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Decision

Matter of: Air USA, Inc.

File: B-409236

Date: February 14, 2014

Richard F. Busch II, Esq., Busch Law Firm, LLC, for the protester.
Richard McKee, Esq., Dustin Monokian, Esq., Patrick Vanderpool, Esq., Bridget Jarvis, Esq., and Thomas Fort, Esq., Department of the Navy, Naval Air Systems Command, for the agency.
Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation requirement that offeror must submit certain airworthiness data documentation at the time of proposal submission does not unduly restrict competition where the record shows that the requirement is reasonably related to the agency's needs.

DECISION

Air USA, Inc., of Quincy, Illinois, protests the terms of request for proposals (RFP) No. N00019-12-R-1001, issued by the Department of the Navy, Naval Air Systems Command for contracted air services. The protester alleges that the solicitation's requirement for airworthiness data documentation at the time of proposal submission is unduly restrictive of competition.

We deny the protest.

BACKGROUND

The Navy issued the RFP as an unrestricted solicitation on July 25, 2013, for the provision of contractor owned and operated aircraft for the training of shipboard and aircraft squadron weapon systems operators and aircrew on a wide variety of

airborne threat simulations. RFP, Performance Work Statement, at 4.¹ The RFP contemplates the award of an indefinite-delivery, indefinite-quantity contract for a base year and four 1-year options, to the offeror submitting the best value proposal based upon the evaluation of the following three factors, which are listed in descending order of importance: (1) technical, (2) past performance, and (3) price. RFP at 24-25, 99. The solicitation advises that the technical factor is more important than past performance, and that the non-price/cost factors, when combined, are significantly more important than price/cost. Id. at 99.

As initially issued, the solicitation's technical factor required offerors to submit Federal Aviation Administration (FAA) airworthiness certificates and airworthiness data documentation for all proposed aircraft. RFP at 72. The solicitation stated that the FAA certificates were considered a pass/fail pre-requisite; any offeror who failed to provide the FAA certificates would be eliminated from the competition. Id. at 96.

On Sept. 24, 2013, Air USA submitted an agency-level protest challenging the terms of the initial solicitation. Agency Report (AR), Tab N, Air USA Agency-Level Protest (Sept. 24, 2013). Specifically, Air USA alleged that the requirement to submit an FAA airworthiness certificate for every aircraft at the time of proposal submission was unduly restrictive of competition. Id. In response to Air USA's agency-level protest, the Navy stated that it would amend the solicitation to remove the FAA airworthiness certificate requirement at the time of proposal submission, and instead, require that the certificates be submitted within three days of final proposal revision submission. AR, Tab Q, Agency Response to Air USA Protest, at 1. Air USA did not protest, and the agency did not address, the solicitation's airworthiness data documentation requirement.

On October 11, the Navy issued RFP amendment No. 6, which revised the technical factor requirements and evaluation criteria. In this regard, the amendment states that offerors technical proposals will be evaluated in two phases. RFP amend. 6 (Oct. 11, 2013) at 37-38. The first phase will evaluate an offeror's technical factor, which encompassed five elements: (1) aircraft performance, (2) airworthiness data, (3) aircraft availability, (4) personnel resources, and (5) small business utilization strategy. Id. The second phase will require all offerors who remain in the competition to submit FAA airworthiness certificates for each aircraft proposed within three days of final proposal revision submission. Id. The amended RFP advises that if any offeror fails to submit the required certificates during the phase two evaluation, the proposal will be deemed unacceptable and ineligible for award. Id.

¹ Unless otherwise noted, all citations to the RFP are to the conformed copy provided by the agency, which incorporates all amendments.

On October 23, Air USA submitted a second agency-level protest challenging the terms of the amended solicitation. Air USA alleged that it was “factually and practically impossible” to provide airworthiness data prior to providing the FAA airworthiness certificates as required by the RFP. AR, Tab T, Air USA Second Agency-Level Protest, at 3. On November 5, the agency denied Air USA’s agency-level protest, concluding that the airworthiness data documentation was “necessary for proposal evaluation” and the documentation “is needed at time of proposal submission.” AR, Tab V, Agency Decision to Air USA Protest (Nov. 5, 2013), at 2. This protest followed.

DISCUSSION

Air USA challenges the terms of the amended solicitation, asserting that the requirement for airworthiness data documentation at the time of proposal submission is unduly restrictive of competition. According to the protester, the documentation is impossible to provide prior to proposal submission for any offeror other than the incumbent because the data “cannot be obtained until the acquisition of the aircraft is complete.” Protest at 9. For the reasons discussed below, we conclude that the requirement for airworthiness data documentation at the time of proposal submission is not unduly restrictive of competition.

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. See Streit USA Armoring, LLC, B-408584, Nov. 5, 2013, 2013 CPD ¶ 257 at 4. 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. SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7. Where, as here, the challenged requirement relates to national defense or human safety, we have held that 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. The determination of a contracting agency’s needs, including the selection of evaluation criteria, is primarily within the agency’s discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests. SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2.

