



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Morse Boulger, Inc.
File: B-224305
Date: December 24, 1986

DIGEST

Protest that agency improperly used a design specification based on drawings duplicating competitor's equipment design is sustained where agency fails to establish prima facie support for the restriction beyond fact that the specified design will cure defects in the competitor's currently-installed equipment but the purpose of the procurement is total replacement of the current equipment.

DECISION

Morse Boulger, Inc. (MBI), protests that the specifications used by the Navy in invitation for bids (IFB) No. N62470-83-B-8778, unduly restrict competition. The IFB is for the replacement of two Detroit Stoker Company incinerator grates (stokers), which move fuel (municipal refuse) down an inclined slope into and through the furnaces firing two separate boilers.

We sustain the protest.

The Navy issued the IFB on August 8, 1986, with a September 9 bid opening date. On September 4, MBI protested to the Navy that the equipment portion of the specifications described a Detroit Stoker item. The Navy had retained an architect-engineer (A-E) to prepare the project specifications, and MBI claimed that the A-E told MBI, during a September 3 conversation, "the design is Detroit Stoker's current design intended to replace the older model now installed." MBI argued that Detroit Stoker equipment cost more than other equipment able to perform the same tasks, and indicated that a number of American manufacturers would be able to compete if the specifications were relaxed. The Navy orally denied the protest apparently because of the A-E's August 28 advice that three stoker manufacturers (Detroit Stoker, MBI and a German firm) could bid on the requirement as specified.

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Before bid opening, MBI filed its protest with our Office contending that the stoker design and specification were unduly restrictive. The protester advised that the new stokers represent approximately 60 percent of the total cost of the project with the balance of the cost going to demolition and removal of the old stokers and installation of the new ones. MBI contended that it was unable to bid because the specification "is for the patented design of another company," and requested either an amendment of the current specification to allow for competition or a new procurement using a performance specification instead of a design one.

Three bids were received at the September 9 bid opening. By letter of September 10, MBI furnished the Navy and our Office with Detroit Stoker descriptive literature showing drawings identical to the specification's grate assembly detail drawing (drawing M-10). MBI argued that this was evidence that the A-E had provided the Navy with specifications requiring the Detroit Stoker designs in detail. In its report on the protest, the Navy stated that Detroit Stoker at one time held a patent on the design used in the specifications, but that the patent had expired. The Navy further stated that while two unique aspects of the design (the use of rollers and the direct connection of hydraulic cylinders) are proprietary to Detroit Stoker, both were needed to reduce problems (excessive wear and high maintenance, respectively) experienced with the current Detroit Stoker equipment and reflect the Navy's minimum needs. The Navy admitted that a manufacturer other than Detroit Stoker would have to modify its equipment to meet the specification.

After receiving the Navy's report, we conducted a bid protest conference, at which MBI explained in considerable technical detail how seven design features required by the specifications were proprietary to Detroit Stoker and why it could not modify its equipment to meet them; in its comments on the conference MBI elaborated on the features that had been discussed. The Navy subsequently filed comments admitting that MBI may have been placed at a competitive disadvantage by the statement of work. Nevertheless, the Navy contends that MBI's initial protest should have provided the technical information later furnished at the conference. The Navy argues that MBI's initial protest did not provide the kind of information it could use to test the A-E's analysis that a number of stoker manufacturers could meet the specification, and contends that the matters discussed in the bid protest conference therefore are untimely raised.

We agree with the Navy that MBI should have discussed the specific design features with which it was concerned before the protest conference so that the Navy could have addressed them in its report. However, we find MBI's initial protest sufficient to raise the issue of whether the Navy's use of a Detroit Stoker design in its specification was unduly restrictive of competition. MBI's September 10 letter provided the Navy with a clear picture of what it objected to: the Navy's prescription of a design identical to that in Detroit Stoker's drawings.

When a protester challenges specifications as being unduly restrictive, the contracting agency must make a prima facie showing that the agency requires the restriction to meet its actual needs. If it does so, the burden shifts to the protester to show that the requirement is clearly unreasonable. Superior Boiler Works, Inc., B-216472, Mar. 25, 1985, 85-1 C.P.D. ¶ 342. The agency's initial burden reflects its statutory obligation to create specifications permitting such full and open competition as is consistent with actual agency needs, 10 U.S.C. § 2305 (Supp. III 1985), while the protester's burden of proof stems from the fact that the determination of the government's minimum needs and the best method of accommodating those needs are primarily matters within the agency's discretion. Davlin Paint Co., B-218413, July 12, 1985, 85-2 C.P.D. ¶ 45. -

The Navy's IFB makes the protested drawing a part of the specification and requires that the replacement stoker be the "manufacturer's latest design that complies with the specification requirements." Obviously, only Detroit Stoker can meet this requirement since any other manufacturer would have to modify the design of its latest equipment to follow the specification drawing. Indeed, the A-E informed the Navy on September 12 that the "specification was based on a reciprocating grate system with input from Detroit Stoker."

While the use of a precise design specification does not automatically provide a basis for finding a solicitation unduly restrictive, such requirements are inappropriate if an agency can state its minimum needs in terms of a performance specification which alternative designs could meet. Viereck Co., B-209215, Mar. 22, 1983, 83-1 C.P.D. ¶ 287. The only reason advanced for specifying the Detroit Stoker design, however, is that it cures defects in the Navy's current Detroit Stoker equipment. This does not mean that other designs, like MBI's, would not similarly cure those defects. Indeed, the A-E's letter of August 28 indicated that the A-E thought MBI's stokers would be acceptable and that use of the Detroit Stoker design probably was not meant to exclude MBI's

product. The problem seems to be that the A-E confused the Navy's need to cure the defects in the current equipment with the Navy's procurement need to secure competition for new replacement equipment.

Consequently, the record establishes that alternative design approaches to Detroit Stokes would have been considered and evaluated, so that the Navy has not, in our view, established prima facie support for its restriction to the Detroit Stoker design. By separate letter, we are recommending to the Secretary of the Navy that the Navy cancel the solicitation, revise its requirements as appropriate, and resolicit.

The protest is sustained.



Acting Comptroller General
of the United States