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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: USA Jet Airlines, Inc.; Active Aero Group, Inc.

File: B-404666

Date: April 1, 2011

Carolyn Callaway, Esq., for the protesters.

Charmaine A. Howson, Esq., H. Jack Shearer, Esq., Joseph A. Lenhard, Esq., and Anh T. Nguyen, Esq., Department of Energy, for the agency.

Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency requirement that offerors present evidence of certification under certain industry quality standards (specifically ISO 9001, ISO 9100, or AS 9110) at the time of proposal submission, rather than at the time of award or performance, is sustained where requirement exceeds agency's reasonable needs.
 2. Protest that solicitation for aircraft maintenance services is ambiguous because agency has not provided service manuals or other more specific information about services that will be required is denied where solicitation provided sufficient information about the aircraft (most of which have not been purchased) to allow offerors to prepare proposals, and for agency to assess offeror understanding in evaluating those proposals.
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DECISION

USA Jet Airlines, Inc. (USA Jet), of Belleville, Michigan, and Active Aero Group, Inc. (AAG), also of Belleville, protest the terms of request for proposals (RFP) No. DE-SOL-0001781, issued by the Department of Energy (DOE), National Nuclear Security Administration (NNSA), for aircraft support and maintenance services. USA Jet argues that the solicitation fails to accurately describe the agency's requirement, and in other respects limits competition by imposing requirements that do not reflect the needs of the DOE.

We sustain the USA Jet protest on one issue, and deny the remaining protest grounds.

BACKGROUND

The DOE issued the RFP as an unrestricted solicitation on November 3, 2010, and amended it several times thereafter. As amended, the performance work statement (PWS) provides for the contractor to maintain (or oversee maintenance¹) and provide related services for multiple aircraft that the DOE is purchasing. Initially, the contract requires services for one Boeing 737-400 aircraft, followed by options for up to two more 737s, and additional options for other aircraft. RFP amend. 5, PWS, at 2-3.² The RFP contemplates a cost plus fixed fee contract for a base year and up to four option years. RFP § B, at 4-12.

The RFP provides for the contract to be awarded on a best value basis, considering technical approach, past performance, and evaluated cost. RFP § M, at 3. The RFP specifies that technical approach and past performance are approximately equal in importance, and that both factors together are approximately equal in importance to the cost factor. Id.

The RFP provides basic information about the aircraft for offerors to use in preparing their proposals, including the expected age of each aircraft at the time of acquisition, and advises that each aircraft is expected to have an annual flight time of 500 hours. For example, the RFP requests that offerors prepare their cost proposals for the initial Boeing 737 assuming the aircraft is 15 years old at the time of acquisition, and will be operated for 500 flight hours annually. RFP § B, at 4.

In providing services, the RFP provides that offerors will be required to follow a variety of manuals and directives that were not included in the RFP: the NNSA Program Office for Aviation Operations (POAO) Safety Management System (SMS), the POAO Maintenance Procedure Manual, the POAO Cabin Safety Specialist Manual, the POAO Flight Procedures Manual, as well as plans for the shared use of government-furnished equipment and property, manufacturer maintenance manuals, and “DOE Orders/Directives or NNSA Policy requirements, or parts thereof, identified in contract.” RFP amend. 4, at 4. Although offerors requested copies of the manuals and procedures identified in the RFP, the DOE responded that they

¹ The PWS requires the contractor to outsource labor-intensive inspections and maintenance and oversee the outsourced work, unless the contractor can document that performing the work itself will provide cost savings to the DOE. RFP amend. 5, PWS, at 8-9.

² The purchase of aircraft is not part of this RFP. When the DOE filed its agency report, it was considering offers for the purchase of its first Boeing 737-400 aircraft. Contracting Officer’s Statement at 2, 9. Subsequently, the DOE has purchased the first aircraft, and the agency expects to have it delivered to the POAO Aviation Facility “sometime between April and June 2011.” DOE Response to GAO Questions, Feb. 25, 2011, at 12.

would be provided after award. E.g., RFP amend. 4, Questions & Answers, at 13 (Answer No. 75).

The RFP explains that the technical evaluation will consider whether “the offeror thoroughly described how the work will be accomplished,” including the technical risks, their impact, and the measures to avoid or minimize those risks. RFP § M, at 1. The RFP also explains that the technical approach evaluation will review the offeror’s technical capabilities, key personnel qualifications and availabilities, corporate experience, management plan, and phase-in plan. Id.

The RFP also specifies that each offeror must “provide evidence in its proposal that the contractor is ISO 9001, ISO 9100 or AS 9110 certified on or before the proposal due date,” and explain how the certification will be maintained throughout the contract.³ Id. In response to a question submitted by USA Jet, the DOE responded that a Federal Aviation Administration (FAA) Part 121⁴ certificate would not be an acceptable substitute for the ISO or AS certifications. RFP amend. 4, Questions & Answers, at 10 (Answer No. 59).

