

Perry



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ford Aerospace Corporation

File: B-239676

Date: September 20, 1990

Jules F. Miller, Esq., for the protester.
John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith,
Pachter, McWhorter & D'Ambrosio, for Hughes Electro-Optical
Operations, Inc., an interested party.
Harry D. Boonin, Esq., Department of the Navy, for the
agency.
Anne B. Perry, Esq., Paul Lieberman, Esq., and John F.
Mitchell, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest is sustained where agency relaxed the solicitation's
required delivery schedule for the awardee without providing
an equal opportunity for the protester and the relaxation
could have had a material impact on the protester's proposed
cost.

DECISION

Ford Aerospace Corporation protests the award of a contract
to Hughes Aircraft Company under request for proposals (RFP)
No. N00383-89-R-5529, issued by the Department of the Navy
for components to support the AN/AAS-38 Forward Looking
Infrared Receiver (FLIR) System for the F/A-18 aircraft.
Ford alleges that the Navy improperly relaxed the equipment
delivery requirements under the RFP for Hughes and that
Hughes' prices for certain items, for which split awards were
made in part to Hughes, are substantially higher than Ford's
prices for these items.

We sustain the protest.

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The RFP was issued on September 29, 1989, using other than full and open competition.^{1/} The 56 line items under the solicitation are all components in the FLIR, a self-contained system housed in a pod mounted on a wing of the F/A-18 aircraft. The FLIR is designed to passively sense infrared radiation and provide a real time scheme of contrast variations presented in television display format. The displayed imagery represents infrared intensity and emissivity of all targets and background contained in the FLIR field of view. Previously, the majority of the components were procured on a sole-source basis from Ford or Texas Instruments.

The RFP provided that proposals would be evaluated to determine which is most advantageous to the government, and that award would be made to the offeror whose proposal presented the most advantageous combination of price and delivery and other factors considered. The RFP also reserved for the government the right to make split awards to different offerors of individual contract line items (CLIN) of over 12 units.

The solicitation contained the following provisions concerning the time of delivery:

"F-649 - Time of Delivery (Time A Factor)

A. This is an urgent requirement. Delivery is required as soon as possible.

B. The Government desires that delivery be made no later than the delivery schedule set forth below. If the offeror is unable to make delivery in accordance with this schedule, it shall set forth in its proposal or quotation the earliest delivery schedule with which it can comply.

^{1/} A justification and approval in accordance with Federal Acquisition Regulation (FAR) § 6.302-1, permitting the award of a contract through other than full and open competition, was approved on August 21, 1989. The reason for limiting competition was that the time needed to obtain a complete data package would prevent obtaining this urgently needed material in a timely manner.

C. If this solicitation is an RFP, then the offeror's failure to take exception to the Government's delivery schedule set forth below shall cause this schedule to become the contract delivery schedule in the event the offeror is awarded the contract."

Following these statements is a delivery schedule entitled "Required Delivery Schedule," broken down by CLIN and months between May 1991 and January 1992. The solicitation also contains a provision permitting the entry of alternate earlier delivery for offerors who qualify for a waiver of first article approval requirements. This provision expressly provides that "at no time shall the delivery occur later than the required delivery schedule." Amendment 0008, issued November 29, 1989, contains a provision which states that: "The delivery schedule contained in clause F-649-Time of Delivery (Time A Factor) is the government's required delivery schedule." (Emphasis added.)

Three offers were received by the amended closing date of December 4, 1989, and discussions were conducted with each offeror on March 14 through 16, 1990. Best and final offers (BAFOs) were received by April 16. Agency approval to make a split award to Ford and Hughes was granted on April 30 and contracts were awarded to Hughes in the amount of \$43,742,971 and to Ford in the amount of \$18,425,050. By letter dated May 16, the contracting agency notified offerors of these awards. Ford filed a protest in our Office on May 14, challenging the award to Hughes on the grounds that Hughes' proposal failed to comply with the required delivery schedule because it provides for beginning delivery items in September 1991 and does not propose to finish delivery until March 1992, while the RFP requires delivery between May 1991 and January 1992.^{2/} In response to information later received by Ford, it raised an additional ground of protest--that the agency awarded 75 percent of CLINs 0002, 0009, 0021, 0026, and 0041 to Hughes, despite the fact that the price offered by Ford for these CLINs was substantially less. The protester argues that the relaxation of the delivery schedule and the award of certain CLINs to Hughes at a higher price than Ford's offer constitutes an award based on requirements other than those stated in the solicitation.

