



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Washington, DC 20548

Comptroller General  
of the United States

**DOCUMENT FOR PUBLIC RELEASE**

# Decision

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**Matter of:** Coulson Aviation (USA), Inc.

**File:** B-414566

**Date:** July 12, 2017

Jonathan D. Shaffer, Esq., Todd M. Garland, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for the protester.

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## DIGEST

1. Protest arguing that a solicitation requirement is unduly restrictive of competition is denied where the agency articulated a reasonable, safety related basis for the requirement.
  2. Agency decision to conduct a procurement using other than Federal Acquisition Regulation (FAR) part 12 procedures did not prejudice the protester where the protester does not offer a commercial item that meets the agency's requirements.
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## DECISION

Coulson Aviation (USA), Inc., of Portland, Oregon, protests the terms of request for proposals (RFP) No. FA8504-17-R-0008, issued by the Department of the Air Force for the design, manufacture, and installation of a 3,500 gallon retardant delivery system (RDS) on seven HC-130H aircraft. The protester argues that the RFP contains terms that are unduly restrictive of competition, and contends that the procurement should be conducted under Federal Acquisition Regulation (FAR) part 12 procedures for the purchase of commercial items.

We deny the protest.

## BACKGROUND

The U.S. Department of Agriculture, Forest Service (USFS), is responsible for protecting national forest lands from wildfires and, by agreement with other agencies, assists in protecting other jurisdictions as well. Contracting Officer's (CO) Statement at 1. In this capacity, the USFS uses air tankers to drop and build retardant lines to aid ground firefighters in controlling wildfires. Id. The National Defense Authorization Act (NDAA) for Fiscal Year 2014 directed the transfer of seven demilitarized United States Coast Guard HC-130H aircraft to the Air Force. Pub. L. No. 113-66, div. A, title X, subtitle I, § 1098, 127 Stat. 672, 881-882. (Dec. 26, 2013). The NDAA directed the Air Force to perform center and outer wing-box replacement modifications, programmed depot-level maintenance, and modifications necessary to procure and integrate a gravity-drop aerial fire retardant dispersal system in each aircraft. Id. Following completion of the assigned tasks, the NDAA directed the Air Force to transfer the aircraft to the USFS for its use. Id.

On March 31, 2017, the Air Force issued the subject RFP seeking a contractor to design, engineer, develop, manufacture, and install a 3,500 gallon retardant delivery system (RDS) for the HC-130H aircraft mentioned above. Memorandum of Law (MOL) at 1. The RFP establishes that the procurement will be conducted using FAR part 15 procedures, and contemplates the award of a contract with fixed-price, time-and-materials, and cost-reimbursable contract line items on a lowest-price, technically-acceptable basis, considering technical and cost/price factors. Id. The RFP established May 15 as the due date for the submission of proposals. Coulson filed this timely protest on April 7.<sup>1</sup>

## DISCUSSION

Coulson argues that the RFP includes a maintenance requirement that is unduly restrictive of competition. The protester also contends that the solicitation should be conducted in accordance with the commercial item procedures of FAR part 12. As explained below, we find that neither argument provides a basis to sustain the protest.<sup>2</sup>

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<sup>1</sup> On February 16, prior to the issuance of the RFP, the Air Force posted a pre-solicitation notice on the Federal Business Opportunities (FBO) website. Agency Report (AR), Tab 19 at 1. The notice included a description of the requirement and informed potential offerors that based on market research, the Air Force had decided not to use FAR part 12 procedures for the procurement of commercial items. Id. Coulson submitted a letter to the agency on February 28 challenging the Air Force's market research, and requesting that the agency issue the solicitation in accordance with FAR part 12. CO Statement. The agency denied Coulson's requests on March 31. AR, Tab 25, Agency Response, at 3.

<sup>2</sup> While we do not address every argument raised by the protester in this decision, we have considered them all and concluded that none provides a basis to sustain the protest.

The protester first argues that the solicitation contains an equipment maintenance requirement that is unduly restrictive of competition. Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. Air USA, Inc., B-409236, Feb. 14, 2014 CPD ¶ 68 at 3. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. AAR Airlift Grp., Inc., B-409770, July 29, 2014 CPD ¶ 231 at 3. Additionally, where requirements relate to issues of human safety or national security, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Womack Mach. Supply Co., B-407990, May 3, 2013 CPD ¶ 117 at 3.

Coulson contends that the requirement for an Air Force Modular Airborne Fire Fighting System (MAFFS) maintenance program is arbitrary and will result in "millions of dollars of additional costs to the government and taxpayer." Protest at 14. Additionally, the protester asserts that its commercial RDS, which has been approved under the Federal Aviation Administration's (FAA) updated structural integrity program (SIP), and its tank, which has been approved for use in military and commercial C-130s, meet standards that equal or surpass the standards under the Air Force's MAFFS program. Comments at 24. Thus, Coulson contends that the agency cannot justify the requirement, while "prohibiting a commercial RDS that meets the FAA SIP requirements." Id.

