

DOCUMENT RESUME

02078 - [A1172169]

Protest of the Award of Two Contracts for Engine Generators to Be Used for Air Traffic Control Towers Now under Construction]. B-187821. April 25, 1977. 6 pp.

Decision re: Ziegler, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services: Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Federal Aviation Administration; Asesco Corp.; IN-TROL Div.; Sandia Detroit Diesel, Inc.

Authority: F.P.R. 1-2.407-8(b). F.P.R. 1-2.202-5. 4 C.F.R. 20.2. B-183986 (1976). B-174919 (1972). 48 Comp. Gen. 659. 49 Comp. Gen. 553. 49 Comp. Gen. 556. 54 Comp. Gen. 1009. 54 Comp. Gen. 1012. 55 Comp. Gen. 999. 55 Comp. Gen. 1019. Ziegler Inc. v. McClucas, 4-77-Civil-66 (D. Minn., Feb. 24, 1977).

The protester claimed that the two successful bidders were not responsive in their proposed use of engines with higher RPM capabilities than required by FAA. The language of the specification should not be construed more restrictively than its plain meaning. The protest was denied. (Author/SS)

02078

Marilynn Eaton
Proc. II

DECISION



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

FILE: B-187821

DATE: April 25, 1977

MATTER OF: Ziegler Inc.

DIGEST:

1. Bidders offering engines rated at 1,200 to 2,400 RPM are responsive to specification calling for 1,200 RPM engines. Language of specification should not be construed any more restrictively than its plain meaning.

2. Agency seeking manufacturers' literature describing equipment offered by bidders should require such information to be furnished with bid and not after bid opening.

Ziegler Inc. (Ziegler) has protested the award of two contracts for engine generators to be used by the Federal Aviation Administration (FAA) for air traffic control towers now under construction. Ziegler's protest is primarily that the low bidder in each case was not responsive, because the engine each proposed was rated for optimal use at either 1,600 or 1,800 revolutions per minute (RPM), while the FAA specifications called for 1,200 RPM.

Two separate invitations for bids are involved in Ziegler's protest. The first, No. AC3B-T-0009 (IFB 0009), issued August 13, 1976, was for two each 30 kilowatt (KW) power plants (no longer required and therefore not at issue here) and three each 30 KW engine generators. The second, No. AC3B-T-0010 (IFB 0010), issued August 6, 1976, was for eight each 125 KW engine generators and four each 175 KW engine generators. Prospective contractors were to select components which would meet both design and performance specifications and were required to list the manufacturers and model numbers of the engines they proposed.

On opening date for IFB 0009, September 14, 1976, the low bidder was Asecco Corporation, In-trol Division (Asecco), offering a Hercules D-4800 engine manufactured by White Engines, Inc. Ziegler, the second low bidder, offered a Caterpillar 3306 NA.

On opening date for IFB 0010, September 8, 1976, the low bidder was Sandia Detroit Diesel, Inc. (Sandia), offering a Detroit Diesel 12V71N for the 125 KW application and 12V71T for the 175 KW application.

B-187821

Ziegler was the next lowest bidder offering different equipment, a Caterpillar 342T, for the 125 KW application. Ziegler offered Caterpillar D342 engines for the 175 KW application.

The pertinent specifications of the two IFBs are nearly identical. Article III, paragraph 3.3.2, provides:

"3.3.2 Engine Description - The engine shall be a manufacturer's standard full diesel minimum six cylinder, four cycle, 1200 RPM, liquid cooled, equipped with all the necessary equipment and auxiliaries to make a complete assembly. With the engine generator completely assembled and operating at the rated RPM, the minimum brake horsepower (BHP) applied to the generator shaft shall be 2 brake horsepower (BHP) per kilowatt (KW) output power at all loads up to 100% of the rated kilowatt (KW) of the generator."

