



Comptroller General  
of the United States  
Washington, D.C. 20548

150269

## Decision

**Matter of:** Bencor-Petrifond, A Joint Venture  
**File:** B-254205; B-254205.2; B-254205.3  
**Date:** October 5, 1993

Adrian L. Bastianelli III, Esq., Donald A. Tobin, Esq., and George W. Stiffler, Esq., Bastianelli, Brown & Touhey, for the protester, Wm. Craig Dubishar, Esq., William L. Walsh, Esq., and J. Scott Hommer, Esq., Venable, Baetjer & Howard, for Bauer of America Corporation, an interested party. Sherry Kinland Kaswell, Esq., and Justin P. Paterson, Esq., Department of the Interior, for the agency. Scott H. Riback, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protester is not an interested party to challenge agency's evaluation of proposals where protester submitted conditional extension of offer, thereby rendering itself ineligible for award.

### DECISION

Bencor-Petrifond, A Joint Venture protests the award of a contract to Bauer of America Corporation under request for proposals (RFP) No. 1425-2-SP-40-12890/DC-7881, issued by the Department of the Interior (DOI) for construction work at the Meeks Cabin Dam in Wyoming. Bencor-Petrifond argues that DOI improperly failed to reopen discussions and also improperly evaluated proposals.

We dismiss the protest.

The RFP sought offers to construct a plastic cutoff wall through the dam's left embankment and foundation in order to prevent failure of the dam due to internal erosion. Essentially, the construction is to be performed in two phases. During the first phase, preliminary work including excavation, grading and site preparation is to be accomplished, along with partial construction of the cutoff wall. During the second phase, construction of the remainder of the cutoff wall is to be accomplished. Because of the severity of the weather in Wyoming during the winter months, construction is not possible from about November to April. Consequently, the RFP contemplated a two-season construction schedule, with the phase one work being accomplished during

the first construction season and the phase two work being accomplished during the second.

By the December 18, 1992 deadline for submission of initial proposals, DOI received three offers, including Bencor-Petrifond's and Bauer's. Bencor-Petrifond's initial offer was based on an assumption that DOI would award the contract and issue a notice to proceed no later than February 18, 1993. Because of this assumption, Bencor-Petrifond concluded that it could perform the entire project during one construction season, and proposed to do so in its initial offer. During discussions, the agency advised Bencor-Petrifond that it would not in fact be able to issue a notice to proceed by February 18, and asked the firm to base its offer on a two-season construction schedule. Bencor-Petrifond, in its best and final offer (BAFO), agreed to perform over a two-season schedule.

DOI was unable to award a contract by the time offers were due to expire. Accordingly, by letter dated April 5, it requested that firms extend their offers an additional 60 days until June 18. By letter dated April 14, Bencor-Petrifond agreed to extend the acceptance period of its offer for the additional 60 days. Also in that letter, Bencor-Petrifond stated as follows:

"This, of course, substantially alters the schedule, such that it is unlikely that any slurry wall work could be done in 1993. Subject to a timely notice to proceed following the June date, it should be possible to do all preparatory and platform work in 1993, then build the slurry wall within the 1994 season. This could result in a potential saving for the government which needs to be assessed."

DOI was still unable to make award by June 18, and therefore requested that firms extend their offers an additional 30 days to July 18. In response to this request, Bencor-Petrifond wrote to the agency on June 15, extending its offer to July 18, but also stating that "[t]his offer is conditional on our comments stated in the letter of April 14, 1993." DOI ultimately made award to Bauer on July 15. After learning of the award, Bencor-Petrifond protested to our Office.

Bencor-Petrifond argues that the agency erred in failing to amend the RFP and reopen the acquisition after it became apparent that there would be a delay in awarding the contract. According to the protester, DOI should have allowed firms to revise their proposals using a one-season rather than a two-season construction schedule. Bencor-Petrifond

also argues that DOI made numerous errors in evaluating its own and Bauer's proposals.

We dismiss the protests. Our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1993), require a protester to be an "interested party" to maintain a protest, that is, an actual or prospective bidder or offeror whose economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Where a firm submits a bid or proposal extension conditioned upon a change to a material term of the solicitation, it renders the firm ineligible for award; consequently, we will not consider the firm to be an interested party where such a condition has been imposed. Kos Kam, Inc., B-221806, May 14, 1986, 86-1 CPD ¶ 460, aff'd, B-221806.2, June 11, 1986, 86-1 CPD ¶ 543.

The April 14 and June 15 letters conditioned the extension of Bencor-Petrifond's offer on DOI's acceptance of the firm's departure from the RFP's construction schedule. Under the solicitation as drafted, the contractor was required to perform all preparatory work at the sight and also begin construction of the cutoff wall during the first construction season. In contrast, Bencor-Petrifond's April 14 letter proposed that no construction of the cutoff wall would occur during the first construction season. The June 15 letter then made this a condition of Bencor-Petrifond's proposal extension. This departure from the RFP's construction schedule rendered Bencor-Petrifond's offer unacceptable; delivery terms are a material provision of any solicitation, and an offer that does not conform to an RFP's material provisions cannot form the basis for award. Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384. Because of this departure, Bencor-Petrifond would be ineligible for award even if we sustained its protest. Bencor-Petrifond thus is not an interested party. Kos Kam Inc., supra.

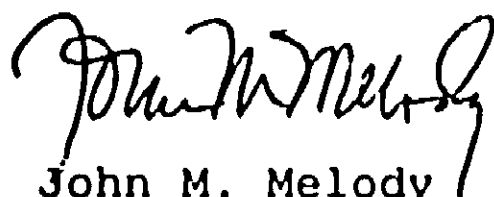
Bencor-Petrifond contends that its June 15 letter was not a conditional extension of its offer. According to the protester, the letter was an unequivocal extension of its offer

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We also note that Bencor-Petrifond's first argument--that the agency improperly failed to reopen the acquisition after the delay in making award--is untimely. The protester knew or should have known by the time DOI made its second request for an extension of offers that the agency would not permit firms to revise their offers using a different construction schedule. Bencor-Petrifond therefore should have protested the matter within 10 working days of June 15. 4 C.F.R. § 21.2(a)(2); see also Loral Defense Sys.--Arizona, B-240537, Nov. 16, 1990, 90-2 CPD ¶ 399.

which merely referred back to the concerns noted in its April 14 letter. We disagree. While the language of the April 14 letter did not condition the initial extension, the June 15 letter clearly imposed the terms of the April 14 letter as a condition for the second proposal extension: "this offer is conditional on our comments stated in the letter of April 14, 1993." In our view, the only reasonable reading of this language is that the terms of the April 14 letter had to be accepted in order for the firm to extend its offer.

The protest is dismissed.



John M. Melody  
Assistant General Counsel