



UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL  
B-216155

December 7, 1984

The Honorable Robert L. Livingston  
House of Representatives

RELEASED

Dear Mr. Livingston:

This responds to your letter dated July 2, 1984, on behalf of Stanley Muller and Associates Inc./Algernon Blair (Muller). You requested that we investigate the Army Corps of Engineers' failure to award Muller a construction contract under solicitation No. DACW29-9-84-05 and its refusal even to consider Muller's proposal in the competitive range despite a proposed cost significantly below that of the awardee. The Corps ultimately awarded the contract (No. DACW29-5-84-22) to Ayrshire Corporation.

Initially, we point out that we generally review protests concerning direct federal procurement actions pursuant to our Bid Protest Procedures, 4 C.F.R. part 21 (1984). Under those procedures, a protest must be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. In this regard, the Corps advises us that it informed Muller on March 9, 1984, that its proposal was not deemed in the competitive range. Muller did not protest, and we did not receive your letter raising the matter until July 13--significantly more than 10 working days after the basis for protest was or should have been known. Therefore, the protest is untimely and not for consideration on the merits.

Nevertheless, we did request that the Corps furnish our Office a report explaining its actions in this procurement, so that we could provide an informational response to your inquiry. The Corps has responded with a documented administrative report. Based on our review of this report, we find that the award was not legally objectionable.

The solicitation informed potential offerors that the Corps, using negotiation procedures, would select a contractor based on an evaluation of offerors' proposals under

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the following major factors, listed in descending order of importance: design, life cycle costs and financing (cost), capacity, and experience. Thus, design, not cost, was the primary evaluation factor. In fact, the evaluation materials (reviewed by our Office in camera) indicate that the Corps' formula allotted 250 of 500 total available points to design and only 100 to cost.

The Corps received seven different design proposals from five firms. The Corps' evaluation team determined Muller's proposal did not have a reasonable chance of being selected for award because it received the lowest scores under three of six design subfactors (site layout, non-building design, and innovative ideas) and the poorest cost score. In this latter regard, while Muller proposed the lowest total cost, the agency found two conditions imposed by Muller (availability of financing and acceptable lease arrangements) unacceptable and, apparently, reduced the firm's score for cost accordingly. The team concluded that while there was a clear possibility that Muller could significantly improve its cost score, even if the firm improved that score by 40 percent, Muller's scores under the technical factors still would be 17 percent lower than those of even the lowest ranking proposal in the competitive range. The Corps considered it highly unlikely that the technical deficiencies could be overcome and, therefore, decided to exclude Muller's proposal from the competitive range for the purpose of entering into discussions and seeking revised offers.

It long has been our position that the evaluation of proposals and the determination of which ones will be included within the competitive range principally are matters within the procuring agency's discretion, since the procuring agency is responsible for identifying its needs and the best method of accommodating them. Even where a proposal is technically acceptable or capable of being made acceptable, the procuring agency may exclude it from the competitive range if the offer stands no real chance of being selected for award.

Here, due to the significant technical and cost deficiencies found in Muller's proposal, the Corps determined that Muller would have no reasonable chance of receiving the award even if it were included in negotiations. As this determination appears to have been reasonable, the Corps' exclusion of Muller from the competitive range was proper.

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We have enclosed a copy of the agency's report, without supporting documents, for your information.

Sincerely yours,

*Harry R. Van Cleve*

Harry R. Van Cleve  
General Counsel

Enclosure