



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: Kahn Instruments, Inc.

File: B-277973

Date: December 15, 1997

Mary Beth Bosco, Esq., and Lynn T. Burleson, Esq., Patton Boggs, for the protester. Russell P. Spindler, Esq., Naval Air Systems Command, for the agency. John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated protester's alternate design proposal for digital hygrometers as technically unacceptable and impermissibly made award on the basis of initial proposals is denied, where record shows agency reasonably concluded that the proposal was unacceptable due to informational deficiencies, and award to remaining technically acceptable offeror without discussions was consistent with the solicitation.

DECISION

Kahn Instruments, Inc. protests the rejection of its proposal and the award of a contract to Panametrics under request for proposals (RFP) No. N68936-97-R-0157, issued by the Naval Air Warfare Center, Weapons Division for 215 digital hygrometers.

We deny the protest.¹

BACKGROUND

The hygrometers called for by the RFP are to be used to measure the water content of various gases that cool the Sidewinder AIM-9M missile. Although hygrometers are commercially available, due to the Navy's special requirements, commercial, off-the-shelf hygrometers were not considered to meet the agency's needs. The Navy developed a prototype hygrometer and drawings based on a commercially-

¹We conducted a hearing on this protest to receive the testimony of the Navy's technical evaluator and a representative of Kahn.

available Panametrics hygrometer and purchased from Panametrics a quantity of the instruments built to the Navy's drawings. As issued, the current RFP included those Navy-developed drawings and essentially permitted only offers meeting those drawings. In a protest and a series of letters to the agency, Kahn complained that the RFP was unduly restrictive of competition since it did not permit offers based on other than the Panametrics instrument. The Navy amended the RFP to permit alternative offers meeting certain listed operational requirements.

The RFP and accompanying drawings required the hygrometer to be built into a portable carrying case with two detachable halves. One half of the case is to house the hygrometer instrument itself, either the referenced Panametrics instrument or an acceptable alternative. The other half of the case is to house a sampling system and other parts. The RFP also called for the sensor--the part of the system that comes into contact with the gas to be tested, Hearing Transcript (Tr.) at 8, 10--to be mounted in the sampling system, not in the hygrometer itself.

Although commercially available hygrometers were not considered to meet the agency's needs without modifications, the RFP was issued as a commercial buy. The RFP required that offers show:

A technical description which shall include a comprehensive statement of the offeror's understanding of the work required in this solicitation and the offeror's method of approach to attain contract objectives. The technical description shall also be specific, detailed, and complete enough to demonstrate that the offeror has a thorough understanding of the requirements needed to achieve the specifications of the products described in the solicitation. The technical description may include product literature, or other documents, but shall not include advertisements or unsubstantiated opinions.

The RFP stated that award would be made to the responsible offeror whose proposal, conforming to the solicitation, was most advantageous to the government, price and other factors considered. The RFP listed as evaluation factors: (1) technical capability of the item offered to meet the government's requirement, (2) past performance, and (3) price, and stated that when combined, the first two factors were significantly more important than the third. The RFP also stated that the government intended to award a contract without discussions with offerors so that initial proposals should contain the offeror's best terms. The RFP, however, reserved the right for the agency to conduct discussions.

Two proposals were submitted. Kahn's proposal, priced at [deleted], did not offer the Panametrics commercial hygrometer; rather it was based on a commercially-available Kahn Cermax hygrometer. Kahn's technical proposal consisted of the following sections:

- I. Technical Presentation Summary
- II. Technical Description
- III. Statement of Compliance
- IV. First Article Testing

The Navy's technical evaluator found Kahn's proposal to be technically unacceptable. Generally the evaluator concluded that, while there were some specifications in Kahn's proposal, the proposal did not explain how the complete instrument would be assembled. Related to this general consideration, the evaluator concluded that Kahn's proposal was unacceptable due to the failure to establish compliance with a number of specific requirements. Among these, the evaluator concluded that the proposal indicated that the sensor was to be housed in the hygrometer and not in the sample system, as required by the RFP; the sample gas is connected to the hygrometer, not the sampling system, as required; and the proposal did not meet a requirement that the proposed system function using alternating current (AC) power.

In its proposal, Panametrics proposed to construct hygrometers in accordance with the RFP specifications and drawing package. The Panametrics proposal, priced at \$2,311,250, was considered technically acceptable as submitted. The Navy reports that it awarded the contract to Panametrics based on its initial proposal, without discussions.

