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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Government Contract Services Company

File: B-294367

Date: October 25, 2004

David K. Eary for the protester.
James P. Flynn for Aviation Enterprises, Inc., an intervenor.
Joni M. Gibson, Esq., Department of Justice, United States Marshals Service, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that amendment's alleged relaxation of requirements requires cancellation of solicitation is denied where amendment does not substantially alter solicitation terms.

DECISION

Government Contract Services Company (GCS) protests an alleged relaxation of requirements under request for proposals (RFP) No. MS-04-R-0005, issued as a small business set-aside by the Department of Justice, United States Marshals Service (USMS), for the procurement of leased aircraft and associated aircraft maintenance services. GCS contends that it did not compete under the RFP because it believed certain solicitation requirements were too stringent for it to participate in the procurement. GCS alleges that because amendment No. 4 to the RFP relaxed these terms after the closing time for the receipt of proposals, the solicitation must be cancelled and the requirement resolicited to allow GCS an opportunity to compete under the amended terms.

We deny the protest.

The RFP, issued on January 9, 2004, pursuant to the streamlined procedures of Federal Acquisition Regulation (FAR) part 12 for the acquisition of commercial items, contemplated contract awards for a base year and 2 option years for the lease of large passenger aircraft (and associated maintenance services) to move prisoners and illegal aliens for the Bureau of Prisons, the USMS, and the Bureau of

Immigration and Customs Enforcement. Three contracts were anticipated; each contractor was to provide two aircraft at one of the following three sites: Oklahoma City, Oklahoma; Mesa, Arizona; and Alexandria, Louisiana.

The RFP set out three evaluation factors for award: maintenance capability (to include identification of the intended maintenance approach and submission of Federal Aviation Administration certification for the approach); past performance; and price. Maintenance capability was to be evaluated on a pass/fail basis; prospective offerors were advised that failure to pass this factor would render an offeror ineligible for award. Equal weight was to be assigned to past performance and price to determine which offer presented the "best value" to the agency. RFP § V. Contract award would not become final, however, until the apparent awardees' aircraft passed an inspection verifying compliance with RFP requirements. RFP § V, ¶ 7. The RFP advised that offerors would not be given an opportunity to cure deficiencies found during the award inspection; rather, award would be made to the offeror next in line for award. Id.

Four amendments to the RFP were issued by the agency. Amendment No. 1, issued on February 9, provided clarifications to specifications and a February 26 closing time for the receipt of proposals. Three offerors submitted proposals by that time. GCS did not submit a proposal.[1] The agency reports that after a review of the firms' initial proposals under the maintenance capability factor, it concluded that an amendment to the RFP should be issued to clarify the pass/fail evaluation basis for the factor. Amendment No. 2, issued on March 3, retained the pass/fail terms of the RFP, but deleted the phrase: "[o]fferors failing to pass the evaluation of the maintenance capability will not be further evaluated or considered for award." Amend. 2, Mar. 3, 2004. The agency apparently perceived a need for the amendment to clarify that it intended to consider proposal revisions in evaluating the proposals under this criterion, after it noticed that the firms' initial proposals failed to contain sufficient maintenance certification documentation.[2] Amendment No. 3, issued on

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[1] The agency reports that the protester neither submitted questions about the solicitation nor expressed any interest in the solicitation until it filed the current protest 5 months after the closing time; by that time, the agency had already awarded two of the anticipated three contracts.

[2] In its comments responding to the agency report, GCS suggests for the first time that amendment No. 2 substantially changed the terms of the competition. The allegation is untimely, since, not only was it first raised several months after the challenged amendment was published and the next closing time passed, the protester also does not show why it should not have known of the basis for the challenge when it initially filed its protest (of amendment No. 4) with our Office. 4 C.F.R. § 21.2(a)(1), (2) (2004). In any event, our review of the solicitation confirms that the amendment had no material effect on the terms of the evaluation, since nothing in the RFP prevented the agency from doing what GCS contends amendment

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April 2, advised offerors that discussions had been concluded and final revised proposals were due by April 9.

Two apparent awardees were selected by the agency. The awards were delayed for several months, however, to allow for the resolution of size status challenges that had been filed against the firms. The agency ultimately withdrew its notice of award for the Louisiana site due to a determination by the Small Business Administration that the apparent awardee was other than a small business. The agency was unable to award to either of the other acceptable offerors for that site, since the aircraft previously identified by the firms were no longer available. Discussions were reopened to allow the offerors to propose alternate aircraft. Amendment No. 4, issued on July 20, requested second final revised proposals for the Louisiana site.

The protester contends that amendment No. 4 substantially relaxes stringent requirements that had kept the firm from competing under the RFP. Specifically, the firm contends that while it interpreted the RFP to require a "lock in" of particular aircraft at the time of initial proposals, amendment No. 4 allowed offerors to provide different aircraft than had been identified in their initial proposals; GCS also contends that the amendment relaxes the RFP prohibition against curing deficiencies identified during inspection.[3] In this regard, GCS explains that the

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No. 4 allows--i.e., for the agency to continue its evaluation to make a final determination of the offerors' maintenance capability after reviewing revised proposals, rather than at an earlier point in the evaluation process.

