

DECISION



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

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FILE: B-184970

DATE: April 13, 1976

MATTER OF: Cummins Diesel Engines, Inc.

DIGEST:

1. Untimely protest is considered on merits because it reflects serious misunderstanding by agency of concepts of responsibility and responsiveness as applied in prior GAO decisions.
2. Inclusion in IFB of six pages of "Descriptive Schedules" containing over 200 blanks in which bidders were to insert specific information concerning equipment being supplied; which were expressly made part of specifications; which were to be furnished with bid; and as to which bidders were advised to fill in all blanks or be found nonresponsive, was a descriptive literature requirement even though agency failed to use descriptive literature clauses prescribed by regulations.
3. Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency.
4. Statement in cover letter accompanying bid that bidder would supply equipment specified in "Descriptive Schedules" "or equal" was reservation by bidder of right to substitute unidentified components for those described in bid, thereby rendering bid nonresponsive.
5. Bidder's failure to submit with bid manufacturer's horsepower curves substantiating engine horsepower claimed in bidder's entry upon "Descriptive Schedules" also resulted in nonresponsive bid.
6. No basis exists for rejection of bid as nonresponsive under argument that generator offered would not meet specifications where bidder inserted acceptable information in "Descriptive Schedules" and furnished with bid letter from generator manufacturer certifying that generator would comply with specifications.

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7. GAO does not recommend that contract awarded to nonresponsive bidder be terminated for convenience of the Government, after considering urgency of procurement, good faith (albeit erroneous) reliance by agency on prior GAO decisions and untimeliness of protest.

Cummins Diesel Engines, Inc. (Cummins), the third low bidder under Coast Guard invitation for bids (IFB) No. CG-60,500-A, contends that the first and second low bids submitted by Essex Electro Engineers, Inc. and King-Knight Co. respectively should have been rejected as nonresponsive. The agency has proceeded with an award to Essex, despite the pendency of the protest, pursuant to a determination that a prompt award would be most advantageous to the Government.

In its report to our Office, the agency observes that Cummins' initial protest to it was untimely filed under the standards set forth in section 20.2 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975). We agree. Our review of the record shows that Cummins' protest to the agency was filed one day late; its subsequent protest to this Office was timely. However, we have considered this protest on its merits because the file reflects a misunderstanding by the agency of the concepts of responsibility and responsiveness as applied in prior decisions of this Office.

FACTUAL BACKGROUND

The instant IFB for diesel engine-driven power systems utilizes a mixture of design and performance specifications. Components of the systems were described in terms of certain required physical and dimensional characteristics as well as in terms of the level of performance to be achieved. The designation of system components, such as diesel engines, generators, switches, meters and cabinets was generally left to each bidder, whose task was to select from the products of several manufacturers a combination of components meeting the design and performance requirements of the specifications.

Each bidder was required to describe his selection of components by filling in approximately 225 blanks in two three-page "Descriptive Schedules" attached to both specifications used in the IFB. (The precise number of blanks varied with the type of radiator used.) At the beginning of each "Descriptive Schedule" was the legend "(To be furnished as part of bid)" and the relationship of the "Descriptive Schedule" to the specifications was explained as follows in the IFB's listing of the items being procured:

- "1. [4] Power systems consisting of two (2) each 400KW Diesel Engine Generator Sets (Prime Power Rated) with automatic transfer switch system and 400KW Load Bank in accordance with Specification No. 953 dated 19 May 1975 consisting of 35 pages and 3 pages of descriptive schedule

- "2. [1] Power system consisting of three (3) 400KW Diesel Engine Generator Sets (Prime Power Rated) with automatic transfer switch system and 400KW load bank in accordance with Specification No. 956 dated 25 June 1975 consisting of 44 pages and 3 pages of descriptive schedule" (Emphasis added.)

The solicitation further provided:

"BIDDER SHALL SUBMIT THE FOLLOWING INFORMATION WITH THEIR BID OR THE BID SHALL BE CONSIDERED NON-RESPONSIVE.

"1. Completion of "Descriptive Schedule" attached to the specifications. ALL items must be completed.

* * * * *

(Emphasis in original.)

