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Decision

Matter of: Air Center Helicopters, Inc.

File: B-412789; B-412789.3; B-412790; B-412790.3

Date: June 2, 2016

Sharon L. Larkin, Esq., and Nicholas Petts, Esq., Steptoe & Johnson LLP, for the protester.

David M. Nadler, Esq., and Stephanie Zechmann, Esq., Blank Rome LLP, for Erickson Incorporated, the intervenor.

Cynthia R. Martin, Esq., and Jeffrey Davenport, Esq., Department of the Navy, for the agency.

K. Nicole Willems, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency's interpretation of a solicitation requirement was unreasonable is denied where the solicitation, when read as a whole and in a manner giving effect to all of its provisions, supports a finding that the agency's interpretation was reasonable.

2. Protest that agency improperly waived a solicitation requirement that proposals include proof of ownership or a binding agreement to purchase or charter proposed aircraft if awarded the contract is denied where the agency reasonably determined that both offerors had complied with the requirement by demonstrating the capability to enter into leases.

DECISION

Air Center Helicopters, Inc. (ACHI), of Burleson, Texas, protests the award of contracts to Erickson Inc., of McMinnville, Oregon, under request for proposals (RFP) No. N62387-15-R-8008 (-8008) and RFP No. N62387-15-R-8009 (-8009), issued by the Department of the Navy, Military Sealift Command, for ship-based and/or shore-based vertical replenishment services. ACHI argues that the agency should have found Erickson's proposal unacceptable because Erickson's proposed heavy-lift helicopter was not listed on the company's operations specifications (OpSpec) at the time proposals were submitted. ACHI also argues that the agency

should have rejected Erickson's proposal because it failed to include a binding agreement for the procurement of its proposed heavy-lift aircraft.

We deny the protest.

BACKGROUND

The agency issued the RFPs on April 9, 2015, seeking detachments (each consisting of two commercial aviation helicopters, five pilots, and three maintenance personnel), to provide ship-based and/or shore-based vertical replenishment services.¹ RFPs § C-2.1. Each RFP provided for award on a lowest-priced, technically-acceptable basis for a one-year base period with four one-year option periods. Proposals were to be evaluated based on the following factors: (1) technical; (2) past performance; and (3) price. RFPs § M-2. Both solicitations sought medium-lift helicopters for the base year, transitioning to heavy-lift helicopters in later years; the heavy-lift helicopters could be sought as early as the first option period for RFP-8008, and the second option period for RFP-8009.² AR at 2.

Under the technical factor, the RFPs established that proposals would be evaluated to determine whether offerors met the minimum aircraft equipment specifications and capability requirements, minimum certification requirements, and contract performance plan requirements. RFPs, at § M-2.2. The RFPs also established that proposals would be evaluated to determine whether offerors complied with the solicitation requirements. RFPs, at § M-2.5. This included compliance with all of the instructions, conditions, and notices to offerors, as well as all stated terms, conditions, representations, certifications, and other information required by section L of the RFPs.³ Id.

Section L-3.2.1 identified a list of certifications and relevant documentation that an offeror was required to provide "showing that it meets the requirements" of sections C-2.8, C-3.3, C-4.4, and C-4.5. RFPs, at § L-3.2.1. These requirements applied to both medium-lift and heavy-lift helicopters proposed by the offerors. Id. At issue in this protest are requirements related to (1) contractor-specific OpSpecs,

¹ The agency intends to deploy the detachments worldwide for an extensive period of time and assign them to Combat Logistics Force ships to meet the operational requirements of the Navy's 5th and 7th fleets. AR at 1.

² The agency has represented that the two RFPs are identical except for the option year in which the heavy-lift helicopters might first be required. AR at 1.

³ The RFPs also provided that the agency could waive informalities and minor irregularities. RFPs, at § M-2.5.

and (2) proof of ownership or a binding agreement to purchase/charter the aircraft if awarded the contract.

As relevant to the first requirement above, section L-3.2.1 required each offeror to provide its Federal Aviation Administration (FAA) approved rotorcraft flight manual and contractor-specific OpSpec showing that proposed aircraft were authorized to conduct operations under 14 CFR part 135 and certified for and fully capable of operating in instrument meteorological conditions per sections C-2.8, C-3.3 and C-11.2.6. RFPs, at § L-3.2.1(i). In this regard, section C-2.8 provided that the contractor's FAA approved OpSpec was required to authorize the class and type of helicopter to operate under instrument flight rules, and under the conditions of flight and geographic regions required under the contract.⁴ RFPs § C-2.8. Section C-3.3 established a requirement for the contractor to maintain certain certifications and documentation, including the contractor's FAA issued OpSpec, throughout the entire contract performance period, without interruption, and to provide updates and renewals when applicable. RFPs § C-3.3. Finally, section C-11.2.6 established that a contractor was required to provide copies of certain items, including the contractor's FAA issued OpSpec, when requested by the Contracting Officer or his/her designee, or when revisions were made. RFPs § C-11.2.6.

