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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Vertol Systems Company, Inc.

File: B-293644.6; B-293644.7; B-293644.8; B-293644.9; B-293644.10

Date: July 29, 2004

Lawrence J. Sklute, Esq., and Nolan Sklute, Esq., for the protester.
Capt. Peter G. Hartman, Department of the Army, and Clarence D. Long, III, Esq., Department of the Air Force, for the agencies.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of procurement of foreign threat systems aircraft under the Economy Act is denied where the Army and Air Force reasonably determined that protester's aircraft could not satisfy the agencies' requirements for demonstrated airworthiness.

DECISION

Vertol Systems Company, Inc. protests the actions of the United States Joint Forces Command (JFCOM) and the Air Force Special Operations Command (AFSOC) in acquiring foreign threat systems aircraft for use in military exercises. Vertol generally asserts that the agencies improperly procured these aircraft from the Threat Systems Management Office (TSMO), Department of the Army, or under an existing contract, in violation of the Competition in Contracting Act, 10 U.S.C. § 2304(a)(1)(A) (2000), and the Small Business Act, 15 U.S.C. § 644(a) (2000).

We deny the protests.

ACQUISITIONS FROM TSMO

Background

Vertol primarily focuses on the agencies' actions in acquiring foreign threat systems aircraft from TSMO--instead of allowing Vertol, a small business, to compete to

provide the required aircraft--for use in military exercises.[1] In this regard, TSMO controls a fleet of government-owned foreign ground and aviation systems, currently operated and maintained by Research Analysis & Maintenance, Inc. (RAM), which are used to provide realistic threats during training exercises and the testing of United States weapons systems.

On March 16, 2004, the Joint National Training Center, JFCOM, executed a determination and findings (D&F) pursuant to the Economy Act, 31 U.S.C. § 1535 (2000), in support of a military interdepartmental purchase request to TSMO for the provision of two Russian helicopters--a Russian Mi-17 transport helicopter and a Russian Mi-24D attack helicopter--with necessary maintenance and operational support, to support opposition forces in a joint training exercise to occur June 12-21, 2004. JFCOM anticipated that the helicopters would actively participate in day and night operations during the exercise, with the Mi-17 transport helicopter ferrying troops and the Mi-24D attack helicopter conducting air assault missions in close proximity to military and civilian personnel. JFCOM's D&F indicated that, before aircraft could be used in a military exercise, they must first be determined airworthy in accordance with military instructions and regulations. JFCOM's D&F further indicated that only TSMO could provide aircraft with the required airworthiness certification; according to the D&F, there were no commercial sources that could provide the required aircraft certified airworthy in accordance with applicable military instructions and regulations. Army D&F, Mar. 16, 2004; Memorandum, Joint Training Directorate, Mar. 19, 2004.

On April 27, 2004, the Air Force executed a D&F pursuant to the Economy Act in support of a military interdepartmental purchase request to TSMO for the provision of a Russian Mi-8 transport helicopter, flight crew, support and maintenance crew and instructor pilot to support the training of pilots and troops of the 6th Special Operations Squadron (6th SOS) through August 31, 2004. The contemplated training requirement included a need for night vision goggle capabilities. The Air Force determined that safety considerations required that only an aircraft with a standard air worthiness certificate from the Federal Aviation Administration (FAA), or the military equivalent certification to carry government employees, could be used. The D&F, and the agency's accompanying market research report, indicated that the agency had concluded, based on its market research, that no private source was qualified to provide aircraft with the required airworthiness certification and approved flight and ground operations. In this regard, while the Air Force was aware that Vertol owned an Mi-8 helicopter, the agency noted that FAA had only granted the aircraft a limited, "experimental" airworthiness certificate, which the Air Force viewed as insufficient to meet its safety concerns. In addition, the Air Force determined that it would not be possible for any private owner of an Mi-8 helicopter

[1] Foreign threat systems aircraft are aircraft that represent enemy aircraft during military exercises and the testing of United States weapons systems.

to obtain the appropriate airworthiness certificate from FAA or the military equivalent in time to meet the agency's immediate need for training forces engaged in the war on terror. According to the agency, an airworthiness assessment/certification by the military, specifically TSMO, could take 2-4 months, with any necessary modifications taking 2-8 months. The Air Force concluded that TSMO was the only source capable of providing an Mi-8 helicopter meeting the agency's needs. Air Force Market Research Report, Apr. 19, 2004; Air Force Mi-8 D&F, Apr. 27, 2004.[2]

Preaward Assessment

Vertol asserts that it is improper to require certification of airworthiness before award. According to the protester, while "[t]he agency has a legitimate need to require offerors to obtain [Army Regulation (AR)] 70-62 airworthiness certification for the proposed helicopters to ensure the airworthiness of the helicopters during contract performance," "the certification is not relevant prior to actual contract performance." Vertol Comments, June 21, 2004, at 58-59. Vertol maintains that its aircraft could be promptly certified airworthy by the military after award.

