves the requirement to test certain software modifications, and whether this would be done on-site (i.e., at BMEWS installations in Alaska and Greenland) or "locally" (i.e., off-site, in the vicinity of the procuring activity in Colorado).

Kappa essentially contends that the RFP required all verification testing to be done on-site; that SCI, in contravention of this requirement, proposed to do the testing locally; and that SCI's proposed method is technically impossible to carry out. The Air Force and SCI maintain that each of these arguments is without substance.

The RFP incorporated as mandatory requirements the provisions of Aerospace Defense Command (ADC) Manual 55-4, a publication which deals with management and control of ADC computer programs. Much of the controversy in this case involves two ADC forms included in the Manual which would be used by the contractor during contract performance. One is ADC Form 545, "MODIFICATION PERFORMANCE TEST/PLAN," which contains three signature blocks for Air Force use. The second is ADC Form 546, "MODIFICATION DISCREPANCY REPORT." At the risk of oversimplification, it can be stated that these forms essentially deal with the modifications tested by a contractor, the Air Force's approval of what was going on, and whatever problems were experienced in the testing.

Kappa initially points out that ADC Manual 55-4 required on-site testing. The protester contends that the following excerpts from sections 4.3.8 and 4.3.9 of SCI's proposal clearly indicate that all of SCI's testing would be done off-site, since the Air Force's sign-off on the ADC Forms 545 and 546 would occur prior to the time SCI went on-site:

"4.3.8 Software Production. \* \* \* SCI shall develop the Modification Performance Test Plan (ADC Form 545). A single ADC Form 545 shall be prepared for the combined Task #77-3 and #77-4 software modification. \* \* \* All software debugging and initial software verification shall be performed on the locally available Government HISI 6080 computer system. Upon completion of the above effort, the ADC Form 545s shall be submitted to the Government for approval. As reflected

in Figure 4-2, fifteen calendar days are provided for the Government approval of the individual ADC Form 545a.

"4.3.9 Software Testing. \* \* \* Upon Government approval of the ADC Form 545, SCI shall conduct software testing locally. SCI shall perform testing IAW the approved ADC Form 545, and shall provide all required support to the Government appointed test directors. Modification discrepancies identified during the test period shall be documented on the ADC Form 546, Modification Discrepancy Report. Upon completion of testing, the related ADC Forms 544/545/546 and test results and recommendations shall be submitted to the Government for approval." (Emphasis supplied.)

Kappa further argues that the following language from section 4.3.11 of the SCI proposal shows that SCI's on-site activities involve only installation and training, not testing:

"4.3.11 Software Implementation. \* \* \* SCI will perform on-site installation with the assistance as required from the Government. SCI shall additionally provide training to on-site personnel on modification impact and utilization procedures, and shall brief site personnel on operating procedures which reflect the software modification. One SCI Senior Programmer and one Senior Analyst shall travel to Site I and II for this effort." (Emphasis supplied.)

The protester maintains that its interpretation of the foregoing textual material is confirmed by a chronological flow chart (figure 4-2) contained in the SCI proposal. Figure 4-2 indicates submission of the ADC Forms 545 and 546 in its blocks 6, 7 and 10--prior to SCI's on-site activities reflected in block 13, which states:

"PERFORM ON-SITE IMPLEMENTATION AND PROVIDE OPS TRAINING ON NEW PROCEDURES."

Also, Kappa suggests that SCI offered an inadequate amount of time--10 days--to perform even the limited on-site activities it proposed. Kappa notes that it, as a predecessor contractor with several years' experience in this work, offered 42 days of on-site time.

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Finally, Kappa points out that the BMEWS operations programs are written in a special modified version of the computer language "FAP." The protester contends that there is no off-site capability in existence for adequately simulating, emulating or testing BMEWS software modifications.

The Air Force's February 15, 1977, supplementary report to our Office responded in detail to the protester's allegations. The Air Force's position can be briefly summarized as follows. First, SCI's proposal acknowledged and accepted the provisions of ADC Manual 55-4. The Air Force interpreted sections 4.3.8 and 4.3.9 of the SCI proposal to mean that after initial local testing, SCI would conduct operational testing on-site as required by ADC Manual 55-4.

