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

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## Decision

**Matter of:** Coulson Aviation (USA), Inc.

**File:** B-411525; B-411525.2

**Date:** August 14, 2015

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Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for the protester.

Lt. Col. Mathew J. Mulbarger, Michael G. McCormack, Esq., and Paul S. Davison, Esq., Department of the Air Force, for the agency.

Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that a procurement should be conducted in accordance with the commercial item procedures of Federal Acquisition Regulation part 12 is untimely where the protester failed to file its protest with our Office within 10 days of initial adverse agency action following the protester's agency-level protests on this issue.
  2. Protest that solicitation requirements improperly disclosed the protester's proprietary information is denied where the protester fails to provide clear and convincing evidence rebutting the agency's determination that the materials at issue were publicly available or general performance requirements logically developed by the agency.
  3. Protest challenging a solicitation provision as unduly restrictive of competition is denied where the agency has articulated reasonable bases for imposing the requirement.
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### DECISION

Coulson Aviation (USA), Inc., of Port Alberni, British Columbia, Canada, challenges the terms of request for proposals (RFP) No. FA8504-14-R-31382, issued by the Department of the Air Force, Air Force Material Command, for the design, manufacture, and installation of a 3,500 gallon fire retardant delivery system (RDS) for seven HC-130H Air Force aircraft. Coulson argues that the Air Force improperly misused and disclosed Coulson's proprietary data in the solicitation. In addition, Coulson contends that the RFP's requirements are unduly restrictive of competition,

and asserts that the procurement should be conducted in accordance with the commercial item procedures of Federal Acquisition Regulation (FAR) part 12.

We deny the protest in part and dismiss it in part.

## BACKGROUND

The Department of Agriculture, Forest Service is responsible for protecting national forest lands from wildfires, and in this role, uses airtankers to drop and build fire retardant lines to aid ground firefighters in controlling wildfires. Contracting Officer (CO) Statement at 4.

On August 1, 2012, the Forest Service issued a request for information (RFI), in connection with its NextGen 1.0 procurement,<sup>1</sup> seeking vendors capable of providing an RDS to be used in C-130H/J and/or C-27J aircraft. Agency Report (AR), Tab 6, NextGen RFI, at 2. The RFI sought the design of an RDS that is both modular (roll-on/roll-off), and permanent (fixed-installation), with a capacity of 3500-4000 gallons of fire retardant at 9.3 pounds per gallon. Id. Coulson responded to the RFI, in which it provided detailed information about its RDS design. AR, Tab 7, Coulson Proposal to Forest Service (Feb. 6, 2012); Protest at 13.

Separately, as relevant to the solicitation challenged here, the National Defense Authorization Act of 2014 directed the transfer of seven demilitarized United States Coast Guard HC-130H aircraft to the Air Force, to be modified by the Air Force to integrate a gravity-drop aerial fire retardant dispersal system (RDS) in each of the seven aircraft. Id. After the modifications are complete, the Air Force is to transfer the aircraft to the Forest Service for its use. Id.

On May 2, 2014, the Air Force issued an RFI for a HC-130H fire retardant delivery system to be used in the seven HC-130H aircraft to be provided to the Forest Service. AR, Tab 18, RFI (May 2, 2014). The RFI consisted of a draft statement of work (SOW), technical manual contract requirements, drawings, a proposed

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<sup>1</sup> The procurement is referred to as the NextGen 1.0 because it is the first NextGen procurement, under which the Forest Service competitively awarded NextGen 1.0 contracts to five firms, including one to Coulson. See Coulson Aviation (USA) Inc., et al., B-409356.2 et al., Mar. 31, 2014, 2014 CPD ¶ 106 at 4-5, 13-14. Our decisions in Coulson Aviation (USA) Inc., et al., supra, and Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197, provide further details concerning the history of the NextGen 1.0 procurement. The Forest Service subsequently issued a solicitation for NextGen 2.0, a follow-on procurement to NextGen 1.0, which is discussed by our Office in Coulson Aviation (USA), Inc., B-411306 et al., July 8, 2015, 2015 CPD ¶ 214.

schedule, and specific questions for interested offerors. Id. At least six small businesses responded to the RFI, stating they could meet the requirements of the solicitation. AR, Tab 22, Market Research Report (June 17, 2014), at 9, 11; CO Statement at 4. In addition, on January 13, Coulson states that it attended a meeting at the Pentagon where it provided Coulson's proprietary information, including a video and drawings, to individuals at the Forest Service, Coast Guard, and Air Force. Protest at 15; see also AR, 48a-b (Coulson video); AR, Tab 49 (Coulson drawings).

