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Decision

Matter of: HEROS, Inc.

File: B-292043

Date: June 9, 2003

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Vera Meza, Esq., and Wade L. Brown, Esq., Department of the Army, for the agency. Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where solicitation to overhaul helicopter engines contemplates less than full and open competition, the agency has concluded that the successor-in-interest to the original equipment manufacturer of the engine is the only entity that possesses adequate information to successfully overhaul the engine, and the agency's view regarding other potential offerors' ability to meet the agency's requirements fails to reflect a reasonable level of advance planning as required by the Competition in Contracting Act.

DECISION

HEROS, Inc. protests the Department of the Army's limitation on competition in connection with request for proposals (RFP) No. DAAH23-02-R-0566 to overhaul T63-A-720 turbine engines for use in OH-58A/C "Kiowa" helicopters. Specifically, the RFP limits the field of offerors to Rolls Royce Corporation (RRC) and RRC's authorized maintenance centers (AMCs). HEROS maintains that the Army's exclusion of all other offerors unduly restricts competition in violation of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304 (2000).

We sustain the protest.

BACKGROUND

On January 10, 2003, the Army published the RFP at issue here, seeking proposals to overhaul a quantity of up to 300 T63-A-720 engines. Agency Report, Tab B, RFP, at 6.

The agency maintains that RRC, and only RRC, possesses certain information—which is unknown to the Army—that is necessary to successfully overhaul the T63-A-720 engine.

Previously, based on this same premise, the Army published a notice in the Commerce Business Daily, dated January 13, 2001, disclosing an intent to award a sole-source contract to RRC for the requirements at issue here. Sabreliner Corporation protested that proposed award; our Office sustained Sabreliner’s protest. See Sabreliner Corp., B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ 170. Among other things, we found that the Army’s documents purporting to support the sole-source award “contain so many inconsistencies and inaccuracies that they cannot reasonably justify the agency’s intended sole-source contract,” id. at 5; we also noted that, although the agency’s procurement officials knew of the inaccuracies, they made no effort to correct them. Id. at 7. We further found that the agency’s conclusion that only RRC possessed the information necessary to overhaul the T63-A-720 engines was not reasonably supported. Id. at 10-11. Finally, based on the “specific and detailed testimony of Army representatives” that the Army could develop data sufficient to compete the overhauled services within 8 to 10 months “at the outside,” we recommended, subject to certain determinations by the Army, that it develop the data necessary and competitively procure the overhaul services.¹ Id. at 11, 12; Sabreliner Hearing Transcript (Aug. 16, 2001) at 23, 32, 145-46, 150-51, 157, 200-01.

Subsequent to issuance of our Sabreliner decision, the Army published the solicitation at issue here, expanding the field of competition to include RRC’s AMCs.² The agency states that, in the event an AMC is the successful offeror, RRC will provide that AMC with RRC’s “secret” information—that is, information that RRC asserts it possesses and which cannot be otherwise obtained—thereby enabling the

¹ In resolving Sabreliner’s protest, GAO conducted a hearing on August 16, 2001. A written transcript of that hearing was prepared, and that transcript was provided to counsel for the parties in the HEROS’s protest, subject to GAO’s protective order, as part of the HEROS’s protest record. In connection with HEROS’s protest, GAO conducted another hearing on May 8, 2003; that hearing was videotaped and a copy of the video record was provided to counsel for the parties. To avoid confusion, citations to the August 16, 2001 Sabreliner hearing transcript are identified as “Sabreliner Hearing Transcript (Aug. 16, 2001) at ____”; citations to the video record of HEROS’s May 8, 2003 hearing record are identified as “Video Hearing Record (May 8, 2003) at ____.”

² AMCs must sign an RRC-prepared agreement in order to qualify as an AMC. RRC Comments on Agency Report, Apr. 28, 2003, at 8.

AMC to perform the required overhauls.³ However, in the event an AMC is selected for award, the Army will be required to pay RRC a royalty fee of \$14,361 per engine.⁴ Agency Report, Tab P-3, at 1. Further, under the Army's agreement with RRC, this fee will similarly be paid for "all future T63 overhauls performed pursuant to future contracts awarded by the Army."⁵ Id.