The ADC Form 545 must be submitted prior to testing; the initial Air Force sign-off indicates only approval of the contractor's test plan. This is what SCI's proposal was interpreted as offering--not that final Air Force approval of the test results would be obtained before going on-site. Also, while submission of ADC Form 546 prior to going on-site is not in accordance with Kappa's past procedures, it is not prohibited by ADC Manual 55-4. ADC Form 546--which does not require Air Force approval--can be submitted at any stage in a two-step testing process, i.e., off-site testing and on-site testing. SCI's two-step testing approach is not in conflict with ADC Manual 55-4.

BMEWS modifications must be extensively tested on-site. SCI agreed to on-site "implementation," which is defined in the RFP as including on-site operational testing.

Final approval of the ADC Forms 545 and 546 cannot be based on local (off-site) simulation testing; however, SCI's proposal was interpreted as calling only for Air Force test plan approval during the off-site phase. Also, the FAP program can only be tested on-site in an operational environment; however, a design concept for a modification can be tested locally. This is what SCI proposed, and in fact Kappa itself indicated local testing of a boosting trajectory modification concept in its technical proposal. For these reasons, SCI offered an acceptable testing and verification approach under ADC Manual 55-4.

Kappa did not respond to the foregoing report.

In addition, for the reasons which follow we see no basis for objection to the Air Force's position. Kappa has not pointed out any provision in the RFP, nor have we found any, which unequivocally

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required that all testing of whatever sort be performed on-site. A requirement important enough to call for rejection of a nonconforming proposal should be explicitly stated in the RFP (48 Comp. Gen. 314, 319 (1968)); the lack of such an explicit requirement in the present RFP is a persuasive indication that none was intended.

We see no basis to conclude that SCI was proposing to do all testing off-site. As noted above, SCI offered software "implementation." The RFP's Statement of Work (SOW) explicitly defined program implementation as involving the installation of computer software modifications including operational testing. Further, as the Air Force has pointed out, ADC Manual 55-4 requires on-site testing and SCI's proposal acknowledged and accepted this directive without exception. While Kappa suggests that SCI's bare acknowledgment of the ADC Manual 55-4 requirements cannot mean very much, we note that RFP section "D," paragraph 3.b.1 (quoted *infra*) indicated that a routine acknowledgment of technical requirements might be all that was expected of offerors.

In addition, as the Air Force and SCI point out, ADC Form 545 clearly provides for more than one "sign-off" by the Air Force. The fact that SCI's proposal contemplated submission of the ADC Form 545 and obtaining Air Force approval before going on-site would not in itself establish that SCI's proposal did not indicate an intent to conduct required operational on-site testing subject to ultimate Air Force approval of the results.

Even if statements in portions of the SCI proposal (such as sections 4.3.8, 4.3.9, *supra*) raised questions as to whether SCI was proposing only off-site testing, we believe that reading these statements together with the remainder of the proposal (i.e., reading the proposal as a whole) reasonably supports the interpretation of the proposal arrived at by the Air Force.

In view of the foregoing, the decisions cited by Kappa for the proposition that a protest should be sustained where the selected proposal fails to comply with a material RFP requirement (for example, Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358; affirmed C3, Inc., et al., B-185592, August 5, 1976, 76-2 CPD 128) are not in point.

Lastly, Kappa's argument that it is technically impossible to satisfactorily conduct off-site testing is basically answered by the fact that SCI did not propose to conduct all testing off-site.

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As the agency has pointed out, SCI's proposal was interpreted as offering a two-step testing procedure, with final operational testing on-site. The impossibility of this procedure is not established by Kappa's argument that there is no adequate off-site capability to test FAP modifications. As for the protester's argument concerning the amount of time SCI plans to spend on-site, Kappa has cited a number of decisions to the effect that our Office will object to the results of an agency's technical evaluation where they are clearly shown to be without a reasonable basis (for example, Rantec Division, Emerson Electric Co., B-185764, June 4, 1976, 76-1 CPD 360). We do not think the fact that SCI offered substantially fewer on-site days than Kappa constitutes such a showing. The RFP apparently did not require a specific number of on-site days, and it may be worth noting in this regard that the RFP evaluation factors, quoted in part infra, indicated that the Air Force was seeking merely a basic level of technical adequacy.