On July 29, the agency issued a pre-solicitation notice, which provided a brief description of the RDS requirement. AR, Tab 23, Synopsis Notice (July 29, 2014), at 1. The pre-solicitation notice also advised that, based on the agency's market research, the procurement would not be a commercial item acquisition under FAR part 12. Id.

The RFP, which was issued on September 17, is set-aside for small business concerns, and seeks proposals for the design, manufacture, and installation of a 3,500 gallon RDS for seven HC-130H aircraft. SOW at 1.<sup>2</sup> The contract awarded will be for one trial kit/installation; one verification kit/installation; and three production kits/installations. Id. at 9. The RFP includes options for two additional production kits/installations. Id. The solicitation requires the successful contractor to manufacture, install, and test the RDS for all seven HC-130 aircraft within 48 months of contract award. Id. at 12.

The solicitation provides for award on a lowest-priced, technically-acceptable basis, pursuant to the evaluation and award procedures of FAR part 15. Technical acceptability is to consider four factors: (1) production plan; (2) integrated master schedule; (3) critical design factors; and (4) installation facilities. RFP at 42. The solicitation included technical requirements documents in a SOW, and required that offerors submit a written technical proposal describing the offeror's proposed approach to performing the requirements set forth in the SOW. Id.

#### Coulson's Correspondence with the Air Force Regarding FAR Part 12

On October 21, Coulson sent a letter to the contracting officer requesting that the agency amend the solicitation to incorporate the commercial item procedures under FAR part 12. AR, Tab 36, Coulson Letter (Oct. 21, 2014), at 1. On November 10, the contracting officer denied Coulson's request. AR, Tab 37, Agency Email (Nov. 10, 2014), at 1; Tab 39, Agency Email (Dec. 9, 2014), at 3. On November 15, Coulson sent another letter to the contracting officer asking that the agency

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<sup>2</sup> Unless otherwise noted, references herein to the RFP are to the version produced by the Air Force in the agency report (AR) that is conformed through amendment No. 0004.

reconsider Coulson's request, which the agency also denied. AR, Tab 38, Coulson Letter (Nov. 15, 2014), at 1. The contracting officer stated that the agency "will not entertain any further correspondence regarding the pursuit of a FAR Part 12 acquisition strategy." AR, Tab 39, Agency Email (Dec. 9, 2014) at 4. Finally, on December 18, Coulson sent another letter to the contracting officer, asking for an in-person meeting with members of the Air Force technical team to discuss Coulson's concerns that the solicitation did not incorporate FAR part 12. AR, Tab 40, Coulson Letter (Dec. 18, 2014), at 2. On December 23, the contracting officer responded that the agency would not meet with Coulson regarding this issue, and stated that "Coulson is encouraged to submit their proposal IAW [in accordance with] the terms of the RFP." AR, Tab 41, Agency Email (Dec. 23, 2014), at 1.

#### Coulson's Correspondence with the Air Force Regarding Proprietary Information

On December 30, Coulson submitted a letter to the contracting officer asking that the Air Force conduct an independent investigation into Coulson's concerns that the solicitation contains Coulson's proprietary information. AR, Tab 42, Coulson Letter (Dec. 30, 2014), at 1. On January 6, 2015, the agency asked Coulson to identify all propriety data that Coulson believed to be included in the solicitation and to correlate it to references in the RFP and SOW. AR, Tab 43, Agency Email (Jan. 6, 2015), at 1.

On January 14, Coulson provided the Air Force with additional information regarding its allegations, including references to certain documents; Coulson, however, did not provide the agency with the referenced documentation. CO Statement at 7; see AR, Tab 44, Coulson Letter (Jan. 14, 2015). On January 21, 2015, the agency responded that, based on the information provided, it was unable to find any evidence demonstrating release of Coulson's proprietary data. AR, Tab 45, Agency Letter (Jan. 21, 2015), at 1.

The next day, on January 22, Coulson requested that the agency reopen its investigation. AR, Tab 46, Coulson Letter (Jan. 22, 2015), at 1. Coulson's letter focused on seven areas of the SOW, and provided a table cross-referencing the SOW requirements with Coulson's alleged proprietary information. The agency agreed to reopen the investigation, and over the subsequent 3 months obtained documents from Coulson and the Forest Service for its investigation. CO Statement at 8. Ultimately, the agency summarized its findings in a series of seven reports addressing each of the arguments raised by Coulson. Id. On May 1, the agency notified Coulson that it had concluded its investigation, and had found no evidence of improper utilization of Coulson's intellectual property. AR, Tab 53, Coulson Letter (May 1, 2015), at 1. On May 11, Coulson filed this protest with our Office.

