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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-295936

Date: April 18, 2005

Lawrence J. Sklute, Esq., Sklute & Assocs., for the protester.
Clarence D. Long, III, Esq., Department of the Air Force, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that procurement of foreign threat systems aircraft under Economy Act is improper, and that agency instead should conduct competitive acquisition under which protester could compete, is denied where Air Force reasonably determined that protester was not viable competitor because its helicopter could not satisfy the agency's requirement for demonstrated airworthiness.

DECISION

Vertol Systems Company, Inc. protests the actions of the Department of the Air Force in acquiring foreign threat systems aircraft for use in military training exercises. Vertol generally asserts that the agencies improperly procured the aircraft from the Threat Systems Management Office (TSMO), Department of the Army, by means of a transaction under the Economy Act, 31 U.S.C. § 1535 (2000).

We deny the protest.

Vertol's protest challenges the Air Force's action 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, which

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

are used to provide realistic threats during training exercises and the testing of U.S. weapons systems.

On January 28, 2005, the Air Force executed a determination and findings (D&F) pursuant to the Economy Act, in support of a military interdepartmental purchase request to TSMO for the provision of a Russian Mi-24 attack helicopter, to serve as an opposition force during Dissimilar Air Combat Training (DACT) with the 14th Weapons Squadron to occur February 13-17, 2005 and August 15-19, 2005. Specifically, the agency contemplated that the Mi-24 would engage in mock air-to-air combat with an MH-53 helicopter, to include low, tree-level flight, sharp acceleration, and abrupt changes in attitude and altitude, for purposes of providing defensive maneuvering training. The agency anticipated that a student or squadron cadre would occupy the front gunner position in the Mi-24, allowing the occupant to view the air combat from the enemy perspective.

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 from TSMO to carry government employees, could be used. The D&F, and the agency's accompanying market research report, indicated that no private source was qualified to provide aircraft with the required certification and approved flight operations. In this regard, while the Air Force was aware that Vertol owned an Mi-24 helicopter, the agency noted that FAA had only granted that aircraft a limited, "experimental" airworthiness certificate, which the Air Force viewed as insufficient to meet its safety concerns.[2] The Air Force concluded that TSMO was the only source capable of providing an Mi-24 helicopter meeting the agency's needs. Air Force Market Research Report, Jan. 24, 2005; Air Force Mi-24 D&F, Jan. 28, 2005; Contracting Officer's Statement, Mar. 22, 2005.

Vertol asserts that, as an alternative to a standard FAA airworthiness certificate, the agency should be required to accept the "experimental" certification of its Mi-24. Vertol concludes that, by virtue of this certification, its helicopter was available, and that the Air Force therefore should have competed the requirement.

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

[2] On January 26, 2005, Vertol had submitted to the agency an unsolicited proposal for the use of Vertol's Mi-24D in the DACT training scheduled for February 2005.

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 find no basis for objecting to the Air Force's refusal to accept Vertol's "experimental" certificate. We note that our Office previously rejected a similar challenge by Vertol to the Air Force's (and the Army's) refusal to accept an "experimental" certificate for purposes of using Vertol's helicopter in military training exercises. See Vertol Sys. Co., Inc., B-293644.6 et al., July 29, 2004, 2004 CPD ¶ 173 at 3-5. We held there that the agencies had 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 saw no basis to object to a requirement that the airworthiness of a foreign, contractor-owned aircraft be demonstrated by means of an appropriate certification by competent aviation authorities. Vertol has provided nothing in its arguments here to change our view.

We further noted in our decision that, in response to our request for its views, FAA, in a letter signed by the manager of its Production and Airworthiness Division, supported the agencies' position that an "experimental" FAA airworthiness certificate would be inadequate for their needs. In this regard, FAA regulations generally provide that "experimental" airworthiness certificates are issued for: (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; or (9) operating light-sport aircraft. 14 C.F.R. § 21.191 (2004). FAA advised our Office that using helicopters in a joint forces training exercise would not qualify as exhibition of the aircraft, and that using the aircraft in this manner would violate the applicable regulation. In addition, FAA advised 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 with an "experimental" 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.") Letter from FAA to GAO, Mar. 19, 2004.

