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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Palm Beach Aviation, Inc.

File: B-401450; B-401450.2; B-401516

Date: August 28, 2009

Ronald H. Uscher, Esq., and Robert D. Banfield, Esq., Peckar & Abramson, P.C., for the protester.

Damon M. Semmens, Esq., and Emanuel N. Anton, Esq., Anton Law Group, for Rampart Aviation, Inc., an intervenor.

Maj. Charlotte M. Emery, and Cpt. T Kathryn E. Waits, Department of the Army, for the agency.

Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that awardee's proposal for aircraft and pilot to support military parachute training was unacceptable is denied where record shows that awardee's proposal was reasonably evaluated by the agency as meeting the solicitation's requirements; aircraft certification requirements, which were not preconditions to award, could properly be addressed as a matter of contract administration.
 2. Protest that agency's price evaluation was not consistent with the solicitation is denied where record supports the evaluation as reasonable and consistent.
 3. Protest that oral solicitation failed to state how quotations were to be evaluated filed after issuance of purchase order is dismissed as untimely.
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DECISION

Palm Beach Aviation, Inc. (PBA) of West Palm Beach, Florida, protests the award of a contract to Rampart Aviation, Inc. of Franklinton, North Carolina, under request for proposals (RFP) No. H92236-09-R-4001, issued by the U.S. Special Operations Command Regional Contracting Office Fort Bragg (USSOCOM) for an aircraft and pilot to support military parachute training for military personnel at Pinal Air Park, Marana, Arizona. PBA contends that Rampart's proposal should have been rejected as technically unacceptable and that the agency's price evaluation was inconsistent with the solicitation requirement.

We dismiss the protests in part and deny them in part.

BACKGROUND

The RFP was issued on April 6, 2009, as a small business set-aside and called for the award of an indefinite-delivery/indefinite-quantity task order contract with firm-fixed-price line items to provide aircraft support for basic and advanced training. The RFP provided that award would be made to the proposal most advantageous to the government considering: technical capability and price, with technical capability more important than price. RFP at 13-14.¹ Under the technical capability evaluation factor, offerors (and all aircraft proposed) were to be Federal Aviation Authority (FAA) Part 91 certified. RFP at 14. In order to be eligible for award, offerors were required to: (1) be listed on the Scott Air Force Base (AFB) Department of Defense (DoD)-approved Part 91 carrier list; and (2) provide the most current government approved USSOCOM Intrastate Contract Aviation Paratroop Survey Checklist. Immediately beneath these two requirements, the RFP advised that offerors should provide proof of inclusion on these lists with their proposals. Id.

With respect to the price evaluation, offerors were to provide the year, make, model, and engine type of each proposed aircraft. The RFP provided that the total cost to provide the aircraft with pilot, and the total price for fuel consumption, would be added to determine the “total operating cost.” RFP at 13. The RFP stated that the “total operating cost” would be divided by the number of jumpers the proposed aircraft could safely lift, which would determine the actual cost per jumper and the best price for the government. The RFP further stated that the number of jumpers allowed on the proposed aircraft would be determined by the government and would be based on the proposed aircraft manufacturer’s specifications, lift capacity, and the government’s safety requirements. Id.

PBA and Rampart submitted the only proposals received in response to the RFP, and both proposals were found to meet the technical requirements of the solicitation. Agency Report (AR) Tab 18. While neither offeror possessed a certificate for aircraft operating under FAA Part 91, the agency concluded that both of them were listed on the Scott AFB DoD-approved Part 91 carrier list, and both provided current copies of their DoD Intrastate Contract Aviation Paratroop Survey Checklists.

PBA’s total price was \$36,123,275 and Rampart’s price was \$13,687,500. The agency determined that Rampart’s price was fair and reasonable and award was made to Rampart on May 21, 2009. On May 22, PBA was notified of the award; the company was given a debriefing on May 29. This protest followed.

¹ Elsewhere, the RFP provided for award to the lowest-priced technically-acceptable offeror. RFP at 38. Notwithstanding this ambiguity, the basis for award is not an issue in this protest.

DISCUSSION

PBA argues that Rampart's proposal was noncompliant with the RFP and should have been found technically unacceptable. PBA also argues that the agency's price evaluation was improper.

As a preliminary matter, throughout these protests, PBA argues that the agency failed to assess, in its evaluation, whether certain regulations and directives would be followed. In this regard, PBA correctly notes that the RFP statement of work (SOW) provided that all air support services had to be performed in accordance with DoD quality and safety requirements as described in DoD Directive 4500.53, USSOCOM Directive 350-8, and several other internal agency regulations. See e.g., RFP, SOW ¶ 1.1.