#### DISCUSSION

Coulson argues that the procurement should be conducted in accordance with the

commercial item procedures of FAR part 12, asserts that the Air Force improperly misused and disclosed Coulson's proprietary data in the solicitation, and contends that the RFP's requirements are unduly restrictive of competition. For the reasons discussed below, we dismiss the first allegation as untimely, and deny the remaining two.

#### Timeliness

As an initial matter, we consider the timeliness of Coulson's allegation that the procurement should be conducted in accordance with the commercial item procedures of FAR part 12. As discussed above, Coulson submitted letters to the contracting officer on October 21 and November 15, asserting that the protester could provide a commercial item to satisfy the agency's requirements, and that FAR part 12 therefore applies to this procurement. The Air Force asserts that these letters were agency-level protests, and that Coulson failed to timely file its protest with GAO within 10 days of the agency's denial of Coulson's protests regarding this issue. The protester argues that its letters to the contracting officer were an attempt to resolve Coulson's concerns through "frank and open discussions," as anticipated under FAR § 33.103(b), rather than through agency-level protests under FAR § 33.103(d). Accordingly, the protester contends that its protest to our Office on these issues is timely because it was filed before the solicitation's May 26 due date for receipt of proposals. For the reasons discussed below, we conclude that Coulson's letters to the contracting officer were agency-level protests. We also find that Coulson filed its protest with our Office more than 10 days after initial adverse agency action following the protester's agency-level protests on this issue. Accordingly, we dismiss this protest ground as untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Masai Techs. Corp., B-400106, May 27, 2008, 2008 CPD ¶ 100 at 3. They specifically require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals are required to be filed before that time. 4 C.F.R. § 21.2(a)(1); A&T Sys., Inc., B-401701, B-401701.2, Nov. 12, 2009, 2010 CPD ¶ 62 at 5. A limited exception to this rule exists when a protester has filed a timely agency-level challenge to a solicitation, and receives an unfavorable answer. Masai Techs. Corp., *supra*. In such instances, any subsequent protest on the same issue to our Office will be considered if it is filed within 10 days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3).

Furthermore, our Office has long held that, to be regarded as a protest, a written statement need not state explicitly that it is or is intended to be a protest, but must convey the intent to protest by a specific expression of dissatisfaction with the agency's actions and a request for relief. Mackay Commc'ns--Request for Recon., B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426 at 1; Masai Techs. Corp., *supra*. In contrast, we have explained that a letter that merely expresses a suggestion, hope,

or expectation, does not constitute an agency-level protest. Masai Techs. Corp., supra.

As discussed above, on September 17, the Air Force issued the RFP under the negotiated procurement procedures of FAR part 15. On October 21, Coulson sent a letter to the contracting officer objecting to the agency's decision to use FAR part 15 procedures in the solicitation. AR, Tab 36, Coulson Letter (Oct. 21, 2014). Specifically, Coulson asserted that it offers a commercial item that is suitable to meet the Air Force's needs, and, that the Air Force was therefore required to proceed with the procurement under FAR part 12. Id. at 2. Coulson also specifically requested that the agency revise the RFP to include the procedures of FAR part 12. Id. at 3.

On November 10, the Air Force denied Coulson's request to amend the RFP. AR, Tab 37, Agency Email (Nov. 10, 2014), at 1. On November 15, Coulson sent another letter to the contracting officer asking that the agency reconsider its rejection of the protester's request for relief. AR, Tab 38, Coulson Letter (Nov. 15, 2014), at 1. Coulson argued that the agency's rationale was based on an erroneous interpretation of FAR part 12 and the capabilities of Coulson's product. Id. Coulson again asked that the Air Force amend the RFP to incorporate FAR part 12 procedures. Id. at 4.

On November 25, the Air Force issued an amended RFP, which did not address the protester's request to amend the solicitation to follow FAR part 12 procedures. In addition, on December 9, the contracting officer provided a written response to Coulson's November 15 request for reconsideration, which explained that the agency's market research "looked for both commercial items that would require minimal modification as well as Commercial off the Shelf (COTS) items," and that, based on this research, the agency concluded that "there is neither a commercial nor a COTS system available that would meet the stated requirement." AR, Tab 39, Agency Email (Dec. 9, 2014), at 3. The contracting officer also provided additional information regarding the agency's conclusion that Coulson's proposed system does not meet the solicitation's requirements. Id. at 3-4. The contracting officer stated that "the US Government will not entertain any further correspondence regarding the pursuit of a FAR Part 12 acquisition strategy." Id. at 4.