[3] GCS also contends that it believes the agency substantially relaxed the RFP's inspection terms regarding the review of aircraft documentation. In this regard, GCS, which is not represented by an attorney admitted to a protective order, and thus has not had access to the source selection sensitive evaluation record, generally alleges that not all of the records listed in an award inspection worksheet were reviewed by the evaluators at the time of the award inspections. The agency responds, however, and our review confirms, that the worksheet advises that not all of the documents listed are specifically required by the RFP. Additionally, the agency points out, the RFP's statement of work allowed offerors to provide substantial documentation after award at the time of delivery of the aircraft at the operational site. In this regard, to the extent the RFP sets out opposing documentation deadlines, it is, at most, ambiguous, a matter that would have had to been protested prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(a)(1). In any event, the agency reports that all required aircraft documentation has been inspected; the agency also points out that despite its identification of the documentation reviewed, GCS has not shown that additional documentation was required for an offeror to pass the award inspection, or that a particular offeror's lack of certain documentation must be considered a deficiency under the RFP. Consequently, we have no basis to consider this allegation further.

reason it believed such a "lock in" requirement was too stringent is because, "[i]n the aircraft leasing world, three months is a long time and [aircraft] availability will often change within even shorter time periods." Protest at 3. Reopening the competition to allow alternative aircraft from the otherwise acceptable offerors, according to GCS, relaxes the "lock in" commitment requirement it believed it had to meet. GCS essentially contends that, since the initial aircraft identified by both offerors were unavailable for award, an evaluation deficiency of some sort should have been noted for each offeror, without any opportunity to cure it, and that the agency must cancel the RFP rather than allow the competition to continue under amendment No. 4.[4]

Under FAR § 15.206(e), where a contracting officer determines that an amendment to a solicitation requirement after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the solicitation must be canceled and all interested firms given an opportunity to respond to the changed requirement. See The New Jersey & H St. Ltd. P'ship, B-288026, B-288026.2, July 17, 2001, 2001 CPD ¶ 125 at 3-4. Our review of the record confirms that the challenged amendment falls outside of this provision as it is neither substantial nor beyond that which prospective offerors reasonably could have anticipated.

As an initial matter, we find unreasonable GCS's interpretation that the RFP required offerors to "lock in" particular aircraft at the time of initial proposals. GCS has not identified, nor has our review of the solicitation revealed, any "lock in" commitment provision that prohibits substitution of acceptable aircraft during the procurement. While GCS points out that offerors were initially asked to identify aircraft they

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[4] GCS also contends that the agency relaxed the RFP's inspection requirements by allowing one offeror to borrow parts from its inspected aircraft for use in its other aircraft for that aircraft's award inspection. As the agency points out, however, routine maintenance, to include the replacement of the parts in question, was contemplated by the agency for all aircraft after the award inspection until (and after) the time of award; the agency reports therefore that the removal of the parts, which the agency describes as minor parts, is not a major alteration to the aircraft or a violation of the RFP's terms. Rather, the agency explains that the parts were borrowed from the already inspected aircraft, in accordance with customary industry practices, merely because new parts, which had been timely ordered, had not yet been delivered to the offeror in time for the scheduled testing of its other aircraft. The minor nature of the parts in question is further illustrated by the agency's explanation that the technical specifications and aircraft airworthiness were not affected; the parts will be replaced as part of routine maintenance procedures; and inspection without the parts in question would not necessarily have resulted in an inspection deficiency. The allegation thus provides no basis for us to question the propriety of the agency's actions.

intended to provide, the firm fails to cite any restriction against alternate aircraft being provided for the award inspection and for performance of the contract after an award inspection. As stated above, the RFP's evaluation factors for award did not include a "lock in" or even a technical review of proposed aircraft prior to the agency's selection of the apparent awardees. As for the award inspection for aircraft to be provided for contract performance, our review of the RFP also confirms that the essence of the inspection is to confirm compliance with RFP technical requirements, and simply does not include consideration of whether the aircraft is the same as that identified in the firm's initial proposal.

We also find unpersuasive GCS's contention that the challenged amendment's reopening of the competition, to allow offerors to provide prices for alternative aircraft different from those initially identified by the offerors under the RFP, is so substantial that prospective offerors could not have anticipated it. As stated above, GSC itself concedes that the unavailability of aircraft at the time of award should have been anticipated by prospective offerors, as it was anticipated by GCS, due to the expected passage of time between initial proposal submission and the award of the contracts. In fact, all parties to the protest agree with GCS that the ultimate availability of any aircraft is uncertain in the aircraft leasing industry, even after the passage of just a few months. Accordingly, we believe prospective offerors reasonably could have anticipated that any delay in the procurement (as was experienced here due to the time involved in the resolution of size status challenges) might reasonably necessitate the issuance of an amendment (here, amendment No. 4) to allow revised proposals for alternate aircraft when all of the acceptable offerors' previously identified aircraft became unavailable due to the delay.[5] Since the protester has not demonstrated that the challenged amendment was so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, we see no support in this record for GCS's allegations of impropriety or contention that cancellation of the RFP is warranted here.

The protest is denied.

Anthony H. Gamboa
General Counsel

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[5] In light of our decision above, concluding that amendment No. 4's continuation of competition among the remaining acceptable offerors is unobjectionable, we need not consider GCS's alternative contention that the amendment improperly limits competition to only two offerors.