The Competition in Contracting Act of 1984 requires that agencies specify their needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 10 U.S.C. § 2305(a)(1)(A)(i) (2000). However, the determination of a contracting agency's minimum needs and the best method for accommodating them are matters primarily within the agency's discretion. Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 2, recon. denied, B-250389.2, June 21, 1993, 93-1 CPD ¶ 472. Where a requirement relates to national defense or human safety, as here, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest level of reliability and effectiveness. Caswell Int'l Corp., B-278103, Dec. 29, 1997, 98-1 CPD ¶ 6 at 2; Industrial Maint. Servs., Inc., B-261671 et al., Oct. 3, 1995, 95-2 CPD ¶ 157 at 2.

We think the agency has reasonably established a legitimate need for aircraft to be certified before award. Given the critical need to ensure the safety of government personnel, including both those on board the aircraft and those who will be in close proximity to the aircraft while in operation during the military exercises, we see no basis to object to a requirement that the airworthiness of a foreign, contractor-owned aircraft be demonstrated by means of a certification by competent aviation authorities. Thus, a foreign, contractor-owned aircraft cannot be used to meet the agency's needs until its airworthiness is demonstrated. While the record indicates that the length of time an airworthiness assessment may take depends to some

[2] In any case, Air Force determined that given the hourly rate Vertol has charged for use of its Mi-8 helicopter, it would be more economical to use TSMO's helicopter.

extent upon the particular circumstances of an aircraft--including its origin, maintenance and flight history, configuration and condition--the agencies report that a detailed airworthiness assessment by the military could take at least 2-4 months, and that any necessary modifications could take 2-8 months. In this regard, the Army notes that it previously took 136 days (and over 3,200 staff-hours) to complete an airworthiness review for an Mi-8 helicopter, even though the review was TSMO's top aviation priority and the aircraft had only accrued 12 hours, 29 minutes of operation since a major overhaul from a factory-authorized service center. Declaration of TSMO Operations Team Leader, June 8, 2004, at 2; Declaration of TSMO Operations Team Leader, Feb. 27, 2004; Declaration of the Commander, Army Aviation Technical Test Center, May 11, 2004, at 6 (TSMO estimate assumes an aircraft with "good pedigree," including good historical records, and only minor modifications); see Declaration of the Commander, Army Aviation Technical Test Center, June 8, 2004. Although Vertol asserts that the time required to assess the airworthiness of its aircraft will be substantially less, the record furnishes no persuasive evidence that the agencies' estimate of the time required for an airworthiness assessment of a foreign, contractor-owned aircraft to be used in military exercises was unreasonable. Given the potentially lengthy process involved in assessing airworthiness, and in view of the fact that there would be no guarantee of a positive assessment, we conclude that the agencies reasonably determined that an airworthiness certification was a necessary precondition to receiving award.[3] See Computer Maintenance Operations Servs., B-255530, Feb. 23, 1994, 94-1 CPD ¶ 170 at 2 (solicitation requirement for security clearances at time of award does not unduly restrict competition where contract performance will be impossible without clearances).

Moreover, Vertol's assertion that its aircraft can be certified after award is premised on its view that a military agency will be able to perform the assessment. However, Vertol's position ignores the fact that there is no military certification process available for the certification of the airworthiness of privately-owned foreign aircraft not under contract to the government. In this regard, the Army reports that TSMO is the only Department of Defense entity with the established policies, procedures, processes and authority to determine the airworthiness of aircraft such as the Russian aircraft in dispute here, and that TSMO's authority only extends to aircraft it owns or controls. Army Report, June 9, 2004, at 12-13; Declaration of TSMO Operations Team Leader, June 8, 2004, at 2. The Army further points out that it would be impracticable for TSMO to perform airworthiness assessments for aircraft not under its control, since a new airworthiness assessment would be necessary

[3] Furthermore, the agencies contemplate having to assume some risk of loss for aircraft they take under contract. Army Comments, June 30, 2004, at 10; Air Force Comments, Contracting Officer's Statement, June 5, 2004, at 4. We see nothing unreasonable in their refusal to accept liability for aircraft before knowing whether such aircraft are airworthy.

each time an approved aircraft passed out of the control of the military; according to the Army, TSMO lacks the specialized manpower to perform such numerous airworthiness assessments. We find no basis to object to the agencies' position.

