



Decision

Matter of: The Kohler Company

File: B-257162

Date: September 2, 1994

Philip J. Davis, Esq., Hugh Latimer, Esq., and David A. Vogel, Esq., Wiley, Rein & Fielding, for the protester. Kenneth S. Kramer, Esq., and Shannon L. Haralson, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the Onan Corporation, Susan E. Goss, for Aptech, Inc., and Bernie Matzke, for Power Systems Associates, the interested parties.

Jerry A. Walz, Esq., and Fred Kopatich, Esq., Department of Commerce, for the agency.

Robert C. Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against the inclusion of a solicitation requirement that diesel engines in power generators be 4-cycle is sustained where the agency has not demonstrated that the restriction is reasonably necessary to meet its minimum needs, it appears that there are other products (2-cycle diesel engine generators) that could meet its requirements, and the requirements could be specified using functional specifications.

DECISION

The Kohler Company protests the terms of request for proposals (RFP) No. 52WCNA406066SH, issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for emergency electrical generators to service weather forecasting offices. Kohler alleges that the RFP is unduly restrictive of competition because it restricts competition by permitting only 4-cycle diesel engines; Kohler submits that 2-cycle engines also can meet the agency's minimum needs.

We sustain the protest.

NOAA based its decision to limit acceptable generators to those powered by 4-cycle diesel engines on a survey of technical literature from two manufacturers of 4-cycle engines. According to the agency, that literature

demonstrates that 4-cycle engines, as opposed to 2-cycle engines, represent the "state of the art" insofar as they are assertedly less polluting, more economical in terms of fuel consumption, quieter, and easier to maintain (and thus, more reliable). NOAA maintains that, as "an agency devoted to improvement of the earth's environment" whose critical weather forecasting stations require quiet and reliable emergency power, 4-cycle engines represent its minimum needs.

On the other hand, Kohler--a supplier of generators powered by both 2-cycle and 4-cycle diesel engines--bases its challenge to the 4-cycle engine requirement on technical literature from 2-cycle engine manufacturers, which Kohler maintains, demonstrates that 2-cycle engines are comparable to 4-cycle engines in terms of atmospheric emissions, fuel economy, noise and reliability. Kohler also notes that the "state of the art" in diesel engine design has not appreciably changed since the 1970's when this Office twice found that, although there was a controversy between proponents of each type of diesel engine design, 4-cycle engines were "not inherently more quiet, less polluting, or mechanically more reliable than 2-cycle diesel engines and that . . . the difference in fuel consumption between 2-cycle and 4-cycle designs is insignificant." Keystone Diesel Engine Co., Inc., B-187338, Feb. 23, 1977, 77-1 CPD ¶ 128; Dobbs Detroit Diesel, Inc., B-182992, May 29, 1975, 75-1 CPD ¶ 326.

In support of its position that the "state of the art" has not changed, Kohler notes that in 1986, the General Services Administration (GSA) adopted a policy for its public construction requirements--which is still in effect--and which states that "in the Generator Specification[s], [where] the number of cycles and cylinders are indicated, such restrictions should be deleted . . . and rely more on performance characteristics such as load requirements and efficiency." Kohler also provides specific examples of recent solicitations for diesel-powered generators from the Federal Aviation Administration, the Department of Energy, the Navy, and the Army Corps of Engineers, which do not specify cylinder number but adopt performance specifications relating to noise, fuel consumption, emissions and maintenance.

NOAA does not directly respond to Kohler's position in this regard except to continue to maintain that, based on its review of the technical literature, including additional literature provided by Kohler, the RFP restriction to 4-cycle engines is "reasonable," and therefore not subject to legal challenge.

