



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Crescent Helicopters

File: B-284706; B-284707; B-284734; B-284735

Date: May 30, 2000

Dean H. Shealy for the protester.

Sherry Kinland Kaswell, Esq., Department of Interior, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly determined, based on market research, that helicopter services could be acquired under Federal Acquisition Regulation part 12 commercial item procedures because the services solicited are the type of services offered and sold competitively by the aviation industry in substantial quantities to commercial entities; none of the requirements pertaining to pilot and mechanic qualifications and invoicing, which were included in the solicitations, transformed the type of services sought here to something other than a commercial item.

2. Protest that agency improperly included in commercial item solicitation for helicopter services pilot and mechanic qualification requirements that were inconsistent with commercial practice is denied where the record showed that commercial contracts had similar requirements, and for those requirements that were not in commercial contracts, the agency properly issued waiver in accordance with Federal Acquisition Regulation § 12.302(c).

DECISION

Crescent Helicopters protests the terms of requests for proposals (RFP) Nos. 8000-03, 8000-04, 8000-05, and 8000-16, issued by the Department of the Interior, Office of Aircraft Services (OAS), for helicopter services.

We deny the protests.

The RFPs, issued pursuant to the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, are for the acquisition of helicopter flight services, fully operated and maintained by the contractor, in four different locations. The helicopter services will be used to support a variety of Interior resource programs,

most importantly wildland fire suppression. The RFPs contemplate the award of fixed-price, with economic price adjustment, contracts for a base year with 2 option years. Each RFP lists the aviation services to be provided under the contract and includes 20 pages of technical specifications, which, among other things, include pilot and mechanic qualifications. Each RFP also includes FAR § 52.212-2, Evaluation--Commercial Items, which provides that the government will award a single contract based on the offer that represents the best value to the government based on the merits of the acceptability of the offer, the aircraft questionnaire, the evaluated price, and the offeror's relative capability. RFP § D2.1.¹

The protester first contends that the RFPs were wrongfully issued as commercial item acquisitions under FAR part 12 because the services being acquired under the RFPs cannot properly be considered commercial items.

Consistent with the Federal Acquisition Streamlining Act of 1994 (FASA), 41 U.S.C. §§ 264a, 264b, 403(12)F) (1994), FAR § 2.101 defines "commercial item" with respect to services as follows:

Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions.

Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 11.

FAR part 12 prescribes policies and procedures unique to the acquisition of commercial items and implements the preference established by, and the specific requirements in FASA for the acquisition of commercial items that meet the needs of an agency. FAR part 12 was intended to establish acquisition policies more closely resembling those of the commercial marketplace as well as other considerations necessary for proper acquisition planning, solicitation, evaluation, and award of contracts for commercial items. FAR part 12 specifies the solicitation provisions and clauses to be used when acquiring commercial items.

Agencies are required to conduct market research pursuant to FAR part 10 to determine whether commercial items are available that could meet the agency's requirements. FAR § 12.101. If market research establishes that the government's needs can be met by a type of item (including services) customarily available in the

¹ Because the solicitations are very similar but may not be identical in paragraph and page number references, all citations are to RFP No. 8000-03.

commercial marketplace that would meet the definition of a commercial item at FAR § 2.101, the contracting officer is required to solicit and award any resulting contract using the policies and procedures in FAR part 12. FAR §§ 10.002(d)(1), 12.102(a). One of the techniques for conducting market research is to contact knowledgeable individuals in government and industry regarding market capability to meet the requirements. FAR § 10.002(b)(2)(i).

The record here shows that OAS reasonably concluded, based on its market research, including information obtained from professional trade associations, that the helicopter services it seeks qualify as a commercial item because this type of service is offered and sold competitively by the aviation industry in substantial quantities to corporations and other private entities. See Agency Report, Tab M, Statement in Response to Crescent Protests, Mar. 1, 2000, and Tab M1, Determination of Commercial Item Availability for Aviation Services, Dec. 2, 1999.

Here, the protester does not argue that the “type” of services being procured are not commercially available; rather, the protester argues that the aviation services being procured under the subject solicitations are custom tailored to such an extent as to be unavailable in the commercial marketplace. Protester’s Comments at 1.

The RFP requirements, which are assertedly inconsistent with customary commercial practices, are not of such a nature as to transform the type of services sought here to something other than a commercial item. In this regard, we note that the FAR definition of commercial item speaks in terms of services of a “type” offered and sold in the commercial marketplace under standard commercial terms and conditions; it does not require that the services be identical to what offerors provide their commercial customers. Aalco Forwarding, Inc., *supra*, at 15-17. In fact, as noted below, similar requirements to those asserted to be inconsistent with commercial practice exist in commercial contracts. While, as discussed below, there is one requirement in the RFPs that may not be consistent with commercial practice, it is permissible for a commercial item solicitation to have noncommercial terms and still remain a solicitation for a commercial item. Id. at 16.

