DOCUMENT RESUME

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[Protest against Award of Contract Funded by Federal Grants]. B-187912. August 17, 1977. 17 pp.

Decision re: Powercon Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel; Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Cleveland, OH: Regional Sewer District; Environmental Protection Agency; Hirsch Electric Co.
Authority: Federal Water Pollution Control Act, sec. 204(a)(6), as amended (33 U.S.C. 1284(a)(6) (Supp. V)). 31 U.S.C. 74. 40 C.F.R. 35.936-7. 40 C.F.R. 35.936-13. 40 C.F.R. 35.936-3. 54 Comp. Gen. 29. 53 Comp. Gen. 522. 55 Comp. Gen. 390. 53 Comp. Gen. 586. 53 Comp. Gen. 592. 51 Comp. Gen. 315. 17 Comp. Gen. 554. 48 Comp. Gen. 291. 48 Comp. Gen. 294. B-185568 (1976). B-186198 (1977). B-172006 (1972). B-156680 (1965). B-187205 (1977).

The protester complained about the decision to exclude the company from being the supplier of switchgear equipment under a contract award funded in significant part by Federal grant funds. The motivation for the "manufacturer only" requirement for switchgear equipment in this case was prompted by the grantee's stated inability to write an adequate specification. However, it is unfair to prevent competent concerns from competing because of such an inability. A suitably modified product experience clause should be used in future procurements to evaluate nonmanufacturer's equipment. (Author/SC)

J. Cunningham
Proc. T.

DECISION

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

FILE: B-187912 DATE: August 17, 1977

MATTER OF: Powercon Corporation

DIGEST:

1. Federal norm compelling "full and free" competition for EPA grantee contracts awarded under section 204(a)(6) of Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1284(a)(6) (Supp. V 1976), together with implementing regulations, applies whether grantee uses "brand name" purchase description or formal specification.

2. Notwithstanding grantee's intent to draft specifications for switchgear equipment so as to allow only manufacturers of circuit breakers to compete, drafted specifications did not reveal intent.

3. It is clear that, to extent grantee could have properly specified "manufacturer only" requirement for switchgear, fact that grantee inadequately expressed intent would have not required resolicitation absent showing of prejudice to other than protester which was not otherwise eligible to compete under requirement.

4. Since there is nothing in legislative history of Water Pollution Control Act that clearly details what is meant by phrases "brand names" or "trade names" of comparable quality, GAO is reluctant to substitute its judgment--that phrases refer to product history, rather than manufacturer identity, of switchgear--for EPA's judgment that phrases also mean manufacturer identity.

5. Long-standing history of disputes between complainant and Federal agencies regarding propriety of "manufacturer only" specification for switchgear equipment shows some agency engineers generally prefer specification because of quality and inspection concerns. Notwithstanding such concerns GAO has suggested that product experience clause be used instead of "manufacturer only" specification.

6. In present case motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete]

while precluding an assembler who is inexperienced and unqualified from doing so." It is unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests use of suitably modified product experience clause to evaluate nonmanufacturer's equipment in future procurements.

Powercon Corporation has complained about the decision of the Cleveland Regional Sewer District to "exclude the company from being the supplier of switchgear equipment" under a contract awarded in July 1976 to Hirsch Electric Company by the Cleveland (Ohio) Regional Sewer District for the construction of the power system for a wastewater treatment plant. The contract was funded in significant part by grant funds from the United States Environmental Protection Agency (EPA).

The bidding documents under which the contract was awarded contained detailed specifications for the power system which consisted of a 0.3-KV metal clad switchgear, underground ducts and manholes, and a unit substation. The original specifications (issued in November 1975) for the power system contained the following provision:

> "It is the intent of these specifications that the equipment to be supplied under this Item be an integrated assembly produced by a switchgear manufacturer such as General Electric, Westinghouse; or equal, who shall coordinate the application of its switchgear, relays and instrumentation to reflect the intent of the specification.
>
> "Metal clad switchgear consisting of circuit breakers, relays and instrument components purchased from various sources and installed by an equipment assembler will not be approved as meeting the intent of these specifications."

