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Decision

Matter of: Timberline Helicopters, Inc.

File: B-414507

Date: June 27, 2017

Alan I. Saltman, Esq., and Kathleen H. Barron, Esq., Smith, Currie & Hancock, LLP, for the protester.

Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.

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DIGEST

Protest challenging the terms of the solicitation is denied where the protester has not demonstrated that meeting the solicitation requirements and complying with applicable Federal Aviation Administration regulations is impossible and fails to show that the agency's judgments are otherwise unreasonable.

DECISION

Timberline Helicopters, Inc., of Sandpoint, Idaho, protests the terms of request for proposals (RFP) No. D17PS00157, issued by the Department of the Interior, Bureau of Land Management (BLM), for an exclusive use heavy size helicopter to transport qualified non-crewmembers and/or cargo in support of the agency's natural resource missions. Timberline contends that the solicitation is defective because no helicopter can meet the solicitation requirements and comply with applicable Federal Aviation Administration (FAA) regulations regarding the transport of qualified non-crewmembers.

We deny the protest.

The BLM issued the RFP on February 27, 2017, for exclusive use helicopter flight services to transport qualified non-crewmembers (firefighters) and/or cargo in support of BLM's fire management missions, pursuant to the procedures contained in Federal Acquisition Regulation (FAR) parts 12 (commercial items) and 15 (contracting by negotiation). RFP at 1, 6. The solicitation anticipated the award of a fixed-price indefinite-delivery, indefinite-quantity contract for a 1-year base period and four 1-year option periods. Id. at 6.

The solicitation listed a number of services to be provided under the contract, including: provision of a helicopter, personnel, fuel servicing vehicle, fuel, and all other associated equipment as prescribed in the solicitation. Id. at 6, 12. The RFP additionally provided that the missions may include, but are not limited to: fire suppression, fire monitoring, initial attack, prescribed fire and aerial ignition, law enforcement (limited to nonthreatening surveillance and reconnaissance), hoist and fast rope insertion operations, and other administrative and related resource activities. Id. at 12.

Sections A and B of the RFP set forth the agency's requirements for the helicopter flight services including requirements for certain aircraft certificates. Id. at 6-28. As relevant here, section B2.5 of the RFP required the offered aircraft to have a standard airworthiness certificate or a restricted airworthiness certificate. Id. at 12. With respect to the restricted category aircraft, the RFP specified that the aircraft "must be certified under 14 CFR § 21.25(b)(2) 'Forest and Wildlife conservation'."¹ Id. The RFP also provided that "[f]or aircraft offered which are certificated under any other portion of 14 CFR § 21.25, offerors must provide a letter from the FAA authorizing the carriage of firefighters under 14 CFR § 91.313(d)(3) and/or 14 CFR § 91.313(d)(4) on the offered aircraft as certified."² Id. The RFP also provided that the "[c]ontractor must hold and keep current all of the following required certificates and must ensure that contract aircraft are operated and maintained in compliance with those certificates at all times." Id.

The RFP stated that the evaluation of proposals would first involve an acceptability determination. Offeror acceptability would be determined by whether the proposal had assented to the RFP's terms, provided all information requested in the solicitation's instructions section (D4), not taken exception to the terms of the RFP, and offered aircraft that met the minimum aircraft requirements of the solicitation. Id. at 72. As

¹ As relevant here, 14 C.F.R. § 21.25 provides, in relevant part, that an applicant is entitled to a type certificate for an aircraft in the restricted category for special purpose operations . . . if he shows that no feature or characteristic of the aircraft makes it unsafe when it is operated under the limitations prescribed for its intended use. For the purposes of this section, "special purpose operations" include: (1) agricultural (spraying, dusting, and seeding, and livestock and predatory animal control); (2) forest and wildlife conservation; (3) aerial surveying (photography, mapping, and oil and mineral exploration); (4) patrolling (pipelines, power lines, and canals); (5) weather control (cloud seeding); (6) aerial advertising (skywriting, banner towing, airborne signs and public address systems); and (7) any other operation specified by the FAA. 14 C.F.R. § 21.25(a),(b).

