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Decision

Matter of: Wescam, Inc.

File: B-285792

Date: October 11, 2000

Kathleen C. Little, Esq., and David R. Johnson, Esq., Vinson & Elkins, for the protester.

D. Susan Spiegelman-Boyd, Esq., Department of the Navy, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency has no immediate requirement to upgrade UH-1N helicopter's thermal imaging systems is denied where record shows that immediate upgrade of existing systems will significantly decrease risk to, and enhance the safety of, the helicopter and its crew.
2. Solicitation provision that proposed systems must be compatible with mechanical, electrical and software interfaces of existing system is reasonable, where agency has spent considerable resources testing existing software and has reasonable interest in avoiding modifications to helicopter's airframe, and there is no evidence that the solicitation's stated compatibility requirements result from unfair motives by the contracting agency.
3. Solicitation's delivery requirements are reasonably related to the agency's immediate need for upgraded systems which have a direct effect on national defense and human safety concerns.
4. Protest that agency failed to engage in adequate acquisition planning is denied where agency documented its needs more than 4 years prior to procurement, the record reflects substantial agency discussions regarding procurement issues beginning more than 7 months prior to issuance of solicitation, and the agency completed a written procurement plan prior to issuing the solicitation.

DECISION

Wescam, Inc. protests the terms of request for proposals (RFP) No. N00164-00-R-0072, issued by the Department of the Navy to obtain targeting thermal imaging systems for Marine Corps helicopters. Wescam asserts that the terms of the solicitation exceed the government's requirements and unduly restrict competition.¹

We deny the protest.

BACKGROUND

The solicitation seeks proposals to provide upgraded thermal imaging systems for UH-1N helicopters, both prior to, and as part of, a "mid-life upgrade" to those helicopters.² The UH-1N is the Marine Corps's only utility helicopter and performs various functions including: providing command and control for assault support operations; transportation of troops, supplies, and equipment; evacuation of casualties; and providing control, coordination, and terminal guidance for supporting arms. To provide guidance for supporting arms, the UH-1N currently relies on a thermal imaging system with a stabilized forward looking infrared (FLIR) sensor, which provides real-time, passive thermal imagery to the pilot. The system is used for navigation as well as hazard and target detection and, as currently configured, does not incorporate a laser designator.³

¹ Wescam also initially protested that the solicitation violated the Anti-Deficiency Act, 31 U.S.C. §1341(a) (1994), but subsequently withdrew that basis for protest.

² The UH-1N was introduced in the 1970s and has never undergone a service life extension or upgrade program. The agency states that deficiencies have developed with regard to the aircraft's operational capability, performance, reliability, and maintainability. Agency Report, Tab 1, Operational Requirements Document for the Mid-Life Upgrade to the UH-1N, at 2. The "midlife upgrade" of the UH-1N, which is being performed under a different contract with Bell Helicopter Textron, Inc. (BHTI), is intended to address and resolve these deficiencies over the next several years. Upon completion of BHTI's upgrade program, the helicopters will be identified as UH-1Y helicopters. Thus, over the next several years, the current fleet of UH-1N helicopters will effectively become the UH-1Y fleet.

³ The agency states that the current weapon of choice for the U.S. Marine Corps is a precision guided munition (PGM), and that the most successful PGMs are laser-guided, which require support from a laser designator. Agency Report, Tab 12, at 2.

In 1996, the agency documented its need to incorporate laser designators into the thermal imaging systems carried aboard the UH-1N aircraft.⁴ Agency Report, Tab 1, at 4. In 1997, the Marine Light/Attack Helicopter Operational Advisory Group (OAG) determined that upgrading the thermal imaging system with a laser designator was one of the top ten fleet priorities for the UH-1N. Contracting Officer's Statement at 6.⁵

In 1998, the agency awarded the contract to Bell Helicopter Textron, Inc. (BHTI) to perform the "mid-life upgrade" of the UH-1N. That contract provides that thermal imaging systems currently in the UH-1N helicopters will be provided to BHTI as government-furnished equipment. The modification of the UH-1N will occur in an ongoing manner, with the last of the unmodified UH-1N aircraft being deployed in 2009 and continuing operations through 2012. Contracting Officer's Statement at 7.

