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Decision

Matter of: Sikorsky Aircraft Corporation

File: B-403471; B-403471.3

Date: November 5, 2010

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DIGEST

Protest challenging the use of the public interest exception to full and open competition for acquisition of Russian-made helicopters for delivery to the Afghanistan Air Force is denied where the Acting Secretary of the Navy issued a determination that justified the restricted competition.

DECISION

Sikorsky Aircraft Corporation, of Stratford, Connecticut, protests the terms of request for proposals (RFP) No. N00019-10-R-0032, issued by the Department of the Navy, Naval Air Systems Command, for Mi-17 variant helicopters for the Afghanistan Air Force. Sikorsky contends that the Navy improperly limited the competition to the Russian-made Mi-17 helicopter.

We deny the protest.

The RFP was issued on July 8, 2010, and sought proposals to provide 21 new Mi-17 variant helicopters, along with tool kits and spare parts, and pre-acceptance testing. The Mi-17 is the export version of a multi-use transport helicopter designed by the Soviet Union for use in Afghanistan, and is currently manufactured in Russia by two companies. Contracting Officer (CO) Statement at 1. Offerors could propose either the Mi-17V5 or Mi-171/172 variants of the helicopters. RFP at 3. The contractor must deliver the helicopters to the Combined Airpower Transition Force (CAPTF) at the

Kabul Airport in Afghanistan, where they will be transferred to the Afghanistan Air Force.¹ In response to the RFP, the Navy received [deleted] proposals [deleted] to provide the Mi-17 helicopters. CO Statement at 2. Sikorsky did not submit a proposal in response to the solicitation.

Public Interest Exception to Full and Open Competition Requirement

This protest presents an issue that our Office has not previously considered: the invocation by the head of an agency of the “public interest” exception to the general requirement in the Competition in Contracting Act of 1984 (CICA) that contracting agencies obtain full and open competition through the use of competitive procedures when conducting a procurement for property or services. 10 U.S.C. §§ 2304(a)(1)(A), 2304(c)(7) (2006). CICA provides seven exceptions to the general requirement for full and open competition. 10 U.S.C. § 2304(c). The “public interest” exception invoked in this case provides:

(c) The head of an agency may use procedures other than competitive procedures only when—

* * * * *

(7) the head of the agency—

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

10 U.S.C. § 2304(c)(7). Unlike the other exceptions to the requirement for full and open competition, the authority of the head of the agency to invoke this exception may not be delegated. 10 U.S.C. § 2304(d)(2).

The Federal Acquisition Regulation (FAR), citing 10 U.S.C. § 2304(c)(7), requires the public interest exception to be exercised on a non-delegable basis by the head of the appropriate executive branch agency, or the secretary of the relevant branch of the Armed Services, e.g., as relevant here, the Secretary of the Navy. FAR § 6.302-7(c)(1). The authorizing official must make a written determination and finding (D&F) supporting the exception of the public interest exception that “set[s]

¹ CAPTF is the U.S.-led entity responsible for developing military and police airpower for Afghanistan.

forth enough facts and circumstances to clearly and convincingly justify the specific determination made.” FAR §§ 6.302-7(c)(1), 1.704.

Acting Secretary of the Navy’s Public Interest D&F

On June 30, 2010, the Acting Secretary of the Navy issued a D&F, under the public interest exception, that authorized a competition that was limited to Mi-17 helicopters. Agency Report (AR), Tab 21, D&F (June 30, 2010). The D&F was provided to the appropriate Congressional committees on August 13. AR, Tab 22, Congressional Notice of D&F (Aug. 13, 2010). The Navy states that the Acting Secretary reviewed or relied upon three documents prior to approving the D&F: (1) a report concerning the Mi-17 prepared by the CAPTF Commanding General; (2) a Department of Defense (DOD) report to Congress concerning the Mi-17, and (3) a memorandum prepared for the Acting Secretary regarding the proposed procurement.² Agency Response to Protester’s Objections Regarding Document Production (Sept. 1, 2010) ¶ 12; AR, Tab 17, Memorandum by CAPTF Commanding General Re: Mi-17 Helicopters (Feb. 23, 2010); Tab 20, DOD Report to Congress Re: Mi-17 Helicopters (Mar. 23, 2010).