² 14 C.F.R. § 91.313 provides, in relevant part, that no person may be carried on a restricted category civil aircraft unless that person: performs an essential function in connection with a special purpose operation for which the aircraft is certificated; or is necessary to accomplish the work activity directly associated with that special purpose. 14 C.F.R. § 91.313(d)(3),(4).

relevant here, RFP section D4, required an offeror to provide “a copy of the applicable type certificate for each aircraft offered.” Id. at 70. This section additionally provided “[f]or restricted category aircraft [the] offeror must provide a current airworthiness certificate and (if applicable) letter of authorization for each aircraft offered which clearly indicates the aircraft is certified under 14 CFR § 21.25(b)(2) ‘Forest and Wildlife conservation’.” Id. at 70-71. For aircraft offered which are certificated under any other portion of 14 CFR § 21.25, “offerors must also provide a letter from the FAA [Federal Aviation Administration] authorizing the carriage of firefighters under 14 CFR § 91.313(d)(3) and/or 14 CFR § 91.313(d)(4) on the offered aircraft as certified.” Id.

The RFP provided that after the acceptability determination was completed, the agency would evaluate all acceptable proposals based on three evaluation factors: aircraft capability, offeror capability, and price. Id. at 72-73. The solicitation stated that aircraft capability and offeror capability were of approximately equal importance, and when combined, were significantly more important than price. Id. at 73. The RFP provided that the agency anticipated making an award on a best-value tradeoff basis. Id.

Prior to deadline for receipt of proposals, Timberline filed this protest with our Office.

DISCUSSION

Timberline primarily argues that the solicitation is defective because no helicopter meeting or exceeding the minimum aircraft requirements can perform under the terms of the RFP and comply with applicable FAA regulations regarding the transport of qualified non-crewmembers. In response, the agency asserts that the terms of the solicitation are not defective. The agency explains that it consulted with the FAA in developing the solicitation requirements with respect to the transportation of qualified non-crewmembers aboard restricted category helicopters. Based on these communications, the agency states that it included the requirement for an offeror proposing a restricted category aircraft to provide a certificate with a special purpose designation of Forest and Wildlife conservation or provide a letter from the FAA authorizing the carriage of firefighters under 14 CFR § 91.313(d)(3) and/or 14 CFR § 91.313(d)(4). Based upon our review of the record, we find no basis to sustain the protest.³

A contracting agency has the discretion to determine its needs and the best method to accommodate them; the responsibility for drafting proper specifications that reflect the government’s needs is the contracting agency’s. Pride Mobility Products Corp., B-405371, Oct. 25, 2011, 2011 CPD ¶ 227 at 4-5. However, those needs must be specified in a manner designed to achieve full and open competition. Id. Where a protester alleges that performance is impossible, we will not substitute our judgment for that of the agency or sustain the protest in the absence of clear and convincing

³ While we do not address each of Timberline’s allegations and variations thereof, we have reviewed all of them and find none provides a basis to sustain the protest.

evidence that the specifications are in fact impossible to meet or unduly restrict competition. Instrument Control Serv., Inc.; Science & Mgmt Resources, Inc., B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66 at 6. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not show that the agency's judgment is unreasonable. See Gallup, Inc., B-410126, Sept. 25, 2014, 2014 CPD ¶ 280 at 5.

Timberline contends that it is impossible to comply with the solicitation's requirements and FAA regulations because FAA regulations prevent the transportation of qualified non-crewmembers (firefighters) on restricted category helicopters.⁴ Our review of the record leads us to conclude that Timberline's understanding of the relevant FAA regulations is erroneous.

In July 2016, the agency contacted the FAA and requested a determination regarding the transportation of qualified non-crewmembers aboard restricted category helicopters. Agency Report (AR), Tab 5, Request for Determination Letter, at 1. After emails between the agency and FAA seeking clarification of the BLM's requirements, the FAA issued a determination to the agency on August 23. AR, Tab 5c, FAA Determination, at 1-3. The FAA's letter provided "[w]hen an airframe is issued a Special Airworthiness Certificate in the restricted category, it will also list the special purpose for which that airframe is certificated. This must be 'Forest and [W]ildlife conservation' to be certificated for firefighting." Id. at 1. The letter additionally provided that firefighters are permitted on these aircraft because they are considered to "perform an essential function in connection with a special purpose for which the aircraft is certificated" or they are "necessary to accomplish the work activity directly associated with that special purpose" in accordance with 14 CFR §§ 91.313(d)(3), (d)(4), if the restricted category aircraft certification contains the special purpose of Forest and Wildlife conservation. Id. at 1-2. Thus, the record reflects that the FAA has determined, contrary to the protester's assertion, that the carriage of firefighters is permitted on restricted category aircraft if the aircraft is certificated with a special purpose of Forest and Wildlife conservation.⁵