As set forth in more detail below, we have reviewed the issue of whether the agency properly followed its stated evaluation criteria, but we have not addressed whether the agency's award decision will result in compliance with other directives and instructions. The jurisdiction of our Office is limited to consideration of whether a procurement statute or regulation has been violated, 31 U.S.C. §§ 3551-3552 (2000), violation of internal agency instructions or directives are not within our bid protest jurisdiction. See RMS Indus., B-246082 et al., Jan. 22, 1992, 92-1 CPD ¶ 104 at 2. Thus, to the extent PBA's protests are based on an alleged violation of USSOCOM and DoD directives, they are dismissed.

Additionally, PBA argues that award to Rampart was improper because Rampart cannot satisfy the SOW requirement that Rampart acquire and maintain an FAA Part 135 certification. The SOW provided that the contractor must acquire and maintain a FAA Part 135 certification in accordance with USSOCOM Directive 350-8. AR, Tab 7, SOW ¶ 1.2.2. Contrary to the protester's assertion that this certification must be obtained prior to award, the language of the RFP does not so provide and, thus, whether or not Rampart satisfies its Part 135 certification requirements is a matter of contract administration and not subject to review by our Office. 4 C.F.R. § 21.5(a) (2009).

Rampart's Evaluation

PBA contends that Rampart's proposed aircraft cannot lift 18 combat equipped jumpers as required by the RFP.² PBA maintains that United States Army Special

² The SOW required the aircraft to be configured to allow a military static line airborne exit of the aircraft whether through a side door or ramp, with a linear anchor line cable that runs the length of the aircraft so as to support 18 combat equipped jumpers. RFP, SOW ¶ 1.5.3.1.

Operations Command (USASOC) Regulation 350-2 limits the number of combat equipped jumpers for the aircraft proposed by Rampart to 12.

Rampart proposed to use two CASA 212-200 aircraft in performance of the contract and specifically stated that the aircraft had a static line for 21 combat equipped jumpers. AR, Tab 17 at 4 - 5. The agency responds that the regulation cited by PBA is an Army regulation and as such is not binding on USSOCOM. The agency also reports that for 10 years it has routinely loaded 18 combat equipped jumpers on the CASA with no accidents or safety violations. Contracting Officer's Statement at 2.

As stated above, the RFP clearly stated that the number of jumpers allowed on an aircraft would be determined by the government and that the determination would be based on the proposed aircraft manufacturer's specifications, lift capacity, and the government's safety requirements. RFP at 13. While the protester disagrees with the agency's determination that Rampart's proposed aircraft satisfied the RFP requirements and maintains that the agency's decision violates the USASOC regulations, our Office affords particular deference to the technical expertise of agency personnel regarding judgments that involve matters of human life and safety. PEMCO World Air Servs., B-284240.3 et al., Mar. 27, 2000, 2000 CPD ¶ 71 at 7. On this record, we have no basis to conclude that the agency's determination with respect to the capacity of the aircraft proposed by Rampart was improper. Moreover, as previously stated, whether or not the agency complied with internal agency regulations or guidelines is not for our determination under our bid protest jurisdiction.

In a supplemental protest, PBA argues that Rampart is not eligible for award because it failed to include its most current Paratroop Survey Checklist in its proposal as required by the RFP. Specifically, PBA maintains that Rampart's proposal contained a March 2006 checklist and not the most current checklist.³

PBA is correct: Rampart included a March 2006 checklist in its proposal; however, appended to Rampart's March 2006 checklist was a memorandum from USSOCOM stating that as of March 3, 2008, Rampart satisfied or exceeded all items on the Paratroop Survey Checklist for Part 91 contractors and that the inspection was valid until March 3, 2010. AR, Tab 17 at 31. We have reviewed Rampart's submission and see nothing unreasonable in the agency's conclusion that this memorandum was sufficient proof of Rampart's compliance with the checklist requirements.

³ PBA also argues that Rampart's March 2006 checklist contained numerous deficiencies and therefore Rampart's most current checklist is material. However, the record shows that the agency determined that Rampart satisfied all the safety requirements listed in the checklists.

Price Evaluation

PBA also argues that the agency improperly evaluated price by overstating the number of combat equipped jumpers that Rampart's proposed aircraft could safely lift, while understating the number of combat equipped jumpers that PBA's proposed aircraft could safely lift. PBA maintains that in accordance with USASOC regulations Rampart's aircraft can only lift 12 jumpers; at the same time, PBA contends that other regulations (promulgated by the United States Army Test and Evaluation Command, Airborne Special Operations Test Directorate) indicate that PBA's proposed aircraft can safely lift 32 combat equipped jumpers (rather than the [DELETED] jumpers the agency used in its evaluation).