In summary, the Army maintains that it "is legally prevented from providing full and open competition" for the engine overhauls because "[RRC] has required that [the Army] only disclose [RRC's] proprietary T63 overhaul data to [an] AMC." Agency Report, Legal Memorandum, at 2. Although this Army statement suggests that the Army will receive RRC's "secret" information, the record is to the contrary and indicates that RRC intends to provide only a successful AMC with whatever, undefined, information is necessary to perform the overhauls. Agency Report, Tab F, at 1. The Army concedes that it "does not have knowledge of what [RRC] proprietary data, if any," has been or will be used in providing a successful AMC with the allegedly necessary information.⁶ Agency Report, Tab F, at 6. Indeed, it does not appear that RRC's "secret" information, if it exists, has yet been reduced to any tangible form.⁷ Video Hearing Record (May 8, 2003) at 13:53.

³ The reference to RRC's "secret" information is intended to differentiate between RRC's proprietary information that has been provided in the record and the undisclosed information that RRC asserts it maintains--and which forms the basis for the limitation on competition.

⁴ The fee amount is calculated as reflecting [deleted]. Agency Report, Tab P-3, at 1.

⁵ The record indicates that the Army may subsequently require as many as 700 overhauls of T63-A-720 engines. Agency Report, Tab I, at 9. RRC's per engine royalty fees for 700 engines would total over \$10 million.

⁶ RRC has prepared a "draft" overhaul manual for review by the Army, Agency Report, Tab P-15; however, neither the Army nor RRC has identified any information in that document which is not otherwise available in commercial publications.

⁷ With RRC's comments to our Office, responding to the agency report, RRC provided declarations from two of its employees containing various factual assertions relevant to the protest issues. Upon concluding that a hearing would be necessary to resolve HEROS's protest, we requested that RRC provide, as witnesses at the hearing, the two employees who had submitted declarations for GAO's consideration. RRC refused to provide any witnesses, including the two specifically requested. As discussed at the hearing, one of the matters about which GAO would have sought information from the RRC witnesses was whether or not its "secret" data has been reduced to any tangible form; our review of the record, along with RRC's refusal to permit any cross-examination of its declarants on this or any other issue, leads us to conclude it has not. See 4 C.F.R. § 21.7(f) (2003) ("If a witness whose attendance has been requested by GAO fails to attend the hearing . . . GAO may draw an inference (continued...)

History of the T63-A-720 Engine

The T63-A-720 engines at issue here have been used to power OH-58 A/C helicopters since the 1970s when the Army began acquiring those engines from Detroit Diesel Allison (DDA), the original equipment manufacturer (OEM).⁸ The record establishes that the T63-A720 engine was manufactured as part of the “family” of DDA/RRC’s 250-C20 engines.⁹ In this regard, DDA/RRC’s Configuration Management Plan for the T63-A-720 engine states, “the T63-A-720 engine is a minor variant of the commercially developed DDA 250-C20B [engine]” and, conversely, describes the 250-C20B engine as “a commercial counterpart of the T63-A-720.” Agency Report, Tab A, DDA Engineering Department Report No. 8663, Rev. B (May 7, 1980), at 22, 23.

Until the mid-1990s, the Army retained an “organic” (that is, in-house) ability to overhaul the T63-A-720 engines. As part of its in-house ability the Army maintained an instruction manual describing the operations, procedures and practices required to overhaul the engines; this type of manual is generally referred to as a “Depot Maintenance Work Requirement” (DMWR). The Army maintained and updated the T63-A-720 DMWR through amendments made by its own engineers, as well as receipt of various publications issued by the OEM. In addition to supporting the Army’s in-house overhaul capabilities, the DMWR was used to facilitate competitive procurements of engine overhauls from commercial vendors.¹⁰

In explaining the basis for its current perceived inability to perform a competitive procurement, the Army states that it has failed to maintain the DMWR; specifically,

(...continued)

unfavorable to the party for whom the witness would have testified.”); see also Guardian Techs. Int’l, B-270213 et al., Feb. 20, 1996, 96-1 CPD ¶ 104 at 9-11; Du & Assocs., Inc., B-280283.2, Dec. 22, 1998, 98-2 CPD ¶ 156.

⁸ In the mid-1990s, DDA, a division of General Motors Corporation, was acquired by RRC; accordingly, RRC has become the successor-in-interest to the OEM.

⁹ The 250-C20 series of engines includes the 250-C20B, 250-C20C, 250-C20F, 250-C20J, 250-C20R, and 250-C20W.