On December 18, Coulson sent another letter to the contracting officer, requesting an in-person meeting with the Air Force technical team to discuss Coulson's concerns that the solicitation did not incorporate FAR part 12. AR, Tab 40, Coulson Letter (Dec. 28, 2014), at 2. On December 23, the contracting officer responded that it would not meet with Coulson regarding this issue. AR, Tab 41, Agency Email (Dec. 23, 2014), at 1. The contracting officer also stated that "the Government feels that there have been thorough exchanges regarding the issue and we are left with a fundamental disagreement [and] see no benefit in continuing to revisit the issues."

Id. The contracting officer further stated that “Coulson is encouraged to submit their proposal [in accordance with] the terms of the RFP.” Id.

Based on this record, we conclude that Coulson’s October 21 and November 15 letters to the contracting officer are agency-level protests. As stated above, to be regarded as a protest, a written statement need only convey the intent to protest by an expression of dissatisfaction and a request for corrective action. See Mackay Commc’ns--Request for Recon., supra. Here, Coulson’s letters clearly expressed dissatisfaction with the solicitation by disagreeing with the Air Force’s decision to use FAR part 15, rather than FAR part 12. They also specifically requested corrective action by asking that the Air Force revise the RFP to follow the commercial item procurement procedures under FAR part 12. As such, Coulson’s letters conveyed the intent to protest. See FAR § 33.103(d); Hospital Klean, Inc., B-286791, Dec. 8, 2000, 2000 CPD ¶ 205 at 3; Compare American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183 at 2-3 (protester’s letter was clearly an agency-level protest since it recommended changes in the solicitation specifications and requested a response from the agency to its letter), with, Great Southwestern Constr., Inc., B-252917, Apr. 14, 1993, 93-1 CPD ¶ 322 at 1 (protester’s letter was not an agency-level protest since it did not request specific relief from the agency).

The record reflects that, on November 10, the agency first advised Coulson as to the agency’s position that the procurement should not be conducted under FAR part 12, and further advised that the agency would not amend the solicitation as requested by Coulson. AR, Tab 37, Agency Email (Nov. 10, 2014), at 1. On November 25, the Air Force issued the amended RFP, which, consistent with the contracting officer’s statements in her November 10 email to Coulson, remained a FAR part 15 procurement. In addition, on December 9, the contracting officer responded to Coulson’s request for reconsideration, in which she reaffirmed the agency’s position that the procurement would remain under FAR part 15. In this document, the contracting officer specifically told Coulson that the agency “will not entertain any further correspondence regarding the pursuit of a FAR Part 12 acquisition strategy.” AR, Tab 39, Agency Email (Dec. 9, 2014), at 4. Finally, after Coulson requested an in-person meeting with the Air Force’s technical personnel to discuss Coulson’s concerns regarding FAR part 12, the contracting officer, on December 23, advised Coulson that agency would not meet with Coulson, but that “Coulson is encouraged to submit their proposal IAW [in accordance with] the terms of the RFP.” AR, Tab 41, Agency Email (Dec. 23, 2014), at 1.

Although Coulson asserts that it did not intend for the letters to be protests, but sought to resolve Coulson’s concerns through frank and open discussions under FAR § 33.103(b), our Office has held that a protester’s subjective intent is not determinative as to whether a written request constitutes a protest. See Mackay Commc’ns--Request for Recon., supra at 2 (“Even though [the protester] claims it never intended to lodge an agency-level protest, [its letter] . . . constituted an initial

protest”); Mammoth Firewood Co., B-223705, Sept. 4, 1986, 86-2 CPD ¶ 261 at 2 (“While, in its letter [the protester] states it is withholding a ‘formal protest’ pending the agency’s review of its complaint, . . . we find the letter was an agency-level protest”). In this regard, we will regard a written request for specific relief to be a protest, even if a firm characterizes its document as open and frank discussions under FAR § 33.103(b).

With regard to timeliness, the protester argues that it had no reason to believe that the agency would not address its concerns in later issued amendments to the solicitation, and therefore that its protest on this issue was timely filed with our Office prior to the solicitation’s May 26 closing date. We disagree. As discussed above, the Air Force advised Coulson on November 10, that it would not revise the RFP to incorporate FAR part 12, and consistent with this statement, when the agency issued the amended RFP on November 25, the solicitation remained a FAR part 15 procurement. AR, Tab 37, Agency Email (Nov. 10, 2014), at 1; RFP, amend. 0002. In addition, on December 9, and December 23, respectively, the Air Force reaffirmed its position, stating that the agency “will not entertain any further correspondence regarding the pursuit of a FAR Part 12 acquisition strategy,” AR, Tab 39, Agency Email (Dec. 9, 2014), at 4, but that Coulson is encouraged to submit its proposal in accordance with the terms of the solicitation. AR, Tab 41, Agency Email (Dec. 23, 2014), at 1.