The Air Force disputes the protester's characterization of the FAA SIP requirements, and contends that the MAFFS maintenance program involves the use of higher maintenance and inspection requirements than FAA certification. MOL at 9. The Air Force further explains that it included the MAFFS maintenance program requirement in the solicitation in order to ensure safety concerns unique to the C-130 fire-fighting missions and impacts on the aircraft structure are thoroughly addressed. Id. According to the Air Force, C-130 fire-fighting operations are significantly more severe than commercial or military logistics operations, and lead to accelerated fatigue cracking of the aircraft structure--specifically the center of the aircraft and the outer wings. CO Statement at 8. By way of example, the Air Force describes the loss of two C-130 aircraft, which were operating under FAA restricted type certificates, during fire-fighting missions in 1994 and 2002. The agency relies on those incidents, which resulted in six lives lost, to demonstrate the danger and severity of C-130 fire-fighting missions. CO Statement at 10. In both instances, inadequate maintenance and inspections were determined to be a factor. Id. at 11.

According to the Air Force, it has never lost a C-130 aircraft due to fatigue cracking induced by fire-fighting operations, because it has a vigorous inspection and maintenance plan that is necessary to ensure the airworthiness of the aircraft and the safety of the aircrew. Id. The Air Force contends that commercial maintenance and inspection plans are insufficient to ensure safety, and thus the use of the Air Force's maintenance and inspection approach is necessary. Id.

We find that the Air Force has articulated a reasonable, safety-related basis for including the non-commercial maintenance program requirement in the solicitation--i.e., to ensure the safety of the aircraft and the crew.<sup>3</sup> While Coulson argues that a commercial maintenance program would address the agency's needs, the protester's disagreement with the agency in this regard does not provide a basis to sustain the protest.

Additionally, we note that, while Coulson argues that this requirement is unduly restrictive of competition, Coulson fails to allege that the requirement would preclude it (or any other potential offeror) from submitting a proposal. While the protester maintains that the requirement will result in increased cost to the government, increased cost to the government does not equate to a restriction on competition.

The protester's remaining arguments relate to the agency's decision not to conduct this procurement using procedures for procuring commercial items under FAR part 12. As explained below, we find that the protester was not prejudiced by the agency's failure to conduct the procurement using commercial item acquisition procedures because it does not currently offer a commercial item meeting the agency's requirements.

The Federal Acquisition Streamlining Act of 1994 established, among other things, a preference and specific requirements for the acquisition of commercial items that are sufficient to meet the needs of an agency.<sup>4</sup> Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355 § 8104, 108 Stat. 3243 (codified, as amended, at 10 U.S.C. § 2377). This section of FASA is implemented in FAR part 12, and allows agencies to use solicitation terms, and other procedures, that more closely resemble the commercial marketplace when procuring commercial items. Section 12.101 of the FAR directs agencies to, among other things, conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements.<sup>5</sup> Section 2377 of Title 10 of the United States Code directs

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<sup>3</sup> This is consistent with our consideration of this requirement in a decision issued in connection with a prior related procurement. See Coulson Aviation (USA), Inc., B-411525, B-411525.2, August 14, 2015, 2015 CPD ¶ 272. After Coulson challenged the terms of the prior solicitation, including the requirement at issue here, award was made to Coulson. The award was later terminated for the agency's convenience because the Small Business Administration concluded that Coulson did not meet the size requirements for that procurement. Subsequently, the agency issued the RFP at issue in this protest.

<sup>4</sup> The definition of "commercial item" can be found in section 2.101 of the FAR.

<sup>5</sup> Section 12.101 of the FAR also requires agencies to acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency, and requires prime contractors and subcontractors at all tiers to incorporate, to the

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agencies to use the results of market research to determine whether there are commercial items that: (1) meet the agency's requirements; (2) could be modified to meet the agency's requirements; or (3) could meet the agency's requirement if those requirements were modified to a reasonable extent. 10 U.S.C. § 2377(c)(2). Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. Palantir USG, Inc., B-412746, May 18, 2016, 2016 CPD ¶ 138 at 4.

According to Coulson, it has been prejudiced by the agency's decision not to conduct this procurement as a commercial item purchase under FAR part 12 procedures, because it has invested substantial resources in developing and selling a commercial product that meets the agency's needs. Comments at 4. Coulson's argument fails, however, because Coulson has not demonstrated that its RDS actually meets the agency's requirements. In this regard, Coulson contends that its RDS, which does not utilize the MAFFS maintenance program discussed above, could "be installed in an HC-130H tomorrow if the Air Force would accept the FAA certification applicable to Coulson's RDS." Comments at 19. As previously discussed, however, we find that the agency has a reasonable basis for the MAFFS maintenance program requirement, and is not required to change its requirements based on the protester's disagreement.

