

Curcio



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Bachy/Bauer/Green Joint Venture

**File:** B-235950

**Date:** September 18, 1989

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### DIGEST

Protest that during discussions agency discouraged protester from changing its technical proposal to make it less costly is dismissed as untimely where it was not filed prior to the next closing date for the receipt of proposals.

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### DECISION

Bachy/Bauer/Green Joint Venture (BBG) protests the award of a contract to any other offeror under request for proposals (RFP) No. DACW03-88-R-0005, issued by the Army Corps of Engineers for the construction of a cutoff wall and associated work as part of the rehabilitation of the Beaver Dam in Carroll County, Arkansas. BBG asserts that it was denied the opportunity for meaningful discussions. BBG also argues that the Corps improperly awarded the contract on the basis of cost.

We dismiss the protest.

The RFP was issued on September 12, 1988, and required the contractor to construct a concrete cutoff wall and associated work items to include design, construction, quality control and inspection. As issued, the RFP listed six technical evaluation factors in descending order of importance, with cost as the last listed factor. However, the Corps subsequently issued amendment No. 1 to the RFP which removed cost as a scored technical evaluation factor. The RFP provided that the contract was to be awarded to the best overall proposal whose final offer was most advantageous to the government considering price and technical factors.

Two offerors responded to the RFP, BBG and Soletanche-Rodio-Nicholson Joint Venture (SRN). After both offers were evaluated by a technical evaluation team and found acceptable, the Corps held written discussions and requested each firm to submit a revised proposal by February 9, 1989.

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Following evaluation of the revised offers SRN had a slightly higher technical score than BBG, but the offers were considered technically equal. Subsequently, on March 1 and 2, the Corps held oral discussions with each offeror and requested that best and final offers (BAFOs) be submitted by March 17. After BAFOs were submitted, both offerors were considered technically equal. Since SRN's proposed price (\$16,920,000) was substantially lower than BBG's proposed price (\$18,700,000), award was made to SRN.

BBG first protests that the Corps did not hold meaningful discussions with the firm. Specifically, BBG states that during the March 1 meeting, the Corps informed BBG that its price needed to be reduced. However, when BBG suggested that it could reduce costs by revising its technical proposal to change the joint system it offered to a less expensive design, the Corps discouraged BBG from doing so by stating that the submission of a revised technical proposal might not be permissible, by informing BBG that such a revision could lower its technical score, and in general by indicating that such a revision would cause an undue delay in the procurement process. BBG alleges that had it not been so discouraged, it would have revised its joint system at a significant savings and therefore would have been in line for the contract award.

BBG's contention that it was denied the opportunity to change its technical proposal is based on discussions with the Corps on March 1. Thus, to the extent that BBG argues that the Corps improperly dissuaded it from changing its technical proposal, BBG was on notice of this basis of protest as of that date. Accordingly, to be considered timely this issue was required to be raised before March 17, 1989 the next closing date for the receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989); Cubic Defense Sys., B-229884, Apr. 22, 1988, 88-1 CPD ¶ 395. Since BBG did not protest this issue until June 23, it is untimely and will not be considered.

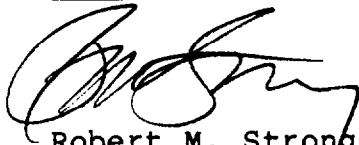
Similarly, the protest is untimely to the extent that BBG argues that the Corps misled it during discussions into believing that technical considerations were more important than cost, when in fact cost was the determinative factor in the award decision.

While the initial RFP listed cost as the least important of six technical evaluation factors, amendment No. 1 removed cost as a scored evaluation factor. Further, the RFP provided that the contract would be awarded to the best overall proposal whose final offer was considered most advantageous to the government considering price and

technical factors. Thus, offerors clearly were on notice that both technical and cost factors would be considered in making the award decision. In this regard, where a solicitation indicates that cost will be considered but does not indicate the relative importance of cost and technical factors, they are considered approximately equal in weight. Transportation Research Corp., B-231914, Sept. 27, 1988, 88-2 CPD ¶ 290. Accordingly, BBG was or should have been aware of the weight assigned to cost in the RFP; therefore, to the extent that BBG believed that during discussions the Corps indicated that, contrary to the evaluation scheme in the RFP, technical considerations in fact were considerably more important than cost, BBG was on notice of its basis for protest and should have raised this issue before the next due date for proposals.

Finally, contrary to BBG's contention, there is no basis to question the agency's decision to make award on the basis of cost since where, as here, the agency determines that two proposals are essentially equal technically, the agency may award the contract to the low cost offeror, even where the solicitation assigns cost less importance than technical considerations. Applications Research Corp., B-230097, May 25, 1988, 88-1 CPD ¶ 499.

The protest is dismissed. Consequently, BBG is not entitled to recover its proposal preparation costs or its protest costs. URS Int'l Inc., and Fischer Eng'g & Maintenance Co., Inc., B-232500.5, June 15, 1989, 89-1 CPD ¶ 563.



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