With regard to requirements related to proof of ownership or a binding agreement to purchase or charter aircraft used in performance of the solicitation requirements, section L-3.2.1 required each offeror to provide "[p]roof of ownership by the [o]fferor and FAA Standard Airworthiness Certificate, FAA Form 8100-2, for each proposed aircraft, or a binding agreement to purchase/charter the aircraft if awarded the contract per [s]ections C-3.3 and C-11.2.6." RFPs, at § L-3.2.1(c).

The agency received four proposals in response to each solicitation, including one from Erickson, two from ACHI, and one from a third offeror. After reviewing the proposals, the agency established a competitive range that included all four.⁵ Agency Report (AR) at 2. The agency issued separate written discussion items to the offerors under each RFP, and, subsequently, all offerors submitted revised final proposals. Id. The agency evaluated revised final proposals and found that all the proposals were technically acceptable. Id. This table shows the results of the evaluation of proposals under solicitation -8008:

⁴ The section also advised that the contractor was required to operate in accordance with its FAA approved OpSpec and General Operations Manual at all times. Id.

⁵ ACHI submitted two proposals in response to each solicitation (-8008 and -8009). In its first proposal (submission one), ACHI proposed to use the [DELETED] helicopter for heavy-lift. AR, Tab 3, at 20-32. In its second proposal (submission two), ACHI proposed to use the [DELETED] helicopter for heavy-lift, which is the same heavy-lift helicopter proposed by Erickson. AR, Tab 3, at 49-51.

Offeror	Technical Rating	Past Performance	Price
Erickson	Acceptable	Acceptable	\$36,634,581
ACHI (submission one)	Acceptable	Acceptable	\$55,028,722
ACHI (submission two)	Acceptable	Acceptable	\$50,152,895
Offeror 3	Acceptable	Acceptable	\$60,301,046

AR, Tab K, Price Evaluation Report at 14.

This table shows the results of the evaluation of proposals under solicitation -8009:

Offeror	Technical Rating	Past Performance	Price
Erickson	Acceptable	Acceptable	\$32,550,667
ACHI (submission one)	Acceptable	Acceptable	\$40,837,235
ACHI (submission two)	Acceptable	Acceptable	\$50,490,307
Offeror 3	Acceptable	Acceptable	\$59,383,184

AR, Tab M, Source Selection Decision, at 5; Protest at 8.

On February 12, the agency notified the protester that it had made award to Erickson, the lowest-priced, technically-acceptable offeror under each solicitation. The agency provided a debriefing to ACHI on February 22. Protest at 2. This protest followed on February 26.

DISCUSSION

The protester contends that the agency should have found Erickson's proposal technically unacceptable because Erickson did not have its proposed heavy-lift helicopter on its OpSpec at the time it submitted its proposal. ACHI further argues that Erickson's proposal was unacceptable because Erickson failed to provide documentation of a binding agreement to purchase/charter the aircraft if awarded the contract.⁶

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accordance with the terms of the solicitation. The protester's disagreement with the agency's judgment, without more, does not establish that an evaluation was unreasonable. Geo-Seis Helicopters,

⁶ The two arguments are related because an aircraft operator must own or possess a current lease of the aircraft for the FAA to add the aircraft to its OpSpec. Supp. AR, Attachment 3, Declaration of Cmdr. Petras, at 1.

Inc., B-294543, Nov. 22, 2004, 2004 CPD ¶ 237 at 2. Here, the record provides no basis to conclude that the agency's evaluation was improper.

OpSpec

ACHI contends that offerors were required to have all of their proposed aircraft on their OpSpecs at the time of proposal submission, and argues that Erickson's proposal should have been found unacceptable because its heavy-lift helicopters were not listed on its OpSpec. In response, the agency argues that it would have been unreasonable to expect offerors to have the heavy-lift helicopters on their OpSpecs at the time of proposal submission because the agency would not be in a position to exercise the option requiring heavy-lift helicopters until one or two years after the base period, if at all. Supp. AR, at 6. According to the agency, such a requirement would exceed the agency's requirements. Id. Where, as here, a dispute exists as to the actual meaning of an RFP provision, we will read the RFP as a whole and in a manner giving effect to all of its provisions in determining which interpretation is reasonable. SRA International, Inc., B-408624, B-408624.2, Nov. 25, 2013, 2013 CPD ¶ 275 at 7-8. Based on our review of the RFPs and of the record, we find no basis to conclude that the agency's interpretation of the solicitations, and its evaluation of proposals in this regard, was unreasonable.