(IFB 0010 was amended on August 10, 1976, to call for either a two or four cycle engine.) Paragraph 3.2.12 further provides:

"The contractor shall certify that the engine generator unit furnished is designed (1) for standby and continuous power use, (2) with normal preventative maintenance to operate a minimum of 3,000 hours without requiring major tuneup or overhaul and (3) to have a useful life of 12,000 hours when used for standby power and 60,000 hours when used for continuous power."

Under Article VIII, contractors must warrant that the engine generator sets are free of all defects, will conform to the specifications in all requirements, and will operate satisfactorily for 365 days, with repair or replacement of non-conforming parts at the contractor's expense. In addition, the specifications include type and production tests which each set must satisfy prior to acceptance.

On September 17, 1976, after bid opening, the FAA requested prospective contractors to furnish certain additional information, including:

a. proof or manufacturers' literature showing that the engines proposed were "off-the-shelf," unmodified engines, designed to operate at best efficiency at 1,200 RPM (efficiency later was

B-187821

excluded from consideration by the FAA since it had not been listed as an evaluation factor);

b. proof from manufacturers that at a speed of 1,200 RPM the engines would apply to the generator shafts a minimum of 2 brake horsepower (BHP) per KW output power (as required by the specifications); and

c. proof from manufacturers that the engines would operate for a minimum of 3,000 hours without major tuneup or overhaul.

Aaseco, by letter dated September 24, 1976, submitted White Engines, Inc. confirmation that its model D-4800 met all requirements. Sandia, on October 14, 1976, submitted literature and horsepower curves from Detroit Diesel Allison Division, General Motors Corporation, and on November 2, 1976, provided the manufacturer's certification covering 3,000 hours of operation at any speed between 1,200 and 1,800 RPM. In both cases, the FAA determined that the engines would meet the specifications.

Ziegler learned that the FAA planned to award the contracts to Aaseco and Sandia on November 16, 1976, and protested to our Office on that date. Ziegler's applications engineer, in a letter dated December 1, 1976, stated that he understood the specifications to require an engine designed to run at 1,200 RPM or slower, not an 1,800 RPM engine slowed down below its designed operating range.

Neither of the low bidders had paid attention to FAA requirements for frequency tolerances upon load change, the protest continued; the White Engines, Inc. equipment was rated for generator service at 1,800 RPM, with the point of maximum torque either 1,600 or 1,800 RPM depending upon application, while the Detroit Diesel engines were rated at 1,800 RPM, with the point of maximum torque 1,600 RPM. Ziegler's engineer argued:

"For proper load assumption, it is incumbent upon application engineering to assure that as load is applied rapidly and speed tends to decrease that torque available should rise. (This is called lugging ability.) This means that the point of maximum torque must be lower than the generator synchronous speed in order to assure good frequency control during load application."

B-187821

Ziegler's protest also stated that the engines proposed by the low bidders had no published ratings at the speed and power required, and that manufacturers' certifications did not reflect field or installation experience.

While Ziegler's protest was pending, the FAA, on January 17 and 18, 1977, awarded the two contracts to the low bidders, Aseco and Sandia. The contracting officer found that the equipment was urgently required, that further delay would jeopardize commissioning of the air traffic control towers and result in additional expense at the construction sites. See Federal Procurement Regulations (FPR) 1-2.407-8(b) (1964 ed.).

Ziegler then filed suit in the United States District Court, District of Minnesota, seeking a preliminary injunction requiring the FAA to suspend the contracts pending our decision. The injunction was denied, the court finding that plaintiff Ziegler had not demonstrated irreparable harm or a likelihood of success on the merits. While eventual judicial consideration was not precluded, the court stated that it would initially defer to the GAO. Ziegler Inc. v. McLucas, No. 4-77-Civil 66 (D. Minn., February 24, 1977) (memorandum and order denying preliminary injunction).

At the outset, FAA asserts that because Ziegler knew in early September that it was not the low bidder and was aware of requests for additional data by mid-October, the November 16, 1976 protest based on the data requirement is untimely. Under 4 C.F.R. 20.2 (1976) protests based on improprieties in solicitations are to be made prior to bid opening and other protests are to be filed within 10 days after the basis for them is known or should have been known.