As discussed above, the amended solicitation states that offerors were required to address five elements under the technical factor. RFP at 100. At issue here, the second technical element requires offerors to provide documentation relating to aircraft airworthiness for each aircraft proposed. The RFP states that offerors should provide the following airworthiness data documentation: (1) a parts life tracking process and status report, to identify all parts with original equipment

manufacturer (OEM)/military-defined life limits and plan for replacing the part; (2) a part overhaul tracking process and status report, to identify parts with OEM/military-defined time between overhaul and plan for overhauling/reworking the parts; (3) a scheduled inspections process and status report, to demonstrate a comprehensive scheduled inspection plan for each aircraft; (4) an aircraft modifications status report, to provide the date each aircraft was retired from military use and demonstrate airworthiness of each aircraft modifications; (5) a maintenance history report, to account for the timeframe from manufacture to proposal submission that aircraft has been properly maintained; and (6) a fatigue life status report, to demonstrate all proposed aircraft have the remaining fatigue life to allow safe operation throughout contract performance, based upon projected usage rates. Id. at 82-83. The solicitation states that all airworthiness data documentation was required at the time of proposal submission. Id. at 79.

As relevant here, the solicitation states that the agency's airworthiness data evaluation will assess an offeror's "ability to meet the current and continued airworthiness requirements by evaluating the plan and supporting data used to maintain airworthiness." RFP at 101. In this regard each offeror's airworthiness documentation will be reviewed to determine whether the offeror demonstrates: the maintenance history of each aircraft; tracking of parts/components with defined limits; a supply strategy to replace parts or to overhaul/rework parts; the structural fatigue life limit remaining for each aircraft; the maintenance plan and scheduled inspection plan; and support for aircraft modifications. Id.

Air USA primarily argues that the requirement to submit airworthiness data documentation is unduly restrictive of competition because it is impossible for any offeror, other than the incumbent, to obtain and submit such data by the time of proposal submission. In this regard, the protester alleges that airworthiness data, such as log books and maintenance data, cannot be obtained prior to the purchase of an aircraft since a seller "will not supply [l]og [b]ooks or maintenance data" in advance of completion of the sale. Protest at 7.

In response to the protester's allegations, the Navy first asserts that Air USA's difficulty providing the airworthiness data documentation is not due to the terms of the solicitation. Rather, the agency states that Air USA could not fulfill the requirement because the protester chose to purchase the aircraft it proposed, which was not a requirement of the solicitation. Indeed, prior to the submission of proposals, the Navy clarified to all offerors that aircraft may be "owned, subcontracted, and leased," which put offerors on notice that purchasing the aircraft was only one of the many approaches available. AR at 36; Tab M, Solicitation Question and Answers (Aug. 14, 2013). Additionally, the agency notes that [DELETED] offerors submitted proposals in response to the solicitation that provided the required airworthiness data--who were not the incumbent contractor. AR at 20.

The agency also argues that its requirement for offerors to present certain airworthiness data documentation at the time of proposal submission is necessary to ensure military and civilian personnel safety during the performance of the contracted air services effort. In this regard, the Navy explains that a Department of Defense directive requires, “[a]ll aircraft and air systems owned, leased, operated, used, designed, or modified by DoD must have completed an airworthiness assessment in accordance with Military Department policy.” AR at 3; citing DoDD 5030.61 (May 24, 2013), Policy, at 1. The Navy states that it requires the airworthiness data documentation at the time of proposal submission to ensure that the technical evaluators have sufficient time to perform a thorough evaluation as part of the mandated overall airworthiness assessment. For example, each aircraft’s modification status report must be evaluated to assess the safety of modifications made after the aircraft’s retirement from military service to ensure all modifications are supported by appropriate engineering analysis and documentation, and to evaluate the risk that a modification to the aircraft was improperly installed. AR at 29-30.

Finally, the Navy contends that unlike the FAA airworthiness certificates, which require only a validation that the offeror possess the certificates, the evaluation of the airworthiness data documentation requires a time intensive review process. For example, each aircraft’s maintenance history documents must be evaluated for the entire life of the aircraft to determine if there are lapses in the aircraft’s maintenance; based upon this information, the evaluators must assess the risk that an aircraft may be unsafe for flight, due to prior negligent or improper maintenance. Id. at 25. In addition, the evaluators must also assess the risk of part failure based upon an offeror’s documentation of its parts replacement plan to avoid the risk of part failure on the aircraft when in flight. Id. at 26. Thus, the agency asserts that the evaluation of the airworthiness data documentation is not simply a check-the-box validation; rather, it requires a comprehensive evaluation and risk assessment. Id. at 24

Based on this record, we think the agency has reasonably established a legitimate need for airworthiness data documentation at the time of proposal submission. Given the critical need to ensure the safety of government and civilian 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 find that the agency’s interest in evaluating each aircraft’s airworthiness data through a thorough assessment of the documentation provided at the time of proposal submission is reasonable to achieve the highest level of reliability and effectiveness.

Moreover, the Navy does not need to delay the procurement simply to accommodate Air USA’s choice of technical approach. See JBG/Naylor Station I, LLC, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 4 (fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency’s needs.) Indeed, as

the agency asserts, Air USA's technical approach appears to be the reason why this information was not readily available to them at the time of proposal submission. While the protester asserts that the agency's legitimate need for airworthiness data is not relevant at the time of proposal submission because the data would be out of date by the time of award, our Office will not question an agency's determination of its minimum needs--or the best method to meet them--unless there is a clear showing that the determination has no reasonable basis. Mid-South Dredging Co., B-256219, B-256219.2, May 25, 1994, 94-1 CPD ¶ 324 at 5. We find that the agency has reasonably identified a need to thoroughly evaluate an offeror's ability to meet the current and continued airworthiness requirements.

The protest is denied.

Susan A. Poling
General Counsel