Essex's Failure to Complete the "Descriptive Schedule"

The agency has conceded the accuracy of Cummins' contention that Essex failed to provide the following information requested by the "Descriptive Schedule":

- (1) the precise model Westinghouse generator circuit breaker;

- (2) the manufacturer of the generator control cabinet; and

- (3) the catalog numbers of the ASCO monitors to be furnished.

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However, the agency obtained that information from Essex after bid opening, and found it to be satisfactory, under the following rationale advanced by the contracting officer in his report to our Office:

"The statement that required data was not submitted with the bid is correct. Here, in spite of the fact that the solicitation states that the bidder shall submit all completed items of the Descriptive Schedule or be considered nonresponsive, nevertheless, it is apparent that the purpose of the requirement is to permit the Coast Guard to determine whether the product offered would meet the specifications and to generally establish what the bidder proposed to furnish.

"In connection with the failure of a bidder to comply with the requirements of a Descriptive Schedule, the Comptroller General held in 48 Comp. Gen. 659 (1969) that a similar requirement for furnishing information with the bid was directed toward determining the responsibility of the bidder rather than the responsiveness of the bid. Therefore, there was no valid basis for rejecting the low bid solely for failure to submit the requirement data at the time of bid. (See also [B-177245, May 7, 1973]). Therefore, in keeping with the ruling of the Comptroller General, I find that the Descriptive Schedule requirement relates to the responsibility, and I have determined that the bid submitted by Essex is responsive. * * *"

We believe the agency's reliance on the decisions cited is misplaced. Our decision which is reported at 48 Comp. Gen. 659 (1969) concerned the proposed rejection of a bid which failed to include certain "preliminary drawings" required by the IFB. The agency advised our Office that the "preliminary drawings" were required to determine prior to award "whether the product offered will conceivably meet the specification requirements and to generally establish what the bidder proposes to furnish." (Emphasis added.) We observed, with specific reference to the underscored language, that the requirement for "preliminary drawings":

"* * * would appear to be directed to determining the responsibility of the bidder, rather than the responsiveness of the bid to the specification requirements. Additionally, we note that [the IFB specifications] would appear to require that the successful bidder must comply with the specification requirements, rather than the preliminary drawings submitted with his bid, as indicated by the requirement in Section C for postaward submission of detailed drawings, and the requirement in section G for submission and approval of a preproduction sample which conforms to every requirement of the specification. In view thereof, it is our opinion the record presents no valid basis for rejecting bids solely for failure to submit preliminary drawings with the bid." 48 Comp. Gen. at 662. (Emphasis added.)

The "preliminary drawings" with which our prior decision was concerned served only to indicate whether bidders sufficiently grasped the specifications to offer products which would conceivably meet the Government's needs, and did not establish exactly what the bidders would ultimately furnish. Moreover, the solicitation did not state that the failure to furnish the preliminary drawings would render the bid nonresponsive.

The function of the "Descriptive Schedule" in the instant procurement was very different. The IFB's Schedule of Supplies/ Services requested bidders to submit firm fixed prices for the supply of power systems which were to be "in accordance with" specifications which expressly included "3 pages of descriptive schedule." "Specifications" is defined in the Federal Procurement Regulations (FPR) as a "clear and accurate description of the technical requirements for a material, product or service * * *." FPR § 1-1.305 (1964 ed. amend. 95).

We think it is clear that the information entered by the bidders in the "Descriptive Schedule" was meant to describe exactly what was to be furnished under any resulting contract. Any doubt in this regard can be resolved by an examination of the quality assurance provisions in both specifications contained in the IFB. Among the tests to be conducted on each engine-generator unit offered for acceptance is one for "Fuel Consumption-Diesel Engine". The "Requirement Paragraph of the specification" against which the test results are to be measured is given as "Manufacturer's Ratings as given in the Descriptive Schedules". (Emphasis added.) The fact that at least in one respect

the "Descriptive Schedule" established a specification requirement against which the supplies were to be tested conclusively demonstrates in our opinion, that the information sought related to the suitability of the equipment rather than to a bidder's capacity to produce it. In addition, the invitation stated that information should be submitted or the bid would be considered nonresponsive.