On this record, we believe the agency clearly articulated its disagreement with Coulson regarding the commercial item nature of the agency’s requirement, as well as the fact that the agency was not going to change the solicitation from FAR part 15 to FAR part 12. The agency’s disagreement with Coulson’s position and refusal to amend the solicitation as requested by Coulson constituted adverse agency action. Even assuming that Coulson’s duty to file its protest on this issue with our Office was not triggered until the agency’s final refusal of the protester’s requested relief on December 23, Coulson’s protest was not filed with our Office until May 11, 2015, which is well past the 10 days allowed by our regulations. See 4 C.F.R. § 21.2(a)(3) (“If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered . . .”). Accordingly, we dismiss this allegation as untimely.

#### Coulson’s Proprietary Information

Coulson asserts that the solicitation improperly discloses its proprietary information, which the protester contends will cause substantial competitive harm to Coulson and preclude a level playing field. Specifically, the protester points to seven requirements in the SOW, arguing they are based on, and misuse information that Coulson provided to the Forest Service in 2012 as part of the NextGen 1.0 procurement. The Air Force argues that its investigation reasonably concluded that the SOW requirements are either: (1) based on information that predated the



delivery of the Coulson information, or were logically developed by Forest Service employees; or (2) are general performance requirements, and therefore not proprietary or novel to Coulson's system. See AR, Tabs 52a through 52g, Air Force Investigation Summaries. For the reasons discussed below, we find reasonable the Air Force's investigation and conclusion that the SOW requirements were not based on Coulson's proprietary information. In addition, we find that Coulson has failed to demonstrate that the SOW requirements are proprietary to Coulson, or that Coulson's proprietary information was the source of the SOW requirements. Accordingly, we find no basis to sustain the protest.<sup>3</sup>

We have recognized the right of a firm to protect its proprietary data from improper exposure in a solicitation where its material was marked proprietary or confidential, or was disclosed to the government in confidence, and where it involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. Ingersoll-Rand Co., B-236495, Dec. 12, 1989, 89-2 CPD ¶ 542; The Source, B-266362, Feb 7, 1996, 96-1 CPD ¶ 48 at 2. To prevail on such a claim, the protester must prove by clear and convincing evidence that its proprietary rights have been violated. Zodiac of N. Am., Inc., B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595.

Coulson first challenges two of the solicitation's tank requirements--SOW 6.2.e (tank side skin angles) and SOW 6.2.h (upper and lower tank)--arguing they are based on Coulson's proprietary information. As discussed above, the agency's investigation found that these SOW requirements were based on information that predates the delivery of Coulson's information, or were logically developed by Forest Service employees, and therefore, were not based on Coulson's proprietary information.

As relevant here, SOW 6.2.e states:

The center of mass of the retardant fluid shall be positioned over the release doors. The side walls of the tank shall be as vertical as

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<sup>3</sup> We note that Coulson's allegations regarding its proprietary information are timely before our Office even though Coulson first raised them with the agency. This is because, as discussed above, the Air Force agreed to conduct an investigation into Coulson's claims that the SOW disclosed its proprietary information, and Coulson timely filed its protest with our Office within 10 days of the agency's decision regarding that investigation. AR, Tab, 53, Agency Letter (May 1, 2015), at 1; 4 C.F.R. § 21.2(a)(3) (when a protester files a timely agency-level challenge to a solicitation, and receives an unfavorable answer, any subsequent protest on the same issue to our Office will be considered if it is filed within 10 days of actual or constructive knowledge of initial adverse agency action).

possible and in no case shall any wall be greater than 40 degrees from vertical. No portion of the tank, except for the bottom and top, shall have horizontal surfaces. The horizontal surface at the bottom of the tank shall be minimized to be only the amount that is necessary to attach the tank to the fuselage.

SOW at 14.

Coulson argues that this SOW requirement is based on is proprietary design, which has side walls of approximately [DELETED] degrees. AR, Tab 52a, Air Force Investigation Summary, at 2.

With regard to SOW 6.2.h, it states:

The RDS tank shall be designed with an upper and lower portion. The upper portion shall extend above the cargo floor and contain the bulk of the tank volume. The upper portion shall be removable. Removal of the upper portion shall use the cargo ramp extended to the ground. The Contractor shall design support equipment to accomplish removal and reinstallation of the upper portion. Removal and reinstallation of the upper portion may use the cargo winch. Removal and reinstallation of the upper portion shall not require a forklift, K-loader, or any such mechanical heavy lifting device.

