Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Transtar Aerospace, Inc.

File: B-239467

Date: August 16, 1990

Peter Ahrens, for the protester.
Col. Herman A. Peguese, Department of the Air Force, for the agency.
R.H. Pacey, for Chrysler Technologies Airborne Systems, an interested party.
Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's refusal to set aside a procurement of transport aircraft for small business concerns or small disadvantaged business concerns was proper where agency's action is supported by its evaluation of the marketplace, Small Business Administration concurred with the decision, and protester admits that there is no reasonable expectation of receiving offers from at least two responsible such concerns.

2. Full and open competition was not precluded by requirement that transport aircraft be pressurized--the need for which the protester does not dispute but with which it cannot comply in the time available for submission of proposals--where: agency advised potential offerors of the requirement for pressurization with reasonable promptness once the need became apparent; operational concerns did not permit any delay in the procurement; it appears responsible sources capable of meeting the government's delivery schedule were able to compete; and protester's difficulty in meeting the pressurization requirement without substantial additional time stems largely from the fact that it has a developmental aircraft and not an existing, operational one.

3. Contention that agency will violate Buy American Act because its specifications effectively limit competition to two foreign firms, one of which has sold aircraft to Libya and the other of which is allegedly owned or subsidized by governments which either have committed human rights

violations or have entered into a joint venture with the Soviet Union, is denied because the Buy American Act does not prohibit awards to foreign firms, but merely establishes a preferential evaluation system favoring domestic products, and there are no prohibitions against contracting with foreign firms under the circumstances the protester has identified.

DECISION

Transtar Aerospace, Inc. protests the terms of request for proposals (RFP) No. F33657-90-R-0003, issued by the Department of the Air Force's Aeronautical Systems Division (ASD) at Wright Patterson Air Force Base (AFB), Ohio for C-27A aircraft. Transtar alleges that the Air Force should have set aside the procurement for small business, small disadvantaged business or women-owned concerns, did not allow sufficient time for it to prepare a proposal, and has improperly favored foreign firms in the competition.

We deny the protest.

This protest concerns the C-27A Program, under which the Air Force seeks to procure 10 commercially available, Federal Aviation Authority (FAA) certified (or military qualified) short takeoff and landing (STOL) aircraft, with full contractor logistics support (CLS) through 1999. The solicitation also contained an option for eight additional aircraft, five in fiscal year 1992 and three in fiscal year 1993.

The C-27A aircraft is to be used for cargo and passenger transport by the United States Southern Command (USSOUTHCOM) and the Military Airlift Command. Initial Operational Capability is slated for three aircraft at Howard AFB, Panama, by October 1, 1991. This procurement is designed to follow an interim current contract, which expires September 1991, with Evergreen International, for airlift services using comparable aircraft.

The protested RFP was issued following an extensive period in which the Air Force communicated with industry concerning its needs through the issuance of a series of Requests for Information and a Draft Request for Proposals. This process culminated in the issuance of the present RFP on March 30, 1990, under which technical proposals were due May 14, and cost proposals on May 25. Transtar filed a protest in our Office on April 27 with 9 allegations, which, through later submissions, grew to approximately 20. These allegations fall into five categories: (1) the Air Force has not justified its decision not to set aside this procurement for small business, small disadvantaged business or women-owned

business concerns; (2) the Air Force has provided an inadequate time in which to respond to the added requirement that the aircraft be pressurized; (3) certain procurement actions by the Air Force unfairly prejudiced the protester's competitive position, especially with regard to foreign firms; (4) the solicitation violates the Buy American Act by allowing foreign firms to compete; and (5) the Air Force's conduct of this procurement exhibits large scale abuses.

SET ASIDES

The protester initially challenges the Air Force's determination not to issue this solicitation as a set-aside for small business, small disadvantaged business or women-owned small business concerns.

We note that there is no program in government procurement which establishes a set-aside for women-owned small business; rather, the applicable regulations only state a government policy to aid women-owned small business concerns, and do not mandate that such a firm receive special treatment in any particular procurement. California Shorthand Reporting, B-236680, Dec. 22, 1989, 89-2 CPD ¶ 584.

The decision whether to set aside a procurement for small business concerns is regulated by Federal Acquisition Regulation (FAR) § 19.502-2 (FAC 84-48), which provides that a set-aside shall not be made if the contracting officer does not have a reasonable expectation of receiving offers from at least two responsible small business concerns at reasonable prices.1/ Since the decision to set aside a procurement is a matter of business judgment within the contracting officer's broad discretion, we will not disturb it absent a showing that it was unreasonable. RBC, Inc., B-233589; B-233589.2, Mar. 28, 1989, 89-1 CPD ¶ 316.