In B-177245, May 7, 1973, also cited by the Coast Guard, we found as relating to responsibility data requirements which admittedly were not necessary to determine whether the product met specifications. In contrast, the data required in the instant case specifically formed a part of the product specifications. We note that the data omitted from Essex's bid was obtained by the Coast Guard prior to award.

We must therefore conclude that the Coast Guard erred in regarding the "Descriptive Schedule" as relating to Essex's responsibility rather than to the responsiveness of its bid. Essex's admitted failure to complete all of the "Descriptive Schedule" items rendered its bid nonresponsive and it should have been rejected as such. See Western Waterproofing Co., Inc., B-183155, May 20, 1975, 75-1 CPD 306.

Our review of the record has revealed another deficiency in Essex's bid which has not been discussed by Cummins or the agency. Attached to Essex's bid was a cover letter signed by the same corporate official who signed Essex's bid form and which was clearly meant to be part of the bid. The letter states in part: "Included is a copy of the Descriptive Schedule specifying proposed sources of supply. The sources will be as specified or equal." (Emphasis added.)

Essex clearly was reserving to itself the right to substitute components for those listed in the Descriptive Schedule and therefore the Coast Guard had no assurance that the items delivered would conform exactly to those listed in the Descriptive Schedule. Since the Descriptive Schedule formed part of the specifications, we believe this reservation by Essex also rendered its bid non-responsive.

Essex's Failure to Submit Horsepower Curves with Bid

Cummins next observes that Essex failed to include with its bid published horsepower curves for the engine upon which it bid, as required by paragraph 3.4.2.1 of the specifications. As we noted

above, it was the bidder's responsibility to select a diesel engine sufficient in size to drive the generator under the altitude and temperature conditions set forth in the IFB. Stating this requirement in a precise and unambiguous manner and assuring that the equipment offered met this requirement has been a particularly vexatious problem. In fact, a prior Coast Guard solicitation was canceled pursuant to a decision of this Office holding that the specifications concerned with the horsepower rating of the engines was subject to conflicting interpretations. Essex Electro Engineers, Inc., Cummins Diesel Engines, Inc. 54 Comp. Gen. 1068 (1975), 75-I CPD 372.

The terms "maximum (peak) horsepower rating", "intermittent horsepower rating" and "continuous (prime power) horsepower rating" appear sufficiently defined in the instant IFB to eliminate any confusion which may have existed previously. Bidders were required to enter in the "Descriptive Schedule" the "Continuous (Prime Power) Horsepower Rating" of the diesel engine they proposed to supply. In addition, paragraph 3.4.2.1. of the specifications stated in part:

"* * * The engine shall have a continuous horsepower (prime power) rating (as shown by the engine manufacturer's published performance curves) (bidder shall furnish published h. p. curves indicating the horsepower for the continuous-prime power-rating of the engine being furnished) of at least ten percent and not more than 25 percent in excess of that required to drive the generator and all engine and generator and auxiliaries at rated generator speed, where the generator is delivering its full output at rated power factor, all at the altitude and ambient temperatures specified. * * *" (Latter emphasis added.)

Essex represented in its "Descriptive Schedule" that it would utilize a Detroit Diesel Allison Model No. 9123-7005 engine with a Continuous (Prime Power) Horsepower rating of 700. However, Essex failed to enclose with its bid manufacturer's horsepower curves which would confirm the horsepower figure entered in the bid.

Using data primarily from the 1975 "Diesel and Gas Turbine Catalog", Cummins has submitted calculations in support of its

contention that the engine offered by Essex cannot satisfy the requirements of specification paragraph 3.4.2.1. However, the agency has concluded that the engine will meet the intent of the specifications, based upon examination of manufacturer's horsepower curves obtained after bid opening.

The Coast Guard used the manufacturer's horsepower curves to verify whether Essex's product would meet the specification requirements: a matter of responsiveness, not responsibility. Essex's failure to submit the required horsepower curves, which were a form of descriptive literature, rendered its bid nonresponsive. In this connection, we note that in the past the Coast Guard has considered the failure of manufacturer's horsepower curves to support the horsepower claimed for the engine as rendering bids nonresponsive. Cummins' earlier protest mentioned in 54 Comp. Gen. 1068 (1975), 75-1 CPD 372, was precipitated in part by such a determination. (Other circumstances which rendered moot Cummins' protest resulted in our not ruling on the propriety of that determination.)

