



Decision

Matter of: Simplex Aerospace

File: B-414566.2

Date: August 8, 2017

Mark D. Zimmerman for the protester.
Captain Justin D. Haselden, and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency.
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DIGEST

Protest that solicitation requirements favor a particular company and are unduly restrictive of competition is denied where the agency demonstrates that the requirements are reasonably necessary to meet the agency's needs.

DECISION

Simplex Aerospace, of Portland, Oregon, protests the terms of request for proposals (RFP) No. FA8504-17-R-0008, issued by the Department of the Air Force for the design, manufacture, and installation of a 3,500 gallon retardant delivery system (RDS) on seven HC-130H aircraft. The protester argues that the RFP contains terms that favor a particular company and are unduly restrictive of competition.

We deny the protest.

BACKGROUND

The U.S. Department of Agriculture, Forest Service (USFS), is responsible for protecting national forest lands from wildfires and, by agreement with other agencies, assists in protecting other jurisdictions as well. Contracting Officer's Statement (COS) at 2. In this capacity, the USFS uses air tankers to drop and build retardant lines to aid ground firefighters in controlling wildfires. Id. The National Defense Authorization Act (NDAA) for Fiscal Year 2014 directed the transfer of seven demilitarized United States Coast Guard HC-130H aircraft to the Air Force. Pub. L. No. 113-66, div. A, title X, subtitle I, § 1098, 127 Stat. 672, 881-882. (Dec. 26, 2013). The NDAA directed the Air Force to perform center and outer wing-box replacement modifications, programmed

depot-level maintenance, and modifications necessary to procure and integrate a gravity-drop aerial fire retardant dispersal system in each aircraft. Id. Following completion of the assigned tasks, the NDAA directed the Air Force to transfer the aircraft to the USFS for its use. Id.

On March 31, 2017, the Air Force issued the subject RFP seeking a contractor to design, engineer, develop, manufacture, and install a 3,500 gallon RDS for the HC-130H aircraft mentioned above. RFP at 1. The RFP establishes that the procurement will be conducted using Federal Acquisition Regulation (FAR) part 15 procedures, and contemplates the award of a contract with fixed-price, time-and-materials, and cost-reimbursable contract line items on a lowest-price, technically-acceptable basis. Memorandum of Law (MOL) at 2. The RFP established May 15 as the due date for the submission of proposals. Simplex filed this timely protest on May 8.

DISCUSSION

Simplex argues that the solicitation contains terms that are overly prescriptive and unduly restrictive of competition.¹ In this regard, Simplex's over-arching contention is that the agency's requirements are patterned after another company's product. Simplex also challenges specific requirements, arguing that the requirements do not reflect the agency's actual needs and that one particular requirement (discussed in greater detail below) imposes undue risk on offerors. Protest at 2. As discussed below, we find that none of the protester's arguments provides a basis to sustain the protest.²

The protester's primary contention is that the agency relied heavily on the features of a system designed by Coulson Aviation (USA), Inc., which previously held a contract for

¹ In its initial protest, Simplex also challenged certain features of the required tank design, and asserted that it was unnecessary for the agency to restrict access to the statement of work (SOW) to certified vendors under the Military Critical Technical Data Agreement. Protest at 4, 6. The agency provided a detailed response to Simplex's arguments in its agency report. MOL at 15-16. Simplex, however, did not meaningfully respond to the agency's arguments in its comments. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does not respond to the agency's position or provides a response that merely references or restates the original protest allegation without substantively rebutting the agency's position, we deem the initially-raised arguments abandoned. G. A. Braun, Inc., B-413735, Dec. 21, 2016, 2016 CPD ¶ 374 at 3-4.

² While we do not address every argument raised by the protester in this decision, we have considered all of the protester's arguments and conclude that none provide a basis to sustain the protest.

the requirements at issue here.³ Simplex contends that the agency simply parroted certain design features of Coulson's product in the subject RFP. Protest at 5. The protester's assertions that the agency favored Coulson's design, however, do not, on their own, give rise to a basis to sustain the protest.

As we have explained, in seeking full and open competition, an agency is not required to construct procurements in a manner that neutralizes the competitive advantages of some potential offerors. Staveley Instruments, Inc., B-259548.3, May 24, 1995, 95-1 CPD ¶ 256 at 3-4. A protest that a specification was "written around" design features of a competitor's product fails to provide a valid basis for protest where the record establishes that the specification is reasonably related to the agency's needs. Fisons Instruments, Inc., B-261371, July 18, 1995, 95-2 CPD ¶ 31 at 2. Here, the agency has provided a detailed rationale for the requirements challenged by the protester, and, as illustrated by the examples below, the record provides no basis to conclude that the specifications do not reflect the needs of the agency.

For example, Simplex challenges the solicitation requirement for a belly door solution with a door aspect ratio of at least 10:1.⁴ SOW at ¶ 6.3 (c). Simplex argues that a door with a 10:1 aspect ratio will not be sufficient to meet other requirements set forth in the solicitation, including grid pattern test requirements.⁵ Comments at 6. According to the agency, however, the requirements enhance the likelihood that the RDS solution will meet the grid testing requirements. COS at 15. The agency also contends that past experience has shown that "belly doors are the best option to ensure higher coverage while also maintaining control of the amount of retardant used," and notes that the 10:1 aspect ratio "maximizes the use of the cargo area without making [an] unnecessarily large modification to the aircraft structure." MOL at 13-14.

