DOCUMENT RESUME

03104 - [C3466[illegible]]

[Rejection of Proposal Involving Product Qualification Clause]. B-191116. December 7, 1978. 5 pp.

Decision re: Wilcox Electro Engineers, Inc.; by Robert F. Keller, Acting Comptroller General.

Contact: Office of the General Counsel: Procurement Law I.
Organization Concerned: Department of the Air Force.
Authority: 55 Comp. Gen. 1. B-189794 (1978). B-147091 (1961). B-186319 (1976). B-182321 (1975).

A company requested reconsideration of the rejection of its proposal, alleging that the product qualification clause was characterized in terms of responsiveness when it actually involved responsibility and that it was restrictive of competition. The product qualification clause related to technical acceptability, not responsibility, since the requirement involved the product rather than the capability of the offeror. The clause was not unduly restrictive since it reflected the legitimate minimum needs of the Government. Rejection of the proposal was sustained. (RRS)

W. Washington

DECISION

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

8573

FILE: B-191116 DATE: December 7, 1978

MATTER OF: Essex Electro Engineers, Inc. - Reconsideration

DIGEST:

1. Product qualification clause in RFP restricting acceptance of offers to those submitted by firms marketing generators to civil airline market is matter of technical acceptability, not responsibility, since requirement goes to product offered, not capability of offeror.

2. Product qualification clause restricting acceptance of offers to those submitted by firms marketing generators to civil airline market is not unduly restrictive of competition, since civil airline market is only market with same minimum needs as agency, agency justified minimum needs, and specifications reflecting minimum needs did not exist.

Essex Electro Engineers, Inc. (Essex), has requested reconsideration of our decision in Essex Electro Engineers, Inc., B-191116, October 2, 1978, 78-2 CPD 247, which denied its protest of the rejection of its proposal and proposed award of a contract for 72-Kilowatt (KW) 400-Hertz (HZ) Diesel Engine Generator Sets (DEGS) for C-5 and C-141 aircraft.

Essex alleged that the product qualification clause of the RFP was characterized in terms of "responsiveness" when it actually concerned "responsibility" and that the clause was unduly restrictive of competition because it limited competition to firms in one commercial market. The clause in question states:

"C-65. PRODUCT QUALIFICATION

"(1) In order to obtain a generator set of demonstrated reliability without the need for complete qualification testing and to permit the Air Force to receive the benefit of commercially developed products and product improvements, established quality control programs, broad based parts availability and the assurance of achieving timely compliance with federal safety and environmental protection regulations, the following applies:

"(a) Proposals will be accepted and considered only from those offerors, determined by the Government to currently manufacture commercial 72KW 400HZ generator sets on a production line basis and currently market them to the commercial airline industry in substantial quantities and who propose to furnish representative generator sets. A representative generator set is a standard generator set as depicted in the manufacturer's commercially published data book for 72KW 400HZ which, with standard options and accessories, is a commercial production model offered to and in use by the commercial airline industry.

"(b) The manufacturing of commercial 72KW 400HZ generator sets on a production line basis and the marketing to the commercial airline industry of such generator sets will be the basis for Government reliance that representative generator sets to be procured thereunder are acceptable."

Citing International Harvester Company, B-189794, February 9, 1978, 78-1 CPD 110, in which we held that a nearly identical clause was a matter of technical acceptability, we stated that clause C-65

"defines the class of technically acceptable products." Since the Department of the Air Force (Air Force) did not have specifications that would adequately describe its needs and apparently only the civilian industry has similar needs, we found that the clause attempts to ensure that products offered meet these needs by permitting acceptance of proposals only from offerors that supply the product to the commercial airline industry. The essence of the restriction then is that the product offered must be currently in use by the commercial airline industry.

Regarding Essex's argument that the clause was unduly restrictive of competition, we found that it reflected legitimate minimum needs of the Government and that it reasonably restricted competition to a single commercial market since that market is apparently the only one with needs sufficiently similar to those of the Air Force. We relied partially on B-147091, November 16, 1961; AUL Instruments, Inc., B-186319, September 1, 1976, 76-2 CPD 212; and International Harvester Company, supra, in reaching this result.

In its request for reconsideration, Essex has again argued that clause C-65 relates to responsibility rather than technical acceptability. Essex argues that "whether or not a product is sold in a particular market in no way affects its reliability, serviceability, capability or quality." Essex also alleges that the DEGS it has sold to the Government and is offering, produced in accordance with Government specifications, meet all of the Air Force technical requirements.

Regarding the reasonableness of clause C-65's restrictions, Essex disagrees with our reliance on AUL Instruments, Inc., supra, and International Harvester Company, supra. Essex argues that the restriction involved in AUL was a requirement for a commercial item with a proven design, not a restriction requiring that the product be sold in one particular commercial market, as in this case. Essex contends that International Harvester also does not support a restriction to one commercial market, but only to "commercially proven" products generally. Essex argues that it is not offering an unproven design and that a product supplied to the Government is "commercial."

It is again our opinion that clause C-65 concerns the technical acceptability of the product to be offered, not the responsibility of the offeror. Essex's argument that whether or not a product is sold in a particular market has no effect on its "reliability, serviceability, capability or quality" assumes that there are no important differences between the DEGS used by the airline industry and those used by the Government or other industries. As we stated in our earlier decision, a Military Airlift Command (MAC) field test indicated that while all DEGS tested, including the one sold to the Government by Essex, meet minimum Air Force electrical needs, there were other significant differences between DEGS used by the Government and those used by commercial airlines. The Air Force has stated, and the protester has not shown otherwise, that it is unable to adequately describe its needs through specifications and that the commercial airline industry is the only market with needs nearly identical to its own. Therefore, requiring that the product offered be sold to the commercial airline industry is a means of ensuring that the product meets the Air Force's needs, not that the offeror meets appropriate responsibility standards.

We also do not agree that the distinctions noted by Essex between the present case and the AUL and International Harvester cases render them inapplicable here. While neither case involved a restriction to a single commercial market, there is nothing in either case to indicate that such a restriction would be inappropriate if there was sufficient justification and if competition was not unduly restricted. In fact, there is language in AUL which indicates that with adequate justification restrictions to a single market would be permissible. In AUL we discussed two cases in which such clauses were found to be unduly restrictive. We stated:

> "* * * In D. Moody & Co., Inc.; Astronautics Corporation of America, 55 Comp. Gen. 1 (1975), 75-2 CPD 1, and in Arctic Marine, Inc., B-182321, May 14, 1975, 75-1 CPD 311, both cited by the protester, we held as unduly

> restrictive of competition, respectively, an agency determination which would have excluded surplus dealers from competing for a QPL item and a solicitation provision which would have required bidders to have their products rated by a particular non-Government professional group. In both cases we found no adequate justification for the restriction since in the former case a satisfactory QPL item could be offered by a surplus dealer and in the other case equivalent ratings could be obtained from competent professional groups other than the one specified. * * * (Underscoring applied.)

In the present case, adequate justification has been given for restricting competition to those offerors who are offering a product marketed to the commercial airline industry, since that industry is apparently the only one with needs sufficiently similar to those of the Air Force to ensure that its needs will be met.

Accordingly, our prior decision is affirmed.

R.F. Keller

Acting Comptroller General
of the United States