



Comptroller General  
of the United States

Washington, D.C. 20548

J. Gary

## Decision

**Matter of:** Embraer Aircraft Corporation

**File:** B-240602; B-240602.2

**Date:** November 28, 1990

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McCarthy, Jutkowitz & Holzworth, for Pilatus Aircraft Limited,  
interested parties.  
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decision.

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### DIGEST

Protest that solicitation for test support airplanes unduly restricts competition by including specifications allegedly "written around" design features of a competitor's product is denied where agency establishes that one specification the protester cannot meet, a minimum speed requirement, is necessary to meet its mission needs.

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### DECISION

Embraer Aircraft Corporation protests the terms of request for proposals (RFP) No. DAAJ09-90-R-0765, issued by the Department of the Army, for six airplanes for use in "chase and pace" test support missions. Embraer contends that the solicitation does not accurately reflect the agency's actual minimum needs and, as written, in effect will improperly exclude it and all but one manufacturer from the competition.

We deny the protest.

### INITIAL PROTEST ISSUES

The solicitation was issued by the Army Aviation Systems Command (AVSCOM) for the lease and optional purchase of six test support airplanes to be used by the Army Aviation Engineering Flight Activity (AEFA) and the Army Texcom Airborne and Special Operations Test Board (Board). The planes are used to closely follow ("chase and pace") various

types of aircraft during flight test maneuvers so that the performance of the aircraft, as well as airdrops of personnel and equipment, can be photographed and evaluated. The RFP provided that, in order to be considered technically acceptable, an airplane must have an angle-of-attack (AOA) system to warn the pilot of an impending stall; a fully aerobatic attitude heading and reference system (AHRS) to provide the pilot with reliable data on the exact location of the plane at all times; an anti-gravity system to protect the pilot from losing consciousness at high speeds; and a minimum sustained cruise speed of 260 knots. The RFP further specified that the airplane must be delivered within 7 days of award.

Embraer initially argued in its protest that each of these specifications exceeded the Army's minimum needs. Embraer further asserted that, since the short delivery schedule allowed no time for modifications to be made to a plane, only manufacturers of planes that met these precise specifications could compete. According to the protester, the only plane that could satisfy the solicitation requirements was the Pilatus Aircraft Ltd. PC-9; Embraer concluded that the specifications were "written around" that plane to exclude all others from the competition.

#### FACT-FINDING CONFERENCE AND REVISED PROTEST

We convened a fact-finding conference under our Bid Protest Regulations, 4 C.F.R. § 21.5 (1990), to determine whether the challenged specifications were unduly restrictive. At the conference, after the Army clarified the meaning of some of the challenged specifications, Embraer determined that its own airplane could meet those requirements as clarified. For example, while Embraer initially had assumed that the specification for an AHRS could only be met by an electronic device, at the conference the protester conceded that a gyro magnetic type--which Embraer apparently desired to use--would be acceptable as well, and that this specification, therefore, was not unduly restrictive. See Conference Transcript (CT) at 40-42. Similarly, Embraer concluded that the Army's specification for an AOA stall-warning system would not preclude it from offering other types of stall-warning systems. CT at 37-41. Embraer indicated, moreover, that it could satisfy these and all of the other challenged requirements, except the 260-knot minimum speed, if it had sufficient time to retrofit the plane on which it desired to base a proposal. Subsequently, the Army extended the delivery date to 75 days after award, and Embraer stated in its post-conference comments that the solicitation as amended allowed enough time for any necessary modifications to its plane. Consequently, after the conference, Embraer abandoned most of the issues in its original protest and focused instead on the

minimum speed requirement, arguing that it is not reasonably related to the Army's actual needs.