SOW at 15.

Coulson argues that this approach, which requires an upper and lower tank, with no additional heavy lift equipment required, is based expressly on Coulson's proprietary approach.

Based on our review of the record, we find nothing unreasonable regarding the Air Force's investigation, or conclusion that there is no information to indicate that these two SOW requirements were based on Coulson's proprietary information. In investigating these two allegations the Air Force found that for both, several other offerors submitted RFIs in 2012 that meet the SOW requirements, and therefore concluded that these requirements were not novel to Coulson. AR, Tab 52a, Air Force Investigation Summary, at 2; Tab 52b, Air Force Investigation Summary, at 2.

With regard to the tank side skin angles requirement, the agency concluded that the tank design requirements were generated from pre-existing studies, such as the Tank Design Guide for Fire Retardant Aircraft, 1978, (page 34), lessons learned from pre-existing studies, and knowledge of engineering and fluid-flow principles. AR, Tab 52a, Air Force Investigation Summary, at 3. For example, the Forest Service personnel explained that, "[h]istorically retardant tanks were designed with the center of mass over the doors," and that, "with the advent of constant flow tanks, tank developers still kept the center of mass of the retardant fluid over the exit

doors, but needed to slope the side walls of the tank to create enough volume for the tank.” Id. at 2. The Air Force also noted that, “although the angle of the tank sidewall for the Coulson design (approximately [DELETED] degrees) is within the SOW requirement, it is [DELETED] than the 40 degree limit in the SOW. Therefore, it is not logical that the Coulson design would be the basis of this requirement.” Id. at 3. Here too, we conclude that Coulson has failed to demonstrate that that the SOW requirement was derived from information that was proprietary to Coulson.

With regard to the upper and lower tank requirement, the Forest Service provided additional information explaining that “this configuration has existed for ‘decades’ on various aircraft, including C-130s not modified by Coulson.” AR, Tab 52b, Air Force Investigation Summary, at 4. Again, Coulson has not provided any evidence to establish that these designs are proprietary to Coulson, or that Coulson’s proprietary information was the source of the SOW requirements. On this record, we find no basis to sustain the protest.

Coulson’s remaining arguments concern SOW requirements which the Air Force found constituted general performance requirements or were not novel to Coulson. For example, Coulson contends that requirement 6.9.a of the SOW (digital tank displays) is based on proprietary data from a video Coulson provided to the Forest Service and Air Force in 2014. As relevant here, this SOW provision requires that “[a] digital tank quantity display shall be installed near each loading port and shall be visible to the loading crew,” and states that the display “shall indicate the total volume in the tank during the filling process.” SOW at 23. Coulson argues that the requirement that the gauge be digital is based on Coulson’s proprietary design, and contends that the Air Force obtained this proprietary information from the Forest Service. Protester’s Comments (June 26, 2015) at 33.

In investigating this issue, the Air Force noted that the Coulson video stated: “There’s also a digital quantity indicator available for the ground crew that indicates where the levels are at.” AR, Tab 48a, Coulson Video; Tab 52g, Air Force Investigation Summary, at 2. The investigation also found, however, that, while “[t]he location of the indicator is shown in the video[,] . . . since the indicator is inside of the air deflector door, the indicator is not shown in the video.” AR, Tab 52g, Air Force Investigation Summary, at 2. The Air Force’s investigation also stated that, while the SOW requirement specified that the gauge must be digital, there are no specific requirements in the SOW on the type of digital gauge that must be used. Id. at 3. Based on the investigation, the agency concluded that there was no information to indicate that Coulson’s proprietary data was used in the development of the SOW requirement. Id.

We find nothing unreasonable regarding the Air Force’s investigation, or conclusion that there is no information to indicate that the SOW requirement was based on Coulson’s proprietary information. Although, as the agency acknowledges, Coulson provided a video that referenced a digital display, Coulson has not provided any

evidence to establish that Coulson owns this requirement, or that this video was the source of the requirement.

As another example, Coulson points to SOW requirement 6.8.c (fill port locations), which states that “[f]ill ports shall be available to loading personnel on both sides of the aircraft,” and that the fill ports “shall be located aft of the main landing gear doors between fuselage stations<sup>4</sup> (FS) 615 and 690,” and “at a height where they can be reached by ground service personnel without a ground handling stand or ladder.” SOW at 23. Coulson concedes that the Forest Service’s 2012 RFI included a requirement that “[f]ill ports shall be available to loading personnel on both sides of the aircraft or at the tail.” Protester’s Comments (June 26, 2015), at 31. The protester nonetheless asserts that the SOW requirement that the fill ports be aft of the main landing gear doors and at a height where they can be reached by ground service personnel without a ground handling stand or ladder, is based on Coulson’s engineering drawings of its system, which Coulson alleges shows fill ports [DELETED]. AR, Tab 49, Coulson Drawings, at 9.

