

S. Riback
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kahn Industries, Inc.

File: B-248736

Date: September 21, 1992

Mary Beth Bosco, Esq., Patton, Boggs & Blow, for the protester.
David R. Perkins for Froude Engineering, Inc., an interested party.
Lori S. Chofnas, Esq., Department of the Navy, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency could not properly accept awardee's best and final offer (BAFO) because of alleged deviation of initial offer from terms of solicitation is denied where record shows that awardee's BAFO contained a blanket offer to meet all of the solicitation's terms and conditions, which was all that was required by amended request for proposals.

DECISION

Kahn Industries, Inc. protests the award of a contract to Froude Engineering, Inc. under request for proposals (RFP) No. N00140-91-R-5133, issued by the Department of the Navy to acquire an automatic mechanical load absorbing waterbrake system or dynamometer. Kahn argues that the Froude offer does not comply with the RFP's specifications.

We deny the protest.

The RFP called for firm, fixed price offers to furnish a dynamometer, any spare parts necessary to ensure the device's operation for a minimum of 10,000 hours and related technical data. As originally issued, the solicitation required the submission of detailed technical and business proposals and provided for award to the firm whose proposal represented the best overall value to the government. Technical proposals were to include descriptive literature showing that the offeror understood the solicitation's specifications.

In response to the RFP, the agency received four initial proposals. Two of these were alternate offers submitted by Kahn and the other two offers were from Froude and a third firm. After evaluating the initial offers, the Navy concluded that none of the offerors had submitted a technically acceptable proposal.

The agency then engaged in discussions with all three firms. During the course of these discussions, the Navy found that the specifications contained numerous ambiguities. In addition, the offerors had submitted various questions concerning the terms of the solicitation which needed to be addressed. The Navy therefore delayed its request for best and final offers (BAFO) until it could provide a comprehensive response to the issues that had come to light during negotiations.

Ultimately, the Navy issued an amendment which contained a completely revised specification, provided answers to the offerors' questions, called for the submission of new certification packages from the offerors, made changes to the solicitation's instructions, and changed the basis for award. Under the revised RFP, offerors were no longer required to furnish descriptive literature in order to demonstrate compliance with the solicitation's specifications. Instead, firms were simply required to submit a blanket certification that all elements of the specification would be met and that all terms and conditions of the RFP would be complied with. The revised solicitation also provided that award would be made to the eligible, responsible firm offering the lowest overall price. Under both the original and revised RFPs, offerors' prices for the spare parts requirement were not evaluated.

After receipt of BAFOs, the Navy determined that all three firms had submitted the required blanket offer of compliance. Froude was found to be the low priced offeror. The agency then conducted a preaward survey on Froude and determined that the firm was responsible. The Navy wanted to make award to Froude on the basis of its BAFO, but discovered two minor issues which required clarification. First, the agency discovered an ambiguity between the delivery schedule for furnishing technical data specified in section F of the solicitation and the delivery schedule stated in the RFP's form DD 1423, contract data requirements list. The delivery schedule stated in section F was more stringent than the other schedule. Second, Froude's pricing schedule contained a notation that its prices were "exclusive of all sales tax."

The contracting officer resolved these concerns by first establishing a competitive range consisting of only Froude, based upon the fact that the firm's price was so low that no

other firm had a reasonable chance of receiving award. The contracting officer then engaged in brief discussions with Froude, during which the firm clarified its intent to meet the more stringent section F delivery schedule for its technical data package and agreed to delete all references to sales tax in its offer. Neither of these changes affected Froude's price and award was made on the basis of its BAFO.

Kahn argues that the Navy was on notice, based upon the contents of Froude's initial proposal, that the firm's dynamometer would not meet the specifications in three respects and that its BAFO offered the same noncompliant machine. First, the protester maintains that the descriptive literature furnished by Froude with its initial offer showed that the firm's dynamometer did not meet the solicitation's horsepower absorption requirements. The solicitation provided that the offered dynamometer was required to absorb power throughout a range of 0 to 35,000 horsepower. According to Kahn, the dynamometer which Froude offered in its initial offer--its model No. F849D--has a power absorption capability of only 32,172 horsepower. In support of this allegation, Kahn has submitted certain published product literature from Froude which it maintains shows that the Froude model F849D dynamometer has an insufficient power absorption capacity. Kahn also maintains that this published literature was furnished by Froude with its initial offer, and this put the Navy on notice that the offered Froude product would not comply with the solicitation.

Kahn argues secondly that the Froude dynamometer does not meet the solicitation's calibration requirement which calls for the contractor to provide the Navy with procedures necessary to calibrate instrumentation transducers to be furnished as part of the contractor's equipment. According to Kahn, the record shows that Froude's initial offer took exception to the RFP's calibration requirement. The protester refers to the agency's initial technical evaluation in support of this allegation, arguing it shows that the agency technical evaluators found this aspect of the Froude proposal deficient. Kahn maintains that, since the Navy had no evidence that Froude offered a different product in its BAFO, it had no basis to conclude that the Froude product would meet this solicitation requirement.