With respect to cost proposals, the RFP requests that offerors submit separate cost tables for each aircraft for each contract year. RFP § L, at 17. For the first 737-400 aircraft, the RFP provides a blank format for the cost proposal, which has spaces for individual direct labor charges (by labor category, the offeror’s estimated hours, labor rate, fringe and overhead rates), subcontract costs, materials costs, equipment costs, travel, other direct costs, general and administrative rate, a fixed fee, and New Mexico gross receipts tax. The RFP directed offerors to also submit a “time-phased summary level table” for each of the optional aircraft for each contract period in a similar format. RFP attach. L-7, Table 1 (contractor cost element summary). As a further breakdown for the materials and equipment lines, the RFP also directed offerors to submit a bill of materials and an equipment list, setting forth each item of material and equipment along with the quantity, unit or hourly price, vendor name, and the source and “currency” of the price estimate. RFP attach L-7, Tables 3 & 4.

Before the due date for proposals, USA Jet and AAG filed these protests.

³ These ISO standards are quality management system standards set by the International Organization for Standardization. See generally International Organization for Standardization, “Discover ISO,” (available at www.iso.org/iso/about/discover-iso_isos-name.htm, last viewed March 28, 2011). The AS standard is a quality management system standard specifically for aerospace maintenance organizations, and is established by the International Aerospace Quality Group. See generally International Aerospace Quality Group, “Maintenance, Repair, and Overhaul (MRO) Organizations: 9110 QMS Standard Revised” (n.d.) (available at www.sae.org/iaqg/projects/9110pressrelease.pdf, last viewed March 28, 2011).

⁴ See, e.g., 14 C.F.R. § 121.361-121.380 (2010) (FAA aircraft maintenance regulations).

DISCUSSION

USA Jet argues first that the solicitation restricts competition by requiring offerors to hold ISO 9001, ISO 9100, or AS 9110 certification at the time of proposal submission. USA Jet Protest at 4. Second, USA Jet argues that the DOE should accept FAA Part 121 certification as an alternative to ISO or AS certification. And third, USA Jet argues that the RFP is ambiguous by failing to provide manuals and policies, which the PWS requires the contractor to follow in performing the work, and thus lacks information necessary to prepare a proposal. AAG joins in the arguments that the absence of manuals and policies renders the RFP defective, but AAG does not join the challenges to the requirement for ISO or AS certification.⁵

With respect to the requirement for ISO or AS certification at the time of proposal submission, the determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion. Systems Application & Techs., Inc., B-270672, Apr. 8, 1996, 96-1 CPD ¶ 182 at 3. However, where a protester challenges a specification as unduly restrictive of competition, we will review the record to determine whether the restrictions imposed are reasonably related to the agency's needs. Id. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. LBM, Inc., B-286274, Dec. 1, 2000, 2000 CPD ¶ 194 at 3.

USA Jet argues that the RFP requirement for each offeror to have an ISO 9001, ISO 9100, or AS 9110 certification at the time of proposal submission exceeds the DOE's needs, and contends that possessing these certifications by the time the services are performed should be sufficient. USA Jet Protest at 5; USA Jet Comments at 6; USA Jet Response to GAO Questions, Feb. 21, 2011, at 8. In this regard, USA Jet argues that it can obtain a required certification before performance begins (although we note that the parties appear to disagree about when the first aircraft will be ready for use by the DOE). See USA Jet Response to GAO Questions, Mar. 3, 2011, at 2; USA Jet Response to GAO Questions, Feb. 21, 2011, at 8; DOE Response to GAO Questions, Feb. 25, 2011, at 12.

⁵ USA Jet explains that it does not possess the required certification, and that its research suggests that no air carrier possesses both an FAA Part 121 certificate and the required ISO or AS certification. USA Jet Comments, attach. 4, Declaration of AAG Airline Business Consultant, at 1. [DELETED]. USA Jet Response to GAO Questions, Feb. 21, 2011, attach. 1, Declaration of USA Jet Vice President, at 1. USA Jet emphasizes that this requirement prevented it from submitting a proposal itself. [DELETED]. USA Jet Response to GAO Questions, Feb. 21, 2011, at 3-4. We consider USA Jet to be an interested party to challenge the requirement for ISO certification.

The DOE responds that offerors must possess an ISO or AS certification at the time of proposal submission because the certification process “could take several months to several years to complete depending on the maturity and motivation of the organization,” and because the DOE is unwilling to waive the requirement to allow performance to begin without a certification. Contracting Officer’s Statement at 12.