Here, the protester itself asserts, in numerous places, that it is the only American company that can produce these aircraft. It has not identified any other responsible small business concern that might reasonably be expected to compete in the procurement. Further, the contracting

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1/ The criteria for deciding to set aside a Department of Defense procurement for small disadvantaged business concerns is similar except that the contracting officer must have an expectation that award will be made at a price not exceeding the fair market price by more than 10 percent. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-72(a).

officer synopsized this requirement several times to solicit responses from industry on its ability to meet the Air Force's specifications, and the results indicated that there was no reasonable basis to conclude that offers would be forthcoming from two responsible small businesses or small disadvantaged businesses. The ASD Small Business Office and the Small Business Administration's representative at Wright-Patterson AFB concurred in this judgment, a fact to which we attribute some weight. MVM, Inc. et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270. In light of these circumstances, we find that the contracting officer had a reasonable basis for not setting aside the procurement.

PRESSURIZATION

Much of Transtar's protest concerns the Air Force's requirement that the aircraft be pressurized. The protester does not dispute the need for pressurization under the conditions in which the Air Force says the aircraft will be flown, but it argues that the addition of the requirement came too late in the procurement cycle for incorporation in its proposal, thereby effectively eliminating it from the competition. Transtar was advised of the pressurization requirement in January 1990, approximately 2 months before the RFP was issued and 4 months before proposals were due; however, it says it needed to be aware of the requirement 18 months before the RFP was issued to incorporate the requirement in its design and proposal.

The Air Force states that it originally thought that pressurization would not be necessary for a cargo-carrying aircraft and so this requirement was not in the earlier descriptions of its needs which were circulated to industry. As experience was gained under the Evergreen International contract--which was awarded in August 1989 and for which similar unpressurized aircraft were selected--it became apparent that an unpressurized aircraft would not suffice. Not only was there a frequent need to carry passengers in addition to cargo but missions were being aborted because of the need to fly up to an attitude of 19,000 feet when inclement weather developed. As a result, the user of these aircraft, USSOUTHCOM, requested that pressurization be made a firm requirement.

A contracting agency is required by statute to allow a minimum 30-day response period for all but a limited number of procurements. See 15 U.S.C. § 637(e)(3)(B) (1988). Transtar argues that in light of the pressurization requirement, the Air Force was required to extend the closing date for receipt of proposals beyond that required by statute in order to obtain full and open competition as

mandated by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1) (1988). In this regard, the protester states that it will require at least until May 1991 to comply with this requirement.

The agency's refusal to extend the closing date was not per se improper, since more than the 30-day statutory response time was provided by the RFP. We therefore review the agency's action to determine whether it is consistent with the full and open competition standard and whether there was a deliberate attempt to exclude the potential offeror. Control Data Corp., B-235737, Oct. 4, 1989, 89-2 CPD ¶ 304.

Transtar alleges that the added requirement of pressurization, combined with the short time frame for the submission of proposals, eliminates all domestic suppliers of this aircraft and leaves only two foreign firms to compete.

The Air Force concedes that three domestic developmental aircraft, including the one proposed by Transtar, may be effectively eliminated from the competition, but argues that this is because these firms lack a certified or military qualified production aircraft, which has consistently been a requirement.2/ The Air Force contends that the effect of the addition of the pressurization requirement, therefore, is simply to add another factor into these firms' inability to meet the specifications.

The contracting officer argues that more germane to the situation is the fact that the IOC for the program--three aircraft in place at Howard AFB in Panama by October 1, 1991--effectively limits the competition to manufacturers of current aircraft. The Air Force argues that it cannot extend the date for receipt of initial proposals by as much as a year as suggested by the protester because it must award the contract by August so that initial delivery will occur within 12 months thereafter and the operational test

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2/ The materials in the record before us indicate that Transtar has only partially constructed one prototype aircraft and that it has not actually completed the manufacture of and flown an aircraft of the type it would propose under this procurement.

and evaluation can be completed before IOC. Having the IOC in place for the C-27A program on time is critical because the interim airlift capability under the Evergreen International contract will expire on September 30, 1991, and any delay in the delivery of these aircraft past that date will likely result in a loss of all airlift capability for USSOUTHCOM which would pose a risk to our national security.

Full and open competition is defined as permitting all responsible sources to submit offers. 41 U.S.C. § 403(6) (1988). That does not mean, however, that an agency must delay satisfying its own needs in order to allow a vendor time to develop the ability to meet government requirements. Indeed, the law defines a responsible source as one that can comply with the required delivery schedule. See 41 U.S.C. § 403(7)(B). Here, it is clear that the Air Force has critical operational needs that do not permit any delay in this procurement. Further, there are at least two competitors which Transtar admits can produce compliant aircraft within the required timeframe; the fact that they may be foreign firms does not make the procurement any less competitive. Moreover, there is nothing in the record to indicate that the Air Force's refusal to extend the closing date was a deliberate attempt to exclude Transtar from the competition, especially in light of the agency's continued efforts under the draft RFP to aid Transtar in its development of a compliant aircraft. We therefore conclude that the Air Force has not violated the statutory requirement for full and open competition.