By amendment of April 20, 1976, the phrase "Allis Chalmers, ITE; Federal Pacific" was inserted between the words "Westinghouse" and "or equal" as found in the original specifications. The phrase "relays and instrument components" was also deleted.

Powercon says that, prior to the April 20 amendment, it discussed the specifications for a related project with the grantee's consulting engineer. An employee of the consulting engineer allegedly told Powercon that "he was familiar with Powercon and realized that they made a good product but that [the consulting engineer] did not anticipate that Powercon would be eligible to bid on the switchgear equipment specified in [the related project]." In a

subsequent conversation, Powercon says that it was told the grantee's engineer "wanted the supplier of this equipment to be a 'big' manufacturer of switchgear not a mere switchboard builder." In reply, Powercon informed the engineer that it was a "switchboard manufacturer and that it designs and builds its own bus ducts and interrupter switches and does all of its own metal work and that it buys its circuit breakers and relays for any particular job from only one manufacturer."

Powercon says that it then sent a letter to the consulting engineer. The letter requested the engineer's authorization to "bid on both [the related project] and [the project in question]." No reply was received in response to this letter. Therefore, Powercon "submitted a bill of materials for the switchgear equipment specified under [the project in question and] on April 22, 1976, quoted a price for the job to Hirsch Electric Company, and subsequently received a purchase order from Hirsch for this switchgear equipment after Hirsch was awarded the prime contract * * *." On August 10, 1976, Powercon was informed, however, that it "had been disqualified by the [grantee] from supplying the switchgear equipment under [the subject contract]."

The grantee explained its rejection of the proposed use of Powercon in an August 9 letter to Hirsch which said:

> "There have been numerous requests either by your company or Power Con to consider them [Power Con] as a supplier for the switch gear for your Contract 9. I am sure you realized that Power Con is not considered as an original equipment manufacturer and therefore cannot be considered as a supplier of this item.
>
> "Based on the foregoing and in order to avoid any delays, [we are] directing that you furnish the switchgear in strict accordance with item 7 of the contract specification."

Powercon then complained of the rejection to the grantee and EPA.

The basis of Powercon's protest was that "any interpretation of this specification which would exclude Powercon from supplying

the switch gear eqiupment [under the contract] would be overly restrictive [and prohibited] under the EPA regulations * * *." The EPA regulations referred to are found at 40 C.F.R. § 35.936-13, § 35.936-7, and § 35.936.3 (1976). These regulations provide, as pertinent:

> "§ 35.936-13 Specifications.
>
> "(a) Nonrestrictive specifications. (1) No specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words or equal."
>
> "§ 35.936-7 Small and minority businesses
>
> "Positive efforts shall be made by grantees to utilize small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements and contracts to be performed utilizing Federal grant funds."
>
> "§ 35.936-3 Competition.
>
> "It is the policy of the Environmental Protection Agency to encourage free and open competition appropriate to the type of project work to be performed."

Explaining its position that it is a "switch gear manufacturer," Powercon said that it had manufactured switchgear for several installations including four other wastewater treatment plants. Thus, Powercon urged that any interpretation which would exclude Powercon would be overly restrictive and prohibited under these regulations. The company also argued that it "is recognized throughout the industry as a 'switch gear manufacturer,' equal, if not superior to the companies listed in [the above-quoted specifications]." Urging that it is a "switch gear manufacturer," Powercon said that it "produces integrated metal-clad switch gear assemblies." The company further argued that it "does not purchase circuit breakers for its switch gear from various sources, but rather

purchases all of its circuit breakers for any given project from only one source and was planning to use all GE circuit breakers on this job." Consequently, the company urged that under the "plain meaning of the words contained in this specification, Powercon cannot be excluded from furnishing the switch gear equipment on this job."

Powercon then argued:

> "If the District and its A&E had wanted to restrict the eligible switch gear suppliers to manufacturers of circuit breakers only, it would have been quite simple to write an unambiguous specification to this end. * * *
>
> "However, the present specification does not limit the eligible suppliers to switch gear manufacturers only, and no reasonable interpretation of this specification can be made which would lead to this conclusion. First, the various companies listed in specification 7.2 are the only circuit breaker manufacturers who are also manufacturers of switch gear equipment. If only circuit breaker manufacturers were to have been eligible, the 'or equal' portion of this specification would then be inconsistent and contradictory, since it indicates that there are other switch gear manufacturers who are eligible."