#### MINIMUM SPEED REQUIREMENT

Embraer bases its argument on the fact that each of the Army activities for which the planes are being procured, AEFA and the Board, initially identified a requirement for a higher speed than the one ultimately specified in the RFP. For example, Embraer states that AEFA originally indicated that it needed a cruise speed of 300 knots, plus an incremental speed to allow the chase/pace airplane to catch up with test aircraft when they maneuvered away. According to Embraer, AEFA initially stated this "catch-up" differential to be 25 percent of the test aircraft's airspeed. Similarly, Embraer states that the Board originally indicated its need for a maximum speed of 270 knots plus a catch-up differential of 50 knots, or a speed of 320 knots. Further, Embraer notes that the Board indicates that future tests are contemplated at speeds of 300-400 knots, and AEFA states that tests will be conducted at speeds requiring chase/pace speeds of 310 knots. According to Embraer, these statements of the two activities' actual needs indicate that a speed well in excess of the specified 260 knots is actually required. Consequently, Embraer concludes that the specified speed is not reasonably related to the Army's actual needs; since, according to the protester, the specified speed is arbitrary, and apparently was selected to allow only the Pilatus plane to qualify, the Army should have set the speed even lower, at 240 knots, to allow firms such as Embraer to compete as well.

Generally, an agency is required to specify its needs and select a procurement approach in a manner designed to promote full and open competition. Southern Technologies Inc., B-239578, B-239578.2, Sept. 6, 1990, 90-2 CPD ¶ \_\_\_\_\_. Restrictive provisions should only be included to the extent necessary to satisfy the agency's minimum needs. The contracting agency, which is most familiar with its needs and how to fulfill them, must make the initial determination of its needs, which, however, must be reasonable. Id. Here, based on the record, we find that the 260-knot minimum speed requirement reflects the agency's minimum needs.

The record clearly shows--indeed, it is undisputed--that the aircraft being tested by the two activities are or soon will be flying at speeds approaching 250 knots, creating an immediate need for chase/pace planes that can fly at a slightly higher speed. CT at 63-64. (The chase/pace plane requires an incremental or "catch-up" speed in order to follow the test aircraft closely during all maneuvers. Id.) While the Army initially determined that its needs into the near future would support a speed requirement approaching

400 knots, it also determined that this requirement could not currently be met by other than jet aircraft (which were deemed unacceptable because they cannot meet the low speed aspects of the chase/pace mission). The Army was aware that the Pilatus plane could maintain a cruise speed of 270 knots, which would satisfy its immediate needs to conduct tests with aircraft traveling at 250 knots, and provide a 20-knot margin for the "catch-up" speed, which the Army considered desirable. Aware that only the Pilatus plane could meet the 270-knot requirement, however, the agency made a conscious decision to specify only the absolute minimum catch-up speed required--that is, 10 knots, for a minimum speed of 260 knots--in the interest of possibly enhancing competition. In this regard, the Army's market surveys indicated that, although only the Pilatus PC-9 could fly at 270 knots, more than one plane was capable of flying at 260 knots, including a version of Embraer's own Tucano airplane.<sup>1/</sup> CT at 18-19, 54, 70-71.

We conclude that the 260-knot speed requirement was not set arbitrarily, as Embraer alleges, but, rather, reflects the Army's actual current needs, as reduced to possibly enhance competition.

#### OTHER OBJECTIONS

Embraer also argues that, if the solicitation's evaluation scheme were revised to provide for a minimum acceptable air speed requirement in the range of 240-260 knots, rather than, as presently written, a firm threshold of 260 knots, the Embraer aircraft could provide a better value to the government due to its lower cost. This argument is without merit. Since we have found that the Army had a reasonable basis for specifying an absolute minimum speed of 260 knots, as stated above, the agency is not required to accept anything less, even at a possibly lower cost. Viereck Co., B-239735, Sept. 12, 1990, 90-2 CPD ¶ 202.

Embraer also suggests that the solicitation was written to accommodate Pilatus on the basis of contacts between the Army and Pilatus, and that the specifications were written around the Pilatus PC-9 because the Army had become favorably disposed toward the product. As a general matter, solicitation requirements that are based on a particular product are not improper in and of themselves, and do not provide a valid basis for protest, where the agency establishes that the specifications are reasonably related to its minimum needs. AGEMA Infrared Sys., B-232195, Nov. 21, 1988, 88-2 CPD ¶ 498.

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<sup>1/</sup> This version, produced by Short Brothers in conjunction with Embraer, is known as the Shorts' Tucano.

As we have found that the speed requirement was developed in light of the Army's actual needs, and accurately reflects those needs, this argument is without merit as well.

The protest is denied.

*Ronald Berger*

for  
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