Where a timely challenge is raised, we will consider whether an agency has shown that it may require offerors to possess ISO or AS certification when initial proposals are due, rather than when the contract is awarded or services are provided. An agency’s otherwise legitimate requirements regarding an offeror’s demonstrated ability to meet contract requirements may not generally be applied at a point in time prior to when such qualifications become relevant. LBM, Inc., *supra*, at 4.

The reasons provided by the DOE do not support requiring ISO or AS certification at the time of proposal submission. The fact that a diligent prospective offeror could face a lengthy process to obtain an ISO or AS certification raises exactly the prospect that USA Jet claims exists here--that the firm can obtain ISO or AS certification in time for performance to be consistent with the certificate, even though it cannot do so by the proposal due date. The fact that the DOE is unwilling to waive the requirement does not mean that the requirement must be met when proposals are due.

Accordingly, we sustain the protest to the extent that USA Jet objects to the requirement that offerors possess an ISO 9001, ISO 9100, or AS 9110 certificate at the time of proposal submission.⁶

Next the protesters argue that the solicitation is ambiguous; that is, that the RFP does not provide information necessary for offerors to prepare proposals, or for the DOE to evaluate those proposals on an equal basis. USA Jet & AAG Protest at 6-12. In response, the DOE points out that the RFP provides hypothetical information about the aircraft types the agency is considering purchasing, along with a hypothetical age for each aircraft, and its intended annual flight hours. In the

⁶ USA Jet also objects that it is unreasonable to require the listed ISO or AS certifications, and argues that the firm’s FAA Part 121 certificate should be viewed as a superior and more rigorous alternative. In addition to the obvious connection between the need for quality in aircraft maintenance and the safety of human life, the DOE points out that the FAA has encouraged aviation service providers to develop and implement a safety management system (as the DOE states that it intends to do), and has noted differences between compliance with FAA regulations and the ISO 9001 standards. Agency Report, Tab B.3, FAA Advisory Circular No. 120-92A, at 1, 5. In short, the DOE has provided a reasonable basis to require ISO 9001/ISO 9100/AS 9110 certification--even for firms holding FAA Part 121 certification--so we deny that aspect of USA Jet’s protest.

context of preparing a technical approach and a realistic cost proposal, the DOE argues that the information provided in the RFP “is sufficient for any competent offeror to employ any number of estimating methodologies, such as establishing the ratio of flying hours to maintenance hours, hiring an aviation consultant firm, or utilizing Boeing’s Commercial Aviation Services, to develop its technical and cost proposal.” DOE Response to GAO Questions, Feb. 25, 2011, at 9.

In our view, based on the record before our Office, the information provided in the RFP provides a reasonable method for offerors to demonstrate their understanding of the requirements to provide the required services for each type of aircraft. The DOE intends for offerors to develop proposals based on both their experience and commercially available information about maintenance and service requirements for aircraft of particular configurations, ages, and usage. Even though we accept the protesters’ premise that the actual maintenance and service requirements for each particular aircraft cannot be known in advance, for purposes of preparing and evaluating proposals for a cost reimbursement contract, the DOE has provided a reasonable basis from which to assess offeror technical understanding and costs. See International Creative & Training, Ltd., B-245379, Jan. 6, 1992, 92-1 CPD ¶ 26 at 5-6 (estimates of required work in solicitation provided sufficient information for competition on an equal basis).⁷

The protest by USA Jet is sustained in part. AAG’s protest, and the remaining grounds of protest by USA Jet, are denied.

RECOMMENDATION

We recommend that the DOE amend the RFP to represent its actual needs concerning when ISO or AS certification is required, and that the DOE reopen the competition and allow offerors to submit new or revised proposals. We also recommend that USA Jet be reimbursed the costs of filing and pursuing this ground of protest, including reasonable attorneys’ fees.⁸ Bid Protest Regulations 4 C.F.R. § 21.8(d)(1) (2011). USA Jet should submit its certified claim for these costs,

⁷ We have also considered and found no merit to other arguments raised by the protesters. In particular, to the extent that the protesters argue that the DOE is mistakenly specifying services to comply with FAA Part 125 standards, but will in fact need services to comply with more stringent FAA Part 121 standards, we will not require an agency to use more restrictive specifications, which would have the effect of reducing competition. We also find no support in the record for the protesters’ arguments that, by providing the manuals and policies to the contractor after award, the DOE will be materially modifying the contract after award, and thus will undermine the competition.

⁸ We decline to recommend that AAG be awarded the reasonable costs of filing and pursuing its protest because we denied all of AAG’s protest grounds.

detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving our decision. 4 C.F.R. § 21.8(f)(1).

Lynn H. Gibson
General Counsel