#### II. Request for Best and Final Offers

Kappa also alleges that the Air Force violated ASPR § 3-805.3(d) (1976 ed.), which states:

"At the conclusion of discussions, a final, common cut-off date which allows a reasonable opportunity for submission of written 'best and final' offers shall be established and all remaining participants so notified. If oral notification is given, it shall be confirmed in writing. The notification shall include information to the effect that (i) discussions have been concluded, (ii) offerors are being given an opportunity to submit a 'best and final' offer and (iii) if any such modification is submitted it must be received by the date and time specified, and is subject to the Late Proposals and Modifications of Proposals provision of the solicitation."

The record shows that after evaluation of the technical proposals, the contracting officer sent a letter to the protester August 11, 1976, which stated in pertinent part:

"1. The Technical Review Board has reviewed your proposal and found it to be technically acceptable.



"2. Notwithstanding the technical adequacy of your proposal, we desire to meet with your firm to discuss certain aspects of your Price Proposal, specifically the following:

"a. Section I, Para 4, Page 1, Alternative Approach.

"b. Figure 2-1, Page 7, Assignments for Tank 77-1.

"3. We have scheduled this meeting to be held at 9:30 A.M., 17 August 1976 \* \* \*.

"4. Should your firm desire to submit a revised Price Proposal as a result of the discussion, adequate back-up data and revised DD Form 633 must be furnished. Any such proposal must be submitted by not later than 4:00 P.M., prevailing local time, 23 August 1976, subject to Paragraph 28, entitled LATE PROPOSALS, MODIFICATION OF PROPOSALS AND WITHDRAWAL OF PROPOSALS, in Section C of the Request for Proposal.

"5. The Government may elect to award the contract without further discussion of proposals. Accordingly, any offer should provide the most favorable terms from a price and technical standpoint which can be submitted to the Government."

Letters sent at the same time to SCI and the third competing offeror were substantially identical insofar as notice of an opportunity to submit a revised proposal. They were different in that they requested a response to the Air Force's technical comments and warned that failure to make an adequate response would result in the proposal being found "nonresponsive."

The August 17 meeting was held with Kappa as scheduled. The contracting officer has stated that at the meeting, Kappa was again advised that it could submit a revised proposal up to August 23, and that the Government might elect to award without further discussion.

SCI and the third competing offeror submitted revised proposals. Kappa did not. The Air Force decided that the two revised proposals were technically acceptable. Award was then

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made to SCI, which had offered the lowest price. When Kappa protested, the contracting officer originally took the position that no written or oral discussions had been conducted since the meeting with the offerors were concerned only with "clarifications" of their proposals. The Air Force later revised this position and correctly pointed out that discussions were in fact conducted.

However, the Air Force maintains that the August 11 letter and the August 17 oral advice to Kappa satisfied the intent of ASPR § 3-805.2(d), because Kappa was effectively put on notice that discussions were being concluded and that best and final offers were being requested. The agency cites Nationwide Building Maintenance, Inc., B-186602, December 9, 1976, 76-2 CPD 474, for the proposition that failure to confirm a request for best and final offers in writing does not provide a basis for overturning an award.

Kappa contends that the plain language of the regulation was violated, since the Air Force never provided written notification on or after August 17, 1976, that discussions had been concluded and that "best and final" offers were being requested. In this regard, Kappa's president has submitted an affidavit stating that Kappa had completed preparation of an "alternative" proposal on August 13, 1976, and that this proposal offered a lower price than the SCI contract price.

#### II.A. Timeliness of Kappa's Objection

SCI contends that Kappa's objection is untimely. In this regard, Kappa's September 10, 1976, protest to our Office stated in pertinent part:

"In accordance with 4 CFR § 20.1 et seq., Kappa  
\* \* \* hereby protests the award of any contract \* \* \*  
under Request for Proposals (RFP) No. F056-04-76-09143  
\* \* \*.

\* \* \* \* \*

"In support of its protest, Kappa alleges that:

"(i) Upon information and belief, the Contracting Officer intends to award the Solicitation, using a firm fixed-price level of effort term contract.

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Use of this type contract, under the circumstances of this Solicitation would be in violation of Section 3-404.7, ASPR.

"(ii) Upon information and belief, the Contracting Officer intends to award a contract to an offeror whose offer is not that which is most advantageous to the Government. Such action would be in plain violation of Sections 3-101 and 3-801.1, ASPR.

"Pursuant to 4 CFR, Section 20.2(c), Kappa will submit an additional statement in support of its protest for the reasons stated above, as well as others, in the immediate future."

Pursuant to section 20.2(d) of our Bid Protest Procedures (4 C.F.R. § 20, et seq. (1976)), our Office requested Kappa to provide an additional statement in support of its protest. In response, Kappa submitted a letter dated September 24, 1976, which was received by our Office September 28, 1976. The September 24 letter specifically contended that the contracting officer violated ASPR § 3-805.3 by failing to give written notice that best and final offers were requested.

SCI's contention is based on section 20.1(c), (d) of our Bid Protest Procedures, which states:

"(c) The initial protest filed with the General Accounting Office shall (1) include the name and address of the protester, (2) identify the contracting activity and the number of the solicitation and/or contract, (3) contain a statement of the grounds of protest, and (4) specifically request a ruling by the Comptroller General. A copy of the protest shall also be filed concurrently with the contracting officer and the communication to the General Accounting Office should so indicate. The grounds for protest filed with the General Accounting Office must be fully supported to the extent feasible. See § 20.2(d) with respect to time for filing

any additional statement required in support of an initial protest.

"(d) No formal briefs or other technical forms of pleading or motion are required, but a protest and other submissions should be concise, logically arranged, and direct." (Emphasis supplied.)

SCI points out that Kappa's September 10, 1976, protest clearly did not raise the "best and final offer" issue, since while that statement mentioned ASPR §§ 3-101 and 3-801.1, it did not mention ASPR § 3-805. In this regard, we note that Kappa in its December 3, 1976, letter to our Office states that it was actually aware of the grounds for its objection when it learned of the award on September 10, 1976. In this light, SCI argues that an "umbrella" ground of protest--the contention that the award was not that which is most advantageous to the Government--is not sufficiently specific, direct and concise. Further, SCI contends that a request by GAO for an additional statement in support of the protest clearly presupposes that a ground of protest has been filed and cannot operate to toll the time limits for filing a ground of protest.

Kappa contends that its objection was timely raised. First, Kappa notes that its September 10 protest objected that the award was not that which is most advantageous to the Government, price and other factors considered. Kappa contends that under standard protest practice, even more general protest grounds are commonly stated in initial protest letters, and that GAO's typical response is to require that specifics be furnished within a stated time. Kappa also asserts that the allegation of failure to request best and final offers is a specific allegation which relates to an award being made which was not most advantageous to the Government.

Initially, we do not agree with Kappa's suggestion or inference that a protester's reserving the right to subsequently raise new grounds of protest can toll our filing time limits. Rather, the timeliness standards for filing protests are objective criteria which must be complied with by protesters.

However, we believe Kappa's objection in this case was timely made. While SCI's arguments are supported to some extent by the language of the Bid Protest Procedures, to adopt the view espoused by SCI might result in protesters' delaying the filing of their protests until they were certain they were in a position to state all

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separate grounds of protest. This could be detrimental to a basic underlying objective of the Bid Protest Procedures, i.e., to attempt to assure that protests against the award or proposed award of contracts are promptly made.

SCI correctly points out that in some cases a protester's attempt to subsequently raise a separate ground of protest will be found untimely. A clear example is State Equipment Division of Secorp National Inc., B-186404, September 22, 1976, 76-2 CPD 270. There, the protest essentially objected to the contracting agency's determination that the protester's bid was nonresponsive. Later, at a bid protest conference, the protester objected that the awardee's bid was nonresponsive. Our Office pointed out that the latter objection was entirely independent of those previously raised and rejected it as untimely. For a similar result, see Consolidated Airborne Systems, Inc., B-184369, October 21, 1975, 75-2 CPD 347, where the initial timely objection related to a refusal to grant waiver of first article testing and the subsequent untimely objection related to the bidder's nonresponsibility. See, also, Radix II, Inc., B-186999, February 8, 1977, 77-1 CPD 94, where the protester's delay in adequately explaining several of its objections until after the agency's report had been received resulted in our Office's dismissing the arguments raised.

However, in the present case we do not believe that Kappa's objection regarding the request for best and final offers can be regarded as entirely separate from its initial statement of protest. We believe Kappa's objection is in the nature of additional support for its timely raised objection that the award made is not that which is most advantageous to the Government, price and other factors considered.

While we therefore find the present protest to be timely, we believe it is also appropriate to reaffirm that protesters should assert and substantiate all of their grounds of protest as promptly as possible. As indicated by the above-cited decisions, failure to do so may result in portions of a protest being found untimely. In addition, even where, as here, the protester's subsequent objection is timely, the delay involved in substantiating all of the grounds of protest inevitably delays the ultimate resolution of the protest.

II.B. Merits of Kappa's Objection

The Air Force did not issue a written notification at the close of discussions advising the offerors that discussions were concluded and that best and final offers were being requested. The issue is whether this deficiency is sufficiently serious to cause our Office to uphold Kappa's protest.

Kappa does not deny that it received the Air Force's August 11 letter, quoted supra. However, there is some disagreement as to what transpired at the August 17 discussions. Both parties agree that some discussion was prompted by a statement in Kappa's initial proposal to the effect that while Kappa had based its proposal on the estimated number of work hours stipulated in the RFP, it believed a more cost effective approach was possible and would welcome discussion on this point.

In this regard, Kappa maintains that at the meeting the contracting officer "inferred" he was aware that the contract work could be done in less time than stated in the RFP; that he indicated he expected Kappa to do the job in less time; and that he told Kappa everything was "in line" on its proposal. Kappa contends that it was in effect persuaded or told by the contracting officer not to submit a revised proposal based upon a reduced man-hour estimate.

The contracting officer has stated that, in response to Kappa's position that fewer work hours be required, he explained why the firm-fixed-price, level of effort type contract was responsive to Kappa's concern in that (1) use of the contract was necessitated by difficulty in estimating the work requirements, and (2) if fewer hours were involved during actual contract performance, the contract provided for a downward adjustment in contract price. The contracting officer indicates he neither stated nor intentionally implied that the work actually could be done in less time. The contracting officer further states that no technical discussions were held because Kappa's technical proposal was adequate as submitted. It is further reported that at the close of the meeting Kappa was carefully advised that, as stated in the August 11 letter, it could submit a revised proposal until the closing hour on August 23, and that no statement was made to Kappa to the effect that it could not submit a revised proposal of any kind. It is unclear from the record whether the oral advice given to Kappa in the discussions included the term "best and final" offer. The contracting officer's statement implies that it did not, while the Air Force's

February 15, 1977, report to our Office (which was not submitted by the contracting officer himself) asserts that it did. Kappa has not explicitly denied that the Air Force used the term "best and final" offer.

Where the only evidence before our Office with respect to a disputed question of fact consists of contradictory statements by the protester and the contracting agency, the protester has failed to carry the burden of affirmatively proving its assertions. Telectro-Mek, Inc., B-185892, July 26, 1976, 76-2 CPD 81. Based on the record, we conclude that Kappa was notified of, and was in fact accorded, an opportunity to submit a revised proposal. Moreover, whether specific reference to "best and final" offers was conveyed to Kappa or not, there were in any event other circumstances strongly suggesting that further discussions were not contemplated. For one thing, the RFP's evaluation factors (quoted in part infra) indicated that once the basic adequacy of technical proposals had been established, the Air Force would look to the most advantageous price in making an award. This, coupled with the relatively limited scope of the discussions with Kappa and the other offerors, would reasonably indicate that the opportunity to submit a revised proposal by August 23, 1976, simply amounted to a final chance for offerors to revise their proposals before the Air Force proceeded with an award. Also, RFP amendment No. 1, July 13, 1976, had indicated that "award/contract start" might be accelerated to October 1, 1976.

Under the circumstances, therefore, we are not persuaded that the lack of written notification concerning the closing of discussions and requesting "best and final" offers is so compelling as to call for our Office to object to the award. In this regard, the record suggests to us that the alternative proposal which Kappa states it had prepared but did not submit on August 23, 1976, was based upon requirements different from those contained in the RFP. The implication is that the real gravamen of Kappa's complaint is not that it lacked notice of best and final offers, but that it objected to the terms of the RFP. However, as noted supra, Kappa did not raise its objections to the RFP in a timely manner.