With respect to BLM's solicitation, the agency implemented the FAA's determination by including language to require restricted category aircraft to be certificated with a special

⁴ The record demonstrates that Timberline's restricted category helicopter certification contains the special purpose of Forest and Wildlife conservation. See AR, Tab 5b attach. No. 2, Timberline Type Certificate Data Sheet, at 3.

⁵ While the protester asserts that this was not a formal determination by the FAA, we find no basis to question the FAA's authority to make this determination, and we find the BLM's reliance on the FAA's determination reasonable. See Glenn Defense Marine-Asia PTE, Ltd., B-401480, Aug. 17, 2009, 2009 CPD ¶ 166 at 5-6.

purpose of Forest and Wildlife conservation.⁶ As an additional step, the agency also contacted the FAA after the solicitation was issued to confirm its understanding of the FAA regulations. In this regard, prior to the receipt of proposals, the agency again asked the FAA whether an aircraft with a current restricted airworthiness certificate on board with a special purpose of Forest and Wildlife conservation is permitted to carry firefighters. AR, Tab 8, Agency Letter to FAA March 15, 2017, at 1. In response, the FAA confirmed that “[y]es, firefighters are permitted to be carried on a restricted category aircraft with a special purpose of [F]orest and [W]ildlife conservation” AR, Tab 9, FAA Email (April 20, 2017), at 2.

On this record, we find no basis to conclude that the solicitation is defective. The protester has not demonstrated that compliance with the solicitation requirements and FAA regulations is in fact impossible to meet.

After receiving the agency report in response to Timberline’s protest, which included the FAA’s determination, Timberline filed a supplemental protest alleging that the agency was required to disclose the FAA’s determination letter to potential offerors. The protester contends that by not disclosing the information to prospective offerors the BLM unreasonably restricted competition and failed in its duty to promote competition. In response, the agency contends that it had no duty to provide such information because, as stated above, it incorporated the FAA’s determination into the requirements of the solicitation.

We agree with the agency that it was under no duty to provide prospective offerors with the FAA’s determination letter. While the protester argues that the agency’s failure to provide the FAA’s determination restricted competition due to a long held industry belief that passengers are not permitted on restricted category aircraft,⁷ we find that the solicitation sufficiently informed offerors of the requirements and did not restrict, or fail to promote, competition. Even if we accept that there existed a long held industry belief that restricted category helicopters are not permitted to carry firefighters, our prior cases have explained that there is no legal requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor or that the procuring agency remove all uncertainty from the mind of every prospective offeror. See Salient Fed. Sols., Inc., B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 2. Thus, while Timberline believed that it was impossible to perform the contract and comply with FAA regulations, the solicitation was clear and unambiguous as to the

⁶ The solicitation also permitted other restricted category aircraft, without the special purpose of Forest and Wildlife conservation, to submit proposals if the offeror obtained a letter from the FAA permitting the transport of firefighters.

⁷ The protester cites to an “Interagency Aviation Tech Bulletin” issued in August 2007 to demonstrate the long held industry belief that restricted category helicopters cannot transport passengers. See AR, Tab 2C, Interagency Tech Bulletin, at 1-2. The record is unclear as to the current applicability of this bulletin.

aircraft certification requirements and BLM was under no obligation to correct Timberline's understanding of the FAA regulations once it received the FAA's determination. Id. at 4 (offerors are reasonably expected to use their professional expertise and business judgment in anticipating risks and computing their proposal costs). Indeed, whether a contractor can ultimately perform the contract in compliance with the FAA regulations is a matter to be decided by the FAA not the BLM. See AR, Tab 5c, FAA Determination, at 3 ("[A]n Inspector must examine each airframe to determine its eligibility to meet the special purpose of 'Forest and [W]ildlife conservation'."). Accordingly, we have no basis to question the agency's actions.

The protest is denied.

Susan A. Poling
General Counsel