

DECISION



29579
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-214625, B-214625.2

DATE: October 17, 1984

MATTER OF: Ricwil, Inc.; Perma-Pipe, Division of
Midwesco, Inc.

DIGEST:

1. Protests filed with GAO more than 2 months after protesters learn of initial adverse agency action on their pre-bid-opening date protests to procuring activity are dismissed as untimely.
2. The "significant issue" exception to our rules concerning untimely protests is not applicable to a protest charging that a solicitation contained overly restrictive specification.
3. Protesters have not shown that burial depths specified by Army Corps of Engineers for installing a direct buried underground heat distribution system are unreasonable or arbitrary or that Corps improperly permitted innovative engineering approaches to be used for installing the shallow trench underground heat distribution system, but not for the direct buried system.
4. Protests against solicitation improprieties raised several months after bid opening date are untimely under GAO Bid Protest Procedures, which require protests alleging improprieties apparent on the face of the solicitation to be filed prior to the bid opening date.

Ricwil, Inc. (Ricwil), and Perma-Pipe, Division of Midwesco, Inc. (Perma-Pipe), protest certain solicitation requirements in invitation for bids (IFB) No. DACA27-83-B-0039 issued by the Army Corps of Engineers (Corps) for the repair/replacement of an underground heat distribution system at Chanute Air Force Base, Illinois. Both protesters are suppliers of underground heat distribution systems and potential subcontractors on this project.

The IFB permitted bidders to offer two alternate systems to meet the agency's requirements: the shallow covered concrete trench system (shallow trench system) and/or the direct buried encased system (direct buried

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system). The protesters allege that the direct buried system requirement that drip and condensate lines be placed in separate conduit is unduly restrictive. The protesters also contend the depths specified for burial of the direct buried systems are excessively deep. No one bid the direct buried system. Award was made for the shallow trench system.

The firms' protests concerning the separate conduit requirement are untimely. Both protesters initially protested this matter to the procuring activity and by letter of January 5, 1984, the procuring activity denied the protests. We received Ricwil's and Perma-Pipe's protests on this same issue on March 12, 1984, and March 15, 1984, respectively. Bid opening was March 13, 1984.

Perma-Pipe erroneously believes that its protest was received by our Office prior to bid opening and, therefore, maintains that its protest was timely filed here under section 21.2(b)(1) of our Bid Protest Procedures. 4 C.F.R. § 21.2(b)(1) (1984).

Under section 21.2(a) of our Bid Protest Procedures, 4 C.F.R. part 21 (1984), when a protest has been filed initially with the procuring activity, any subsequent protest to our Office must be filed within 10 working days of formal notification of initial adverse agency action. While section 21.2(b)(1) provides that a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening, we have held that where the solicitation defect initially has been filed with the procuring activity, section 21.2(a) controls. Compucorp, B-211889, June 10, 1983, 83-1 C.P.D. ¶ 644; Informatics, Inc., 58 Comp. Gen. 750 (1979), 79-2 C.P.D. ¶ 159. Accordingly, the firms' protests to our Office, filed over 2 months after the procuring activity denied the same protests filed with it, are untimely. Compucorp, B-211889, supra.

Perma-Pipe requests that we apply the "significant issue" exception to its untimely protest. This exception provides that an untimely protest may be considered if it raises a question of significant interest to the procurement community. 4 C.F.R. § 21.2(c) (1984). Perma-Pipe argues that we should apply the exception here because the separate conduit requirement may be at issue in future procurements of this nature and there is congressional interest in the resolution of Perma-Pipe's protest.

In order to invoke the significant issue exception to our timeliness rules, the subject matter of the protest must

not only evidence a matter of widespread interest or importance to the procurement community, see e.g. Willamette-Western Corporation; Pacific Towboat and Salvage Co., 54 Comp. Gen. 375 (1974), 74-2 C.P.D. ¶ 259, but must also involve a matter which has not been considered on the merits in previous decisions. CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 C.P.D. ¶ 225; Garrison Construction Company, Inc., B-196959, Feb. 26, 1980, 80-1 C.P.D. ¶ 159; Wyatt Lumber Company, B-196705, Feb. 7, 1980, 80-1 C.P.D. ¶ 108.