¹⁰ Although most of the agency’s requirements were performed organically at the Corpus Christi Army Depot facility in Texas, competitive procurements to overhaul the T63-A-720 engine were conducted by the Army, using the DMWR, in 1990 and 1993. In 1990, a contract was awarded to Pacific Turbine Pty, LTD, to overhaul 102 engines; a second contract was also awarded to Aeromaritime Mediterranean to overhaul 78 engines. In 1993, a contract was competitively awarded to Dallas Airmotive to overhaul 50 engines. Agency Report, Contracting Officer’s Statement, at 2.

the Army states that it has not updated the DMWR since 1993. Agency Report, Contracting Officer's Statement, at 2. The Army maintains that its failure to update the DMWR has been due to the "impending retirement of the OH-58 A/C [helicopter]." *Id.* at 3. Although it is not clear when the Army first scheduled the OH-58A/C for retirement, a March 26, 2003 memorandum, written by the Director of the Army's Scout Observation Directorate, states: "[The] OH-58A/C fleet has for the past 15 years been downsized, scheduled for retirement and allocated inadequate resources." Agency Report, Tab F, at 1.

Regarding the actual retirement date--that is, the date after which the Army will no longer operate OH-58A/C aircraft and, thus, have no ongoing requirements to maintain and overhaul T-63-A720 engines--the Army's statements have fluctuated radically. In creating documentation purporting to justify the attempted sole-source award to RRC in 2001, the agency represented that the OH-58A/C aircraft would be retired by the year 2004; however, during the course of our review of Sabreliner's protest, it became apparent that the Army intended to retain and operate OH-58A/C helicopters through the year 2020. Sabreliner Corp., supra.¹¹

Here, in first responding to HEROS's protest, the Army again asserted that the OH-58A/C will be retired in the relatively near future, stating "the actual retirement year for the OH-58A/C helicopter . . . is 2005." Agency Report, Contracting Officer's Statement, at 3. The referenced authority for this representation is an Army memorandum, dated Dec. 28, 2001 and signed by the Army's Vice Chief of Staff, which states: "the Army's primary OH-58A/C fleet is targeted for retirement by end-FY04 [fiscal year 2004]." Agency Report, Tab H, at 1. Notwithstanding this "targeted" retirement date, this same memorandum also states:

[N]ot later than FY05 125 aging OH-58A aircraft in the RAID [Reconnaissance Air Interdiction Detachment] mission will either have to be replaced by a newer series aircraft, or maintained at a significant and steadily increasing cost using commercial parts and contract support for higher level maintenance.

. . . . There are no replacement aircraft planned or programmed under the current constrained funding levels. . . .

Agency Report, Tab H, at 1-2 (underlining added).

During the hearing conducted in connection with the Sabreliner decision, an Army official testified that the retirement date for OH-58A/C helicopters had been

¹¹ Shortly after the Sabreliner decision was issued, the contracting officer signed a memorandum, dated November 21, 2001, stating that the retirement date for the OH-58 A/C helicopter was 2019. Agency Report, Tab L-3, at 79.

extended to the year 2020 “because they [Army leadership] don’t have [replacement] aircraft available . . . to do the transformation they want to do.” Sabreliner Hearing Transcript at 195. During the hearing conducted by GAO in connection with HEROS’s protest, the Army’s Aircraft Sustainment Leader for the OH-58A/C aircraft testified that “there has been movement among the units that have these aircraft to retain them beyond [FY05],” and that a decision to extend the retirement date for OH-58A/C helicopters currently involved in certain activities, including drug interdiction efforts and pilot training activities, is currently pending. Video Hearing Record (May 8, 2003) at 10:23-24. Finally, in its post-hearing submission, the Army lists the retirement date for up to 143 OH-58A/C helicopters as “Close FY06-FY08.” Agency Post-Hearing Brief, May 15, 2003, at 2.

Accordingly, in light of the various conflicting positions taken by the Army on this issue, along with the Army Vice Chief of Staff’s express acknowledgement that “there are no replacement aircraft [for the OH-58A/C] planned or programmed,” Agency Report, Tab H, at 1-2, it appears likely that the Army will continue to operate OH-58A/C aircraft beyond the end of fiscal year 2004—and thus will continue to generate requirements to overhaul T63-A-720 engines.

DISCUSSION

HEROS protests the Army’s conclusion that only RRC, or one of RRC’s AMCs, is capable of successfully performing the Army’s overhaul requirements arguing, among other things, that the Army’s activities related to this procurement violate the statutory requirements of CICA. We agree.¹²

CICA generally requires that agencies engage in “full and open competition” when conducting government procurements; specific exceptions to this general requirement include a situation where the agency’s requirements can be performed by only one responsible source. 10 U.S.C. § 2304(c)(1). However, under no circumstances may noncompetitive procedures be used due to a lack of advance planning by contracting officials. 10 U.S.C. § 2304(f)(5); New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6; TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700. Our Office has recognized that, while the requirement for advance planning does not mean that such planning must be completely error-free, see, e.g., Sprint Communications Co., L.P., B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24, as with all procurement actions taken by an agency, the advance planning required under 10 U.S.C. § 2304 must be reasonable.

