

*N. L. Gado-Vega  
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The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Raymond International Builders, Inc., Bauer of  
America Corporations and SIF-Bachy, a Joint  
File: Venture  
B-225827.2  
Date: August 11, 1987

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### DIGEST

Protest of apparent solicitation impropriety must be filed before the closing dates for receipt of proposals.

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### DECISION

The joint venture of Raymond International Builders, Inc., Bauer of America Corporations and SIF-Bachy (Raymond/Bauer), protest the award of a contract for the construction of the second phase of modifications to the Fontenelle Dam in Wyoming to Soletanche-Ohbayashi. The award was made on May 26, 1987, under the Department of the Interior solicitation No. 7-SP-40-04900/DC-7710.

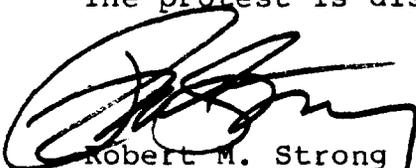
We dismiss the protest.

Soletanche had performed the contract for the first phase modifications (which included the construction of two test section wall segments). Raymond/Bauer contends that Soletanche had an unfair advantage in the competition for the second phase (which included building a cutoff wall), in that Soletanche alone had the information necessary to submit a production schedule consistent with the production/construction rate achieved during phase I. The protester argues that the agency should have made this information available in the second phase solicitation; Raymond/Bauer said that it first recognized the importance of that information when it discovered that its offer had been unsuccessful, in part because of Interior's lack of confidence in Raymond/Bauer's proposed schedule. In this respect, Raymond/Bauer lost 11.6 points out of the 65 relevant points available in the technical evaluation, which was worth a total of 750 points; Raymond/Bauer's total technical score was 604 points, whereas Soletanche's was 637, and the offers were \$23,453,520 and \$23,938,200, respectively.

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The protest is untimely. Raymond/Bauer tried to get the information in issue, first informally, and then by a Freedom of Information Act (FOIA) request, before the solicitation was issued. Interior denied the request based on Soletanche's claim that the data is proprietary. Thus, notwithstanding Raymond/Bauer's assertion that it did not recognize the importance of the information until its offer was rejected, it is clear that Raymond/Bauer believed even before submitting an offer that the information missing from the solicitation would be necessary to compete successfully. Under our Bid Protest Regulations, a protest of an apparent impropriety in a solicitation--here, the perceived lack of sufficient information--must be filed before the closing date for proposal receipt. 4 C.F.R. § 21.2(a)(1) (1987). Since Raymond/Bauer's FOIA request does not constitute a protest to the agency for purposes of the timeliness requirements, Trend Construction & Associates--Reconsideration, B-222817.2, May 8, 1986, 86-1 C.P.D. ¶ 445, the protest, filed on June 5, is dismissed as untimely.

In any event, a protester alleging that another offeror has an unfair competitive advantage has to prove that the advantage is the result of unfair action or prejudice by the government. Food Services, Inc., B-222578, July 24, 1986, 86-2 C.P.D. ¶ 106. An advantage gained by performing a government contract generally is not unfair. See Gentex Corp., B-221340, Feb. 25, 1986, 86-1 C.P.D. ¶ 195. The protest is dismissed.



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