As noted above, § L-3.2.1(i) required each offeror to furnish, among other documentation, a contractor-specific OpSpec showing that proposed aircraft are authorized to conduct operations under 14 CFR part 135 and certified for and fully capable of operating in instrument meteorological conditions per sections C-2.8, C-3.3 and C-11.2.6. For the FAA to add an aircraft to an aircraft operator's OpSpec, the operator must own or possess a current lease for the aircraft, Supp. AR, Attachment 3, Declaration of Cmdr. Petras, at 1-2, and the solicitation here provided for the possibility that an offeror might not own or possess an aircraft at the time of proposal submission by allowing offerors to provide proof of a binding agreement to purchase/charter aircraft if awarded the contract. RFPs, at § L-3.2.1. Consistent with that possibility, the solicitation allows a contractor to revise and update its OpSpec throughout the performance period. We think that when these sections are read together, it is clear that the agency did not intend to require that all proposed aircraft be listed on the offeror's OpSpec at the time of proposal submission, but rather intended to allow offerors to enter into leases for aircraft, and to update their OpSpecs to add the leased aircraft to their listing of authorized aircraft, after award.⁷

⁷ We also note that the OpSpec furnished by the protester listed only one of the [DELETED] helicopters that it proposed in its submission one, and none of the [DELETED] helicopters proposed in its submission two. Thus, it appears that the protester, like Erickson, anticipated that it would be permitted to update its OpSpec to add the proposed aircraft after contract award.

Binding Obligation

ACHI also argues that Erickson should have been found technically unacceptable because it did not meet the requirement to provide proof of ownership or a binding agreement to purchase/charter aircraft if awarded the contract. In this regard, both Erickson and ACHI proposed to enter into leases to satisfy the requirements for heavy-lift helicopters if they were awarded the contracts. ACHI, however, contends that it provided detailed lease agreements for the four [DELETED] aircraft that it proposed in submission one, while Erickson only provided “speculative and futuristic agreements” regarding its proposed [DELETED] heavy-lift helicopters. Comments on AR, at 5. In response, the agency argues, and the record reflects, that the agreements provided by ACHI in both of its proposals fall short of the “detailed lease agreements” it claims to have provided, and, similar to what was provided by Erickson, provide nothing more than evidence of ACHI’s capability to lease heavy-lift helicopters from another company in the future. Supp. AR, at 4.

According to the agency, both parties provided information that was sufficient to satisfy the evaluators, despite the fact that they did not provide what might generally be considered “binding agreements.” In this regard, the agency argues that the solicitation only required a showing that an offeror would be able to meet the requirements in sections C-3.3 and C-11.2.6. Supp. AR, at 2. The agency also contends that the term “binding agreement,” when used in the aviation industry, and in the context of contracting for aviation detachment services, is understood to require evidence of capability to enter into a binding agreement before performance.⁸ Supp. AR, Attachment 3, Declaration of Cmdr. Petras, at 1.

As discussed above, where, as here, a dispute exists as to the actual meaning of an RFP provision, we will read the RFP as a whole and in a manner giving effect to all of its provisions in determining which interpretation is reasonable. SRA International, Inc., supra. In this instance, it is clear that the agency did not require offerors to have ownership or be in possession of the aircraft proposed at the time of proposal submission, such that something less than an actual lease agreement could satisfy the solicitation submission requirements. As discussed above, such an understanding is consistent with the requirements related to OpSpecs, which allowed for updates and revisions. Because the agency was looking for information other than proof of ownership or a fully executed lease agreement, it was not unreasonable for the agency to find that information related to potential future leases or purchases of proposed aircraft was sufficient. Moreover, even assuming for the sake of argument that the agency’s finding in this regard could be considered

⁸ The agency explains in the connection that the aviation industry is “notoriously competitive,” with low profit margins, and that a company cannot afford to lease an aircraft before the aircraft’s relevant performance period begins. Id.

a waiver of a requirement, the agency effectively waived the requirement for both the protester and awardee; as a result, there is no basis for our Office to find that the protester was prejudiced by the agency's action. Geo-Seis Helicopters, Inc., supra, at 3 (no prejudice shown where agency found letter of intent to purchase a helicopter acceptable and neither vendor provided proof of ownership or binding purchase agreement as required). Competitive prejudice is an essential element of every viable protest, and we will not sustain a protest where a record does not establish prejudice. Id.

The protest is denied.

Susan A. Poling
General Counsel