



Comptroller General
of the United States

303276

Washington, D.C. 20548

Decision

Matter of: R.D. Brown Contractors, Inc.

File: B-256557

Date: June 28, 1994

DECISION

R.D. Brown Contractors, Inc. protests the rejection of its offer as technically unacceptable under request for proposals (RFP) No. AA85259K, issued by the Westinghouse Savannah River Company (WSRC), a Department of Energy (DOE) prime contractor,¹ for the design and construction of a Central Sanitary Wastewater Treatment Facility (CSWTF) at Aiken, South Carolina. R.D. Brown argues that its low-priced proposal fully complied with the functional requirements of the RFP.

We dismiss the protest as untimely.

The RFP contemplated an award on the basis of the lowest priced technically acceptable offer. Paragraph 1.6, section 01010 of the summary of work (SOW) described the CSWTF project as consisting of a number of systems including an equalization basin and an oxidation ditch. According to the agency, an equalization basin is a holding basin in which variations in flow and composition of wastewater are averaged to provide a flow of uniform volume and composition to a treatment unit; an oxidation ditch is a channel where screened wastewater is aerated with the assistance of mechanical rotors. Paragraph 1.5 of section 01010 of the SOW set forth functional requirements which offerors' project designs were to meet in terms of flow rates and influent and effluent quality.

Five initial proposals, including the protester's, were received on June 22, 1993. R.D. Brown's proposal was determined to be technically unacceptable because the firm proposed to use a sequential batch reactor (SBR) system in lieu of a system utilizing an equalization basin and an oxidation ditch. By letter dated July 15, R.D. Brown was

¹DOE concedes that we have jurisdiction to consider this protest concerning WSRC's award of a subcontract for the wastewater treatment project. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1994).

advised that its proposal had been found to be technically unacceptable for not meeting the requirements of the specification; nonetheless, the firm was asked to submit a revised proposal. On July 21, R.D. Brown resubmitted its initial proposal employing SBR technology noting that its "design build team" was "more comfortable with this method" of wastewater treatment than the one set forth in the RFP. This reiteration of the initial proposal was again rejected as technically unacceptable. By letter dated November 4, R.D. Brown was invited to submit a third proposal but was specifically advised that its second proposal was "deemed unacceptable due to non-compliance with the technical requirements of the [s]pecification. Technically, the proposal did not respond to the requirement for the equalization basin . . . and the oxidation ditch"

R.D. Brown submitted a third proposal on November 16. Again the firm proposed to employ SBR technology and stated:

". . . this proposal meets the intent of the specifications for flow and treatment to produce an effluent quality per the specifications. The [offer] is in accordance with the functional requirements of the [SOW]. Because our system is more efficient, there is no need for an equalization basin . . . , nor for the oxidation ditch. . . ."

R.D. Brown was subsequently eliminated from further competition and, on December 6, the firm again was notified that its proposal to use an SBR system in lieu of the equalization basin and oxidation ditch required by the SOW had been rejected. In addition, WSRC informed R.D. Brown that the firm's proposed project schedule exceeded the schedule required by the RFP.²

The firm then requested a debriefing which was held on January 19, 1994. At the debriefing, WSRC reiterated the reasons for rejecting R.D. Brown's proposal and explained that alternative technologies, including SBR, had been investigated by the prime contractor prior to the issuance of the RFP and rejected because the equalization basin/oxidation ditch technology was determined to be best for the CSWTF Project.

On January 27, R.D. Brown filed a protest with WSRC which was orally denied on February 16. This protest to our Office followed on February 24, reiterating R.D. Brown's position that its SBR-based system complied with the functional requirements of the RFP.

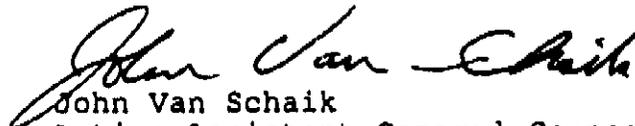
²R.D. Brown has not challenged this finding.

In response, WSRC argued that the protest to this Office was untimely because it was not filed within 10 days after the basis of protest was known or should have been known--i.e., within 10 days after WSRC advised R.D. Brown of the specific reasons for its determination of unacceptability. 4 C.F.R. § 21.2(a)(2). We agree.

The grounds for R.D. Brown's protest center on its contention that the design and build specifications in the RFP permitted it to offer an SBR system and that WSRC's interpretation of the SOW limiting acceptable systems to those including equalization basins and oxidation ditches is erroneous. It is clear, however, that, on November 4, when R.D. Brown received WSRC's rejection of its proposed system for failure to comply with what the prime contractor interpreted as mandatory design specifications for an equalization basin and oxidation ditch, the protester was on notice of the grounds of its protest.

Under our Bid Protest Regulations, as discussed above, the protester had 10 working days from November 4, when it was unequivocally informed of WSRC's interpretation of the specifications, to file a protest. Because R.D. Brown did not, and elected instead to continue proposing a noncompliant system,³ the protest is dismissed as untimely. Securiguard, Inc., et al., B-254392.8 et al., Feb. 9, 1994, 94-1 CPD ¶ 92.

The protest is dismissed.


John Van Schaik
Acting Assistant General Counsel

³The protester also contends that it had to await the debriefing to learn the grounds of its protest and that it was otherwise misled by WSRC into believing that the timeliness requirements would be tolled until after the debriefing. The debriefing added nothing to the protester's knowledge of WSRC's interpretation of the SOW; further, we note that advice from contracting officials, even if it is erroneous, does not operate to toll our timeliness requirements. See D/FW Appraisal Corp., B-248428.2, Sept. 30, 1992, 92-2 CPD ¶ 218.