The grantee did not consider the merits of Powercon's complaint because it found the complaint to have been untimely filed under EPA's complaint procedures. This "untimeliness" finding was subsequently reversed by EPA.

By decision dated November 15, 1976, the Regional Administrator (Region V) rejected the merits of Powercon's complaint. EPA found the "intent of the specifications" to be evident as follows:

> "As originally written, a company which purchased 'circuit breakers, relays and instrument components' and assembled them into the switchgear would not be acceptable to [the grantee]. After the addendum this requirement reads: 'Metal clad switchgear consisting of circuit breakers purchased from various sources and installed by an equipment assembler will not be approved as meeting the intent of these specifications.' Thus if the circuit breakers were purchased rather than manufactured by the equipment supplier, it would be unacceptable. The switchgear supplier must manufacture the circuit breakers. 4/

This conclusion is further justified by clause 7.3 on page 7-6 of the specification which states: 'The circuit breaker manufacturer shall furnish and install the protective relays, test devices, potential and current transformers as required, and shown on the Contract Drawings:

* * * * *

4/ Powercon has argued that since it purchases its circuit breakers from one source this requirement does not apply to it. While the language used may not be grammatically correct, the intent is evident; to qualify as the equipment supplier, one must manufacture its own circuit breakers."

Recognizing that Powercon had admitted that it was not a manufacturer of circuit breakers, EPA then decided that the grantee had "demonstrated a rational basis" for restricting suppliers to those who also manufactured circuit breakers and that the solicitation provisions in question did not violate the EPA regulations quoted above. As was stated by EPA:

"The switchgear in question is the one to tap into the CEI line for power to the facility. The very large and complex Cleveland Southerly Plant is dependent upon the switchgear functioning properly and if the circuit breakers fail, there could be a severe problem with the rest of the electrical systems in the facility. In cases of this type, this Agency will take a careful look at the underlying basis for the type of specification requirement. * * *

"The August 20, 1976, letter from the Grantee's consulting engineer (Pirnie) highlights the reasoning underlying the requirement.

"'In the case of item 7, the proper coordination of the many sophisticated components that must be incorporated, together with detailed exacting requirements of the Cleveland Electric Illuminating Company for interfacing their Data Acquisition System, implies a considerable level of skill and experience.

> "We do not know of any feasible way to write a specification that permits qualified assemblers to furnish the end item while precluding an assembler who is inexperienced and unqualified from doing so. (emphasis supplied) That is the reason behind our decision to allow only those manufacturers who actually manufacture the 13 KV circuit breakers, to furnish the equipment."

* * * * *

"The limitation, in the present case, to those suppliers who manufacture their own circuit breakers goes to the issue of the responsiveness of the bid and not to the responsibility of the bidder. The Comptroller General has held that the award of a contract can be limited to a class of bidders meeting specified qualitative and quantitative experience requirements in a specialized field where the invitation so provides and where the restriction is properly determined to be in the Government's best interests. Plattsburgh Laundry and Dry Cleaning Corp., 54 Comp. Gen. 29 (1974); Descomp, Inc., 53 Comp. Gen. 522 (1974).

"Under the circumstances of this case, where there is a pressing need to proceed with this contract in conjunction with numerous other interrelated contracts for this complex project, and where the Grantee in fact obtained competition from enough vendors to meet the minimum U.S. EPA requirements, I find that there is a rational basis for the Grantee's determination; in addition I also find that requiring resolicitation now would not best serve the public interest. In future instances, however, it should be noted that specification requirements comparable to the one at issue in this case will be more closely scrutinized to insure that any restriction is fully and adequately justified by the grantee or its consulting engineer, consonant with the Congressional and U.S. EPA requirements favoring full and free competition. Any restriction upon competition must be demonstrated to address salient performance characteristics addressed to the minimum needs of the project as well as the public benefit."

Consequently, EPA denied the complaint.

