The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: Janke & Company, Inc.

File: B-225710.2; B-226897.2

Date: February 17, 1988

## DIGEST

1. Protest that low temperature test requirement for aircraft hydraulic test stand is unduly restrictive of competition is denied where the agency revised this test consistent with the terms of a recommendation made by the General Accounting Office in connection with a prior protest challenging the same requirement.

2. Protest that noise level test requirement for aircraft hydraulic test stand is unduly restrictive of competition is denied where the agency establishes that the requirement is based on Occupational Safety and Health Act standards as amended based on actual testing, and the protester does not establish that reliance on this amended standard is unreasonable.

## DECISION

Janke & Company, Inc., protests as unduly restrictive two test requirements included in request for proposals (RFP) Nos. F41608-87-R-C033 and F41608-87-R-C013, as amended, issued by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas. Janke previously protested to our Office that these same two test requirements, as initially drafted, were impossible to meet. We sustained these protests in our decision Janke & Company, Inc., B-225710, B-226897, June 12, 1987, 87-1 CPD ¶ 589, and recommended that the tests "be revised to conform with the standards established as achievable in previous procurements of diesel engine-powered hydraulic test stands." Janke currently argues that the corrective action taken by the Air Force was insufficient to cure the noted deficiencies, and that the requirements remain unduly restrictive of competition.

We deny the protests.

As stated in our prior decision, these solicitations sought offers for trailer-mounted, diesel engine-powered test stands for aircraft hydraulic systems. The specifications

for these test stands require a number of pre-production environmental tests, including a low temperature test and a noise level test. The solicitation states that failure of the test stand to successfully perform these environmental tests constitutes cause for rejection.

Low Temperature Test

The original low temperature test provided that the diesel engine had to be stored at minus 65 degrees fahrenheit for 24 hours; the temperature than had to be raised to minus 40 degrees; the test stand had to start after 30 minutes or less of preheating; and the flow and pressure of the two hydraulic systems in the test stand had to attain certain levels and maintain these levels for 30 minutes. As amended, the test procedures remain the same, but the agency has added a new section that suggests 10 acceptable cold weather starting techniques (e.g., battery warmers, heavy duty batteries) to be used in any combination by the contractor to assist in starting the engine under the test procedures listed above. The agency also reports that it has conducted the test on another manufacturer's similar equipment under a current contract using a combination of the suggested techniques, and that the test stand started within the allotted 30 minutes.

Janke argues that the test remains restrictive as evidenced by the experience of other manufacturers who have previously used various combinations of the identified starting aids. Janke also expresses concern that the failure to identify the type and size of any of the starting aids allows for nonuniform evaluation of test results. Further, Janke states that use of any of the starting aids is inconsistent with another solicitation provision requiring that hydraulic fluid in the engine reservoir not be heated prior to starting or during the test from any external source. Janke's position is without merit.

In considering Janke's initial protest, we were concerned that the lack of direction regarding acceptable methods of achieving the desired test results made it unclear whether the use of any cold weather starting aids would be permissible, and that this ambiguity possibly could afford a competitive advantage to those contractors with knowledge of the Air Force's past acceptance and use of cold weather starting aids. We concluded that the Air Force had not established "that its minimum needs [could not] be met by a revision of the low temperature test to reflect experience with previously procured test stands and current methods of starting the diesel engines in extreme cold."

We find the Air Force's amendment of the low temperature test has resolved our concern. By specifying acceptable starting aids in the IFB, the Air Force has removed doubt regarding the accepted use of such devices and, consequently, also eliminated any competitive advantage possibly enjoyed by contractors who had prior knowledge that certain devices were acceptable. The Air Force also tested similar equipment to confirm that the test, with use of the specified devices, could be met. Nothing more was contemplated by our recommendation.

Inclusion of detailed design specifications for each of the identified starting aids, as urged by Janke, was not required. So long as it appears that the test reasonably can be met, we find nothing objectionable in leaving offerors to their own ingenuity and inventiveness to devise an approach using the listed aids in any size, shape, form, or combination, to best meet the government's performance standard. See Imperial Schrade Corp., B-223527.2, Mar. 6, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 254.