Vertol asserts that the Air Force should have accepted its helicopter's "experimental" certificate for this requirement because, unlike the certificate on which our prior decision was based (which limited operational use to exhibition of the aircraft), Vertol's current "experimental" certificate certifies its helicopter for use in research and development. In this regard, Vertol notes that, in October 2004, an FAA

Designated Airworthiness Representative (DAR) approved issuance of an "experimental" FAA airworthiness certificate to Vertol for the purpose of research and development. In a declaration furnished to our Office by Vertol, the DAR states that the "experimental" certificate was issued in response to a Program Letter from Vertol that specified the purpose of the intended flights as training U.S. military personnel in the unique characteristics of the Mi-24 helicopter. (The Operating Limitations document approved by the DAR for Vertol's Mi-24 prohibits operation of the helicopter for purposes other than those set forth in Vertol's Program Letter. The Operating Limitations document also requires operation to be in accordance with the rules of part 91 of FAA's regulations.) The DAR states that in January 2005 he approved an amendment to Vertol's Program Letter that described the purpose of the intended flights as testing and developing new aircraft equipment, installations and operating techniques, and further specified that the helicopter may be used to develop and demonstrate new operating techniques in support of dissimilar aircraft training techniques, air combat maneuvers and defensive evasive maneuvers. See DAR Declaration, Feb. 23, 2005.[3] Based on this certification, Vertol concludes its helicopter was available to compete for the Air Force's requirement.

Vertol's reliance upon approval by the DAR is misplaced, inasmuch as the record indicates that the governing FAA regulations, as interpreted by the FAA, do not permit use of Vertol's helicopter in the contemplated DACT training. As an initial matter, we note that DARs are not FAA employees, but private individuals, appointed by FAA, who may charge a fee for their services. Further, FAA's regulations prohibit DARs from acting inconsistently with FAA regulations and policy. Specifically, a DAR "may, within limits prescribed by and under the general supervision of the Administrator" of FAA, perform such functions as "[p]erform[ing] examination, inspection, and testing services necessary to the issuance of certificates, including issuing certificates." 14 C.F.R. §§ 183.1, 183.11, 183.33. However, as made clear in the applicable FAA order, DARs "ARE NOT authorized to approve departures from specific policy and guidance, new/unproven technologies, equivalent level of safety findings, special conditions, or exemptions. These are inherently governmental functions and cannot be delegated to a designee." FAA Order 8100.8B § 300(c) (CHG 3).

FAA's manager for its Flight Standards Division has advised that the statements made by the DAR here "do not reflect the official position of the Federal Aviation Administration." Letter from FAA to Vertol, Mar. 11, 2005. Moreover, FAA further advises that the use of Vertol's Mi-24 helicopter in training military personnel would

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[3] We note that, notwithstanding the DAR's approval of an "experimental" certificate for the purpose of research and development, FAA's on-line registry of aircraft still indicates that Vertol's Mi-24 helicopter's "experimental" certificate is for purposes of exhibition--the certification FAA previously found insufficient for use of the helicopter in military exercises. See <http://registry.faa.gov/arquery.asp>.

not be a permitted use under an "experimental" certificate for the purpose of research and development. In this regard, as set forth in FAA's regulations, an "experimental" certificate for the purpose of research and development is issued for "[t]esting new aircraft design concepts, new aircraft equipment, new aircraft installations, new aircraft operating techniques, or new uses for aircraft." 14 C.F.R. § 21.191(a); Letter from FAA to GAO, Apr. 8, 2005. We find no basis to disagree with FAA's position; Vertol has not shown, nor is it evident from the record, how training military personnel in dissimilar air combat falls within the permitted scope of the research and development purpose.[4]

FAA further states that the carriage of military personnel on the Mi-24 helicopter, which is part of the DACT training contemplated by the Air Force, would not be in accordance with the research and development purpose for which Vertol's "experimental" certificate was issued. According to FAA, since the contemplated training includes the transport of military personnel, any payment accepted by Vertol for that service would be viewed by FAA as "the carriage of persons for compensation or hire," which, as noted above, is not permitted under FAA regulations for aircraft issued experimental certificates. 14 C.F.R. § 91.319(a); Letter from FAA to GAO, Apr. 8, 2005. Again, Vertol has not provided a basis for us to question FAA's position.

Since the Air Force's view reflects FAA's position, the Air Force reasonably determined that Vertol's aircraft could not satisfy the requirement for demonstrated airworthiness. It follows that there is no basis for objecting to the agency's proceeding under the Economy Act.[5]

The protest is denied.

Anthony H. Gamboa
General Counsel

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[4] Vertol asserts that it intends to use its helicopter to test new aircraft operating techniques. However, the requirement the Air Force is seeking to satisfy under the Economy Act is for training military personnel in dissimilar air combat, not developing new aircraft operating techniques. Air Force Comments, Mar. 22, 2005, at 3.

[5] Vertol asserts that this requirement should be set aside for small businesses. However, since Vertol is not eligible to compete for the requirement, it is not an interested party eligible to protest the agency's failure to conduct a small business set-aside procurement. 4 C.F.R. § 21.0(a) (2005); Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2.