Kahn first disputes the Navy's conclusion that the Kahn proposal did not include the information required by the RFP to show that the proposal met the specifications. According to Kahn, its proposal carefully extracted each of the Navy's requirements from the RFP and demonstrated Kahn's understanding and compliance with each. Kahn also challenges each of the specific flaws attributed to its proposal by the evaluator. In addition, Kahn argues that the Navy applied a different standard to its evaluation of the Panametrics proposal. According to Kahn, in some instances, the Panametrics proposal contained the same information as that contained in the Kahn proposal, yet in Kahn's case the Navy claims it could not understand what Kahn was proposing, while in Panametrics' case, the Navy had no such problem. Finally, Kahn argues that in spite of the Navy's representation that award was made to Panametrics based on its initial proposal, discussions occurred with Panametrics and therefore should have been conducted with Kahn.

KAHN'S PROPOSAL

In reviewing a technical evaluation, we will not reevaluate proposals; rather, we will examine the record to ensure that the evaluation was reasonable and consistent with the RFP evaluation criteria and applicable statutes and regulations. Advanced Am. Diving Serv., Inc., B-274766, Jan. 2, 1997, 97-1 CPD ¶ 1 at 3. Based on our review of the record, we conclude that the Navy reasonably determined that Kahn's

alternate design proposal was technically unacceptable for lack of adequate supporting information. We discuss some areas of the evaluation below.

The Navy's basic problem with the Kahn proposal was its lack of information concerning how the firm would modify the Cermax commercial instrument and how that instrument would be mounted in the two-part case required by the RFP. As explained, the RFP called for the hygrometer instrument itself to be housed in one part of the carrying case and the sampling system to be housed in the other, separable part of the case. Concerning how the firm's commercial unit would be modified to fit in the two-part case, Kahn's representative testified that this would be done by abandoning the case for the commercial unit, and fastening the display and the internal parts of the commercial unit to a front panel, which would be mounted in a case meeting the requirements of the RFP. Tr. at 29-30, 50-51.

Nonetheless, the Technical Description in Kahn's proposal appears to indicate that the commercial instrument, including the commercial case, would be provided. The specifications on the second page of the Technical Description, including dimensions, weight, and other details of construction, describe the commercial case. The specifications also include commercially available options such as a carrying bag, a shoulder strap and a spare battery pack, which were not required by the Navy's drawings. To the Navy, regardless of other representations in the proposal, these references raised a question as to what Kahn was proposing and whether the firm understood the agency's requirements. Tr. at 52-53.

In addition, beyond the problem of what the unit would look like and how it would fit in the case, the Navy's evaluator was concerned that Kahn's proposal did not meet the RFP requirement that the sensor be mounted in the sampling system, not in the hygrometer itself. As Kahn's representative acknowledged at the hearing, the Kahn Cermax commercial hygrometer has an internal sensor. Tr. at 25. As Kahn notes, its proposal stated that the firm was offering the Cermax commercial instrument with "the optional sampling system," and that the "[s]ensor, transducer are mounted in sample system." Nonetheless, the proposal otherwise led the Navy's evaluator to question those representations. As the Navy notes, the first page of the Technical Description in Kahn's proposal described the firm's Cermax hygrometer. A paragraph on that page which begins with a description of Kahn's commercial Cermax instrument states that "[m]easurements are made by connecting the sample gas to the inlet port compression fitting and turning the instrument on" In the context of that paragraph, the Navy's evaluator understood the reference to "the instrument" as a reference to the hygrometer--raising a question of whether the proposal complied with the RFP requirement that the sensor be located in the sample system.

Kahn's response to these concerns is essentially twofold. First, Kahn maintains that other sections of its proposal, in particular the Statement of Compliance, included information concerning how the instrument was to be assembled and what it would

look like. As to the overall configuration of the hygrometer and the sample system in the carrying case, Kahn points to the following language in the Statement of Compliance in its proposal:

Attachment 2 Enclosure 1, Para. 1.0
Also Enclosure 2, Para. 3.0

Kahn maintains that by means of this language, which is a reference to provisions in the RFP, the firm agreed to provide a configuration for the hygrometer and the sample system in an acceptable carrying case in accordance with the Navy's drawings. That provision, Kahn argues, essentially incorporated into the proposal various requirements concerning dimensions, workmanship, assembly and construction.