The Competition in Contracting Act of 1984 (CICA)--which took effect after our 1975 and 1977 decisions relating to 2- and 4-cycle diesel engines--requires agencies to specify their needs in a manner designed to achieve full and open competition and to "develop specifications in such a manner as is necessary to" achieve that end. 41 U.S.C. § 253a(a)(1)(A), (C) (1988). While the use of a precise design specification does not automatically provide a basis for finding a solicitation unduly restrictive, design specifications are inappropriate, in light of the requirements imposed by CICA, if an agency can state its minimum needs in terms of a performance specification which alternate designs could meet. Morse Boulger, Inc., 66 Comp. Gen. 174 (1986), 86-2 CPD ¶ 715.

Where, as here, specifications are challenged as restrictive, the procuring agency is responsible for establishing that the challenged specifications are reasonably necessary to meet its minimum needs. American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183. Stated in other terms, the agency is required to establish prima facie support for its position that allegedly restrictive specifications are necessary to satisfy its minimum needs. Data-Team, Inc., 68 Comp. Gen. 368 (1989), 89-1 CPD ¶ 355. In examining whether the agency has met its responsibility to demonstrate that its specifications are necessary to meet its minimum needs, we examine the adequacy of the agency's position not simply with regard to the reasonableness of the rationale asserted, but also the analysis given in support of the reasons advanced by the agency to assure that the agency's overall position will withstand logical scrutiny. Id.

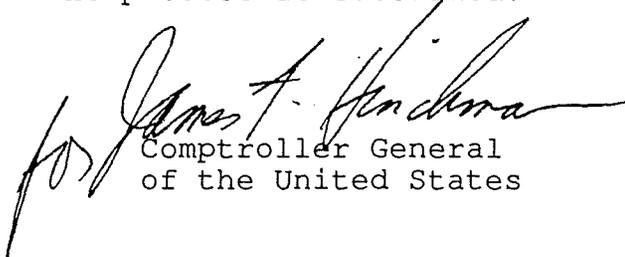
The competing positions reflected in the technical literature relied upon by all of the parties serve to illustrate that, as in the 1970's, the "state of the art" in diesel engine design is still a matter of controversy in the industry. Caterpillar, which manufactures only 4-cycle engines, and Onan Corporation, which has proposed generators employing 4-cycle engines, maintain that 4-cycle designs are superior to 2-cycle designs. On the other hand, as Kohler points out, Detroit Diesel, which manufactures both types of engines, performed a comparative analysis of the two designs (including tests), and found that there is no appreciable difference between the two in terms of pollution, fuel consumption, noise and reliability. We need not resolve this debate, however, since if environmental, noise, fuel consumption, and reliability issues are concerns of NOAA, specifications for such parameters can easily be drafted without requiring a particular engine design. We are particularly persuaded by the continuing GSA policy that functional specifications should be used in specifying for generators and by the fact that other agencies are employing

functional specifications for generators to satisfy their minimum needs for pollution control, fuel consumption, noise and reliability--NOAA's stated concerns.

NOAA has not addressed the CICA mandate to make its specifications as unrestrictive as possible consistent with the agency's minimum needs. NOAA also has not addressed GSA's continuing policy that generators should not be specified by cycles nor the fact that a number of agencies are employing functional specifications to accomplish the purposes NOAA states that it seeks to accomplish. Nor has NOAA asserted that such functional specifications would be too difficult to specify. Accordingly, the agency has not reasonably supported its position that only 4-cycle engines can meet its needs. Id.

We recommend that NOAA cancel the RFP and revise its specifications to adopt performance specifications tailored to the agency's reasonably determined needs for pollution control, fuel consumption, noise and reliability. We also find that the protester is entitled to be reimbursed for its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1994). Kohler should submit its detailed and certified claim for such costs directly to the agency within 60 days after it receives this decision.

The protest is sustained.¹


 Comptroller General
 of the United States

¹While the agency claims that Kohler is not prejudiced by the 4-cycle requirement because the protester can supply generators with that type of engine, Kohler has adequately documented that it is more expensive for it to supply generators with 4-cycle engines than the 2-cycle design. In our view, this establishes the reasonable possibility of prejudice which, in the face of a clear violation of procurement requirements, is all that is necessary to sustain the protest. See Colonial Storage Co.--Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335.