The issue of an agency's determination of its minimum needs has been the subject of numerous previous GAO decisions. Swintec Corporation--Reconsideration, B-212395.8, Aug. 13, 1984, 84-2 C.P.D. ¶ 161; Potomac Industrial Trucks, Inc., B-204648, Jan. 27, 1982, 82-1 C.P.D. ¶ 61. In this connection, we have explained that the "significant issue" exception is not applicable to protests, such as the one in the present case, charging that a solicitation contains overly restrictive specifications. Swintec Corporation--Reconsideration, B-204648, supra. Furthermore, while we are not unmindful of the congressional interest in the resolution of Perma-Pipe's protest, congressional interest is not a grounds for invoking the significant issue exception. We have explained that, if we were to consider an untimely protest on the merits when submitted by a Member of Congress or when a Member expressed interest in the protest, this would suggest to the procurement community that the timeliness provisions of our Bid Protest Procedures could be circumvented by submitting a protest through a Member of Congress. The "significant issue" exception must be strictly construed and sparingly used to prevent our timeliness rules from being rendered meaningless. Swintec Corporation--Reconsideration, B-204648, supra.

The protesters' other contention is that the depths specified for burial of the direct buried system are excessively deep. This contention is timely. Ricwil and Perma-Pipe both raised this contention with the contracting agency before bid opening. The initial adverse agency action on this contention was the bid opening. Ricwil protested the issue to our Office before bid opening and Perma-Pipe protested it to our Office promptly after bid opening.

The protesters state that the construction and excavation work required to bury the pipes at the depths specified is unnecessary and will raise contract performance costs substantially. The protesters maintain that such additional costs precluded them from competing with suppliers of the shallow trench system. Specifically, the protesters question the depth needed to provide adequate protection for the

pipes (the Corps' requirement for a minimum of 2 feet of protective "cover") and the depths at which the pipes should be placed to avoid underground obstacles.

To support the above contentions, the protesters point out that no bids were submitted for the direct buried alternate. The protesters also have submitted their own plans for shallower burial of the direct buried conduit and reports from independent engineering consultants which support the viability of their plans. The reports submitted indicate that the direct buried conduit should be placed at the shallowest depth practical and that the Corps has specified depths which are "much deeper than required."

Perma-Pipe further argues that our review of the Corps' technical plans for this project will show that the Corps permitted more flexibility, engineering innovation, and cost effective approaches for installing the shallow trench system while not permitting the same approaches for installing the direct buried system. For example, Perma-Pipe points out that the specifications for the shallow trench system direct the contractor to modify a certain storm sewer where the trench line intersects the sewer; however, the specifications for the direct buried system direct the contractor to bury the conduit beneath the sewer.

The Corps responds that the depths contained in the IFB engineering plans for burial of the direct buried system are sufficiently deep to avoid conflicts between the new pipe lines and other existing utility lines at known and unknown depths. While the IFB permits the contractor to submit final plans for installation of the direct buried system, the Army maintains that burial depths suggested by the protesters would result in the pipes being placed in positions where they would conflict with numerous utility lines at known depths and probably other lines at unknown depths. Furthermore, the Corps states that to thread the pipes between existing utility lines of known depths would result in "an undesirable distorted sawtoothed profile" which, the Corps states, would be difficult to maintain.

Concerning the 2-foot minimum cover requirement, the Corps explains that the amount of cover is required for safety reasons in the event that the pipes rupture and to protect the system from exposure to the elements as well as prevent damage to the pipes which could be caused by future construction.