In conducting its investigation, the Air Force found that, while Coulson’s design had fill ports on both sides of the aircraft at a height that would meet the SOW requirements, it appeared that the location of the fill ports were between FS [DELETED] and [DELETED], rather than between FS 615 and 690, as required-- and therefore did not meet the SOW requirements.<sup>5</sup> AR, Tab 52f, Air Force Investigation Summary, at 2. The agency concluded that the SOW requirement either was based on information that predated the delivery of Coulson’s information, or was logically developed by Forest Service employees, and that there was no indication that the SOW requirement was based on Coulson’s proprietary information. Id. at 3.

We again find nothing unreasonable regarding the agency’s investigation, and find that Coulson has failed to establish by clear and convincing evidence that the agency based this SOW requirement on Coulson’s proprietary information. Rather, as reflected by the record, the agency has previously required fill ports on both

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<sup>4</sup> Fuselage stations designate location along the length of an aircraft. SOW at 23.

<sup>5</sup> In choosing this location over others, the Forest Service explained: “Locating the fill port forward of the gear pods is not appropriate because of the proximity of the in-board propellers; nor is it appropriate to locate the fill port in the gear pod forward of the wheels because of internal equipment, putting the loading crew under the wing, and other considerations; nor is [it] appropriate to locate the fill port behind the forward edge of the cargo ramp (approx. aft of frame 700). Locating the fill port anywhere aft of this location (frame 700) requires the hoisting of the fill hose to a height above the shoulders and could result in OWCP injuries. Also, the government is not interested in requiring the paratroop doors to be opened for retardant loading.” Id.

sides of the aircraft, provides explanations for its inclusion of the requirement, and indicates that Coulson's fill ports do not meet the SOW requirement. In short, the protester has failed to establish that this requirement is unique to Coulson or that the SOW requirement was based on Coulson's proprietary information. The protester's assertions that a SOW requirement is generally similar to one of Coulson's designs is not enough to establish the propriety of the requirement, and GAO will not make inferences in this regard on the protester's behalf.

Coulson also asserts that requirement 6.3.c of the SOW, regarding door ratio, is based on its proprietary information. This SOW requirement states: "The door's aspect ratio (opening length compared to maximum opening width) shall be at least 10:1." SOW at 17. Coulson contends that the SOW's revised requirement for a long, slender door is based on Coulson's proprietary design, which has a door opening ratio of [DELETED].

During its investigation, the Forest Service advised that "historically retardant tanks were designed with openings that were long and slender." AR, Tab 52c, Air Force Investigation Summary, at 3 (citing 1991 Airtanker Criteria, Multi-Engine Criteria ¶ I.O.6.a) ("[A] long, narrow tank is to be preferred over a square tank."). In this regard, the Air Force found that the SOW's door aspect ratio requirement was based on pre-existing studies into door geometry and familiarity with many door configurations currently in use. Id. The Air Force stated that, "[a]lthough the door opening ratio for the Coulson design (approximately [DELETED]) meets the SOW requirement, it is different than the 10:1 limit in the SOW," and "[t]herefore, it is not logical that the Coulson design would be the basis of this requirement." Id. at 4. In addition, the Air Force stated that, based on several RFI responses received from other companies in 2012, "this design is not novel to Coulson's system." Id. Accordingly, the agency concluded that there was not any indication that the SOW requirement was based on Coulson's proprietary information. Id.

The Air Force further concluded that, "although the door opening ratio for the Coulson design (approximately [DELETED]) meets the SOW requirement, it is different than the 10:1 limit in the SOW." AR, Tab 52c, Air Force Investigation Summary, at 4. Accordingly, the agency concluded that "it is not logical that the Coulson design would be the basis of this requirement." Id. In addition, the agency also concluded, based on 2012 RFIs submitted by other companies, that "this design is not novel to Coulson's system." Id. Ultimately, the agency concluded: "There is no information that indicates Coulson IP was used in the development of this SOW requirement." Id.

We think that the protester fails to demonstrate how the agency's requirement for the door aspect ratio was based on Coulson's proprietary information. On this record, we find nothing unreasonable regarding the agency's investigation, and no basis to sustain the protest.

