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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: L-3 Systems Company Wescam Sonoma, Inc.

File: B-297323

Date: December 3, 2005

Kathleen Little, Esq., Amanda J. Kastell, Esq., and Amy R. Napier, Esq., Vinson & Elkins LLP, for the protester.

John S. Pachter, Esq., Jonathan D. Shaffer, Esq., Tamara F. Dunlap, Esq., and Erin R. Karsman, Esq., Smith Pachter McWhorter & Allen PLC, for FLIR Systems, Inc., an intervenor.

Angela J. Cosentino, Esq., Naval Sea Systems Command, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as untimely where protester learned of independent bases for protest as a result of letter from agency, but raised the issues with our Office more than 10 days later in its comments on the agency report.

DECISION

L-3 Systems Company Wescam Sonoma, Inc. (Wescam) protests the award of a contract to FLIR Systems, Inc. under request for proposals (RFP) No. N00164-04-R-8534, issued by the Department of the Navy, Naval Sea Systems Command, for electro-optic sensor systems.

We dismiss the protest.

The RFP, issued on September 17, 2004, contemplated the award of an indefinite-delivery/indefinite quantity (ID/IQ) contract, with fixed unit prices for orders of electro-optic sensor systems over a period a period of 5 years. As amended, the solicitation provided the Navy would order a minimum quantity of one unit and a maximum quantity of 94 units over the 5-year contract term. Award was to be made on a “best value” basis considering three evaluation factors, price, technical, and past performance. The technical factor included three subfactors: (1) product sample; (2) performance specification compliance; and (3) statement of work compliance.

As a general matter, offerors were “encouraged to submit multiple offers presenting alternative terms and conditions or commercial items satisfying the requirements of [the] solicitation.” RFP, Instructions to Offerors, Federal Acquisition Regulation (FAR) § 52.212-1(e). Under a section entitled “Alternate Proposals,” the RFP advised as follows:

Offerors may submit more than one proposal, each of which must satisfy the mandatory requirements of the solicitation, including any Benchmark Tests, in order to be considered. As a minimum, one of the proposals submitted must be complete. The alternative proposal(s) may be in an abbreviated form following the same section format, but providing only those sections which differ in any way from those contained in the original proposal. . . . If alternate proposals are submitted, such alternatives will be clearly labeled and identified on the cover page of each separate document. The reason for each alternate and its comparative benefits shall be explained. Each proposal will be evaluated on its own merits.

RFP, Instructions to Offerors, FAR § 52.212-1 addend.

As part of the technical evaluation, offerors were required to submit product samples for testing and evaluation. In this regard, the RFP instructed:

(e) Product Samples are to be submitted to the [point of contact (POC)] on page 1 at the same time technical proposal[s] are required One unit (Electro Optic System) is required as a product sample. If alternate proposals are submitted one product sample per system type is to be provided. The product sample will be tested to ensure compliance with the technical requirements.

Id.

With regard to price, the RFP provided under “CLIN 0001” for unit prices within “stepladder quantities” for each year of the contract term as follows:

		Year 1	Year 2	Year 3	Year 4	Year 5
Pricing Quantity	2	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Pricing Quantity	6	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Pricing Quantity	11	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Pricing Quantity	21	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Pricing Quantity	51	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____

RFP amend. 2, CLIN 0001.

The Navy received timely proposal submissions from Wescam and FLIR. As required by the RFP, Wescam included a product sample with its initial proposal submission

and, after an initial round of evaluations, the agency sought final proposal revisions from the offerors. With its final proposal, Wescam submitted several alternate proposals, but did not submit product samples with any of these alternates. As part of its final evaluation of proposals, the Navy did not consider Wescam's alternate proposals because it considered them to be "late offers" and because they did not include "product samples for the exact systems." Agency Report (AR), Tab 15, Post Negotiation Business Clearance Memorandum, at 5. In evaluating price, the contracting officer calculated each offeror's total price assuming what the Navy characterized as a "worst case scenario," a total order of 94 units in year five based on a single unit price quantity. *Id.* at 6. As a result of its evaluation, the Navy determined that FLIR's offer represented the best value.

By letter dated September 20, the Navy notified Wescam of the award decision, identified Wescam's total evaluated price, as well as that of FLIR, and explained that its "alternate proposals were not evaluated as they were considered late offers." AR, Tab 18, Letter from Navy to Wescam, Sept. 20, 2005. In response, Wescam sent the Navy a letter requesting a postaward debriefing and further indicated that it disagreed with the agency's rejection of its alternate proposals as late offers. AR, Tab 20, Letter from Wescam to Navy, Sept. 23, 2005.

In a letter dated September 30, the Navy responded as follows:

The alternate proposals were received after close of the solicitation. Further, the late offers also did not meet the requirements as specified in 52.212-1: '(e) Product Samples are to be submitted to the POC on page 1' Wescam did not advise during negotiations that alternate systems would be proposed and did not submit product samples for the alternate proposals.