^{2/} Ford also alleges that Hughes will be unable to meet the delivery date specified for first article testing. Whether or not Hughes meets this date is a question of contract administration which we will not review under the circumstances present here. 4 C.F.R. § 21.3(m)(1) (1990).

Award must be based on the requirements stated in the solicitation, Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96, and an agency does not have discretion to disregard an offeror's failure to satisfy a material RFP requirement in its proposal. Marisco, Ltd., B-235773, June 26, 1989, 89-2 CPD ¶ 8; Logitek, Inc., B-238773, July 6, 1990, 90-2 CPD ¶ _____. A delivery requirement is a material term of a solicitation; therefore, changes in such a requirement must be communicated to all offerors, and award generally cannot be made on the basis of a proposal that takes exception to a required delivery schedule. Coflexip & Servs., Inc., B-216634, May 16, 1985, 85-1 CPD ¶ 554.

Here, the RFP as issued was ambiguous as to the nature of the delivery schedule. On the one hand, the solicitation stated that the delivery schedule contained in the RFP was desired, and that if offerors could not meet this schedule they could propose an alternate schedule, thus suggesting that a later schedule might be acceptable. On the other hand, the RFP stated that this was an urgent requirement, identified the enclosed schedule under clause F-649 as the "required delivery schedule," and stated that offerors eligible for waiver of first article test procedures could propose an alternate earlier delivery schedule, but that "[i]n no event may such offered schedule provide for deliveries later than date such deliveries would be required under clause F-649." This language indicates the mandatory nature of the delivery schedule contained in the RFP, and provides that an alternate delivery schedule would be acceptable only if it was an earlier schedule than that contained in the solicitation.

The Navy contends that it intended to permit offerors to submit alternate delivery schedules which extended beyond the "required" delivery schedule in the solicitation, and that insofar as the solicitation is ambiguous, Ford was required to seek clarification or file a protest before the closing date for receipt of proposals.

We disagree because, although the RFP as initially issued was arguably ambiguous, in our view, amendment 0008 eliminated the ambiguity by providing that the delivery schedule contained in the relevant clause was "the government's required delivery schedule."^{3/} (Emphasis added.) A contrary interpretation of amendment 0008 would render it superfluous. That is, there would have been no reason for the agency to include this

^{3/} This interpretation is also supported by amendment 0010 which provides offerors with an example of what the required delivery schedule would be in the event of split awards, and this example indicates that delivery would occur within the required schedule.

statement in the amendment, other than to eliminate the inconsistencies contained in the solicitation. When interpreting a solicitation, our Office reads the terms of the solicitation in a manner that gives effect to all provisions to determine which interpretation is reasonable. See Honeywell Regel Sys. GmGH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149.

The Navy argues that the statement in amendment 0008 specifying that the delivery schedule in the solicitation is the government's required delivery schedule was simply the contracting officer's acknowledgment of "the time period when the Navy's needs for the items will occur or be 'required,'" and contends that the statement did not eliminate an offeror's opportunity to submit an alternative delivery schedule. In our view, the Navy's explanation of the intended purpose of amendment 0008 is both unreasonable and inconsistent with the amendment terms. The statement clearly and unequivocally provides that the delivery schedule contained in the RFP is the government's required delivery schedule. It does not say, as the Navy urges, that the government's needs will arise according to this schedule, but that offerors are not required to make deliveries in accordance with this schedule. Moreover, such an interpretation is unreasonable because it would mean that the Navy, which had justified restricted competition on the basis of its urgent need for the equipment, intended to permit offerors to deliver CLINs at a time later than the agency urgently needed the equipment. Accordingly, we agree with Ford that the only reasonable interpretation of the solicitation as amended is that offerors were required to meet, or deliver in advance of, the specified delivery schedule.

The Navy further argues that offerors were on notice that alternate later delivery schedules were acceptable because delivery was a stated RFP evaluation criterion. While the RFP did inform offerors that their proposed delivery schedules would be evaluated, this did not permit offerors to propose delivery schedules which failed to meet the stated minimum requirements under the RFP. Under this evaluation formula, the agency reasonably could give a higher technical rating to an offeror proposing an earlier-than-required delivery schedule; however, the evaluation provision did not waive the minimum required delivery schedule set forth in the RFP.

The agency contends that even if the contract award incorporates a material deviation from the solicitation, it did not result in prejudice to Ford or any other offeror. In support of this allegation, the Navy argues that Ford was on notice that offerors would have difficulty in meeting early

delivery requirements.^{4/} Moreover, the Navy asserts that as a result of the manner in which the awards were divided between the two offerors, only a small amount of CLINs will be delivered after the "required" delivery end date.

Ford's knowledge of the time constraints on other offerors does not provide any basis for the agency's relaxation of mandatory delivery requirements for Hughes. While Ford complied with the required delivery dates, Ford asserts that had it been permitted to propose a longer delivery schedule its price would have been lower. It has long been recognized that delivery requirements have a direct and often a substantial effect on price. Here, award of the CLINs which were not split was made on the basis of low price. Accordingly, in our view, Ford was prejudiced by the agency's actions. While it is not clear precisely what impact the relaxed delivery schedule would have had on Ford's price, we recognize that permitting delivery to begin 4 months late and end 2 months late could have led Ford to reduce its price significantly. See Coflexip & Servs., Inc., B-216634, supra; Logitek, Inc., B-238773, supra.

As to the Navy's second assertion, that only a small number of CLINs will be delivered late, it appears that late deliveries of specific CLINs will be occurring throughout the delivery schedule. Further, the effect of Hughes' late delivery is minimized only by the agency's taking advantage of Ford's timely deliveries, which clearly constitutes unequal treatment of the two offerors.

Ford also alleges that the agency awarded a contract for 75 percent of CLINs 0002, 0009, 0021, 0026 and 0041 to Hughes despite the fact that Ford's prices for these items were lower. Ford further contends that on CLIN 0017 and 0050 it was awarded a contract for 75 percent of the units and Hughes a contract for 25 percent of the units where Ford's price for 100 percent of the units was lower.

The agency does not dispute these allegations with respect to the specific CLINs, but argues that the solicitation informed

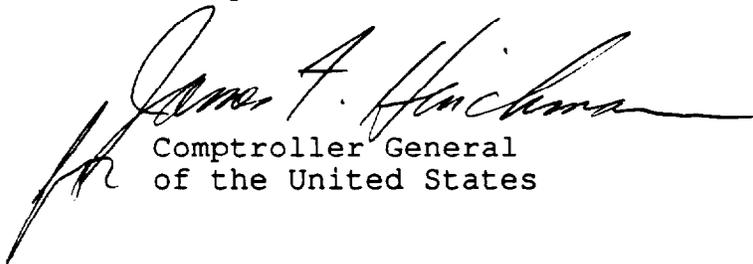
^{4/} Apparently, Ford as the previous sole-source supplier of certain CLINs in the RFP, believed that the Navy was improperly removing Ford's restrictive legends on technical data and had unsuccessfully filed suit in this regard. Although the court denied Ford's request for an injunction against the agency from removing these legends and releasing this data, the agency elected to wait until the conclusion of the litigation to issue the solicitation, thereby decreasing the time offerors would have to manufacture these items.

offerors that the government reserved the right to award a contract for the entire quantity to one offeror or to split the award for all of the CLINs for which the quantity ordered exceeded 12 units, and that the contracting officer determined that it was in the government's best interest in terms of delivery and price to split the award for all CLINs between Ford and Hughes as was done.

While the agency is correct that the solicitation permits split awards, the solicitation does not provide any criteria for making a split award. Here, offerors were advised of the potential lot size awards of each CLIN by virtue of the fact that the solicitation required offerors to submit prices based on receiving an award for 25 percent, 75 percent and 100 percent of the total quantity; offerors were not informed, however, what criteria the government would use to make a decision whether to split awards by these percentages. The determination to make split awards is commonly made on the basis of achieving the lowest aggregate price to the government. See, e.g., Barnes Elec. Co., Inc., B-234935, July 19, 1989, 89-2 CPD ¶ 61. Disclosure to offerors of the criteria to be used by the agency is crucial. It is necessary not only to achieve full and open competition by ensuring that offerors will be competing on an equal basis, but also to eliminate the potential for abuses that may arise from an agency's unbridled discretion to determine, after proposals are received, the basis on which to make award.

We believe that the remedy is for the Navy to now reexamine its actual delivery requirements, and if, as appears to be the case, a relaxed delivery schedule will meet the Navy's minimum needs, to so amend the solicitation and request BAFOs from all offerors in the competitive range. It should also amend the solicitation to disclose to offerors the criteria that will be used in a determination to make split awards so that offerors can calculate their prices accordingly. If, on the basis of these BAFOs, Ford or another offeror is in line for award, Hughes' contract should be terminated for the convenience of the government. We also find that Ford is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).

The protest is sustained.


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