Third, Kahn alleges that the initial Froude offer did not meet another aspect of the specifications, the solicitation's 10,000-hour operating life requirement. Kahn also relies on the agency's initial technical evaluation to support this argument, maintaining that it shows that Froude's initial proposal did not meet this requirement.

Kahn also argues in this regard that Froude's pricing for its spare parts, which was significantly lower than the other offerors' pricing in this area, should have put the Navy on notice that the Froude product would not meet the solicitation's 10,000-hour operating life requirement. According to Kahn, the other offerors' spare parts lists called for the replacement of various major components in order to achieve the 10,000-hour operating life requirement, and since the Froude offer does not include such major components in its spare parts list, the agency should have been on notice that its dynamometer would not meet this solicitation requirement.

These allegations provide no basis for our Office to question the agency's award decision. While the solicitation originally required offerors to submit detailed technical proposals showing compliance with the RFP's specifications, the amended RFP required only a blanket offer of compliance from each firm. Under the terms of the revised solicitation, the Navy thus could not have rejected a BAFO on the basis of a deficiency identified in a firm's initial proposal, provided that the BAFO contained the required blanket offer of compliance. In essence, the agency chose to discard the original technical evaluation criteria (as well as any evaluation results obtained thereunder) in favor of an evaluation scheme which relied on the offerors' blanket statement of compliance with the terms of the RFP. A BAFO taking no exception to the terms of the solicitation thus would be acceptable under this revised scheme. Under these circumstances, Froude's BAFO obligated the firm to furnish a conforming item and thus superseded the firm's initial offer; since it also did not take exception to any of the specifications it properly was found technically acceptable.

We also do not agree with Kahn that alleged deficiencies in Froude's initially offered model served to qualify its BAFO, which did not offer that model. Rather, it follows from our position explained above that the agency rendered the initial offers and evaluations void by eliminating the need to specify a model (or provide descriptive literature) and revising the evaluation scheme.¹

¹Kahn alleges that Froude offered its model F849D in its BAFO and directs our attention to a reference to the model F849D appearing in the Froude BAFO. This reference, however, relates to the support equipment to be furnished by Froude for its dynamometer and not to the actual machine being furnished which, according to an affidavit furnished by a Froude representative, is a derivative of its model F849D. In view of the fact that Froude claims it was

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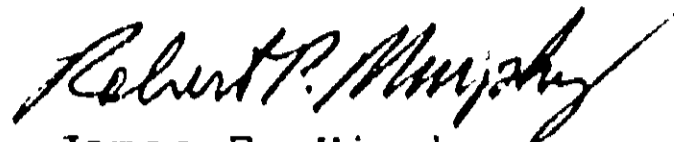
Kahn's argument regarding Froude's spare parts list also does not serve as a basis to question the Navy's award. The RFP requested that offerors provide a "recommended" list of spare parts necessary to assure that their dynamometer met the 10,000-hour operating life requirement. The fact that Froude's list of spare parts was not as extensive as the list provided by other offerors does not bring into question the firm's legal obligation to meet the requirement. Instead, it brings into question the capability of Froude to meet the RFP's requirements and thus relates to the Navy's determination that Froude is responsible, a determination which this Office will not consider except in limited circumstances not present in this case. General Projection Sys., Inc., B-246068, Jan. 28, 1992, 92-1 CPD ¶ 119.

Finally, Kahn argues that the agency improperly made award on the basis of Froude's BAFO because it took exception to the solicitation's technical data package delivery schedule requirements. There is no basis for this allegation. The record shows that Froude's initial offer conformed to the delivery schedule found in the DD 1423 rather than the delivery schedule contained in section F of the solicitation. Froude's BAFO, however, did not contain a detailed delivery schedule, and the firm relied instead upon its blanket offer to meet all of the RFP's terms and conditions. Froude's BAFO thus did not take exception to the solicitation's delivery schedule requirements. Moreover, to the extent that there existed an ambiguity in the solicitation

¹(...continued)
offering a derivative of its model F849D, this reference to the support equipment seems reasonable.

relating to the delivery schedule, Froude confirmed its intent to be bound by the more stringent schedule found in section F.²

The protest is denied.


for James F. Hinchman
General Counsel

²Froude would have been bound to the more stringent terms of the section F delivery schedule in any event. The solicitation contained the clause in Federal Acquisition Regulation § 52.215-33, order of precedence, which provides that any inconsistency in the solicitation be resolved by the order of precedence stated in the clause. The clause further states that contract clauses (for example, the delivery schedule in section F) take precedence over "other documents, exhibits and attachments" (which includes the DD 1423 at issue here).