A contracting agency has the discretion to determine its needs and the best methods to accommodate them. Remote Diagnostic Techs., LLC, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3-4. When a specification or requirement is challenged 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. Nexagen Networks, Inc., B-411209.7, June 20, 2016, 2016 CPD ¶ 164 at 4. Our Office will examine the adequacy of the agency's justification for the allegedly restrictive provision to ensure that it is rational and can withstand logical scrutiny. Id. Here, the agency has provided its rationale for

³ This requirement had been awarded to Coulson Aviation (USA), Inc., on May 18, 2016, but that contract was terminated for the convenience of the government, effective March 30, 2017. MOL at 2.

⁴ The SOW defines the door's aspect ratio as "opening length compared to maximum opening width." SOW at ¶ 6.3 (c).

⁵ We note that, while Simplex speculates that this requirement mirrors Coulson's RDS system, Simplex provides no evidence in support of this assertion.

the requirement, and we have no basis to conclude that the requirement is unreasonable. While Simplex disagrees with the judgments made by the agency, such disagreement does not establish that the requirement is unreasonable, and the record provides no basis for us to conclude otherwise. Cryo Techs., B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 at 4.

By way of a second example, Simplex argues that the agency has an unreasonable requirement for the accuracy of gauges measuring the volume of retardant in the tanks. Comments at 6. The solicitation requires that the volume measurements be accurate to +/- 10 gallons, whether on the ground or in flight. SOW at ¶ 6.9. The protester contends that the required standard is “over specified for operational requirements and considerably more precise than current operational systems of a similar nature.” Protest at 5. According to Simplex, a requirement for measurements to be accurate to +/- 3 percent is “more operationally reasonable and will result in a better cost to value for the government.” Id.

In response, the agency explains that its requirement is necessary for accurate management and tracking of retardant release. COS at 16. Additionally, the agency provides explanations that highlight the need for accurate measurement of the volume of retardant in the tanks due to the fact that weight will vary based on the volume of retardant in the system. Id. In this regard, the agency asserts that weight variations are significant in the aviation context. Id.

Specifically, the agency explains that a gallon of retardant typically weighs 9.1 pounds. Id. Thus, the +/- 10 gallon standard required by the solicitation would allow for deviations of +/- 91 pounds. The +/- 3 percent standard proposed by the protester, however, would allow for deviations of 105 gallons, which would result in vastly larger weight deviations of +/- approximately 956 pounds.⁶ Id. This is another instance in which Simplex simply disagrees with the agency as to what its requirements should be. As noted above, an agency, not a potential contractor, is responsible for determining the agency’s needs. Here, in light of the rationale provided by the agency, we have no basis to conclude that the agency’s requirement is unreasonable.

In a final example, Simplex argues that the agency’s crash load factor is unreasonable because it exceeds current normal standards for a firefighting mission under Federal Aviation Administration (FAA) regulations. Protest at 5. In response, the agency notes that the aircraft will not be certified under FAA regulations, but will instead be self-certified by the USFS as airworthy under its own airworthiness certification process. COS at 13. According to the agency, the higher crash load requirements specified in the RFP are necessary to ensure the safety of the aircrew. Id. at 14. In this regard, the agency explains that firefighting missions are unique for a number of reasons, including the tendency to carry out missions at low airspeeds and altitudes. MOL at 13. The

⁶ Three percent of the total payload (3,500 gallons) is 105 gallons. COS at 16.

agency also cites to a prior incident where a C-130 crashed while performing a firefighting mission, resulting in lives lost. Id.

Where, as here, 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/or effectiveness. Nova Constructors, LLC, B-410761, Jan. 21, 2015, 2015 CPD ¶ 51 at 4. Accordingly, we have no basis to conclude that the agency's requirement is unreasonable.

Finally, the protester challenges the requirement that the contractor employ the original equipment manufacturer (OEM) as a subcontractor to, among other things, perform and/or review analyses substantiating the contractor's modification design, and validate that the analyses and processes used are appropriate, the results are accurate, and the design requirements set forth in the SOW are satisfied. SOW at ¶ 2.0. The parties do not disagree that OEM participation is necessary, but Simplex challenges the agency's approach to obtaining participation from the OEM.

Specifically, Simplex argues that the agency should obtain an agreement from the OEM to provide support to offerors during the proposal and post-award phases of the procurement. Protest at 3. In this regard, the protester contends that the OEM has refused its requests to participate in the pre-award phase, and asserts that the lack of participation has hindered Simplex's ability to properly evaluate schedule risk and/or limit the firm's liability.⁷ Id. In response, the agency contends that its decision to require that the awardee contract for OEM support, rather than serve as an integrator between the awardee and the OEM, is reasonable. MOL at 9. According to the Air Force, the agency is in a better position than Simplex to determine whether use of the agency's financial resources, rather than man-hour resources, is the most efficient method for fulfilling the OEM support requirement. Id.

As noted above, a contracting agency has the discretion to determine its needs and the best methods to accommodate them. Remote Diagnostic Techs., LLC, supra. Additionally, the mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. Fluor Fed. Sols., LLC, B-414223, Mar. 29, 2017, 2017 CPD ¶ 109 at 8. Risk is inherent in most types of contracts, especially fixed-price contracts, and firms must use their professional expertise and business judgment in

⁷ Additionally, Simplex notes that problems could arise should the OEM decline to team with the awardee. Comments at 4. The protester's contention here is speculative regarding an eventual awardee's ability to enter into an agreement with the OEM. Further, should such a situation arise, it would be a matter of contract administration not for consideration by our Office. See 4 C.F.R. § 21.5(a).

anticipating a variety of influences affecting performance costs. Id. Here, we have no basis to conclude that the agency's requirement for the awardee to contract with the OEM is unreasonable.

The protest is denied.

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General Counsel