¹² RRC asserts that HEROS’s protest was not timely filed. We disagree. The protest challenges the solicitation’s limitation on potential offerors and was filed prior to the closing date for submission of initial proposals. Accordingly, the protest was timely filed. 4 C.F.R. § 21.2(a)(1) (2003).

In enacting CICA, Congress explained: “Effective competition is predicated on advance procurement planning and an understanding of the marketplace.” S. Rep. No. 50, 98th Cong., 2d Sess. 18 (1984), reprinted in 1984 U.S.C.C.A.N. 2191. The Senate Report also quoted with approval the following testimony regarding the need for advance planning:

Opportunities for obtaining or improving competition have often been lost because of untimely, faulty, or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition also has resulted many times from the failure to develop specifications By requiring effective competition, Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute.

S. Rep. No. 50, 98th Cong., 2d Sess. 19 (1984), reprinted in 1984 U.S.C.C.A.N. 2192.

Finally, in interpreting this statutory requirement, our Office has noted that contracting officials have a duty to promote and provide for competition and to obtain the most advantageous contract for the government. Precision Logistics, Inc., B-271429, July 18, 1996, 96-2 CPD ¶ 24 at 5; National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43. In other words, contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole-source situation when they could reasonably take steps to enhance competition.

Here, the Army’s actions over the past several years fail to comply with CICA’s statutory mandate for reasonable advance planning. As discussed above, the agency has, repeatedly, taken the position—when attempting to justify limiting competition for this requirement—that retirement of the OH-58A/C aircraft is imminent. Based on this assumption, agency officials have declined to conduct any detailed or documented analysis regarding the time and costs associated with obtaining competition as compared to the cost savings likely to flow from enhanced competition. Video Hearing Record (May 8, 2003) at 14:30-33. Here, as in our prior Sabreliner decision, scrutiny of the agency’s initial position regarding the schedule for retirement of the OH-58A/C aircraft indicates that elimination of this aircraft, along with the associated engine overhaul requirements, is unlikely to occur on the schedule initially presented by the agency. The bottom line, as reflected in the record here and in the prior Sabreliner record, is that there are no ready replacements for these helicopters; yet a substantial number of these aircraft are being used to perform activities that constitute ongoing requirements. Notwithstanding these facts, the agency has failed to perform any reasonable and documented analysis regarding the costs and benefits associated with obtaining competition that takes into consideration a realistic assessment of the length of time the OH-58 aircraft will continue to fly.

Further, as discussed above, the agency has failed to update the DMWR since 1993. Since nothing in the record suggests that the OH-58A/C was ever scheduled for retirement before 2004, we view the Army's apparent abandonment of this document—which the agency considers critical to its ability to conduct full and open competition for the engine overhauls—more than 10 years prior to the earliest projected retirement date as, itself, reflecting a lack of advance planning. In any event, during the hearing conducted in connection with this protest, the contracting officer acknowledged that the agency could issue a full and open competitive solicitation without relying on either the outdated DMWR or RRC's "secret" information—provided the Army performed qualification testing on the overhauled engines initially produced under such a contract. Video Hearing Record (May 8, 2003) at 13:47-50. The contracting officer stated that such qualification testing would add approximately one year to the procurement cycle. Id. Although the agency has considered itself to be wholly dependent on RRC's "secret" information for considerably longer than the single year that this approach would add to the procurement cycle, the agency apparently rejected this alternative with little or no comparative analysis of the costs and/or time associated with obtaining the overhauls from RRC and/or RRC's AMCs. Id. To the extent any such analysis was performed, it was based on a projected retirement of the engines in 2005. Id.

Finally, the record associated with this procurement demonstrates that the agency has failed to reasonably consider alternative methods of meeting its requirements. Specifically, the record shows that, since 1995, a significant number of OH-58A/C aircraft powered by T63-A-720 engines have been transferred to non-Army organizations, including public sector local law enforcement agencies. In connection with the ongoing requirements to maintain and overhaul the T63-A-720 engines, these other organizations have sought input from RRC. In response, RRC has expressly recommended that the T63-A-720 engines be overhauled using the commercially available overhaul manuals for the series 250-C20 engines.¹³ Specifically, on August 18, 1998, RRC issued a Commercial Service Letter, stating:

[RRC] has received numerous questions from commercial recipients of these military T63 engines regarding parts, technical support, maintenance requirements, and overhaul

¹³ As noted above, DDA/RRC's own Configuration Management Plan describes the 250-C20B engine as the "commercial counterpart" to the T63-A-720 engine.

requirements. The purpose of this Commercial Service Letter is to provide the operators of T63 engines with answers to the most commonly asked questions and [RRC’s] policy regarding our support of those engines.