Further, we believe the decisions of our Office relied on by Kappa are distinguishable. The basic issue in Operations Research, Incorporated, 53 Comp. Gen. 593 (1974), 74-1 CPD 70 (modified by 53 Comp. Gen. 860 (1974), 74-1 CPD 252) and 51 Comp. Gen. 481 (1972) involved the situation where an offeror initially found to be within

the competitive range is given no opportunity to revise its proposal. Here, Kappa had an opportunity to revise its proposal. 50 Comp. Gen. 222 (1970) involved the complete failure to establish any common cutoff date for proposal revisions. Here, August 23, 1976, was the common cutoff date for the three offerors. In 48 Comp. Gen. 536 (1969), an attempt to close negotiations was ineffective because, unlike the present case, one offeror thought negotiations had already been closed and that it was merely being requested to confirm or extend its offer. 50 Comp. Gen. 246 (1970) involved circumstances where an RFP amendment reduced the performance time; the protester's response indicated several possible approaches to estimated labor costs, a possible reduction in such costs, and that it was available for discussion. In the present case, the Air Force's notification concerning revised proposals did not change the RFP requirements, and Kappa did not respond to it. Finally, in ABC Food Service, Inc., B-181978, December 17, 1974, 74-2 CPD 359, the agency's request for revised proposals, unlike the present case, explicitly indicated that negotiations would not close upon receipt of the revised proposals, i.e., the request for revised proposals indicated that a request for best and final offers would be forthcoming after receipt of the revised proposals.

In contrast to the foregoing decisions, we believe the present case is more similar on its facts to James R. Parks Company, B-186031, June 16, 1976, 76-1 CPD 384. There, as here, the agency was apparently proceeding with the intent to make an award on the basis of the initial proposals, but in fact conducted discussions. A second amendment to the RFP incorporated an additional clause, and offerors responded to this with revised proposals by a common cutoff date. While the RFP amendment did not contain all of the specifics of a request for best and final offers required by ASPR § 3-805.3(d), we found that it had the "intent and effect" of such a request and denied the protest.

In view of the foregoing, we agree with Kappa that the Air Force did not fully comply with the requirements of ASPR § 3-805.3(d), but do not believe that an objection to the award is warranted. However, as noted infra, we are calling this deficiency in the agency's procurement procedures to the attention of the Secretary of the Air Force.



III. Type of Contract

Kappa also maintains that the Air Force erred in awarding a firm-fixed-price, level of effort (FFP-LOE) type contract for this work. Kappa contends that two criteria for use of FFP-LOE contracts set forth in ASPR § 3-404.7 (1976 ed.) are not met in the present case--i.e., that the work to be performed cannot otherwise be clearly defined, and that there is reasonable assurance that the desired result cannot be achieved by expenditure of less than the stipulated effort.

The Air Force believes this argument is without merit; also, the agency and SCI take the position that Kappa's objection is untimely. In this regard, our Bid Protest Procedures provide that protests against improprieties which are apparent in an RFP as initially issued must be filed prior to the closing date for receipt of initial proposals, and that alleged improprieties which are subsequently incorporated in the RFP must be protested not later than the next closing date for receipt of proposals. See 4 C.F.R. § 20.2(b)(1) (1976).

Thus, a protest after award, challenging the type of contract contemplated by the RFP, is untimely. See, for example, Bayshore Systems Corporation, B-184446, March 2, 1976, 76-1 CPD 146. We note that such results are consistent with the principle applied by the courts that it is not proper for an offeror which acquiesces in a particular procurement method or procedure to later complain, after award has been made to another, that the method or procedure was improper. See Airco Inc. v. Energy Research and Development Administration, 528 F.2d 1294, 1300 (7th Cir. 1975).

Kappa admits it was aware when it examined the RFP that award of an FFP-LOE contract was contemplated. However, the protester states that it was unfamiliar with this type of contract and did not actually become aware of the impropriety until September 10, 1976, when it consulted with its counsel and reviewed the relevant ASPR section.

Kappa's position is without merit. The impropriety which is alleged should have been apparent to a prospective offeror upon receipt of the RFP and reasonable examination and consideration of its contents. Moreover, Kappa--the incumbent contractor--would appear to have been in a particularly good position to promptly call this issue to the Air Force's attention. Also, consultation

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with counsel is not a valid basis for extending the protest filing time limit. Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256.

Kappa also argues that its objection, if found untimely, should nonetheless be considered on the merits by our Office because it involves a "significant issue" (4 C.F.R. § 20.2(c)). Kappa has offered no reasons why the issue involves a procurement principle of widespread interest, and we find none. See, generally, Catalytic, Inc., B-187444, November 23, 1976, 76-2 CPD 445.

#### IV. Evaluation Factors

Kappa next contends that the RFP's statement of evaluation factors was defective. The protester alleges (1) that the RFP did not contain specific criteria to be used in the evaluation of technical proposals, and (2) that the relationship of price to technical considerations was not adequately expressed.

