



**The Comptroller General
of the United States**

Washington, D.C. 20548

Zelkowitz

Decision

Matter of: American Rocket Company

File: B-232391

Date: January 4, 1989

DIGEST

1. Agency's use of phased development approach for the development of a propulsion system will not result in a potential conflict of interest requiring exclusion from the subsequent work phases of any one of multiple awardees under initial work effort, where the awardees will not be directly involved in the preparation of statements of work for the subsequent work effort and will be unable to exert more than minimal influence on the source selection process for these follow-on efforts.

2. Amendment which merely reemphasizes the stated objective of the procurement as set forth in the solicitation does not render the solicitation ambiguous.

DECISION

American Rocket Company (AMROC) protests the terms of request for proposals (RFP) No. 1-8-EP-98621, issued by the National Aeronautics and Space Administration (NASA) for a research study on hybrid propulsion.

We deny the protest.

The solicitation is for the first phase of a three-phase program to develop the technology for hybrid propulsion-- hybrid propulsion systems utilize one fluid propellant (oxidizer) in combination with a solid fuel--to be used on the next generation of manned and unmanned space launch vehicles. This program is designed to identify the necessary technology in phase I, acquire that technology in phase II, and demonstrate that technology in phase III. Phase I requires the development of a conceptual design package detailing the design concepts and configurations of various hybrid propulsion systems for boosters to be used in phases II and III of the program; concept selection is to be based upon the following four factors, listed in descending

044302/137683

order of importance: (1) flight safety and reliability, (2) life cycle cost, (3) performance, and (4) other pertinent criteria. Phase I also requires development of a technology definition package detailing the activity the contractor recommends NASA pursue during phases II and III. NASA anticipates the multiple award of up to four parallel contracts under phase I. (NASA anticipates the award of two contracts under phase II and one contract for phase III.)

After issuing the solicitation, NASA learned that AMROC believed that it had already developed the required hybrid propulsion technology. AMROC requested that NASA cancel the solicitation and award a single, sole-source contract to it. Subsequently, NASA indefinitely suspended the RFP by amendment, and sent a team from its Marshall Space Flight Center, the contracting activity for this procurement, to AMROC's facilities to assess the merits of AMROC's claims. Based on this visit, which included observation of the test firing of a developmental motor, NASA concluded that AMROC's approach, based on AMROC's own program for the launch into low earth orbit of 500 to 4,000-pound payloads, did not satisfy NASA's requirements for a hybrid propulsion system capable of providing 750,000 to 3,000,000 pounds of thrust, a level sufficient to propel a manned vehicle into orbit. NASA then amended the solicitation to reestablish a proposal due date and also to reemphasize that the focus of the program is to be on "manned reliability, high thrust and high performance hybrid propulsion systems."

Five firms responded to the solicitation. AMROC did not submit a proposal, but instead filed this protest with our Office alleging that the solicitation was defective.

AMROC first argues that NASA's use of a phased development approach for the hybrid propulsion program will result in an improper organizational conflict of interest under the provisions of the Federal Acquisition Regulation (FAR), subpart 9.5, because the work to be performed under phases II and III of the program will be defined by the design package to be developed in phase I. To avoid such potential problems, AMROC maintains that NASA should have included in the phase I solicitation a clause explicitly warning offerors of the potential conflict in the second and third phases of the acquisition and providing that no follow-on contracts would be awarded to the phase I awardees. FAR § 9.508.

The FAR generally requires contracting officials to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a

contractor's objectivity. FAR §§ 9.501, 9.504 and 9.505; see ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. In particular, the FAR provides that if a contractor (1) provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, or (2) prepares or assists in preparing a work statement to be used in competitively acquiring a system or provides materials leading directly and without delay to such a work statement, the contractor generally may not be awarded a contract to supply the system. FAR §§ 9.505-1 and 9.505-2. However, where more than one contractor is involved in the preparation of the work statement, the agency need not exclude the contractors from the follow-on contract. See FAR § 9.505-2(b)(1)(iii).

AMROC asserts that the circumstances here are similar to those in one of the examples set forth in the FAR of instances where a contractor is to be excluded from a follow-on contract; this example provides that a firm that is awarded a contract to define the detailed performance characteristics an agency will use for purchasing rocket fuels should be prohibited from competing for the subsequent supply contract. FAR § 9.509. Further, AMROC notes that in a recent decision rendered by the General Services Administration Board of Contract Appeals (GSBCA), CACI, Inc.--Federal, GSBCA No. 9193-P, 88-1 BCA ¶ 20,336, the Board indicated that a contract clause restricting participation in the second phase of a two-phase contract effort was properly included in the phase I solicitation notwithstanding the fact that the awardee for the first phase would not prepare detailed specifications or a work statement for the phase II effort.

We find the FAR example cited above and the CACI decision to be inapposite here. Both involve situations where a single firm was awarded a contract to draft or assist in the preparation of specifications to be used in the competitive acquisition of a product; in such instances a significant risk exists that the firm would be in a position to affect the follow-on procurement by drafting specifications favoring its own products or capabilities and for this reason should be excluded from that competition. The circumstances here, however, are clearly distinguishable. NASA proposes to award not one but four contracts to perform studies of various technologies available for hybrid propulsion systems. Further, the firms selected for the phase I effort will not specifically prepare or assist in preparing statements of work for the other phases of the development effort, but will merely provide recommendations concerning the possible approaches available for the program.