Powercon and EPA have affirmed their previously argued positions on the issue concerning the proper interpretation of the questioned specifications and the question whether the specifications--if construed to require potential suppliers to be manufacturers of circuit breakers---are unduly restrictive.

Before proceeding to a discussion of these issues a threshold question--whether Powercon's status as a prospective subcontractor precludes it from requesting our review of the award in question--is initially for decision.

We have decided to consider complaints against contracts awarded "by or for" grantees. Here the record shows that the grantee's engineering consultant drafted the questioned specifications and recommended the rejection of Hirsch's proposed use of Powercon as a supplier. Although Hirsch was the party actually awarding the subcontract, the subcontract award must be considered to have been made "for" the grantee because the grantee's participation in the award process had the net effect of causing Powercon's rejection. See Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237.

Another threshold question--the choice of the applicable procurement norm for resolution of the complaint--has been raised by EPA. In its report to our Office on the complaint, EPA urges that "prior decisions of our Office concerning restrictive specifications under direct Federal Procurements should not be routinely applied to the problem here" because:

(1) "* * * the provisions of section 204(a)(6) of the Federal Water Pollution Control Act, as amended [33 U.S.C. § 1284 (a)(6)], differ considerably from the Federal statutory and regulatory requirements which govern direct Federal procurement." (They differ, EPA says, in that "performance type" specifications constitute the norm in Federal procurement; by contrast, however, EPA notes that the cited act expressly allows use of "brand name or equal" references as an alternate means of specifying actual needs.);

(2) The Administrator of EPA, not GAO, has the "authority * * * to interpret" the act;

(3) grantees lack "specialized expertise" in drafting specifications.

(Notwithstanding objection (2), EPA has "request[ed] the advice of [our] Office pursuant to 31 U.S.C. § 74 (1970), and does not object to [our] exercise of jurisdiction * * *" in hearing Powercon's complaint.)

Recently, in BBR Prestressed Tanks, B-187205, B-187999, May 4, 1977, 77-1 CPD 302, which involved a complaint against an award by an EPA grantee under the cited section of the same act, we held that the section and implementing regulations "impart the Federal norm regarding the requirement for full and free competition and the avoidance of restrictive specifications." Accepting, without deciding, EPA's argument that the act permits EPA grantees to employ brand name or equal purchase descriptions as a suitable alternative to a formal specification, whereas under the Federal procurement scheme a brand name or equal purchase description is a "last resort" method, the Federal norm compelling "full and free" competition under the specification ultimately chosen by the grantee still applies.

Turning to the issue of the interpretation of the questioned specifications, there is no doubt that the grantee's engineering consultant--with the concurrence of the grantee--intended to draft the specifications so as to "allow only those manufacturers who actually manufacture the 13 KV circuit breakers, to furnish the equipment." Notwithstanding this stated intent, the drafted specifications are less than clear that only manufacturers of circuit breakers would be considered as suitable suppliers. Although EPA's decision holds that there was "grammatical error" in the specification's prohibition against switchgear containing circuit breakers purchased from various sources (rather than "source") (which, on its face, would not contradict Powercon's stated intent to purchase its circuit breakers from only one source--General Electric Company), it implicitly rejects the notion that the error supports Powercon's interpretation of the specification.

We do not agree. The phrase, "Purchased from various sources," is grammatically harmonious with the term "circuit breakers" and, coupled with Powercon's admitted status as a switchgear manufacturer--albeit not a circuit breaker manufacturer--supports Powercon's view that it qualifies under the specification as actually drafted. Nor do we agree that the solicitation's statement that the "circuit breaker manufacturer shall furnish and install the protective relays, test devices, potential and current transformers as required" supports the view that only circuit breaker manufacturers could furnish the entire switchgear requirement. As stated by Powercon:

> "* * * when Powercon reviewed these specifications, it interpreted them as meaning what the clear words said, i.e., a switchgear manufacturer who purchased circuit breakers from a sole source could supply the switchgear for this project as long as its own circuit breaker supplier also installed the relays, devices, and transformers in the switchgear equipment."

We therefore find that the specifications read as a whole rationally support Powercon's interpretation of them.

On the other hand it is clear that had the grantee been aware of the inadequacies inherent in its drafting of the specifications it would have corrected the specifications to make its stated intent clear. Moreover, it is clear that, to the extent the grantee could have properly specified a "circuit breaker-manufacturer only" requirement, the fact that it inadequately expressed its stated intent would not have required cancellation and resolicitation of the requirement absent a showing of prejudice. See GAF Corporation, 53 Comp. Gen. 586, 592 (1974), 74-1 CPD 68. The only "prejudice" Powercon has suffered--assuming the validity of the inadequately expressed "manufacturer only" requirement--is the preparation of a supplier's quotation without realizing that the quotation could not be considered because of the requirement. An example of the kind of "prejudice" that would support resolicitation under the cited precedent would be a showing that an otherwise eligible concern did not submit a bid because of a deficiently worded specification. Under this assumption, however, Powercon is not an "otherwise eligible" concern because it is not a circuit breaker manufacturer.

Turning to the validity of the expressed intent of the grantee to restrict suppliers only to manufacturers of circuit breakers, it is EPA's implicit position that this stated intent squares with the express language of the cited section of the act which permits specifications of requirements by referencing "at least two brand names or trade names of comparable quality or utility [provided they] are followed by the words 'or equal.'" EPA apparently reads the phrases "brand names" or "trade names" as meaning either listing of brand name products or the manufacturers of the brand name products whichever the grantee chooses to select.

There is nothing in the legislative history of the cited section (see H.R. Report No. 92-911, 92d Cong., 2d Sess. (1972), which accompanied H.R. 11896 as amended (containing

the cited section which, after being incorporated into S. 2770, became law over the President's veto); S.Rep. No. 92-1236, 92d Cong., 2d Sess. (1972); comments of Mrs. Abzug, speaking for the House Committee on Public Works, 118 Cong. Rec. 10212 (1972)) which explains the intended meaning of the phrases "trade names" or "brand names."

We think the expressions "brand names" or "trade names" must reasonably be viewed as denoting brand name products rather than named manufacturers--otherwise the words "brand" and "trade" would be mere surplusage. On the other hand, since there is nothing in the legislative history of the cited act which clearly details what is meant by the terms in question we are reluctant to substitute our judgment as to the meaning of the phrases for the meaning of the phrases advanced by the agency charged with administering the statute. It is well settled that "deference [is to be given] to the interpretation given the statute by the officers or agency charged with its administration." Udall V. Tallman, 380 U.S. 1, 16 (1965) and cases cited in text. Nevertheless, given the uncertainties as to the precise meaning of the phrases as intended by the Congress, we think EPA and its grantees should, at a minimum, rationally support any "manufacturer only" requirement.

In a series of decisions commencing in 1965 involving Powercon Corporation, we have dealt with the problems stemming from "manufacturer only" requirements for switchgear equipment similar to the type involved in the subject contract. The first of these decisions--B-156680, July 13, 1965, addressed to Powercon Corporation--involved a Veterans Administration procurement for switchgear, "all components" of which were to be the "product of one manufacturer." Powercon did not submit descriptive literature with its bid showing the "stationary [super] structure" to which the switchgear components would be attached. Initially, as reflected in our July 1965 decision, both our Office and the procuring agency felt that Powercon's bid was properly rejected for failing to contain data showing the "superstructure" component.

Subsequently, by our decision in B-156680, September 9, 1965, we quoted from a supplemental report prepared by the Veterans Administration in which the Administration agreed with Powercon's assertion that the superstructure was not, in fact, considered to be a "major electrical component" of the required switchgear. The Administration's report continued:

"The purpose in requiring all components to be of one manufacture was to insure that the assembly would be an electrically coordinated unit of high quality. The importance of the superstructure in this assembly is secondary to the manner of attaching the electrical components to the superstructure and to the proper spacing between elements within the superstructure.

"Since the time when the specifications for the Perry Point project were issued, this office recognized that the specifications were unduly restrictive [because of the requirement that the superstructure be also made by the same manufacturer] and did not permit assemblers to supply such units to the V.A. We have since distinguished between 'all components' and 'all major electrical components.' Furthermore, we are attempting to specify electrical coordination and spacing, insofar as being related to the superstructure to assure that the government will obtain high quality and that the specifications will not be unduly restrictive."

Further correspondence with the company then ensued. Powercon, while gratified that the Administration acknowledged that the superstructure was not considered to be a major electrical component of the assembly, continued to assert that it was unreasonably restrictive to require that even all electrical components be of the same manufacturer since "such a specification would be absolutely restrictive to only the General Electric Co. and the Westinghouse Electric Company." Powercon insisted that there was a "host of suppliers making first class equipment which could provide to an assembler such as myself or even G.E. and Westinghouse either better prices or better delivery * * *."

By letter of September 23 , 1965, from our Office Powercon was told:

"The question whether a specification is unduly restrictive or is necessary to assure a quality product is most difficult to determine. Unquestionably it is possible for a competent and conscientious assembler to produce a quality assembly equal to or perhaps even better than a regular manufacturer of the complete assembly.

> However, due to the nature of the assemblies, it is difficult, if not impossible, to determine after assembly whether the various components used are first-class, compatible, properly assembled, etc. Furthermore, in view of the small quantity involved, in particular procurements, many times only one item, it is not feasible to provide for inspection during assembly. For this reason engineering experts apparently are hesitant to accept other than a standard, known and proven type of assembly from a manufacturer regularly engaged in the field. This is understandable when the overall importance of the particular assembly is considered. A similar problem is involved when a minimum acceptable grade of a product is established. Some will urge that the standard is too high and a waste of money, while others will argue that it is not high enough and will be more costly over all."

During 1971 and 1972 we decided a related series of cases--again involving Powercon--concerning an electrical equipment purchase by the Government Printing Office (GPO). In 51 Comp. Gen. 315 (1971) we upheld the rejection of a low bid for failure to furnish required descriptive data on the electrical equipment to be supplied by Powercon under the prime contract. We also related in our decision the judgment expressed by the procuring office's engineering staff that there would be less risk of malfunction, and more trouble-free use of equipment if both the "circuit breakers and the switchboard [containing the breakers and other electrical components]" were made by the same manufacturer. Our decision went on to say:

> "* * * we see nothing in [the equipment specifications] or elsewhere in the IFB which would support the premise that GPO's requirements would be satisfied by a switchboard in which only the major electrical components were manufactured by the same firm as manufactured the circuit breakers. Nor do we concur with your view that B-156680, supra, stands for such premise.
>
> "The drafting of specifications reflecting the minimum needs of the Government and the determination whether items offered by bidders will meet such needs are primarily the responsibility of the particular contracting agency. 17 Comp. Gen. 554 (1938). In recognition of such well established principles of competitive bidding, we did not hold in B-156680,

> supra, that a procurement requirement that the entire switchgear, or switchboard, including the superstructure, be the product of one manufacturer was restrictive of competition per se. To so hold would have been to require other contracting agencies to accept VA's determination without regard to their own requirements."

In our decision in B-172006, June 30, 1972, to the attorney representing Powercon's prime contractor, we made it clear that we did not express either agreement or disagreement with GPO's technical position or with the view that it might have been appropriate to have rejected the prime contractor's bid solely on the basis that the switchgear offered would have been assembled by a firm other than the manufacturer of the components of the switchgear. We also said:

> "While we appreciate your concern as to the possibility that an agency might issue a solicitation which would preclude the installation of a switchboard assembled by Kennedy's supplier (Powercon), the question of whether a solicitation is unduly restrictive of competition must necessarily be decided under the particular circumstances pertaining to that individual procurement. The procurement statutes require that specifications be drawn so as to permit the greatest amount of competition possible consistent with the needs of the Government. This is an affirmative responsibility of the procuring activity which may not be evaded by arbitrary or capricious actions, and when competition is materially restricted by precluding the use of products of certain manufacturers the agency must be able to show a substantial basis for its action. In cases where the items being procured are of a type which has been generally produced by the manufacturing concerns involved, as we understand the switchboards in question to be, we tend to agree with the view indicated in the affidavit of the president of Powercon that the subjective judgment of engineering personnel of the procuring activity as to the reliability of a manufacturer's product can be offset by the factual history of that product's actual performance in comparison with the performance histories of those products of other manufacturers."