The Air Force maintains that the RFP's statement of evaluation factors was adequate and established price as the ultimate award criterion. Also, the agency and SCI assert that the protest on this issue is untimely.

Section "D" of the RFP, entitled "EVALUATION AND AWARD FACTORS," is three pages in length. The section begins with paragraph 1, which states in its entirety:

"1. AWARD

"Award of any contract resulting from this solicitation will be determined in the following manner:

"a. Negotiation based upon the pricing provided.

"b. Less discount for prompt payment."

Paragraph 3(b) further states in pertinent part:

"\* \* \* Technical Proposals submitted under this solicitation shall be evaluated by a Technical Review Board. The following areas will be considered by the Board in its evaluation of basic adequacy of each proposal; therefore, each Technical Proposal should specifically include the following:

"(1) Acknowledgement of the specific tasks and responsibilities set forth in the Statement of Work. A simple statement of acknowledgement is sufficient unless implementing procedures or more detailed coverage is appropriate.

"(2) The proposed contractor organizational chart, including management/operational responsibilities.

"(3) The proposed manning chart, indicating skill categories and number of personnel.

"(4) The proposed work schedule setting forth the timetable for task accomplishment.

"(5) Generalized position descriptions for all proposed personnel, indicating their education and experience level in comparison to the required level established in the Statement of Work and extent of current availability of such personnel, including any recruitment/retention plans.

"(6) Specifics concerning the proposed Colorado Springs area office, e.g., location, square footage, parking accommodations, etc." (Emphasis supplied.)

Further, amendment No. 1 to the RFP, dated July 13, 1976, provided the following question submitted by a prospective offeror and the Air Force's answer:

"Q. What specific evaluation criteria will the Government use to rate proposals? Will there be a weighting of cost vs. technical factors?

"A. See RFP Section D, Para 3b. Each technical proposal will be evaluated for basic adequacy, specifically in regards to the information submitted in response to Subparas (1) through (6). There will be no weighting of factors, cost or technical." (Emphasis supplied.)

The protester contends that the foregoing information does not tell how technical proposals would be evaluated, and that it does not establish price as the determinative factor in making an award. Kappa believes that amendment No. 1's reference to "no weighting" of factors is enigmatic and confusing, and that Kappa was misled because during the negotiations (August 17, 1976) the contracting officer wittingly or unwittingly used this state of confusion to

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convince Kappa that it was unnecessary to submit a revised proposal. The protester states that it drew the only logical conclusion under the circumstances, i.e., it assumed that price and technical factors would be weighted equally. Kappa maintains that it learned for the first time at a September 14, 1976, debriefing that the Air Force attached predominant importance to the price factor and, therefore, that its protest raised this issue in a timely manner.


Since the RFP as amended contained a detailed statement of the price and technical considerations applicable in the procurement, and since the offerors' attention was specifically called to the relative importance of the evaluation factors by the question and answer in RFP amendment No. 1, we believe the solicitation impropriety which Kappa alleges can only be considered "apparent." In this regard, it must be noted that the obligation rests on the offerors to carefully scrutinize the RFP, including the evaluation factors, and to seek clarification from the agency if necessary. Honeywell, Inc., B-184825, November 24, 1975, 75-2 CPD 346. Also, as noted previously, the contracting officer denies that Kappa was told in the discussions not to submit a revised price proposal. Further, we find no indication in the record that Kappa posed any specific questions to the Air Force during the discussions for the purposes of obtaining clarification of the evaluation factors.

Since the alleged solicitation impropriety was apparent, we do not believe that Kappa, by relying on its own assumption as to the meaning of the RFP's terms, can obtain consideration of this issue on the merits. Kappa's protest should have been filed not later than the closing time for receipt of revised proposals on August 23, 1976. Also, for the same reasons as those applying to the FFP-LOE contract issue, supra, we do not find this to be a significant issue pursuant to 4 C.F.R. § 20.2(c).

#### V. Conclusion

In view of the foregoing, the protest is denied.

As noted supra, by letter of today we are calling to the attention of the Secretary of the Air Force our conclusion that the requirements of ASPR § 3-805.3(d) were not fully complied with in this procurement, so that this information can be brought to the attention of the personnel involved with a view towards precluding a repetition of similar difficulties in future procurements.

  
Deputy Comptroller General  
of the United States