Second, Kahn argues that the RFP did not require offerors to describe what the assembled instrument would look like or how it would fit together. Noting that the solicitation called for a technical description, which could include product literature that exhibited an understanding of the requirements needed to achieve compliance, Kahn argues there was no requirement that offerors provide drawings or sketches of the products offered. Kahn maintains that it met the RFP requirements by including in its proposal a narrative description of its proposed product's operational capabilities--the Technical Presentation Summary, a narrative technical description of the product which included a one-page sheet outlining the salient characteristics of the product being offered to the Navy--the Technical Description, and the Statement of Compliance, which parsed out each individual requirement of the RFP and demonstrated how Kahn would comply.

Notwithstanding Kahn's attempts to refute the Navy's concerns, we conclude that those concerns were reasonable. Concerning the Statement of Compliance, while that section of Kahn's proposal appears to cover many of the specific requirements which are in dispute, due to information in other sections of the proposal, in particular the section labeled Technical Description, the Navy's evaluator reasonably questioned whether the proposal met the requirements. In this respect, although Kahn asserts that its Statement of Compliance shows the firm's commitment to the requirements of the RFP for dimensions, workmanship, construction and assembly of the complete instrument, various provisions of the Technical Description also covered these matters, in some cases in a contradictory fashion. For example, a page of the Technical Description labeled Specifications included the dimensions for

the case for Kahn's commercial Cermax hygrometer, which Kahn concedes would not fit in the case required by the RFP. Tr. at 30. Although Kahn now explains that it planned to discard the commercial case, this was not clear from the proposal.²

Moreover, although Kahn argues that those specific provisions of the Technical Description did not apply because those provisions dealt with the firm's commercial item, this was far from clear from the proposal. Essentially, the problem is that the Technical Description section of Kahn's proposal included two pages which, although they appear to have been prepared specifically for this solicitation, also included information which related only to the Cermax commercial instrument and which was not intended to apply to this proposal. To add to the confusion, although Kahn now discounts some of the information on those two pages of the Technical Description as simply related to its commercial instrument, Tr. at 52-54, 83-85, those pages also include information which Kahn has repeatedly asserted was prepared specifically for this proposal in order to show the actual product which the firm would supply.³

²The specific reference in the Statement of Compliance upon which Kahn relies also was a source of confusion and ambiguity in the proposal. As noted above, the reference in the proposal was to:

Attachment 2 Enclosure 1, Para. 1.0
Also Enclosure 2, Para. 3.0,

Those provisions of the RFP essentially required that assembled hygrometers under the contract would be examined in accordance with the RFP specifications and drawings for compliance with requirements for dimensions, surface finish, workmanship, assembly, construction, identification plates, and stowage of loose parts. Both provisions also stated that hygrometers not meeting those requirements could be rejected. Although Kahn argues that its reference to those provisions was a commitment to meet all of the RFP requirements for dimensions, surface finish, workmanship, assembly, construction, identification plates, and storage of loose parts, we think it was reasonable for the Navy's evaluator to question whether Kahn had merely committed to examine the units for compliance with various underlying requirements, as a method of quality control, as opposed to committing to meet those underlying requirements.

³For example, in its October 20 comments, Kahn--arguing that its proposal contained sufficient information to show compliance--stated that, in addition to its Technical Presentation Summary, its proposal included "a technical description of the item itself, including a one-page specification sheet that set forth each of the salient characteristics of the product." These references are to the two pages of the Technical Description in question.

We think it is significant that the section of the proposal labeled "Technical Description" included these ambiguities. As explained, the RFP called for a "technical description" to demonstrate the offeror's "understanding of the work required in this solicitation and the offeror's method of approach to attain contract objectives." The technical description was to "be specific, detailed, and complete enough to demonstrate that the offeror has a thorough understanding of the requirements needed to achieve the specifications of the products described in the solicitation." Thus, although Kahn is correct that there was no specific requirement of the RFP that its proposal describe what the assembled instrument would look like, or how it would fit together, the very section of the proposal which the RFP stated was to demonstrate an offeror's understanding of the work required in the RFP, in fact, caused the most confusion about Kahn's understanding and intentions. Under the circumstances, the Navy's technical evaluator reasonably determined that Kahn's proposal was unacceptable as submitted.

THE PANAMETRICS PROPOSAL

As explained above, Kahn also argues that the Navy applied a different standard in its evaluation of the Panametrics proposal. Kahn argues that, in some instances, the Panametrics proposal contained inconsistencies between the commercial literature in the proposal and other parts of the proposal--as did the Kahn proposal-- yet in Kahn's case, the Navy claims it could not understand what Kahn was proposing, while the Navy had no such problem with the Panametrics proposal. For example, Kahn notes that the Panametrics proposal included commercial literature for the firm's commercially-available hygrometer, the Panametrics System 280, and that literature included the notation that "AC operation of the unit is not possible in this configuration." Thus, according to Kahn, the Navy ignored a statement of noncompliance in the commercial literature in the Panametrics proposal.