Next, Coulson challenges requirement 6.4.m of the SOW, regarding flow rate adjustment of the drop controller<sup>6</sup> which states: “The RDS shall adjust flow rate with ground speed and maintain the ground pattern performance identified in this SOW.” SOW at 20. Coulson argues that the SOW requirement to adjust the flow rate with ground speed is based on its design, which Coulson alleges provides for a stand-alone RDS GPS to vary flow rate based on GPS ground speed.

During the Air Force investigation, the Forest Service advised that, “[h]istorically the drop speed for airtankers has been an average of 125 KIAS,” and that “[t]he addition of adjusting flow rate as aircraft speed is adjusted is an efficiency and performance requirement.” AR, Tab 52e, Air Force Investigation Summary, at 4. In addition, the Air Force noted that the information provided by the Forest Service showed that the requirement to adjust flow rate based on airspeed was added due to a finding that “actual airdrop speeds were higher than qualification speeds.” Id. at 5. The Forest Service also explained that “[s]everal vendors have already integrated speed adjustment logic into their drop controllers.” Id. at 4. Based on this, the Air Force concluded that the capability to adjust flow rate for various airspeeds is not novel to Coulson’s system, and the agency concluded that there was no information that indicated that the SOW was based on Coulson’s proprietary information. Id. at 5.

In sum, on the record before us, we conclude that Coulson has not demonstrated that the solicitation improperly incorporated or disclosed its proprietary information.

#### Unduly Restrictive Maintenance Requirements

Finally, Coulson argues that the solicitation contains an equipment maintenance requirement that is unduly restrictive of competition. As discussed below, we do not find that the provision challenged by Coulson is unduly restrictive of competition or is otherwise objectionable.

Procuring agencies are required to specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to

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<sup>6</sup> Coulson also argues that requirement 6.4.d of the SOW, which requires that the “drop controller . . . include a selector that performs the programmed release information until the settings are manually changed,” is based on Coulson’s proprietary information. SOW at 18. The Air Force investigation reflects, however, that this same requirement was included in the Forest Service’s 2012 RFI. AR, Tab 52d, Air Force Investigation Summary, at 4; Tab 6, Forest Service RFI (Aug. 1, 2012), at 6 (“The drop controller shall include a selector that performs the programmed release information until the settings are manually changed.”). To the extent this information was publicly available, it is not proprietary information. See The November Grp., Inc., B-292483, Sept. 30, 2003, 2003 CPD ¶ 165 at 2.

the extent they are necessary to satisfy the agencies' legitimate needs (or as otherwise authorized by law). 10 U.S.C. § 2304(a). Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. Air USA, Inc., B-409236, Feb. 14, 2014, 2014 CPD ¶ 68 at 3. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. AAR Airlift Grp., Inc., B-409770, July 29, 2014, 2014 CPD ¶ 231 at 3. Additionally, where requirements relate to issues of human safety or national security, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Womack Mach. Supply Co., B-407990, May 3, 2013, 2013 CPD ¶ 117 at 3.

Coulson argues that the solicitation's requirement that offerors adopt a non-commercial maintenance and inspection program is unduly restrictive of competition because, the protester asserts, it results in substantial additional costs to the government and to the taxpayer, and a commercial maintenance and inspection program is sufficient to meet the agency's needs. The Air Force responds that the C-130 fire-fighting operations are significantly more demanding than commercial operations, and that increased severity leads to accelerated fatigue cracking of the aircraft structure, and specifically to the aircraft center and outer wings. CO Statement at 29. In this regard, the agency points to the loss of two C-130 aircraft during firefighting operations in 1994 and 2002, as examples of the danger involved. Id. The Air Force states, however, that it has "a vigorous inspection and maintenance plan that is necessary to ensure the airworthiness of the aircraft and the safety of the crew," and that the Air Force "has never lost a C-130 aircraft due to fatigue cracking induced by firefighting operations." Id. The agency further explains that "[t]he government has an obligation to ensure the safety of the aircraft and crew," and that "[p]revious C-130 firefighting mishaps demonstrate the severity associated with these operations." Id. at 30. Accordingly, the Air Force states that "[t]ypical commercial maintenance and inspection plans have proven insufficient to protect safety," and therefore, "the government's use of the proven . . . maintenance and inspection approach is a reasonably necessary and legitimate need." Id.

We find that the Air Force has articulated a reasonable, safety-related basis for including the non-commercial maintenance and inspection program requirement in the solicitation. In this regard, ensuring the safety of the aircraft and crew are reasonable objectives justifying the imposition of the requirement. Although Coulson argues that a commercial maintenance program would be sufficient to

address the agency's needs, we find that the protester's disagreement with the agency does not provide a basis to sustain the protest.

The protest is denied.

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