



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kahn Industries, Inc.; Midwest Dynamometer & Engineering Company

File: B-251777; B-251777.2

Date: May 3, 1993

David A. Kahn for Kahn Industries, Inc. and George M. Pape for Midwest Dynamometer & Engineering Company, the protesters.

Jonathan H. Kosarin, Esq., and Thomas J. Lundstrom, Esq., Department of the Navy, for the agency.

Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where contracting agency has justified limiting competition based on unusual and compelling urgency of the requirement and has surveyed four potential sources, all of whom have stated they could meet the required delivery schedule, contracting specialist's deliberate decision not to solicit a quote from one firm because other agency personnel did not supply the firm's telephone number and because she believed three firms were sufficient to establish minimum competition is unreasonable and does not meet statutory standard for achieving maximum competition practicable under the circumstances.

DECISION

Kahn Industries, Inc. and Midwest Dynamometer & Engineering Company protest the award of a contract for engine test stand dynamometer systems to Taylor Dynamometer, Inc. under request for quotations (RFQ) No. N00146-93-Q-0005. The protesters allege that the solicitation, which was issued by the Marine Corps Air Station in Cherry Point, North Carolina for its Naval Aviation Depot, improperly limited competition and that the agency improperly failed to solicit a quote from the protesting firms. We deny Midwest's protest and sustain Kahn's protest.

The RFQ sought offers for the manufacture and delivery of two engine test stand dynamometer systems for testing both rebuilt and overhauled diesel engines. The dynamometer systems were required for testing the engines on aircraft

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tow tractors, which are used to park and move aircraft. The tractors are used extensively on board aircraft carriers, where the aircraft must be parked closely on the flight deck and hangar deck. The record states that the majority of tow tractor engines in Navy inventories are old and more frequently in need of repairs, resulting in a higher demand for dynamometers. The Navy had sought to replace a number of tow tractor engines, but had to cancel the procurement for replacement engines because of design problems and cost overruns.

In September 1992, the Navy designated the Naval Aviation Depot as the sole maintenance facility for all aircraft tow tractors owned or operated by the Navy. All maintenance operations were to be transferred to this facility and were to be functional by February 1993. In order to meet this schedule goal, the Naval Aviation Depot needed to acquire two engine dynamometer test stands by that date. The contracting department received a requisition for the two test stands on October 22, 1992. The contracting officer and competition advocate determined that the requirement was sufficiently urgent to require limiting competition, based on the unanticipated transfer of responsibility for tow tractor maintenance; the compressed schedule for solicitation, award, delivery and implementation of the test stands; time requirements for personnel training on the dynamometers; and the immediate and continuing critical need for tow tractor support to fleet air operations.

The contract assistance office of the requiring activity had conducted a market survey to ascertain whether there were sources capable of satisfying the government's requirement for delivery of one test stand within 30 days of receipt of the first order and a second test stand within 60 days. The requiring activity contacted four companies including Kahn and Taylor, but not Midwest. Upon receipt of the requisition for the items on October 22, the contract specialist prepared a justification and approval (J&A) for limiting competition to Taylor, citing 10 U.S.C. § 2304(c)(2) (1988) as implemented by the Federal Acquisition Regulation (FAR) § 6.302-2 as authority for permitting other than full and open competition based on unusual and compelling urgency.¹ Notwithstanding the fact that the J&A discussed Taylor's unique qualifications as the only known vendor with a dynamometer system already built and available as an off-the-shelf item, the RFQ was issued

¹Although the contract specialist states in an affidavit submitted in connection with this protest that she received the J&A from the Naval Aviation Depot Business Office, the J&A itself states that it was prepared by the contract specialist.

on October 26 to all of the firms that had initially been contacted, except Kahn. The closing date for submission of quotes was October 28. The contracting specialist states in a declaration that when the requiring activity supplied her with the names of the four firms that had been contacted, the information she received did not include a telephone number for Kahn. The contract specialist states she does not know why she was not given the phone number for Kahn, but:

"due to the urgency of the requirement, volume of the specifications, and the minimal time allotted to achieve this procurement action only the three sources whose phone numbers were provided were solicited."

According to the agency report, she did not make any further attempt to get Kahn's telephone number because she "mistakenly believed only three companies were needed to establish a competition."

