

DECISION

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

81-2 cpd 441

FILE: B-203790

DATE: December 3, 1981

MATTER OF: Quality Diesel Engines, Inc.

DIGEST:

1. Where a solicitation contains only a general requirement that the contractor comply with applicable laws and does not indicate that a specific state or local business license is required, the contracting officer may place the responsibility for determining compliance upon the prospective contractor. In such circumstances, the contracting officer's affirmative determination of responsibility, either explicit or implicit, will not be questioned by GAO even though the contractor may not have held all locally-required business licenses at time of award, absent a showing of fraud on the part of the procuring officials.
2. Whether contract is being performed in compliance with contract requirements is matter of contract administration and not for resolution under GAO Bid Protest Procedures.
3. Award is not objectionable merely because quoters were advised orally, instead of through written amendment, of revision to specifications, since all parties including protester were aware of change and therefore were not prejudiced by failure of agency to issue written amendment.

Quality Diesel Engines, Inc. (Quality) protests the award of a contract to Charlie Lamb & Sons (Lamb) under National Oceanic and Atmospheric Administration (NOAA) request for quotations No. NASO-1916, and Lamb's subsequent performance under that contract.

The NOAA Northwest Administrative Service Office, Seattle, Washington, issued this request for quotations on May 14, 1981 for the testing and repair of four diesel engine generator sets. These sets had been removed from a

Navy ship and were scheduled for shipment to the Pribilof Islands, Alaska, for use by the residents. Lamb offered the lowest price, and was awarded a contract for the work in question. Lamb has completed the testing and repairs and the first generator sets have been shipped to Alaska.

Quality contends (1) that because Lamb did not have the necessary business licenses it was not a responsible bidder; (2) that Lamb did not properly perform the contract work; and (3) that certain statements by NOAA personnel constituted an impermissible oral modification to the solicitation terms. The protest is denied in part and dismissed in part.

Responsibility

Quality contends that Lamb is not a responsible bidder in that Lamb did not have a local business license at the time of award, that it was not registered with the State of Washington under the name used on its contract, and that it did not have proper insurance coverage for its employees.

The NOAA contracting officer contends that Lamb is qualified in all respects to perform the work in question, and that, therefore, he considers Lamb to be a responsible contractor. He advises (1) that a license to do business in Seattle, Washington, was not needed because the work was performed entirely within a Federal reservation; (2) that Lamb has obtained a business license from Puyallup, Washington; (3) that the firm is registered with the State of Washington; and (4) that the firm had a proper Certificate of Insurance.

Where a solicitation contains only a general requirement that the contractor be in compliance with applicable laws and does not indicate a specific state or local license which is required, we have held that the contracting officer should not have to determine what the state or local requirements may be and the responsibility for making such determinations is correctly placed on the prospective contractors. New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225. Here the solicitation did not contain even a general requirement that the contractor comply with applicable state and local laws. Consequently, the contracting officer satisfied the requirements

of Federal procurement law when he affirmatively determined Lamb to be responsible either explicitly or, at least, implicitly, even though Lamb may not in fact have held all locally-required licenses and permits at time of award. Our Office does not review protests against affirmative determinations of responsibility absent a showing of fraud on the part of the procuring officials or that the solicitation contains definitive responsibility criteria which have not been applied. Planned Systems International, Inc., B-200860, November 7, 1980, 80-2 CPD 348. For this reason, we dismiss that portion of Quality's protest relating to responsibility.

Performance

Quality asserts that Lamb did not properly perform the testing and repair work required under the contract. In particular, Quality asserts that Lamb failed to clean out all preservative from the engine, that a proper compression test could not have been done in such event, and that Lamb could not have properly checked the overspeed trips without setting the engine to the original manufacturer's specification, which was not done. Quality's assertions are based upon inspections it performed, and others performed for it, while the generator sets were sitting on a Federal pier awaiting shipment.

The NOAA contracting officer advises that Lamb performed the work as required by the statement of work, which statement did not include restoring the engines to the original manufacturer's specification. According to the contracting officer, the contract required only the repairs necessary to test the engines so that the best generator set could be selected and shipped to the Pribilof Islands where complete restoration would be performed by the Pribilovians.

Whether Lamb performed the work properly is a question of contract administration which does not relate to the propriety of the award. Contract administration is the function and responsibility of the procuring activity and such matters are not for resolution under our Bid Protest Procedures, 4 C.F.R. part 21 (1981). Post Marketing Corporation, B-197472, January 28, 1980, 80-1 CPD 76. Consequently, this aspect of Quality's protest is dismissed.

Oral Modification of Solicitation

Item number two of the statement of work required offerors to "(p)ump hot oil through the engines to clean

out all preservative." Quality contends that NOAA orally modified this portion of the solicitation when, prior to receipt of offers, NOAA advised all potential contractors that "removal of all preservative from the engine was not required nor desired." According to Quality, this oral direction amounted to an oral modification of the solicitation prohibited by Section 1-3.805-1(d) of Federal Procurement Regulations (FPR).

The record shows that Quality was apprised of the fact that NOAA did not desire the removal of all preservative, and that NOAA was even considering deleting the line item requiring the contractor to pump hot oil through the engines to remove the preservative. Further, Quality's letter of May 15, 1981, to the contracting officer shows that, in Quality's opinion, pumping hot oil through the engines would remove only a small fraction of the preservative. Consequently, when Quality submitted its bid on May 18, it was aware of NOAA's interpretation that pumping hot oil through the engines would satisfy NOAA's requirement, even if preservative remained in the engines afterwards.

Regardless of whether the prohibition against oral modifications set forth in FPR § 1-3.805-1(d) applies to this procurement, which was conducted under the small purchase procedures authorized by FPR subpart 1-3.6, we would not object to the award because it is clear that Quality was aware of the specification change and was not prejudiced. See Tymshare, Inc., B-193703, September 4, 1979, 79-2 CPD 172; The Ohio State University Research Foundation, B-190530, January 11, 1979, 79-1 CPD 15. We therefore deny this aspect of Quality's protest.

Quality also seeks reimbursement of the costs it incurred employing consultants to inspect the generator sets after Lamb had completed testing and repairs, and requests payment for the loss of profits it suffered through the alleged improper award to Lamb. The only type of costs which our Office will grant are those associated with the preparation of bids and proposals. Consequently, Quality's costs incurred in developing the protest and its potential loss of profits are not for consideration. To recover bid preparation costs Quality would have to show that the agency's award actions were arbitrary or

capricious. See Decision Sciences Corporation--Claim for Proposal Preparation Costs, 60 Comp. Gen. 367 (1980), 80-2 CPD 298. Here, we have found that the award to Lamb was unobjectionable.

The protest is denied in part and dismissed in part.

for *Melton J. Fowler*
Comptroller General
of the United States