We note that, while the agencies have no certification process available, they have indicated a willingness to consider airworthiness certifications from other competent aviation authorities. The Army has stated that it would accept a standard FAA airworthiness certificate, a limited certification that specifically allows the helicopter to participate in complex military exercises (including transporting troops and flying at night), or the Russian equivalent of an FAA standard airworthiness certificate. Army Comments, July 23, 2004; Army Comments, June 30, 2004, at 6, 12. Likewise, the Air Force has stated that it would accept a standard FAA airworthiness certificate or an airworthiness certificate issued by a country with which the FAA has a bilateral airworthiness agreement. In addition, the Air Force has indicated that it "may consider" accepting foreign civil airworthiness certificates from countries with which the FAA does not have a bilateral airworthiness agreement. Air Force Comments, July 1, 2004, at 3-4. Although Vertol asserts that a standard FAA airworthiness certificate is not available to foreign aircraft such as its helicopters, certification still could be available through the other means identified by the agencies. In any case, where, as here, a requirement reasonably reflects the agency's needs, the mere fact that a particular prospective offeror is unable or unwilling to compete does not establish that the requirement is unduly restrictive of competition. See Virginia Elec. and Power Co.; Baltimore Gas & Elec. Co., B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 134 at 15.

FAA Certification

Vertol asserts that, as an alternative to a standard FAA airworthiness certificate, the agencies should accept an experimental airworthiness certification by the FAA. In this regard, the record indicates that some, but not all, of Vertol's Russian aircraft have an experimental FAA airworthiness certificate. (The remainder appear to have no FAA airworthiness certificate.[4]) However, neither the Air Force nor the Army consider an experimental FAA airworthiness certificate to be a sufficient demonstration of airworthiness as to warrant participation in military exercises and training involving government personnel (including both those on board the aircraft

[4] As noted by the Army, FAA's on-line registry of aircraft currently indicates that only one of Vertol's Mi-24D helicopters has even an experimental FAA airworthiness certificate; the other four Mi-24D helicopters and the Mi-8 helicopter appearing under the registry listings for "Vertol Systems" have no FAA airworthiness certificate. FAA's on-line registry also includes a Vertol Systems listing of a Russian An-2 fixed-wing Russian aircraft, which does have an experimental FAA airworthiness certificate. Army Comments, May 14, 2004, at 2; Army Comments, June 9, 2004, at 6; see <http://registry.faa.gov/arquery.asp>.

and those who will be in close proximity to the aircraft while in operation during the military exercises), and flying at night as well as during the day.

We find no basis for objecting to the agencies' refusal to accept an experimental certificate. In response to our request for its views, FAA has supported the agencies' position regarding the limits of an experimental FAA airworthiness certificate. In this regard, FAA regulations generally provide that experimental airworthiness certificates are issued for the purposes of: (1) research and development; (2) conducting test flights and other operations to show compliance with the airworthiness regulations; (3) crew training; (4) exhibiting the aircraft's flight capabilities, performance, or unusual characteristics at air shows, motion picture, television, and similar productions; (5) air racing; (6) market surveys; (7) operating amateur-built aircraft; (8) operating kit-built aircraft; and (9) operating light-sport aircraft. 14 C.F.R. § 21.191 (2004). FAA has advised that using helicopters in a joint forces training exercise does not qualify as exhibition of the aircraft, the only operational purpose for which the Vertol Mi-24 helicopter with an experimental FAA airworthiness certificate had been certified, and that using the aircraft in this manner would violate the applicable regulation. In addition, FAA advises that accepting payment when the helicopter is used to transport troop personnel would amount to the carriage of persons for hire, an activity that is prohibited for aircraft issued only an experimental FAA airworthiness certificate. (In this regard, 14 C.F.R. § 91.319(a) provides that: "No person may operate an aircraft that has an experimental certificate--(1) For other than the purpose for which the certificate was issued; or (2) Carrying persons or property for compensation or hire.") Further, FAA states that operation of the helicopter at night would not be permitted until certain FAA regulatory instrumentation and equipment requirements had been met. Letter from FAA to GAO, Mar. 19, 2004.