We also reject Janke's argument that use of any of the suggested starting aids is inconsistent with the solicitation provision prohibiting the heating of hydraulic fluid in the engine reservoir by an external source prior to or during the test; Janke states that use of the starting aids will raise the engine temperature and heat the fluid. Reading the RFPs as a whole, we think it is plain that fluid heating resulting from the use of specified acceptable starting devices is not encompassed by this prohibition; it would be unreasonable for the agency or any contractor to read the prohibition in this manner.

Noise Level Test

The noise level test specifies maximum permissible decibels when the test stand engine is operating at various sound frequencies (i.e., engine noise at different speeds). The test in the RFPs was based on noise levels specified in an Occupational Health and Safety Act (OSHA) standard codified at 29 C.F.R. § 1910.95 (1987), aimed at protecting personnel performing duties near the test stand during its operation. This OSHA standard sets forth the maximum allowed decibel levels at eight sound frequencies for six different noise categories. The original noise levels specified in the solicitation were based on the category D levels; this category prescribes decibel levels that will allow for shouted communication at a distance of 2 feet (in comparison, category C decibel levels only allow for such communication at a distance of 1 foot).

In considering Janke's initial protest challenging the propriety of this requirement, we concluded that the Air Force had not presented prima facie support for this noise restriction, the necessary first step in establishing that a restrictive provision nonetheless is necessary and thus unobjectionable; once such support is established, the burden shifts to the protester to show that the provision in fact is unreasonable. See Cardin Electronics, B-218566, Aug. 15, 1985, 85-2 CPD ¶ 172. Accordingly, we sustained Janke's protest of this test provision and recommended, as we did with respect to the low temperature test, that it be revised to conform with standards established as achievable. To comply with our decision, the Air Force revised each of the RFPs' allowable decibel levels upwards, consistent with the results obtained during testing of equipment similar to that being procured here. That is, the agency measured the noise from this equipment and raised the decibel levels to assure that the levels would be achievable ones for the equipment being procured.

Janke contends that this test, as revised, continues to suffer from the same defects that plagued the requirement as initially drafted. While Janke does not contend that it is technically impossible to meet the specified noise levels, Janke states that the decibel level increases for each of the stated frequencies bear no relationship to established OSHA standards or to the use of this equipment in the field. In fact, Janke maintains that this modification creates a hybrid category of noise limits completely inconsistent with the OSHA standard. Janke further argues that since different engines have different characteristics, the tests conducted by the agency on other than the exact equipment to be procured do not provide a valid measure of the achievability of the standard.

We find that the Air Force's response to our recommendation and its explanation in its administrative report are sufficient to establish, prima facie, that the noise level test is necessary to meet its needs, that is, to protect the personnel in the vicinity of the test stands during operation, while allowing limited oral communication. Our prior decision was based on the absence from the record of any reason as to why the stated RFP levels were the levels actually required. By reviewing the stated levels and then modifying them based on actual testing, the Air Force now has shown that the allowable noise levels, as revised, are tied directly to this procurement. This is precisely what we envisioned in sustaining the prior protest.

Janke has not established that the Air Force's position, as newly supported, is unreasonable. First, the fact that the new RFP noise test levels are different from the OSHA

standards simply is unobjectionable. There is no requirement for agencies to key allowable noise levels to the OSHA standards and, indeed, as we held in our prior decision, an agency may not, without supporting reasoning, merely adopt preestablished OSHA standards.

Further, we do not agree with Janke that the testing conducted by the Air Force was meaningless. Although the engine the Air Force tested (larger than the one being procured here) slightly exceeded the original RFP noise test levels, the Air Force attributed this to the fact that the engine was equipped with a turbocharger. The Air Force concluded that, absent the turbocharger, the smaller engine being procured here would easily meet the amended noise test levels.

Janke claims a smaller engine actually would be noisier but, even if this is the case, it appears the agency reasonably has determined that the expected noise levels of the engine being procured are within the allowable noise test levels, as amended. This is further supported by the comments of two other manufacturers of test stands, who both state that the revised noise level standards are achievable. Again, as with the low temperature test, the Air Force was only required to establish reasonably attainable standards that were established with reference to the agency's true needs; the standards did not have to be formulated with exactitude. The agency has met this standard.

The protests are denied.

for Seymour Efros
James F. Hinchman
General Counsel