The solicitation protested by Wescam was issued on May 31, 2000, and contemplates award of up to 124 thermal imaging systems under an indefinite-quantity/ indefinite-delivery contract to be installed in the currently existing UH-1N aircraft, as well as in the UH-1Y aircraft under the "mid-life upgrade" program.⁶ The RFP provides that, in addition to laser designating capabilities, any proposed system must "have all the operational functions of the existing [system]," must "mount to existing hardware without modifications to the aircraft and airframe," and must "interoperate and conform with existing mechanical, electrical and software interfaces." RFP § C, Statement of Work (SOW), at 28-29. The RFP also requires that the proposed systems be delivered within 90 or 120 days after receipt of an order, depending on whether the offeror has proposed an upgraded system or a replacement system. The closing date for submission of proposals was July 7, 2000.⁷ Wescam filed this protest on July 5.

⁴ The agency states that attempts to obtain funding for laser designation capability date back as far as 1989 and that, during Desert Shield/Desert Storm, the Marine Corps obtained and installed development models of a laser designator system onto the UH-1N aircraft. Agency Report, Tab 12, at 2.

⁵ In 1999, the agency began making modifications to the thermal imaging systems in the UH-1N which were aimed at providing laser designator capabilities for the existing aircraft, including incorporation of a third generation infrared array sensor and an eye safe laser range finder. Contracting Officer's Statement at 4. At this time approximately 60 percent of the thermal imaging systems in UH-1N aircraft are equipped with these upgrades. *Id.*

⁶ The agency initially intended to obtain the system from the manufacturer of the existing systems on a sole-source basis.

⁷ [Deleted].

DISCUSSION

Wescam protests that, to the extent the solicitation seeks laser designators for the UH-1N aircraft before they are inducted into the midlife upgrade program, the solicitation exceeds the agency's requirements and "conflict[s] with the agency's Congressionally-mandated requirement or need." Protest at 2. Wescam asserts that, with regard to the UH-1N aircraft prior to the mid-life upgrade, Congress has only authorized modifications to address safety concerns, and asserts that "[t]here is no published Congressional support for arming the [UH-1N] Helicopter with a laser designator," which--Wescam asserts--will "add lethality." Protest at 2, 4.

In arguing that acquisition of a laser designator exceeds the agency's actual needs, Wescam refers to a Senate report that accompanied the National Defense Authorization Act for Fiscal Year 2000, quoting the following portion of that Report:

The budget request included \$6.3 million for H-1 series aircraft requirements. The committee is concerned about limitations of currently installed navigational thermal imaging systems for UH-1N aircraft. Current equipment has limitations in range performance and image quality for detection, recognition, and identification of hazards, personnel and vehicle sized targets. The committee supports an existing effort to upgrade this equipment and provide for enhanced safety for Marine Corps aviators. The committee recommends an increase of \$15.0 million to complete upgrade requirements.

S. Rep. No. 106-50, 106th Cong., 1st Sess. 92 (1999).

Based on this legislative history, Wescam asserts: "Congress earmarked funds to enhance the **safety** of the existing [UH-1N] Helicopter fleet in the interim while those helicopters are being upgraded to the [UH-1Y] version. Procuring a laser designator for the [UH-1N] Helicopters does not address this requirement. The laser designator will make the [UH-1N] Helicopter lethal." Protest at 8.

The determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion. Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 2, aff'd, B-250389.2, June 21, 1993, 93-1 CPD ¶ 472. Where a solicitation requirement is challenged as unduly restrictive, we will review the matter to determine whether the alleged restriction is reasonably related to the agency's needs and, if so, the provision is generally permissible. Tek Contracting, Inc., B-245454, Jan. 6, 1992, 92-1 CPD ¶ 28 at 2; T-L-C Sys., B-223136, Sept. 15, 1986, 86-2 CPD ¶ 298 at 2-3. Where a requirement relates to national defense or human safety, an agency has discretion to define the solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Tucson Mobilephone, Inc., supra, 93-1 CPD ¶ 79 at 5.

The agency first responds that the addition of the laser designator to the existing thermal targeting system will not make the helicopter more lethal or more of an attack helicopter;⁸ rather, it increases aviator safety by increasing the standoff range for terminal guidance for supporting arms from other weapon platforms. Contracting Officer's Statement at 5 n.3. More specifically, the agency explains that, as currently configured, the efficiency and effectiveness of the UH-1N in providing terminal guidance for supporting arms are limited in that the helicopter pilot must provide verbal directions to the attack aircraft, using distinct terrain features or smoke bombs. This method of "marking" a target requires the helicopter to come within 2000 meters of the target--increasing the vulnerability of the aircraft, and its crew, to shoulder-fired surface-to-air missiles as well as small arms fire. Contracting Officer's Statement at 5. With the addition of the laser designator, the standoff range for the UH-1N will increase by over 400 percent, drastically reducing the risk to the aircraft and its crew. Id.

Wescam does not dispute that the laser designator will permit the UH-1N helicopter to effectively perform its mission regarding guidance for supporting arms from a significantly greater distance--thereby substantially increasing the safety of the aircraft and crew.⁹ On this record, we find no basis to question the agency's determination that there is an immediate requirement in existing UH-1N aircraft for upgrading existing thermal imaging systems with laser designators.

⁸ The agency elaborates that neither the UH-1N, nor the upgraded version of that aircraft, the UH-1Y, will carry laser guided munitions. The laser designator does not provide munitions guidance for the utility helicopters; rather, it assists the utility helicopter's mission to provide guidance for weapons from other platforms. Supplemental Agency Report, Aug. 24, 2000, at 1-2.

⁹ Wescam does, however, argue, in a similar vein, that to the extent there is a legitimate need for a thermal imaging system with a laser designator, that need exists only with regard to the upgraded helicopters--that is, for the UH-1Y helicopters--because, Wescam asserts, the agency "[will] eliminate the [UH-1N] Helicopters from service by 2004." Protest at 4. As discussed above, Wescam is factually mistaken regarding the scheduled operational life of the UH-1N helicopters. The record shows that the UH-1N helicopters will continue operation through 2012. Contracting Officer's Statement at 5; Agency Report, Tab 5, H-1 Transition Plan. Further, the agency's immediate need for a laser designator in the UH-1N aircraft is reflected in the very legislative history on which Wescam relies for its assertion that the agency's needs are limited to safety issues. As noted above, the Senate Report accompanying the National Defense Authorization Act for fiscal year 2000 expressly referenced congressional concerns regarding the limitations of "currently installed" (emphasis added) thermal imaging systems, specifically referring to "limitations in . . . detection, recognition, and identification of . . . targets." S. Rep. No. 106-50, supra.

Wescam next protests that the RFP requirement that proposed systems must conform to existing mechanical, electrical, and software interfaces unfairly favors the manufacturer of the existing system. [Deleted].

The fact that an incumbent contractor will have a competitive advantage over another offeror resulting from an agency requirement of compatibility does not preclude an agency from requiring such compatibility, so long as the advantage did not result from unfair motives or action by the contracting agency. Bironas, Inc. B-249428, Nov. 23, 1992, 92-2 CPD ¶ 365 at 3.

Here, the agency states that it has spent considerable time and resources developing and testing the software used in the existing thermal imaging system and that, unless the proposed system is compatible with that software, those expenditures will have been wasted. Further, the agency explains that it is requiring compatibility with existing mechanical and electrical interfaces to ensure that proposals for the thermal imaging system do not require modifications to the aircraft itself or the existing airframe. Finally, the agency states that its approach with regard to existing mechanical, electrical and software interfaces is intended to minimize risks to aviator safety and mission capability. Contracting Officer's Statement at 6-7.