In this regard, NASA anticipates that input from each of the four contractors, as well as in-house technology, will be considered by it in the development of work statements for the two subsequent phases of the program. Thus, unlike those firms described in the example or the CACI decision, each individual phase I contractor here will not be in position to directly influence the selection process for the follow-on work requirements; NASA, itself, will draft the work statements for these efforts. Thus, any advantage accruing to a particular contractor will result solely from that contractor's having developed a superior design independently adopted by NASA. We find, therefore, that NASA's use of the phased development approach for the hybrid propulsion program will not result in a potential conflict of interest as defined by the FAR. See Coopers & Lybrand, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100 (the restrictions set forth in the FAR are intended to avoid the possibility of bias where a contractor would be in a position to favor its own capabilities). Accordingly, NASA's decision not to restrict the future work efforts was reasonable and consistent with applicable FAR provisions. See FAR § 9.505-2(b)(1)(iii); Associated Chemical and Environmental Services et seq., B-228411.3 et seq., Mar. 10, 1988, 67 Comp. Gen. —, 88-1 CPD ¶ 248; see generally Arthur Young and Co., B-226626, June 12, 1987, 87-1 CPD ¶ 591 (an agency's determination regarding application of the conflict of interest rules will not be overturned except where it is shown to be unreasonable).

AMROC next argues that the solicitation failed to warn offerors that only those firms awarded contracts on phase I would be eligible to compete for the phase II and III efforts. AMROC states that it was advised by the Director of Research and Technology at the Marshall Space Flight Center during NASA's inspection of AMROC's facilities that the phase II and III competitions would be restricted in this manner. NASA, however, reports that it does not intend to limit competition for the follow-on contracts. In any event, it does not appear that the protester was prejudiced by this alleged erroneous advice since AMROC did not submit a proposal for the phase I effort.

AMROC also contends that the RFP improperly excluded coverage of certain sections of the FAR. In this regard, it points out that a clause in the solicitation provides that pending promulgation of certain segments of the FAR which as of April 1, 1984 had yet to be issued, any reference in the solicitation to such segments shall be deemed to refer to the corresponding provisions set forth in NASA Procurement Notice 85-17. We view this clause, however, as expanding,

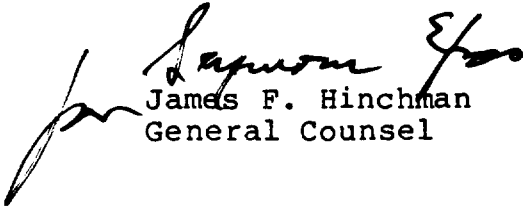
rather than diminishing, the coverage of the FAR. Further, as each of the referenced segments has been promulgated and incorporated in the FAR, this clause has been rendered superfluous. Moreover, we find AMROC's assertion that other potential offeror's nevertheless may have been influenced not to submit proposals because of the inclusion of this clause--AMROC does not argue that it was so improperly influenced--to be purely speculative.

AMROC argues that the clarification of the objectives of the program as set forth in the solicitation amendment, reemphasizing a focus on "manned reliability, high thrust and high performance hybrid propulsion systems," rendered the solicitation ambiguous, thereby making it impossible to submit an offer that would demonstrate an understanding of NASA's objectives. AMROC maintains that the RFP as initially issued clearly set forth as the objective of the procurement the development of a hybrid propulsion system to be used for the next generation of manned and unmanned space launch vehicles, and listed the factors to be considered in the development of such system, in descending order of importance, as safety and reliability, cost and performance (payload capability). AMROC asserts, however, that these factors, although not formally changed, nevertheless were in fact fundamentally modified by the terms of the amendment; according to AMROC, the amendment in effect deleted the requirement for developing hybrid propulsion systems to be used for unmanned space launch vehicles, and also placed more significance on high performance than originally contemplated.

We disagree. As set forth in the solicitation as issued, NASA's stated objective was always the development of a hybrid propulsion system capable of lifting both manned and unmanned vehicles. NASA issued the amendment in response to AMROC's apparent misapprehension that AMROC's previously designed system, which was designed for payloads in the 500 to 4,000-pound range, would satisfy NASA's requirements. To ensure that other contractors did not similarly misconstrue its requirements, which called for a system producing 750,000 to 3,000,000 pounds of thrust, NASA believed it was necessary to reemphasize that it required a system that was capable of propelling manned launch vehicles into orbit. The fact that NASA only referred to manned launch vehicles in this amendment did not signify that NASA was abandoning its requirements for a hybrid propulsion system also capable of supporting unmanned payloads. As noted by the agency, the performance level required for boosters capable of supporting manned flights is equal to or greater than that necessary for unmanned missions; a hybrid propulsion system of sufficient power and reliability for

manned launch vehicles thus necessarily also would support unmanned ones. Accordingly, NASA had no need to specify its continued need for a system capable of supporting its unmanned missions. Moreover, the amendment did not change any of the factors upon which offerors were to base their selection of a concept and configuration for the hybrid propulsion system, nor did it change the evaluation criteria upon which NASA was to evaluate proposals. Accordingly, we find the amendment merely reemphasized the agency's original objective; it did not render the solicitation ambiguous.

The protest is denied.



James F. Hinchman
General Counsel