OTHER PROCUREMENT ACTIONS

Transtar alleges that certain aspects of the specifications, such as the power plant and landing gear, that were mandatory in the draft RFP now have been relaxed and that this is unfair to offerors who developed their aircraft to meet stricter standards. We do not find it unreasonable for the Air Force to relax specifications that were more stringent than the agency's minimum needs and that may enhance competition or save money. See, e.g., Northrop Corp., Precision Prods. Div., B-234237, May 3, 1989, 89-1 CPD ¶ 423 (Our Office will not review a protest that has the purpose or effect of eliminating competition.) Moreover, Transtar has not alleged how these "relaxed" specifications prejudiced its competitive position in this procurement.

Transtar also argues that it has been treated unfairly as it was (1) singled out as the only offeror subject to a site visit for a pre-award survey; and (2) not "invited" to a site survey at Howard AFB, Panama. The record disproves

both of these contentions. Under the FAR, agencies are instructed to perform pre-award surveys when they are necessary to determine an offeror's responsibility. FAR § 9.106-1 (FAC 84-47). It is common practice for a pre-award survey to be requested in large and important procurements, and the solicitation advised offerors of the government's right in this regard. In this instance, as the Air Force already informed Transtar, a pre-award survey was requested for all offerors in this procurement.

Transtar's allegation that it was excluded from the site survey at Howard AFB, Panama, is equally without merit. Offerors were informed in the solicitation the time and place of the site survey, and no offerors were given a special invitation to attend. Transtar received the solicitation, so it knew or should have known of the site visit and it had a duty to inquire at the agency if it had any questions.

BUY AMERICAN ACT

Transtar next argues that the only two firms that can meet the specifications within the required timeframe are foreign-owned, and it is therefore improper for the Air Force to purchase military aircraft from these firms as this violates the Buy American Act.

The Buy American Act, 41 U.S.C. §§ 10(a) and 10(d) (1988), does not prohibit awards to foreign firms or the procurement of foreign products, but merely establishes a preferential evaluation system favoring domestic products. Lenzar Optics Corp., B-225432, Mar. 4, 1987, 87-1 CPD ¶ 246. A challenge of an award to one of these two firms solely on the basis that it is a foreign firm is therefore without merit.

Transtar, however, has specific allegations against each of these firms which it contends will justify eliminating them from the competition. It contends that one of these firms should be disqualified because it has sold 20 of these aircraft to Libya. There is no prohibition on dealing with firms that sell their products to Libya. The only prohibition on dealing with Libya in this regard is contained in DFARS § 252.209-7000, Certification or Disclosure of Ownership or Control by a Foreign Government that Supports Terrorism. This regulation requires offerors to reveal ownership or control by Libya, but does not prohibit a firm from selling products to Libya. Since there is no evidence that this firm is owned or controlled by Libya, we have no basis on which to object to the inclusion of this firm in the competition.

Transtar also challenges the eligibility of the second firm to compete in this procurement, alleging that it is owned and subsidized by the governments of Indonesia and Spain. Transtar contends that it would be improper to award a contract to this offeror since Indonesia is a violator of human rights, and the Spanish entity is just now entering into a joint venture with the Soviet Union. Since there is no restriction on the award of contracts to firms located in and/or supported by nations who purportedly violate human rights, however, we have no basis upon which to conclude that the Air Force must eliminate this firm from the competition. Likewise, there is no such restriction with respect to a firm that does business with the Soviet Union. In addition, the Air Force has informed this Office that both of these foreign firms are teamed with domestic companies for this procurement.

GENERAL ABUSE

Transtar's protest also contains approximately six additional allegations which it argues show general abuse of the procurement process by the Air Force. Specifically, Transtar requests that we investigate and review: (1) why senior Air Force and other government personnel are not answering its letters or meeting personally with company representatives; (2) the manhours the Air Force has expended on this program, which the protester considers excessive; (3) the amount of money that Congress has appropriated for this program; (4) the alleged theft of Transtar's proposal materials from its office; and (5) the policy of the Air Force to use civilian personnel for the maintenance portion of the statement of work rather than military personnel, a concept which Transtar alleges is unnecessarily expensive and reduces military readiness.

Our function as a bid protest forum is to review the propriety of specific procurement actions to determine whether there has been a violation of law or regulation and not to review contracting agencies' internal processes and policies. Therefore, none of these matters is appropriate for any consideration in this protest.

The protest is denied.

for Ronald Berger
James F. Hinchman
General Counsel