AR, Tab 21, Letter from Navy to Wescam, Sept. 30, 2005.¹

In addition, the Navy responded to a concern raised to the agency by Wescam in a September 26 e-mail message questioning how the agency had calculated the offerors' total evaluated prices. Specifically, the Navy provided its calculation of the awardee's and Wescam's total prices, thus revealing that the agency had calculated prices based on the purchase of 94 total units, one unit at a time, at an offeror's fifth year unit price. *Id.*

Also on September 30, Wescam filed a protest with our Office arguing that: (1) "[t]he agency's failure to consider Wecam's alternate proposals because they were 'late

¹ The Navy indicated that it sent the letter to Wescam via e-mail that day and then followed up with a telephone call to Wescam; the protester has not contested its receipt of the letter on September 30.

offers' is contrary to the terms of the Solicitation and the applicable GAO case law"; and (2) the Navy's award decision was based upon a calculation of evaluated prices that was not supported by the evaluation criteria and was clearly wrong. Protest at 6. With regard to the second issue, Wescam added the caveat that it was unable to ascertain how the Navy calculated its price or the price of the awardee without receiving further information from the Navy. Protest at 8.

On November 1, the Navy provided the parties and our Office with the contracting documents relevant to the issues in the case, including the agency's September 30 letter to Wescam, and on November 7, the Navy submitted its report addressing the two issues raised in the protest. With regard to the first issue, the Navy effectively conceded the protester's contention that it would have been improper to reject Wescam's alternate proposals on the ground that they were late, but reiterated its alternate position, which it had articulated in the September 30 letter to the protester, that it did not evaluate Wescam's alternate proposals because they failed to include product samples as required by the solicitation. With regard to the price evaluation issue, the agency again reiterated its September 30 price calculation explanation and noted that the solicitation did not specify a particular method for calculating offerors' total prices.

In its November 18 comments on the agency report, Wescam withdrew its protest related to two of its alternate proposals, noting that it had failed to submit product samples as required by the solicitation for these alternative proposals. With regard to one of its alternate proposals, however, Wescam argued, for the first time, that the Navy's decision not to consider its "Alternate A" proposal, because Wescam did not provide a product sample in connection with this alternate offer, was contrary to the terms of the solicitation. Protester's Comments at 5. According to Wescam, a product sample was not required because it had submitted a product sample with its initial proposal for the same system type as its Alternate A proposal. *Id.* In support of this contention Wescam provides a detailed discussion of the similarities between its original product sample and the system proposed in its Alternate A offer.

Wescam also challenged, in its comments, the specific price evaluation methodology used by the Navy. According to Wescam, the Navy's "worst-case" calculation of offerors' total prices, which was based on an assumed purchase of 94 units in year five, one unit at a time, did not bear any relation to the Navy's anticipated needs and was therefore misleading and unreasonable. *Id.* at 11.

As a general matter, under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known their bases. 4 C.F.R. § 21.2(a)(2) (2005). Moreover, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. FR Countermeasures Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 at 9.

Here, in its November 18 comments, Wescam challenges, for the first time, the Navy's rejection of one of its alternate proposals because Wescam did not provide the agency with a product sample for the alternate offer, as well as the specific price evaluation methodology used by the Navy. The record, however, demonstrates that Wescam knew or should have known of these issues as a result of the Navy's September 30 letter to Wescam. The letter specifically informed Wescam that, aside from rejecting its alternate proposals as late, the Navy did not consider its alternate proposals because Wescam did not provide the agency with product samples for the alternate offers. The letter also put Wescam on notice of the agency's price evaluation methodology--information, which, as noted above, Wescam asserted in its initial protest was required to assess the basis of the agency price evaluation. Because Wescam first raised these challenges in its November 18 comments on the agency report, more than 10 days after it learned of these bases for protest, Wescam's challenges are untimely.

Wescam maintains that the contentions presented in its comments are not untimely because they merely provide further support for its general protest contentions that the Navy improperly failed to consider its alternate proposals and that the agency's price evaluation was unreasonable, and that the issues raised therefore are not independent protest grounds. Wescam's reliance on general articulations of its bases of protest is misplaced. Where a protester raises a broad ground of protest in its initial submission but fails to provide details within its knowledge until later, so that a further response from the agency would be needed to adequately review the matter, these later, more specific arguments and issues cannot be considered unless they independently satisfy the timeliness requirements under our Bid Protest Regulations. Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 12-13. In this regard, we have found supplemental protest grounds untimely which present "examples" of flaws in the agency's evaluation generally alleged in the initial protest since such staggered presentation of "examples," each of which involves different factual circumstances and requires a separate explanation from the agency, constitutes precisely the piecemeal presentation of issues that our timeliness rules do not permit. QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 12-13.

The protest is dismissed.

Anthony H. Gamboa
General Counsel