Vertol notes that, contrary to the agencies' positions here, the record indicates that the Army and the Air Force have previously procured the use of contractor-owned foreign aircraft--including aircraft furnished by Vertol--possessing only an experimental FAA airworthiness certificate. Army Comments, June 30, 2004, at 3-4; Air Force Report, June 16, 2004, Contracting Officer Statement of Facts; Air Force Comments, July 1, 2004, at 2. In addition, it appears that the Department of the Navy may use contractor-owned foreign aircraft possessing only an experimental FAA airworthiness certificate. Army Comments, June 30, 2004, at 3-4, 7 n.14, Declaration of Director, Joint National Training Capability; Vertol Comments, June 21, 2004, at 6. However, the Army and Air Force explain that, until Vertol brought the matter to their attention, they had not fully understood and complied with the airworthiness certification requirements for foreign aircraft; they state that they will seek to ensure that the airworthiness certification requirements are met in the future. Army Comments, June 30, 2004, at 4; Air Force Comments, July 1, 2004, 2-3. In any case, each federal procurement stands alone; an agency's acceptance of an approach as acceptable under a prior procurement does not require the agency to find the same approach acceptable under the present procurement. See Career Quest, Inc., B-292865, B-292865.2, Dec. 10, 2003, 2004 CPD ¶ 4 at 5-6. We conclude that the fact

that the agencies may have been willing in the past to accept foreign, contractor-owned aircraft with only an experimental FAA airworthiness certificate, or that the Navy may still accept such aircraft, does not render unreasonable the agencies' determination here to require the highest levels of safety as evidenced by a standard FAA airworthiness certificate.

We find that the Army and Air Force reasonably determined that Vertol's aircraft, whether possessing an experimental FAA airworthiness certification or no FAA airworthiness certification at all, could not satisfy the agencies' requirements for demonstrated airworthiness. We thus conclude that nothing in Vertol's arguments furnishes a basis for objecting to the agencies proceeding under the Economy Act.

ACQUISITION UNDER EXISTING CONTRACT

Vertol also challenges the Air Force's acquisition of aircraft under the United States Special Operations Command's (USSOCOM) existing contract with L3 Communications Integrated Systems (L3Com). On April 1, 2003, USSOCOM awarded an indefinite-delivery/indefinite-quantity contract to L3Com to furnish logistics support, including logistics support services for aircraft, to special operations forces. On November 6, two task orders were issued to L3Com to provide 6th SOS with three aircraft, including one BT-67, one Russian An-32, and one Russian Mi-8/17 aircraft. On November 13, one task order was modified to replace the An-32 aircraft with a Russian An-26 aircraft. L3Com conducted a competition among potential subcontractors to meet the An-26 requirement and then issued a purchase order to Avia Leasing/SRX for an An-26.

On June 2, 2004, Vertol filed a protest with our Office challenging procurement of the An-26 from Avia. Asserting that it first learned the basis of its protest on May 31, Vertol argued that the order to Avia for the An-26 exceeded the scope of L3Com's contract and was an improper sole-source award. As discussed above, however, Vertol has made no showing that, if afforded the opportunity to satisfy the agency's need for an An-26 aircraft, it could furnish a suitable aircraft that meets the Air Force's reasonable requirements with respect to demonstrated airworthiness.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2000), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2004). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2. A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. Id. Since

Vertol is unable to meet the agencies' reasonable minimum needs, Vertol is not an interested party to protest the procurement of the An-26.[5]

The protests are denied.

Anthony H. Gamboa
General Counsel

[5] As noted by Vertol, although the An-26 being procured is listed in the FAA registry of aircraft, it has no FAA airworthiness certificate. However, according to the Air Force, the aircraft has a valid country-of-origin standard airworthiness certificate. In any case, reports the agency, the aircraft is grounded and will not be flown until questions regarding its airworthiness ars resolved. Air Force Comments, July 1, 2004, at 4; Air Force Comments, July 12, 2004; Air Force Comments, July 15, 2004.