The three firms that had been contacted submitted quotes by the deadline of October 28. Taylor offered the lowest price, and was awarded the contract on October 29. On November 16, the contracting officer and competition advocate certified the J&A as accurate and complete. A post-award synopsis was published in the Commerce Business Daily on December 14. These protests followed.

Midwest and Kahn each protest that competition was improperly restricted and that they should have been permitted to compete for the award.

Under 10 U.S.C. § 2304(c)(2) an agency may use other than fully competitive procedures where the agency's need for property or services is of such an unusually and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals. Where a contracting agency is authorized to conduct procurements with less than fully competitive procedures, 10 U.S.C. § 2304(e) requires that the agency request offers from as many potential sources as practicable under the circumstances. Bay Cities Servs., Inc., 70 Comp. Gen. 4 (1990), 90-2 CPD ¶ 271. We have sustained challenges to such limited competitions where the existence and capability of an excluded potential source was clearly known to agency contracting officials by virtue of the source's prior performance of the same services, and the agency did not adequately justify the source's exclusion from the competition. Olympic Marine Servs., Inc., B-246143 et al., Feb. 19, 1992, 92-1 CPD ¶ 205.

Midwest contends that it has "the largest United States product line of dynamometers," and that it had just completed a contract for dynamometers for the Marine Corps Logistics Base in Albany, Georgia, and that it therefore should have been contacted and given an opportunity to compete for this contract as well. We deny Midwest's protest. First, we think the agency could reasonably conclude that the urgency of the requirement justified restricting competition to the firms it believed could perform the work promptly and properly. The record shows that the dynamometers were urgently needed at a particular repair site to test and repair engines critical to fleet operations by February 1993, when the existing inventory of working engines would be exhausted. Second, Midwest has not alleged that the contracting office involved in this procurement had any particular knowledge of Midwest's ability to supply the dynamometers or its interest in competing, either because Midwest had requested that it be placed on the activity's bidder's list or there exist other facts (such as incumbency under a current contract with this contracting office) to establish that the agency should have known of the firm's capability.

Kahn, on the other hand, is in a different position. The Navy does not dispute Kahn's contentions that when it was initially contacted during the market survey, it reported that it could meet the required delivery date; that the same contracting office has also awarded Kahn several contracts and was, at the time of this procurement, supervising Kahn in the performance of a high-volume contract for dynamometers (valued at almost 1 million dollars); and that Kahn's address, telephone and fax numbers are listed in a variety of publications routinely available in military procurement departments, including the Federal Manufacturers' Supply Code and Thomas Register. Thus, the agency knew of Kahn's interest in competing for the contract, and even had the firm's assurance that it could meet the demanding delivery requirement.

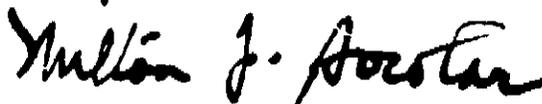
The Navy's sole reason for not soliciting a quote from Kahn was that it "mistakenly believed only three offers were required for competition." While the Navy argues that its failure to solicit a quote from Kahn should be excused because the agency's contracting personnel did not make a deliberate or conscious attempt to exclude the protester, the fact that the contracting specialist's actions were motivated by a mistaken understanding of the statutory requirements does not make the action a reasonable one. See J. Sledge Janitorial Serv., 70 Comp. Gen. 307 (1991), 91-1 CPD ¶ 225 (failure to solicit incumbent contractor based solely on contracting official's belief that contractor was not interested in competing for future procurements, without

seeking any verification of incumbent's alleged lack of interest, was unreasonable).

The applicable statutory and regulatory provisions require that agencies request offers from as many potential sources as is practicable under the circumstances. See FAR § 6.302-2(c)(2). In other words, the agency's goal should be to achieve the maximum competition practicable within the time constraints, not simply to achieve a minimum number of competing offers. See Earth Property Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273. In light of this responsibility to include all sources whose existence and capability are clearly known to the contracting officials, it was unreasonable for the contracting specialist to omit a source simply because the source's telephone number has not been supplied by other contracting agency personnel. The urgency of this particular situation would not have precluded the additional step of obtaining the missing telephone number.

The record shows that Taylor completed the performance of the contract on November 29, 1992, making any corrective action impossible at this point. However, Kahn is entitled to the costs of filing and pursuing this protest, including any attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1993). Kahn should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

Midwest's protest is denied. Kahn's protest is sustained.



Acting Comptroller General
of the United States