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DECISION



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

FILE: B-203790.2

DATE: March 25, 1982

MATTER OF: Quality Diesel Engines, Inc. -- Reconsideration

DIGEST:

1. Upon reconsideration, factual basis of prior decision regarding the nature of the conversations conducted between the contracting agency's project engineer and the protester prior to bidding, which conversations conveyed to the protester the Government's interpretation of the specification prior to the submission of offers, is affirmed.
2. Request for conference made on reconsideration is denied as such requests are granted only where matter cannot be promptly resolved without a conference and this is not such a case.

Quality Diesel Engines, Inc. requests reconsideration of our decision Quality Diesel Engines, Inc., B-203790, December 3, 1981, 81-2 CPD 441.

In the prior decision, we denied in part and dismissed in part Quality's protest against the award of a contract to Charlie Lamb & Sons for the testing and repair of four diesel engine generator sets under request for quotations No. NASO-1916 issued by the National Oceanic and Atmospheric Administration. We concluded that (1) absent conditions not present here, we would not consider a protest of the contracting officer's determination that Lamb was a responsible bidder, (2) the acceptability of the work Lamb performed under the contract was a matter of contract administration not for resolution by this Office and (3) because Quality was aware of NOAA's interpretation of the specification prior to the submission of offers, Quality suffered no prejudice when the successful contractor performed in accordance with that interpretation.

First, Quality alleges that our original decision was based upon a mistake in fact, in that Quality was never advised orally or in writing of any changes in the specification prior to the submission of offers. In support of its contentions, Quality submits an affidavit from its president stating that instead of modifying the specification, the conversations which occurred prior to the submission of offers confirmed the specification as written. This being the case, Quality argues, any failure by NOAA to require Lamb to fully comply with the specification during performance was contrary to the decisions of this Office prohibiting the modification of a contract specification immediately after award where the basis for the change was known prior to award. Quality contends that our prior decision erred as a matter of law in this respect and in concluding that Quality was not prejudiced by NOAA's actions. Quality asserts that it is entitled to bid preparation costs in these circumstances and requests a conference to discuss the case.

As stated in our prior decision, item number two of the specification required the contractor to "(p)ump hot oil through the engines to clean out all preservative." We concluded that Quality knew that the specification required only the pumping of hot oil to remove the preservative, even though this technique might not remove all of the preservative. Quality's affidavit states that it was told to perform the specified work "as is." Our factual conclusion that NOAA had advised Quality that the removal of all preservative from the engine was not required, is therefore challenged as mistaken. For the reasons detailed below, we believe that the record supports the factual conclusions set forth in our original decision.

On May 15, 1981, three days before offers were due, Quality wrote two letters to the NOAA contracting officer asserting that pumping of hot oil was not a satisfactory method for removing preservative and that additional, more time-consuming hand scraping and brushing would be necessary to remove the great majority of the preservative. In this regard, Quality's shorter letter states:

"In our opinion, the major problem we find with the bid request is item number two. 'Pump hot oil through the engines to clean out all preservatives.' Our interpretation of all means the total amount of preservative in the engine must

be removed. There is no way, even with unlimited time, that circulation of hot oil through this engine will remove all the cosmoline, as it does not circulate where the heaviest concentration of cosmoline is located." (emphasis in original)

In other words, Quality was aware of the possibility that item two of the specification admitted of two interpretations, either as requiring only the pumping of hot oil through the engine to remove the preservative, or as requiring whatever work was necessary to completely remove all preservative. Quality's letter further reflects its understanding that the Government interpreted item number two as requiring only the pumping of hot oil, since Quality stated that:

"In our opinion, it will be necessary to hand scrape and brush clean all of these areas to make it operational. We therefore offer an alternative proposal to the bid request. This proposal is put forth in a separate letter which explains our findings by individual engines."

Quality would, of course, have had no reasons to propose the alternative of removing preservative by other means if it did not fully understand the Government's position that item number two required only the pumping of hot oil.

Quality's longer letter repeats its contention that pumping hot oil is unsatisfactory, advises that the matter had been discussed with NOAA's project engineer, and concludes:

"If we were to just clean according to the bid request, item number two, the unit would not be runnable. We would then have to come back and ask for supplemental funds in order to bring the unit into compliance with industry standards. We will bid this either way."

As indicated in Quality's record of its telephone conversation of May 15, the contracting officer confirmed the project engineer's directions when, in reply to Quality's concerns, she suggested that they supply an alternate bid.

These written statements by Quality furnish support for NOAA's position that prior to the date offers were received, Quality was informed that removal of all preservative from the engine was not required. It does not matter that Quality objected to NOAA's interpretation of item two, since NOAA did not have to obtain Quality's agreement as to what NOAA intended to purchase. Instead, NOAA needed only to communicate its intent to Quality, and so long as Quality was aware of that intent prior to submission of offers, Quality had no cause for complaint. As stated above, we believe that Quality's letters of May 15, 1981, written prior to receipt of offers, reflects Quality's awareness of NOAA's interpretation of item two as requiring only the pumping of hot oil through the engines.

By rejecting the more thorough cleaning methods proposed by Quality, NOAA's project engineer orally rejected Quality's proposed interpretation that item two required complete removal of all preservative. To the extent that this interpretation negated the word "all" in the phrase "remove all preservative," these conversations, together with the contracting officer's confirming remarks suggesting that Quality submit an alternate bid if it was not satisfied, constitute the oral modification of the specification mentioned in our prior decision. Consequently, the contracting officer's advice to Quality that it should "[g]o with the bid as is, no changes," meant that Quality should offer to perform the work in accordance with the oral directions and interpretations that NOAA had previously communicated to Quality.

Quality further argues that the disparity between Lamb's price and the other prices offered supports Quality's contention that it was not aware of NOAA's interpretation of the specification prior to the submission of offers. In this regard, we first note that the difference between Lamb's low offer and Quality's second low offer, \$6,585.40 and \$8,208.15, respectively, is not so great as to indicate that the firms were responding to different interpretation of the specification. Moreover, Quality has consistently urged that Lamb performed unsatisfactorily in a number of areas, so that the entire cost difference between Lamb's offer

and Quality's offer cannot be attributed to item two in any event. Consequently, we cannot agree with Quality's assertion that the difference in prices offered shows that Quality was not aware of the interpretation of item two communicated to offerors by the NOAA project engineer prior to the receipt of offers.

Quality's other contentions in its request for reconsideration are dependent upon Quality's showing that the factual basis of the original decision was mistaken and that a modification of the specification occurred after award. However, under our factual analysis, the Government's interpretation of the specification, which may be viewed as a modification, was communicated to Quality prior to bid opening. Therefore, we need not consider the other contentions.

As for Quality's request for a conference, our Bid Protest Procedures do not explicitly provide for a conference in this situation. See 4 C.F.R. § 21.9. Since it is the intent of the Procedures to effect prompt resolution of reconsideration requests, we believe a request for a conference should be granted only where the matter cannot be promptly resolved without a conference. In our judgment, this is not such a case. See Dubie-Clark Company, Patterson Pump Division--Request for Reconsideration, B-189642, April 6, 1978, 78-1 CPD 274.

Finally, as we find no basis for sustaining the protest, there is no basis for our allowing the claim for bid preparation costs.

The prior decision is affirmed.

for 
Comptroller General
of the United States