Clearly, Ziegler's protest against awards of contracts to bidders it considers nonresponsive is timely, because Ziegler learned of the proposed awards and filed its protest with GAO on the same day. In any event, because the District Court is interested in our decision, we will consider the protest on the merits. Control Data Corporation, 55 Comp. Gen. 1019 (1976), 76-1 CPD 276; Dynalectron Corporation; Lockheed Electronics Company, Inc., 54 Id. 1009, 1012 (1975), 75-1 CPD 341.

The main issue for our determination is whether the bids of Aseco and Sandia were responsive to FAA specifications. As the FAA report notes, the specifications in this case required a 1,200 RPM engine which would operate for extended periods without major overhaul and for even longer periods without replacement. The specifications did not require an engine which would operate with

B-187821

peak efficiency at 1,200 RPM, as Ziegler interpreted them. We do not believe that the language of the IFB should be construed any more restrictively than its plain meaning. B-174919, April 17, 1972.

On IFB 0009, Ziegler apparently assumed that Aseeco proposed to use Hercules Model D-4800T engines, which have published ratings only at 1,800 RPM (as indicated on the White Engines, Inc. literature submitted with the protest). Actually, Ziegler proposed D-4800 engines which have published ratings of 76 BHP at 1,200 RPM. For IFB 0010, Detroit Diesel's literature shows that both engines proposed by Sandia operate at 1,200 RPM. These engines therefore meet the requirements of the FAA design specifications.

It may be, as Ziegler argues, that its engines are more reliable or more efficient than those of Aseeco and Sandia at 1,200 RPM, because they are operating on the down or right side of the torque curve. But such operation was not a requirement of the FAA specifications.

Ziegler also argues that the FAA's request for additional information shows that it was not sure that the low bids were responsive. However, the test of responsiveness is whether the bid, as submitted, is an offer to perform, without exception, the exact thing called for in the invitation. Unless something on the face of the bid or specifically a part of it either limits, reduces, or modifies the obligation of the prospective contractor to perform, the bid is responsive. 49 Comp. Gen. 553, 556 (1970). Thus, we find no reason to disagree with FAA's determination that the low bidders in this case were responsive. Although the engines proposed by Aseeco and Sandia are rated at 1,200 - 2,400 RPM, they can operate at 1,200 RPM, as required by the specifications. Acceptance of the bids obligates the contractors to supply engine generator sets meeting the FAA's performance specifications, Ex-Cell-O Corporation, B-183986, June 3, 1976, 76-1 CPD 357, and in this case, to repair or replace any unqualified equipment.

Because the FAA's post-bid opening request for manufacturers' literature has created some confusion about responsiveness, we recommend that in the future if the FAA needs such information to determine whether equipment offered meets its specifications or to establish exactly what a bidder proposes to furnish, Federal Procurement Regulations 1-2.202-5 (1964 ed.) be observed. This section requires an agency to state exactly what descriptive data is to be furnished with a bid, the extent to which it will be considered in bid evaluation, and whether failure to supply it will render the bid nonresponsive. See generally Cummins Diesel Engines, Inc., 55 Comp. Gen. 999 (1976), 76-1 CPD 248; 48 Comp. Gen. 659 (1969).

B-187821

The remaining issues raised by Ziegler do not affect our decision. Arguments that the engines proposed by the low bidders have no published ratings at the speed and power required, and that manufacturers' certifications do not reflect field or installation experience have been refuted in the record. Both Sandia and Abbott G. M. Diesel, Inc., for example, cited numerous instances of actual use of the engines which they proposed. Finally, the FAA has stated that it has no history of procurement of adequate or unqualified equipment, indicating it does not believe any such precedent is being set, as stated by the protester.

Accordingly, Ziegler's protest is denied.


Deputy Comptroller General
of the United States