Additionally, according to the agency, Coulson would be required to perform extensive non-recurring engineering to integrate the RDS into the HC-130H and to satisfy the agency's crash load requirements. CO Statement at 13-14. In this regard, the agency relies on its experience with Coulson's RDS under a prior contract for these requirements, which was terminated for the agency's convenience. During the time Coulson was performing that contract, the agency identified the need for modifications to enable Coulson's RDS to meet 9G crash load requirements.<sup>6</sup> CO Statement at 13.

According to Coulson, it has subsequently completed redesign efforts needed to satisfy the 9G crash load requirements. Comments at 19-20. It is unclear, however, whether this effort had been finalized at the time the agency conducted its market research update. In an agency-level protest filed on February 28, 2017, Coulson informed the agency that it had modified its 3,500 gallon RDS to meet 9G crash load requirements, and that it was currently in the process of certifying the updated configuration with the FAA. AR, Tab 28, Coulson Letter to the Agency. The 2017 Market Research Report appears to have been finalized on March 8, and there is no indication that Coulson's

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maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

<sup>6</sup> The agency issued a stop work order to Coulson on October 14, 2016, followed by a notice of termination letter on March 29, 2017. AR, Tab 13, Stop Work Letter; AR, Tab 24, Notice of Termination.

updated system had received FAA certification by that time. AR, Tab 20, 2017 Market Research Report, at 11.

Nonetheless, even if Coulson has made some improvements to its system, Coulson's RDS still fails to meet the MAFFS maintenance program requirement, and the extent to which Coulson's RDS would require modification in order to meet that requirement is unclear. In this regard, Coulson complains about the overly restrictive nature of the MAFFS maintenance program requirement, and the significant cost that the government will incur as a result of that requirement. Protest at 14; Comments at 24. In subsequent arguments, however, Coulson contends that it would only require minor modifications for its RDS to comply with the Air Force's requirements. The lack of clarity is further complicated because, according to the protester, the MAFFS requirement "relies on government-only data not available to contractors." Protest at 19. As a result, Coulson may not actually be aware of the Air Force's most current requirements, such that the assertion that its RDS could easily meet them is speculative. In sum, while Coulson may have made modifications to its system that would better address some of the agency's requirements, Coulson has still not demonstrated that it offers a commercial product that meets the agency's requirements or that could meet the agency's requirements with minor modifications.

Our Office has consistently explained that to prevail, a protester must demonstrate that it has been prejudiced by the agency's errors. Where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. IAP World Services, Inc.; Jones Lang LaSalle Americas, Inc., B-411659 et al., Sept. 23, 2015, 2015 CPD ¶ 302 at 13. Thus, because Coulson has not demonstrated that it offers a commercial product that meets the agency's requirements, we find no basis to conclude that Coulson was prejudiced by the agency's decision not to seek a commercial item to satisfy its requirements.<sup>7</sup>

We also note that in arguing that the agency should require a commercial item, Coulson is, in effect, arguing that the agency should define its needs in a manner that would restrict competition to Coulson's advantage. In this regard, Coulson asserts that it is

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<sup>7</sup> Because we find that Coulson's RDS fails to meet the agency's MAFFS requirement which is, by its very nature, non-commercial, we need not consider Coulson's argument that its product qualifies as a commercial item under FAR part 2.101. A debate regarding the extent to which Coulson has sold its current RDS system to the general public or to non-governmental entities is beside the point because the fact remains that Coulson's RDS fails to meet the agency's requirements. Additionally, because we find that Coulson was not prejudiced by the agency decision to conduct the procurement under FAR part 15 instead of FAR part 12, we do not address Coulson's complaint that the agency failed to conduct adequate market research regarding the availability of commercial items meeting the agency's requirements.

"the only entity that has already designed, manufactured, and installed a 3,500 gallon retardant delivery system on an [sic] C-130H aircraft." Comments at 2. Our Office generally will not consider contentions that specifications should be made more restrictive, because an objective of our bid protest function is to ensure full and open competition for government contracts, not to protect any interest a protester may have in more restrictive specifications. Y&K Maint. Inc., B-405310.2, Oct. 17, 2011 CPD ¶ 239 at 6. Here, the agency has identified a number of firms that could potentially compete under the current solicitation, but there is no evidence to demonstrate that the same would be true if the agency sought a commercial item to meet its needs.<sup>8</sup>

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>8</sup> We recognize that in its initial protest, Coulson asserted that it "understands there are at least two other potential offerors with tanking systems that might meet the commercial item definition." Protest at 12. The protester provided no support for this vague, speculative assertion in its protest or in its comments responding to the agency report, however.