We reject this contention. While permitting alternative offers, the RFP called for offers to "manufacture, test and validate the design of the TTU-546/E, Digital Hygrometer in accordance with Government Baseline Drawing Number 639AS9334." That drawing depicts the entire unit as designed by the Navy, based on the Panametrics commercial instrument. The cover letter to the Panametrics proposal states that the firm was proposing "Digital Hygrometers, NAWC P/N: TTU-546/E," and that the proposal includes standard product literature for the firm's "commercial equivalent to the TTU-546/E," the System 280 Moisture Analyzer.⁴ In addition, the next page of the Panametrics proposal states that the firm is offering a

⁴As contrasted with Kahn's proposal, there is no confusion in the Panametrics proposal concerning the commercial literature. The commercial literature in the Panametrics proposal is clearly identifiable as such, so there is no ambiguity, as there was with the Kahn proposal, concerning whether the commercial literature took exception to RFP requirements.

quantity of "280-NAWC" units. One of the drawings in the Navy's drawing package indicates that Panametrics is an approved source of supply for the instrument depicted in the drawings under its vendor part number "280-NAWC." Under the circumstances, it was clear that Panametrics was offering to supply the precise instrument identified in the Navy's drawing package.

DISCUSSIONS

Kahn argues that the agency should have held discussions to permit it to correct any deficiencies in its proposal. However, there generally is no requirement that an agency hold discussions when the solicitation advises offerors that the agency intends to make award without discussions. Federal Acquisition Regulation (FAR) § 15.610(a)(3) (June 1997); Advanced Am. Diving Serv., Inc., *supra*, at 7-8. Since the solicitation advised offerors that the agency intended to make award without discussions, Kahn could not presume that it would have a chance to improve its proposal through discussions. The burden was on Kahn to submit an initial proposal containing sufficient information to demonstrate its merits, and the protester ran the risk of having its proposal rejected by failing to do so. *Id.* Given that the solicitation advised offerors of the possibility of award without discussions, and our conclusion that the Navy reasonably determined that Kahn's proposal was unacceptable as written, there was no requirement for the agency to hold discussions with Kahn.⁵

Kahn nonetheless argues that, in spite of the Navy's representation that it awarded the contract to Panametrics without discussions, the record shows that discussions were conducted with Panametrics. Specifically, Kahn notes that, although there is no record of any discussions, the contract awarded to Panametrics differs from the Panametrics proposal in three instances. According to Kahn, the only explanation for these differences is that the Navy must have conducted discussions with Panametrics.

⁵Alternatively, Kahn argues that the Navy could have communicated with Kahn, without conducting discussions, in order to address any concerns the evaluator had with the firm's proposal. According to Kahn, such communications would not have constituted discussions, but would have been simply clarifications. This is incorrect. Kahn's proposal was unacceptable. Since discussions occur when information provided by an offeror is essential for determining the acceptability of a proposal, FAR § 15.601 (June 1997), any communications with Kahn in order to give the firm an opportunity to make its proposal acceptable would have constituted discussions.

Concerning the first of these three instances, Kahn notes that the RFP required the delivery and testing of a first article unit. The RFP permitted waiver of the first article requirement when supplies identical to those called for by the RFP had previously been furnished and accepted by the government. Kahn notes that the Panametrics proposal requested waiver of first article testing, although the proposal admitted that testing had not been completed on the firm's previously delivered units. Kahn also notes that, in spite of the fact that, at the time of proposal submission, the Panametrics unit had not completed testing, the contract awarded to Panametrics waived the first article requirement. According to Kahn, some discussions must have occurred between the Navy and Panametrics in order to approve the waiver of first article testing.

Kahn argues that discussions also must have been occurred with Panametrics concerning the delivery schedule, since the schedule in the contract differs from that proposed by Kahn. The RFP included a desired delivery schedule, but also allowed offerors to propose an alternative delivery schedule so long as such an alternative schedule required delivery of the first article no later than 90 days after the date of the contract, and the production quantity no later than 820 days after the date of the contract. Panametrics proposed waiver of the first article requirement and a phased delivery schedule of "First 10 units delivered in 12-14 weeks ARO [after receipt of order] - Remainder of units will be delivered at a rate of 10/month."