As noted, Crescent argues that many of the RFP provisions are inconsistent with commercial practice. Specifically, Crescent contends that the RFP requirements for pilots and mechanics exceed those mandated by the Federal Aviation Administration and are not present in commercial contracts. Crescent also alleges that the RFP-mandated invoicing procedures are impermissibly custom tailored in a manner inconsistent with commercial practice.²

² The protester also lists in its protest 88 clauses that appear in the RFPs that it contends, without any further explanation, are inconsistent with customary commercial practice. Protest at 2-3. The agency responded in its report by examining a portion of the clauses to which Crescent objected, and noting and

(continued...)

FAR § 12.301(a) provides that:

contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses--

(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items;
or

(2) Determined to be consistent with customary commercial practice.

FAR § 12.301(b)(3) provides for the inclusion of FAR § 52.212-4 in solicitations and contracts for commercial items, which “includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices.” FAR § 12.301(b)(3) further provides that the “contracting officer may tailor” the terms of FAR § 52.212-4 in accordance with FAR § 12.302. In pertinent part, FAR § 12.302(a), provides that:

[b]ecause of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at . . . [FAR §] 52.212-4 . . . to adapt to the market conditions for each acquisition.

FAR § 12.302(c) provides:

The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures.

(...continued)

documenting comparable provisions found in various commercial contracts. Contracting Officer’s Statement at 5. Since Crescent did not further discuss this contention in its comments responding to the report, we deem these issues abandoned and will not consider them further. International Management and Communications Corp., B-272456, Oct. 23, 1996, 96-2 CPD ¶ 156 at 2-3 n.2.

With regard to the pilot and mechanic qualifications included in the RFP, the agency has provided a commercial aviation services contract that has many similar provisions. For example, the RFPs require pilots to possess at least a current second class medical certificate, RFP § B3.3.2, and the agency-provided commercial contract requires the captain (pilot) to possess a current first class medical certificate or equivalent. Agency Report, Tab L, Commercial Contract, at 2. Also, the RFPs require mechanics to have 12 months total experience maintaining aircraft of the same category specified in the contracts, RFP § B3.6.2, and the commercial contract contains the same requirement. Agency Report, Tab L, Commercial Contract, at 2. As illustrated by the foregoing examples, our review indicates that, with one exception, the RFP's pilot and mechanic qualification requirements have counterparts in commercial contracts, and thus cannot be said to be inconsistent with customary commercial practice.

That one exception involves the RFP requirement that, at the discretion of the contracting officer's technical representative, each pilot pass an agency flight evaluation to demonstrate the pilot's proficiency on the make and model of aircraft to be flown during the contract using all of the equipment required by the RFP. RFP §§ B3.3.5, B3.3.6. We were unable to find any similar provision in the commercial contracts provided by the agency. However, during the course of this protest, OAS executed a waiver pursuant to FAR § 12.302(c) to allow for agency flight evaluation for pilots in the event that these provisions were determined to be inconsistent with customary commercial practice. Class Justification To Include Pilot Proficiency Check Rides In Aviation Services Contracts Involving Special Use Missions, May 5, 2000.

The protester has challenged the validity of the May 5 waiver on procedural grounds. While waivers such as this are subject to a test of reasonableness, Aalco Forwarding, Inc., supra, at 18, we think the protester has failed to provide a valid basis here to challenge the waiver. FAR § 12.302(c) provides:

The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

There is no prohibition in the regulation against the granting of waivers following the issuance of the RFP. Additionally, our review of the memorandum supporting the waiver shows that all the information required by the regulation was included in the

waiver or was considered by the authorized official who granted the waiver, including why these requirements are necessary.³

Finally, Crescent argues that the mandatory use of OAS Form 23 (Aircraft Use Report) as an invoice impermissibly tailored the FAR provision concerning invoices in a manner inconsistent with commercial practice. The agency responded to this protest contention by issuing an amendment to each solicitation stating that the OAS Form 23 may be used as an invoice. Agency Report, Tab K, RFP amend. 1, at 2. Therefore, according to the agency, the contractor is to complete OAS Form 23 to describe the daily services it has provided in support of the agency, and the contractor may use the same form as an invoice, if it elects to do so. Agency Report at 3. In response to the amendment and agency's explanation, Crescent labels OAS Form 23 a "de facto invoice," since the form still must be used to describe the daily services provided. Protester's Comments at 2-3. However, the fact remains that the OAS Form 23 is not a required invoicing form, so it cannot be said to impermissibly tailor the invoicing terms and conditions.

The protests are denied.

Comptroller General
of the United States

³ We see nothing improper with approval of this waiver by the Director of OAS. Under FAR § 12.302(c), waivers are to be considered in accordance with agency procedures. The Director of OAS has been delegated full authority to discharge a broad range of duties on behalf of the Secretary of the Interior on all matters relating to contracting for aviation services. See 205 Department of Interior Departmental Manual (DM) 11.1 (Apr. 20, 1987); 112 DM 12.1, 12.3 (Dec. 17, 1997). According to these agency documents, the Director of OAS appears to be the department-wide authority of aircraft and aircraft-related service contracts and appears to be the appropriate official to make the findings and determination on behalf of the Department supporting the waiver.