

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

Mr. K. p.c.s  
31164

**FILE:** B-217129 **DATE:** May 6, 1985  
**MATTER OF:** Victaulic Company of America

**DIGEST:**

1. Protest assertions based on alleged improprieties that were or should have been apparent to the protester prior to either the initial or final closing date for receipt of proposals are untimely and will not be considered on the merits where raised after the final closing date for receipt of proposals.
2. Purchase descriptions for the items being procured under a solicitation do not constitute definitive responsibility criteria.
3. GAO will not review an affirmative responsibility determination based generally on alleged agency bad faith in conducting procurement, where there is no evidence or specific allegation that the agency's affirmative responsibility determination itself was motivated by bad faith.

Victaulic Company of America (Victaulic) protests the potential award of a contract to LaBarge Products (LaBarge) under request for proposals (RFP) No. DAAJ10-84-R-A117, issued by the Department of the Army for double-grooved aluminum piping, couplings, and production tooling and drawings. Victaulic contends that the Army acted improperly in several respects in conducting this procurement, and that an award to LaBarge therefore would be improper. We dismiss the protest.

The facts are, briefly, as follows. In 1982, the protester recently had developed a new double-grooved, pipe-joining technique that facilitated the rapid assembly and deployment of pipeline systems. The Army expressed interest in this technique, and during the period 1982-1984 Victaulic worked with the Army and Reynolds Metal Company

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(Reynolds) to develop specifications and purchase descriptions for double-grooved aluminum piping and couplings. The RFP, incorporating these specifications, was issued on July 9, 1984, with an August 16 closing date for receipt of initial proposals.

Reynolds was awarded a contract for the piping portion of the requirement on August 31 based on its initial proposal. This award is not in dispute. Three offerors remained in contention for the coupling requirement. LaBarge's initial proposal was low on these items, Victaulic's was second low, and Reynolds' was third. Best and final offers were requested September 11 with a final closing date of September 14. By letter of September 13, Victaulic advised the Army that "it elects to not bid the solicitation." This election by Victaulic apparently was related to the fact that Victaulic had decided to enter into an agreement with Reynolds to furnish the couplings as Reynolds' subcontractor. LaBarge's best and final price was lower than Reynolds', however, and after determining that LaBarge was responsible, the Army prepared to award LaBarge the contract for the couplings. The Army is withholding the award pending resolution of this protest.

Victaulic essentially believes it is entitled to some portion of the contract since the requirement actually was based on its double-grooved pipe technology, and raises a number of arguments to the effect that Reynolds (with Victaulic as its subcontractor), not LaBarge, should receive the couplings contract. These arguments, however, are either untimely or involve matters not reviewed by our Office.

Victaulic first argues that it was unfair to Victaulic, and thus improper, for the Army to permit offers on either the pipe or the couplings, and to provide for separate awards for these items rather than providing for a single award for both items. Victaulic claims it had an implied agreement with the Army under which the Army would make only a single award if Victaulic permitted the use of its proprietary information in the RFP and quoted its coupling prices to other potential offerors. Had the Army done so, it appears Reynolds would have been in line for the whole award (since it apparently was the only offeror capable of furnishing the pipe), and Victaulic thus would have been able to furnish the couplings as Reynolds' subcontractor.

It is Victaulic's position that because the Army failed to abide by this implied contract, its use of Victaulic's proprietary information was unauthorized and improper. •

Under our Bid Protest Procedures, protests based on alleged deficiencies or improprieties apparent prior to the closing date for receipt of proposals must be filed before that date. 4 C.F.R. § 21.2(b)(1) (1984). Amendment 0004, issued August 13, incorporated the following notation in the RFP:

"Offerors may bid on either one of or both of the above items [pipe and couplings]. In the event that separate awards are made, a coupling will be provided G.F.P. to the pipe supplier to ensure configuration compatibility between the pipe and couplings."

This language clearly allows offerors to propose furnishing both or only one of the items, and affords the Army the option of making separate awards for the two items; Victaulic states it was informed by Reynolds on August 14, two days prior to the closing date, that this language had been added to the RFP. Thus, if Victaulic believed that the Army, in allowing for separate awards, was violating some agreement concerning Victaulic's proprietary data, it was required to so allege prior to August 16. See Native American Management Services, Inc., B-216282, Sept. 17, 1984, 84-2 C.P.D. ¶ 304. Since Victaulic's initial protest letter was not received in our Office until November 15, three months after the initial closing date and two months after the final closing date, this aspect of the protest is untimely and will not be considered on the merits.

Victaulic next contends that the request for best and final offers improperly incorporated new requirements in the RFP by asking offerors to quote prices on an option for the Army to purchase production drawings and tooling. Victaulic argues that since this option was not a part of the original RFP, it should not have been included in the best and final offers request. This portion of the protest is untimely under the same section of our Procedures applied above. Victaulic received verbal notice of the option price requirement on September 11, three days prior to the final closing date. Since this constituted an alleged impropriety apparent prior to the final closing date, any protest on the

matter had to be filed before that closing date. 4 C.F.R. § 21.2(b)(1). Victaulic's protest filed on November 15 therefore is untimely. Id.

Victaulic also asserts that the Army used improper auction techniques in an attempt to persuade Victaulic to lower its price for the couplings. This assertion is based on an anonymous tape recording reciting offerors' initial prices, allegedly played for Victaulic over the telephone on September 6. This portion of the protest, however, also is untimely since it was not raised prior to the September 14 final closing date. 4 C.F.R. § 21.2(b)(1).

Victaulic argues that, even if its allegations technically are untimely, we should waive the filing deadlines in the interest of maintaining the integrity of the competitive bidding system.

Our Procedures allow for consideration of the merits of an untimely protest where the issue raised is significant to the procurement system. 4 C.F.R. § 21.2(c). We apply the "significant issue" exception to our timeliness requirements sparingly, however, and only when the subject matter is of widespread interest to the procurement community and has not previously been considered by our Office. OAO Corp., B-211803, July 17, 1984, 84-2 C.P.D. ¶ 54. We previously have considered protests concerning the propriety of multiple awards, Veterans Administration--Request for Advance Decision, 62 Comp. Gen. 196 (1983), 83-1 C.P.D. ¶ 141; the alleged misuse of proprietary data, Neff Instrument Corp., B-216236, Dec. 11, 1984, 84-2 C.P.D. ¶ 649; the inclusion of solicitation amendments in requests for best and final offers, Avitech Inc., B-214749, Sept. 17, 1984, 84-2 C.P.D. ¶ 297; and the alleged use of improper auction techniques, Andrews Tool Co., B-214344, July 24, 1984, 84-2 C.P.D. ¶ 101. Moreover, we see no reason to believe that the procurement community in general would be interested in the resolution of these issues which, it appears to us, Victaulic brought to our attention only after it realized it might not be in a position to furnish the couplings under this procurement. Consequently, we do not consider the issues raised "significant" so as to warrant invoking the exception to our timeliness requirements.

Victaulic also disputes the Army's determination that LaBarge is capable of performing under the contract, that is, that LaBarge is responsible. We will review an agency's affirmative determination of an offeror's responsibility

only where it is shown that the agency misapplied definitive responsibility criteria, or that the determination resulted from fraud or bad faith on the agency's part. E.A.R., Division of Cabot Corp., B-215032, July 5, 1984, 84-2, C.P.D. ¶ 19. Victaulic attempts to invoke our limited review of affirmative responsibility determinations by contending that the purchase descriptions for the double-grooved pipe and couplings constituted definitive responsibility criteria and that, since only Victaulic possesses the rights to the designs for these items, it follows that no other offeror, including LaBarge, can meet these criteria.

The purchase descriptions and specifications for the pipe and couplings clearly are not definitive responsibility criteria. Such criteria consist of objective standards relevant to the offeror's ability to perform--such as a requirement for 5 years of specific experience--with which an offeror must be found to comply as a precondition to receiving the award. The purchase descriptions here do not establish a standard related to an offeror's ability to perform the contract; rather, they serve the sole purpose of describing the items offerors are to agree to supply in the event they receive the award. We have specifically held that such performance requirements are not definitive responsibility criteria. Hatch & Kirk, Inc., B-214024, June 11, 1984, 84-1 C.P.D. ¶ 614.

Victaulic also alleges that bad faith by the Army in conducting this procurement warrants our review of LaBarge's responsibility. The bad faith alleged by Victaulic, however, relates only to Victaulic's general belief that it was treated improperly under this procurement. Victaulic has not shown, by irrefutable proof, that the Army's finding that LaBarge was responsible to perform reflected a malicious and specific intent to injure the protester, the showing necessary before our Office will question an affirmative responsibility determination. See Coastal Striping & Painting Corp., B-214869, Dec. 26, 1984, 84-2 C.P.D. ¶ 697. We also find no evidence--beyond Victaulic's own view of the circumstances of this procurement--that the Army's actions in connection with this procurement otherwise were motivated by bad faith.

The Army questions whether Victaulic is an interested party eligible to bring a protest in this matter. See 4 C.F.R. § 21.1(a). We agree that Victaulic may lack the

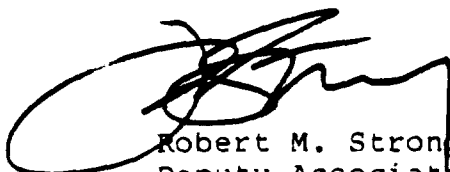
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requisite interest for at least portions of its protest since it appears Reynolds, not Victaulic, would be in line for the award in the event we upheld the protest; Victaulic dropped out of the competition instead of submitting a best and final offer, and now essentially is seeking a subcontract award from Reynolds. See Die Mesh Corp., 58 Comp. Gen. 111 (1978), 78-2 C.P.D. ¶ 374. In view of the above disposition of Victaulic's arguments, however, we will not decide this issue.

The protest is dismissed.

A handwritten signature in black ink, appearing to read 'R. M. Strong', is written over a horizontal line.

Robert M. Strong  
Deputy Associate General Counsel