In contrast, Kahn notes, the contract awarded to Panametrics stated a delivery schedule of 98 days after the date of the contract for the first 10 units and 737 days after the date of the contract for the remaining units. Kahn maintains that the 737 days permitted by the contract for delivery of all units is different than the schedule in the Panametrics proposal. In this regard, Kahn argues that, under the schedule in the Panametrics proposal, after delivery of the first ten units in 84 to 98 days (12 to 14 weeks), delivery of the remaining units at the proposed rate of 10 per month, would take 21 months, or 644 days (using seven 30-day months and fourteen 31-day months). According to Kahn, since the first 10 units were to be delivered in 84 to 98 days, and the remainder were to be delivered in an additional 644 days, the Panametrics proposal permitted delivery of all required units in 728 to 742 days. Kahn argues that discussions must have occurred between the Navy and Panametrics in order for the contract to be different than the proposal.

In response to these contentions, the Navy explains that after Panametrics submitted its proposal, the contract specialist responsible for this solicitation was informed by an agency technical representative that first article approval had been granted to Panametrics. Based on that approval, the contract document was drafted to reflect waiver of the first article requirement. Concerning the delivery schedule, the Navy explains that, once he was informed of the waiver of the first article, the contract specialist calculated the delivery schedule for the contract

based on Panametrics' proposal. The Navy also reports that there was no contact with Panametrics concerning the delivery schedule.

We have no basis to conclude that the Navy conducted discussions with Panametrics. The Navy denies there were any communications with Panametrics. In addition, there was no need for discussions with Panametrics; any information which the Navy needed concerning either the first article waiver or the delivery schedule was either in the proposal submitted by Panametrics, or was available from agency sources. In this respect, since the decision as to whether to waive the first article requirement was the Navy's to make, there would have been no reason to communicate with Panametrics concerning a waiver.

Concerning the inconsistency between the delivery schedule in the Panametrics proposal and the delivery schedule in the contract, the proposed schedule was acceptable as submitted, and Kahn does not argue otherwise. Under the circumstances, there was no reason to communicate with Panametrics. Moreover, the only difference between the schedule in the Panametrics proposal and the contract schedule was that the contract included a conversion of weeks and months set forth in the proposal to days; even with that conversion, the contract was consistent with the proposal. Under these circumstances, even if the Navy had communicated with Panametrics concerning the delivery schedule, such communication would have constituted clarifications, not discussions. See FAR § 15.601 (June 1997); Deployable Hosp. Sys., Inc., B-260778.2, B-260778.3, Feb. 12, 1996, 96-1 CPD ¶ 113 at 6, n. 4.⁶

Kahn also argues that discussions must have occurred with Panametrics concerning the requirement of the RFP for a small business subcontracting plan. Kahn notes that the RFP incorporated by reference the clause located at FAR § 52.219-9 (Alt. II), which states "Proposals submitted in response to this solicitation shall include a subcontracting plan" Kahn notes that, although the Panametrics proposal included no such plan, the Navy's business clearance memorandum refers to the submission of such a plan by Panametrics. According to Kahn, the submission of such a plan by Panametrics after proposals were due must have involved some discussions between the Navy and Panametrics.

⁶Kahn also argues that the Navy improperly waived the first article requirement. While the contract indicates that the first article requirement was waived, the Navy informs us that the waiver may have been premature at the time the contract was awarded since, although Panametrics had passed first article testing under the earlier contract, it had not been given first article approval. We do not see, and Kahn does not explain, how the first article waiver, even if it was granted in error, would affect the propriety of the award to Panametrics.

We do not agree. The requested subcontracting plan relates to an offeror's responsibility, even where the solicitation requests the offeror submit the plan with its proposal. A.B. Dick Co., B-233142, Jan. 31, 1989, 89-1 CPD ¶106 at 3. Thus, we have found that an agency's request for a subcontracting plan does not constitute discussions or require that revised proposals be solicited from all offerors. Id.⁷

The protest is denied.

Comptroller General
of the United States

⁷Kahn also argues that its proposal should have been included in the competitive range and that the Navy improperly created a competitive range of one. The premise of this allegation is incorrect; the Navy did not create a competitive range. Rather, as explained above, Kahn's proposal was rejected as technically unacceptable and award was made to Panametrics based on its technically acceptable, initial proposal. In addition, Kahn argues that the award was flawed because the Navy failed to evaluate past performance and failed to determine, as required by the RFP, that the Panametrics proposal was the most advantageous to the government. We disagree; since Kahn's proposal was unacceptable as submitted and Kahn was not eligible for award, only the Panametrics proposal was eligible for award. Under the circumstances, the past performance evaluation and the determination of which proposal was the most advantageous to the government could have had no impact on Kahn's competitive position.