As previously stated, with respect to the price evaluation, the RFP provided that the total cost to provide an aircraft with pilot and the total price for fuel consumption would be added together to determine the "total operating cost." RFP at 13. The total operating cost would then be divided by the number of jumpers the proposed aircraft could safely lift to determine a cost per jumper and the best price for the government. Id. The RFP specifically provided that the number of jumpers allowed on a proposed aircraft would be determined by the government, and that this determination would be based on the aircraft manufacturers' specifications, lift capacity and the government's safety requirements. Id.

The record shows that the agency made its determination of the number of jumpers based on manufacturers' specifications, aircraft lift capacity, government safety requirements, and historical training records.⁴ Based on this assessment, the agency used 15 jumpers in determining the cost per jumper for Rampart's aircraft and [DELETED] jumpers for PBA's aircraft. As a result, Rampart's cost per jumper was \$493.35 and PBA's was \$603.55. AR, Tab 19 at 2 - 3.

In answer to the protester's assertions, the agency (USSOCOM) maintains that it was not required to follow either the USASOC, or the Army Test and Evaluation regulations, in determining the cost per jumper in its price evaluation. We have reviewed the record and we see no basis to question the agency's position. Moreover, the agency points out that even if it used the USASOC regulation the relative prices would not have changed. AR, Memo. of Law, at 9.

In conclusion, while PBA disagrees with the agency's determination about the number of jumpers that can be safely carried on these aircraft, we have seen nothing in this record that shows the agency's decisions were unreasonable or inconsistent

⁴ The CO states that despite the agency's routine use of 18 jumpers on Rampart's proposed aircraft, it used a conservative number of 15 for calculation of the cost per jumper. CO Statement at 2.

with the RFP.⁵ Ultimately, the Army, not our Office, is in the best position to determine how these aircraft can be safely used. See, e.g., PEMCO World Air Servs., supra.

Protest B-401516

In order to satisfy its current needs pending resolution of protests B-401450 and B-401450.2, on June 11, 2009, the agency issued oral request for proposals (RFQ) No. H92236-09-P-4079, seeking quotes for these services for the interim period of June 15 through September 30. The CO states that he only solicited Rampart and PBA, and that he advised the vendors that award would be based on an hourly rate, which should include the cost of fuel. AR, Tab 5. Vendors were advised that the government would pay for actual hours used and would guarantee a minimum of 300 hours, but not more than 600 hours. Rampart and PBA submitted quotes by the June 11 due date. Rampart's quote for 600 hours was \$930,000 and PBA's was [DELETED]. On June 12, a purchase order was issued to Rampart, and this protest followed.

PBA argues that the issuance of the purchase order to Rampart was improper because: the agency was required to award to PBA as only PBA is an approved commercial operator with an air carrier's certificate; the agency's oral solicitation did not specify how the evaluation would be conducted; PBA submitted the lowest evaluated price when offers are evaluated on an equal basis; and PBA's price was reasonable. PBA also argues that since award to Rampart reduces the number of deliverables under the RFP at issue in protests B-401450 and B-401450.2, the agency engaged in a de facto override of the Competition in Contracting Act of 1984 (CICA) stay provisions applicable to PBA's primary protest.

We dismiss these contentions.

To the extent the protester argues that the agency's oral solicitation did not specify how the evaluation would be conducted or that the award would not be made on a cost per jumper basis, the protest involves a solicitation impropriety and is untimely filed. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1)(2009). Since PBA submitted a quote and did not file its protest until after it was notified of nonselection, its protest

⁵ The protester also argues that the agency violated the RFP because it used historical data to help determine the number of jumpers an aircraft could safely lift, which the protester argues was not one of the stated RFP criteria. While the RFP listed specific criteria the agency would review to determine the number of jumpers an aircraft could safely lift, we see nothing in the RFP that precluded the agency from also using historical data in making this determination.

challenging what are, essentially, the “ground rules” of the procurement is not timely and will not be considered.

To the extent PBA argues that in issuing a purchase order to Rampart, the agency violates certain internal agency directives, as explained above, this matter is not for consideration by our Office, since violation of internal agency instructions or directives are not within our bid protest jurisdiction. See RMS Indus., supra.

Lastly, issues regarding whether an agency is complying with the CICA stay requirements are not subject to review by our Office.⁶ See Grot, Inc., B-276979.2, B-277463, Aug. 14, 1997, 97-2 CPD ¶ 50 at 3 n.1.

The protest is denied.

Daniel I. Gordon
Acting General Counsel

⁶ Additionally, PBA argues that the agency failed to treat vendors equally when it orally solicited quotes for the interim contract because Rampart’s initial quote was based on only 300 hours, not 600 hours. As noted above, vendors were advised that the government would pay for actual hours used and would guarantee a minimum of 300 hours, but not more than 600 hours. Since Rampart was not allowed to change the hourly rate in its quote, even if the agency allowed the company to change the quantity, we do not see how PBA was prejudiced in this matter.