As noted above, where an agency's stated requirements relate to national defense and human safety, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Tucson Mobilephone, Inc., supra, 93-1 CPD ¶ 79 at 5.

Here, we view the agency's interests in minimizing airframe modifications in order to minimize risk to aviator safety and mission capability, as well as retaining the value associated with its prior development and testing, to reasonably support the solicitation's compatibility requirements. Further, we find no indication in the record that the advantage to the manufacturer of the current thermal imaging system results from any unfair motives or action by the contracting agency. On this record, we find no merit in Wescam's assertion that the solicitation's compatibility requirements are inappropriate.¹⁰

¹⁰ Wescam also protests that the solicitation provides that \$150,000 will be added to the evaluated price of proposals offering systems other than the existing system. The agency states that this amount reflects the minimum costs the agency will incur in confirming that an alternative proposed system does, in fact, meet the compatibility requirements. We view this amount--which is less than one-half of one percent of the estimated procurement value--as both de minimis and reasonably related to the agency's compatibility requirements.

Wescam also protests that the solicitation requirement that deliveries occur within 90 or 120 days after an order is placed is unduly restrictive. Wescam asserts that it would need “at least a six to nine month lead time” to meet the agency’s requirements. Protester’s Comments at 22.

Although restrictive provisions may be included in a solicitation only to the extent necessary to satisfy an agency’s needs, once an agency has established a reasonable basis for its stated requirements, an allegedly restrictive provision which meets those requirements is not objectionable. Tek Contracting, Inc., *supra*. An agency need not delay satisfying its requirements to allow a vendor time to develop the ability to meet those requirements. Trimble Navigation, Ltd., B-247913, July 13, 1992, 92-2 CPD ¶ 17 at 6.

As discussed above, the agency has established that it has an immediate need to equip existing UH-1N aircraft with laser designators.¹¹ Further, acquisition of these items will have a direct effect on the safety of the aircraft and crews operating both the UH-1N and UH-1Y aircraft. Since any delays in meeting this need will prolong the risks to aviator safety and mission capabilities, there is no merit in Wescam’s assertion that the delivery requirement is unduly restrictive.

Finally, Wescam complains that the agency failed to perform adequate acquisition planning for this procurement, referring to provisions of Federal Acquisition Regulation (FAR) Part 7, which requires agencies to perform acquisition planning and conduct market research for all acquisitions in order to promote full and open competition. See FAR § 7.102(b).

The record shows that the agency first documented its requirements for upgrading the UH-1N’s with laser designators in 1996. Agency Report, Tab 1, at 4. Further, in response to the document production request made by Wescam in connection with this protest, the agency has produced numerous e-mail messages between various agency personnel, dating back to October 1999, which document multiple discussions within the agency regarding the manner in which acquisition of the thermal imaging systems should occur.¹² Agency Report, Tab 13. Finally, the record

¹¹ The agency also states that it conducted a market survey of potential offerors and found that at least two vendors had items currently available that would essentially meet the technical requirements and that delivery of similar items by these manufacturers often takes place in between 90 and 120 days. Contracting Officer’s Statement at 12. We think the agency reasonably believed it could obtain competition for this system.

¹² The fact that Wescam does not agree with the agency’s resolution of some of the issues discussed does not negate the acquisition planning in which the agency engaged.

contains a written procurement plan for this acquisition, which was finalized prior to issuance of the solicitation and which addresses a variety of procurement issues, including the manner in which the solicitation will be distributed, the type of contract contemplated, a discussion of the procurement history for similar items, the manner in which the contract will be funded, the delivery requirements, and the total estimated value of the contract. Agency Report, Tab 8. On this record we find no merit in Wescam's assertion that the agency failed to engage in adequate advance planning for this procurement.

The protest is denied.

Acting General Counsel
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