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3. Overhaul Requirements:

. . . . Allison recommends that the closely equivalent commercial manuals listed below be utilized when overhauling the engine:

<u>Engine Model</u>	<u>Publication</u>	<u>Pub P/N</u>
.		
T63-A720	250-C20 Overhaul Manual	10W3

Agency Report, Tab K-6, RRC Commercial Services Letter 1209, at 5-6.

During the August 16, 2001 hearing conducted in connection with Sabreliner’s protest, testimony was presented that Sabreliner had successfully overhauled a quantity of T63-A-720 engines under a contract with the Department of the Navy--without access to RRC’s “secret” data--by relying on the commercially available manuals for the 250-C20B engine. Sabreliner Hearing Transcript (Aug. 16, 2001) at 407-08. This contract apparently called for Sabreliner to, in effect, convert the T63-A-720 engine to a 250-C20B engine. Id. Nonetheless, at the May 8, 2003 hearing conducted in connection with HEROS’s protest, the Army engineer associated with this procurement testified that he did not know how non-Army owners of the T63-A-720 engines met their engine overhaul requirements, and that information in that regard had not been sought. Video Hearing Record (May 8, 2003) at 12:32-35. In this regard, the Army acknowledges that it has not obtained current versions of the commercially available manuals for overhauling the 250-C20B engines. Video Hearing Record (May 8, 2003) at 14:49. Finally, the record suggests that, with regard to overhauling the T63-A-720 engines, RRC may be attempting to extract an unusually high price for its assistance and/or services.¹⁴ In the context of all these facts, the agency has failed to seek information regarding other T63-A-720 engine owners’ experience in obtaining engine overhauls, which might have obviated the

¹⁴ The contracting officer testified that the Army has engaged in “heated discussions” with RRC, during which RRC essentially refused to assist the Army in conducting any competition that would permit proposals from non-AMCs, and that the price quoted by RRC with regard to [deleted] was “very high.” Video Hearing Record (May 8, 2003) at 14:11-12.

perceived need for limiting competition. Based on all of the facts discussed above, we conclude that the agency has failed to meet CICA's requirements regarding a reasonable level of advance planning.

The protest is sustained.¹⁵

RECOMMENDATION

Consistent with our discussion above, we recommend that the agency reach a realistic, supportable, and documented conclusion regarding its future use of the OH-58A/C helicopter.¹⁶ Based on that determination, we recommend that the agency conduct a documented cost/benefit analysis reflecting the costs associated with obtaining full and open competition, either through updating the DMWR, issuing a full and open solicitation that includes qualification testing, or overhauling the engine to 250-C20B specifications. In connection with this effort, we recommend that the agency obtain information from non-Army owners of the OH-58A/C aircraft, including law enforcement agencies, regarding their experience in overhauling the T63-A-720 engines. To the extent the Army views its intended use of the aircraft as materially different from other non-Army users, thereby mandating differing performance specifications, we recommend that it document the basis for that conclusion. We also recommend that HEROS be reimbursed its cost of filing and

¹⁵ In responding to HEROS's protest, the Army and RRC have argued that GAO should conclude that HEROS does not have standing to bring this protest based on the Army's and RRC's assertions that HEROS lacks the necessary resources and/or qualifications to perform the required overhauls; accordingly, RRC and the Army assert that we should dismiss the protest. It is undisputed that, in December 1988, HEROS was issued Federal Aviation Administration (FAA) Air Agency Certificate No. HEFR202K, which refers to the overhaul of "Allison 250-C18, C20, C28, and C30 engines." Agency Report, Tab A, HEROS Protest, Ex. 7. While we do not view this or any other document submitted in this matter as establishing that HEROS is qualified to perform the required services, we also decline to conclude that, as a matter of law, HEROS is not. Accordingly, we reject the requests to dismiss the protest.

¹⁶ In the event the Army concludes that use of the OH-58 A/C will be eliminated in the near future, we recommend that the documentation supporting that determination discuss the requirements currently being performed by these aircraft and address how and/or whether those requirements will continue to be met.

pursuing this protest including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2003). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel