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Marc E. Ryan  
Proc. II

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE: B-187347**

**DATE: March 9, 1977**

**MATTER OF: Condur Aerospace Corporation**

**DIGEST:**

Protest that awardee's experimentally certificated aircraft failed to satisfy alleged solicitation requirement for FAA certification is denied where solicitation may be reasonably read in light of applicable law as requiring no certification at all. Moreover, assuming that some form of certification was intended by agency, protester fails to show that requirement would not be satisfied by operation of experimentally certificated aircraft. Recommendation made that future solicitations more clearly articulate agency's requirements.

Condur Aerospace Corporation (Condur) protests the award of a contract for Manned Aircraft Tow Target (MATT) services to Flight Systems, Incorporated (FSI) under Request for Proposals No. DAAH01-R-76-0721, issued by the U.S. Army, Redstone Arsenal.

Condur contends that the solicitation required the successful offeror to use Federal Aviation Administration (FAA) certificated aircraft and that the aircraft proposed by the awardee were not, and could not become, appropriately certificated. In view of its own efforts to comply with the alleged requirement, Condur contends that it was irreparably damaged by the Army's acceptance of a "nonresponsive" offer.

The instant solicitation was issued April 30, 1976, for MATT services in support of air defense weapons training at Fort Bliss, Texas. The solicitation contemplated up to three months of MATT demonstration flights, with government options to obtain MATT flight services in fiscal years 1977 and 1978. The basic contract was awarded to FSI, who proposed to use Canadair T-33 surplus Military aircraft holding a Special Airworthiness Certificate, FAA Form 8130-7 issued in the

B-187347

Experimental classification. After contract award Condor filed the instant protest contending that FSI was "nonresponsive" to the following terms of the RFP's Attachment "A," Scope of Work:

"3. MATT OPERATIONS:

3.1 The contractor shall:

"3.1.1 Comply with all Federal Aviation Administration (FAA) and local civilian and military aircraft operating and safety SOPs, [standard operating procedures] rules, and regulations for Manned Aircraft Tow Target operations to include obtaining necessary FAA MATT certifications.

\* \* \* \* \*

"7. To conduct satisfactory MATT flights including flights required for demonstration and satisfactory presentations, the contractor shall:

\* \* \* \* \*

"7.2 Determine in conjunction with FAA and obtain, as required by FAA regulations, operational waivers, air worthiness, and safety certification for the aircraft as modified for MATT operation.

"7.3 Operate and maintain FAA certified MATT in compliance with all FAA flight regulations. Only FAA certified MATT shall be operated by the contractor in support of this contract."

All parties to the instant protest agree, and the FAA confirms that performance of the instant contract will involve "public aircraft," i. e., "aircraft used exclusively in service of any government or of any subdivision thereof \* \* \*," 49 U. S. C. 1301 (32) (Supp. IV 1974). Unlike "civil aircraft" (viz. "any aircraft other than public aircraft," 49 U. S. C. 1301(14) (1970)).

public aircraft are not subject to FAA certification requirements. See U.S. v. Aero Spacelines, Inc., 361 F.2d 916 (3d Cir. 1966). Consequently, apart from the solicitation there was no legal requirement for FAA certification to perform the instant contract. Condur does not dispute this fact. It argues that, precisely because the Army appreciated the absence of a legal requirement for certifying the operation of public aircraft, the Army required the FAA certification in the solicitation. As evidence of the reasonableness of the proposed construction, Condur points to the FAA Handbook, 8130.2A CHG 6, June 26, 1972, chapter 1.11.b:

"Public aircraft are not required to have airworthiness certificates; however, in some instances, government agencies operating public aircraft may choose to meet the airworthiness requirements of FAR Part 21 [concerning certification]."

Condur contends that questions posed by the Government during discussions confirmed its belief that the Army intended to require FAA certification. The protester also refers to a letter dated August 19, 1976, which it sent to the Commander, Redstone Arsenal, purporting to confirm an agreement reached during the negotiations to the effect that FAA certification would be required in accordance with sections 7.2 and 7.3 of the Scope of Work. Finally Condur contends that the level of required certification should be that of a civil aircraft performing like contract work and that, since FSI's experimental certificate does not authorize it to perform repetitive routine operations like target towing, FSI's proposal should have been rejected.

FSI and the Army contend that the solicitation required FAA certification only if and to the extent necessary to perform the contract work in conformity with applicable law. In addition, FSI contends that, even if the solicitation may be interpreted as requiring the use of FAA certificated aircraft, it satisfied this requirement by proposing to use FAA certificated aircraft in the experimental classification.

We agree with FSI and the Army that the solicitation did not require certification beyond the level proposed by the awardee. We note that all but one of the sections relied upon

B-187347

by the protester use conditional language when referring to FAA certification. Section 3.1.1 required "necessary" certifications; section 7.2 required certification "as required by FAA regulations." In both provisions, the conditional language would be superfluous if certification was to be mandatory. The one unconditional reference to FAA certification was section 7.3, which states in pertinent part:

"Only FAA certified MATT shall be operated by the contractor in support of this contract."

We have been advised by the FAA Assistant Regional Counsel that the phrase "FAA certified MATT" is not a term of art and does not refer to any cognizable certification category. Thus, not only is the seemingly unconditional language of section 7.3 inconsistent with the conditional language found elsewhere in the Scope of Work, but the object of the requirement is unclear. Under the circumstances, we believe that it is reasonable to interpret this reference to FAA certification in conjunction with the references in sections 3.1.1 and 7.2, see Lite Industries, B-184403, November 28, 1975, 75-2 CPD 363, as requiring certification to the extent legally necessary to accomplish job assignments.

However, even if section 7.3 was intended to articulate a certification requirement, an interpretation which was reinforced by questions regarding FAA certification posed by the Army during negotiations, we cannot say that such a requirement was ignored by FSI in proposing to use experimentally certificated aircraft. While it is the Army's position at this time that no FAA certification was required for the instant procurement, it may be that the Army's negotiators did not fully appreciate this fact. In any event, there is no basis in the record for concluding that the Army intended that civil aircraft standards be applicable. Furthermore, Condur has produced no evidence to indicate that any technical requirement which the Army may have sought to satisfy by requiring FAA certification was not met by the experimentally certificated aircraft proposed by FSI. Instead, Condur refers to the limitations applicable to FSI's aircraft when operated as civil aircraft, which limitations are irrelevant both to the Army's minimum needs and to the operation of public aircraft under this contract.

While we find no basis for objecting to the award made to FSI in this case, we are recommending to the Army that in future procurements steps be taken to insure that solicitation provisions

B-187347

be lucid to avoid a recurrence of the difficulties created by the  
inartful drafting exemplified by section 7.3 of this solicitation's  
Scope of Work.

*R. J. K. H.*  
Acting Comptroller General  
of the United States