Conformance to the Specifications of Generators Bid by Essex

Cummins' final argument is that the Marathon 680-FDF generator listed in Essex's "Descriptive Schedule" will not meet the requirement of specification paragraph 3.4.1 that: "The temperature rise at rated load shall not exceed 40 degrees Centigrade." Cummins contends that National Electrical Manufacturers Association "MG-1- Standards for Motors and Generators" which was expressly made part of the specifications, requires temperature rise to be measured by the "resistance" method and that the temperature rise of the Marathon 680 generator exceeds the permissible limits when measured by that method.

The report furnished our Office by the Coast Guard does not directly respond to Cummins' argument, stating only that Military Standard MIL-HDBK-705B allows the use of either the "resistance" or the "contact" method for measuring generator heat rise. The protester concedes that when the "contact" method is used the generator meets specifications.

The agency also notes that in compliance with the IFB, Essex furnished with its bid a letter from Marathon certifying that its Model 680-FDF generator would meet the specifications. In view of this certification and the use of the "contact" method permitted by MIL-HDBK-705B, the agency has found the Marathon generator acceptable.

Cummins has furnished our Office with copies of pre-bid correspondence from Marathon to Cummins in which the former stated that its generators would meet the Coast Guard specifications "as indicated on our quote." The Marathon quotation, however, took four specific exceptions to the specifications. Cummins states that it did not use Marathon's product for this reason and suggests that Essex will furnish a nonconforming generator.

In contrast to its failure to complete certain entries in the "Descriptive Schedule" or to submit manufacturer's horsepower curves Essex fully complied with what was in effect the IFB's descriptive literature requirements with regard to the generator. It completed all blanks in the "Descriptive Schedule" concerning the generator with apparently acceptable data and submitted a certification from the generator manufacturer stating that the generator would meet the specifications. Nothing more was required of Essex by the IFB and we believe that Essex is committed to furnishing a generator which complies with the specifications in every respect.

Conclusions and Recommendation

The Coast Guard failed to include in the instant IFB the "Requirement for Descriptive Literature" clause prescribed by Federal Procurement Regulations (FPR) § 1-2.202-5 (1964 ed. amend. 13). However, we think the IFB did in fact require the submission of descriptive literature in the forms of entries upon the "Descriptive Schedules" and manufacturer's horsepower curves. The "Descriptive Schedules", which were made a part of the specifications, which were "to be furnished as part of Bid", and "ALL" whose blanks were to be filled in (bidders were advised) in order to avoid a nonresponsive bid, requested over 200 items of information descriptive of the equipment being purchased. Essex's failure to complete the "Descriptive Schedules", and moreover, the express reservation in its bid of the right to substitute unidentified "equal" components, rendered its bid nonresponsive. See Western Waterproofing Company, Inc., B-183155, May 20, 1975, 75-1 CPD 306. We believe the same conclusion is applicable to Essex's failure to submit with its bid manufacturer's horsepower curves substantiating the horsepower claimed for the engines in the "Descriptive Schedules" attached to Essex's bid.

Normally, we would recommend that a contract awarded to a nonresponsive bidder be terminated for the convenience of the Government. See, e.g., Hartwick Construction Corporation, B-182841, February 27, 1975, 75-1 CPD 118. However, we are

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advised that these power systems are to be Government furnished equipment for other contracts for the construction of Loran-C chains which are part of the National Plan for navigation, and that it was necessary to proceed with award of this contract in October, 1975, in order that the completion of the navigation system would not be unduly delayed. It also appears to us that the Coast Guard's acceptance of Essex's bid was undertaken in good faith (albeit erroneous) reliance upon prior decisions of this Office. Finally, we believe some weight should be given to the fact that Cummins' protest was not made as timely as it should have been.

After consideration of these factors, especially the urgency of the procurement and the apparent lack of bad faith, we have concluded that it would not be in the best interests of the Government to disturb Essex's contract. However, we are advising the Secretary of Transportation of the deficiencies which existed in this procurement in order to prevent their reoccurrence.


Deputy Comptroller General
of the United States