Finally, concerning Perma-Pipe's allegation that the Corps permitted innovative engineering for installing the shallow trench system only, the Corps explains that the direct buried and shallow trench systems have inherent structural differences which preclude logical comparison of the installation approaches for the systems. The shallow trench system is installed at a minimum depth; a trench is formed which often follows the existing surface slope. Concrete trench tops which are required to protect the system often also serve as sidewalks. Furthermore, shallow utility lines which intersect the trench must be modified or relocated because there is no practical alternate to modifying the utility lines when installing the trench system.

In contrast, the direct buried conduit, as explained above, requires dirt "cover" to protect it. Further, with respect to allowing utility relocations when installing the two systems, the Corps points out that, while the IFB does instruct the contractor to relocate certain buried utilities when installing the direct buried system, to permit the contractor to relocate or modify many or all of the approximately 350 buried utilities at known depths, which would be encountered when installing the direct buried conduit, would result in numerous service interruptions to the base.

Both the protesters and the Corps have supplied our Office with numerous technical arguments and reports to confirm their views. Essentially, this evidences to us that a technical dispute exists concerning the most efficient and economical approach to installing the direct buried system which will accommodate the agency's needs. For instance, the protesters take exception to the requirement that the direct buried system be protected by a minimum of 2 feet of "cover" and argue that a lesser amount would adequately protect the pipes. However, the Corps has enumerated several reasons as justification for the cover depth required, such as to protect the system from exposure to the elements and prevent damage to the pipes in the event of future construction. Furthermore, the protesters believe Corps engineering plans provide for excessively deep burial of the pipes. However, the Corps has explained that the depths chosen reflect the agency's best judgment of the depth needed to avoid extensive rerouting or replacing of existing utility lines. While the protesters have submitted evidence purporting to show that the pipes could be buried at shallower depths, the procuring activity advises that the burying of the pipes at the depths suggested by the protesters could disrupt existing utility services and the agency is not

willing to accept this. In light of the procuring activity's concerns regarding the various risks associated with the protesters' approach, we cannot say that the agency's unwillingness to permit greater flexibility to accommodate the protesters' approach is unreasonable. Cleaver Brooks Division of Aqua-Chem, B-213323, June 12, 1984, 84-1 C.P.D. ¶ 620; Slurry Systems, B-212033, Dec. 13, 1983, 83-2 C.P.D. ¶ 675; Rack Engineering Company, B-208615, Mar. 10, 1983, 83-1 C.P.D. ¶ 242; Industrial Acoustics Company, Inc., et al., B-194517, Feb. 19, 1980, 80-1 C.P.D. ¶ 139.

Perma-Pipe complains that the Corps permitted flexibility for installing the shallow trench system, but not for the direct buried system. The two systems have recognizable differences; each system has several features which are unique to that system. Therefore, we cannot conclude that the differences in the two systems do not adequately explain the differences in specifications for the two systems.

Next, the protesters refer to a waiver from the Department of Defense. The waiver permitted competitive bidding of the shallow trench system in addition to the direct buried system for this procurement. The waiver was granted contingent upon the procuring activity insuring that the specifications for the direct buried system were written to allow for fair and comparable competition from prequalified suppliers of the direct buried system. The protesters allege that the contracting activity did not meet the above conditions of the waiver. In this connection, we note that the waiver directs the procuring agency to submit the IFB specifications to the Office of the Assistant Secretary of Defense (OSD) for review. The record does not indicate that OSD objected to the specifications. Further, as noted above, we have concluded that the specifications were reasonable considering the differences in the systems.

To the extent the protesters may be complaining about permitting bidding of the shallow trench system in addition to the direct buried system, we have consistently refused to review allegations that agencies have improperly broadened competition. Metermod Instrument Corporation, B-211907, Apr. 19, 1984, 84-1 C.P.D. ¶ 448.

Finally, in their response to the procuring activity's administrative report, the protesters allege several solicitation defects which they had not protested previously. These allegations raised for the first time several months after the bid opening date are untimely and will not be considered on the merits. Container Service, Inc., B-214697, Aug. 13, 1984, 84-2 C.P.D. ¶ 165.

The protest is dismissed in part and denied in part.

for *Milton J. Aoulan*
Comptroller General
of the United States