Finally, in two recent cases involving protests from Abbot Power Corporation--a supplier of switchgear equipment similar to Powercon Corporation--(B-186568, December 21, 1976, 76-2 CPD 509: B-186198, January 7, 1977, 77-1 CPD 13) the Veterans Administration informed us that it views a "manufacturer only" requirement for switchgear to be an unrealistic and restrictive requirement. As a result of VA's decision to reject the requirement, the issue involving the validity of the requirement was rendered moot, and we expressed no opinion on the propriety of the VA requirement.

From this historical review of "manufacturer only" requirements for electrical switchgear equipment, it is clear that some engineers prefer the requirements because it is difficult, if not impossible, to determine after assembly whether the "various components used are first-class, compatible, [and] properly assembled"--especially given the administrative difficulty of providing inspection during assembly. On the other hand, it is also clear that we think the subjective preference of engineering personnel can be offset by the factual history of the assembler's product compared with the performance history of a manufacturer's product--as apparently was the case with four other EPA grantees who have accepted Powercon's product. Also, as suggested by the series of decisions in the 1960's involving this engineering problem, it seems that greater engineering effort in specifying design criteria for "electrical coordination and spacing, insofar as * * * related to the superstructure [of switchgear]" might tend to lessen the felt need for a "manufacturer only" requirement.

Indeed, in the present case, it seems that the motivation for the "manufacturer only" requirement may not be so much a preference for the requirement but--in the words of the grantee's consulting engineer--an inability to "write a specification that permits qualified assemblers to furnish the end item while precluding an assembler who is inexperienced and unqualified from doing so." This stated inability--perhaps prompted by reluctance and the long-standing engineering preference for a "manufacturer only" specification when switchgear purchases are involved--constitutes the rationale for Powercon's exclusion.

It is manifestly unfair, in our view, that admittedly qualified concerns be excluded from competition because of an engineer's stated inability--or reluctance--to draft a suitable product history specification and additional design specifications providing component spacing and coordination for switchgear equipment. As an example of a product history clause (for diesel engines) that, with appropriate modifications, might be used as a model for a product history clause for switchgear is the following provision (taken from the procurement involved in 48 Comp. Gen. 291, 294 (1968)):

> "Each of two diesel engines of the same model for each type of plant specified herein and operating at the same or higher speed, brake mean effective pressure (bmep) as the equipment proposed hereunder, shall have performed satisfactorily in an installation independent of the contractor's facilities for a minimum of 8,000 hours of actual operation. This operating experience shall have been accumulated within a consecutive period of 2 years as of the date of bid opening * * *.
>
> "The engines cited as meeting the operating experience requirement shall be the same model, shall have operated at or above the same rating, speed, brake mean effective pressure, and shall have the same cylinder configuration as the units proposed hereunder. * * *"

It is evident that the development of a suitable product history clause for assessing switchgear would take an indeterminate amount of time, however. Once developed, the clause--insofar as the present case is concerned--would have to be released in a new competitive solicitation so that any concern which might have decided not to submit a quotation to Hirsch because of the original specifications would also have a chance to bid along with Powercon. Moreover, we cannot conclude that Powercon would necessarily qualify under that clause or submit the lowest quotation for the switchgear.

In any event, the grantee has informed us that: "The prime contractor, Hirsch Electric Company, issued a purchase order in November, 1976, to Allis Chalmers Corporation for the subject equipment which has since been manufactured and partially delivered. The circuit breakers have been delivered to Cleveland and the remainder of the equipment is scheduled for delivery in June. Final installation of this equipment is scheduled to be completed by the end of July. Based on the above, it is evident that any change of equipment suppliers at this time would be a practical impossibility." We concur in this assessment, especially in view of the critical nature of the equipment.

We are recommending, however, that EPA bring the switchgear specification problem to the attention of its grantees nationally so that in future grantee procurements a suitable product experience clause might be drafted before a solicitation is released.

R. F. Keller

Deputy Comptroller General
of the United States