The D&F states that the Afghanistan Air Force requires a multipurpose helicopter with “cargo, passenger, and defensive/offensive capabilities,” and that the Mi-17 helicopter is “the most logical choice for achieving mission success in Afghanistan.” AR, Tab 21, D&F, at 2. The D&F further finds that the acquisition of 21 Mi-17 helicopters is “critical to the mission of [CAPTF] which is to develop a highly proficient [Afghanistan Air Force] capable of sustaining the long-term security requirements of Afghanistan.” *Id.* at 1. Based on the findings contained in the D&F, the Acting Secretary concluded that it was in the public interest to obtain 21 Mi-17s for the Afghanistan Air Force, and that “[f]ull and open competition need not be provided in this procurement based on the public interest exception due to the Mi-17’s proven robust operational capabilities in the extreme environments of Afghanistan, the familiarity of the Afghans with the helicopter platform, and the considerable delays that would hinder the war effort.” *Id.* at 3.

With regard to the Afghanistan Air Force’s familiarity with the Mi-17, the D&F stated that “[i]t is important for the United States to sustain a familiar platform for the Afghans to support the war effort.” *Id.* at 2. Specifically, the D&F explained that “[t]he [Afghanistan Air Force] has over 30 years of extensive experience with this platform with nearly 76 percent of the seasoned Afghan helicopter pilots having flown and maintained this platform since the 1980s.” *Id.* The D&F stated that the restriction of the competition to the Mi-17 was warranted because of the need for a

² The Navy declined to produce this memorandum, stating that it contained privileged material. Agency Response to Protester’s Objections Regarding Document Production (Sept. 1, 2010) ¶ 12.

“simple and familiar platform,” in light of the difficulties in recruiting and training pilots for the Afghanistan Air Force, such as limited literacy. Id. at 2-3. The D&F concluded here that it would take a “minimum of three years” to retrain the current Afghanistan Air Force pilots and maintenance crews, and that a change to a different helicopter “would result in unacceptable delays and significantly impact the mission of [CAPTF] and long-term success of the [Afghanistan Air Force].” Id. at 2-3.

With regard to performance capabilities, the D&F stated that “[i]t is crucial in the on-going war effort to supply a robust helicopter capable of meeting specific requirements, including transporting combat ready Afghan troops throughout the remote regions of Afghanistan,” and that “[c]omparison of the Mi-17 with other helicopters reveals that the Mi-17 stands apart as an all around helicopter capable of medium and heavy lift, as well as defense and offensive air operations.” Id. at 2. For example, the D&F explained that the “[Afghanistan Air Force] mission routinely requires fully-loaded helicopters to operate in excess of 15,000 feet in altitude, with some missions up to 19,000 [feet] in altitude.” Id. The D&F concluded here that there is no alternative multipurpose helicopter available that is “able to meet the altitude requirement with the same amount of cargo as the Mi-17.”³ Id.

Propriety of Public Interest D&F

Sikorsky argues that this RFP improperly restricts competition because the D&F does not set forth an adequate basis for specifying the Mi-17 helicopter. The protester primarily argues that the statements set forth in the D&F regarding the required effort and associated delay associated with transitioning the Afghanistan Air Force from the Mi-17 helicopter to a different helicopter platform are not reasonable, and also argues that it can offer a variant of the Sikorsky S-61 helicopter that can meet the same altitude performance requirements as the Mi-17.

As indicated above, the FAR requires the public interest exception be justified by a D&F that “set[s] forth enough facts and circumstances to clearly and convincingly justify the specific determination made.” FAR § 1.704. Our review of an agency’s invocation of the public interest exception is based on this regulatory requirement implementing CICA’s public interest exception.⁴ In this regard, we note that the

³ The D&F describes the Navy’s issuance of a sources-sought synopsis on January 8 requesting information from potential offerors concerning the procurement of Mi-17 helicopters. The agency received numerous responses, but contends that neither Sikorsky nor any other offeror challenged the requirement for a Mi-17 variant helicopter or offered an alternative helicopter that provided the same level of performance as the Mi-17. AR, Tab 21, D&F, at 2; CO Statement at 2; see AR, Tab 28, Responses to Sources Sought Notice (Jan. 8, 2010).

⁴ Sikorsky also argues that the agency should have used the exception to full and open competition where brand-name items are needed to satisfy the agency’s

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Court of Federal Claims has reviewed the invocation of the public interest exception on this basis. See Spherix v. United States, 58 Fed. Cl. 514, 515 (2003); Spherix v. United States, 58 Fed. Cl. 351, 358 (2003). Our review of a D&F issued by an agency in support of the public interest exception to full and open competition addresses whether the D&F provides, on its face, a clear and convincing justification that the restricted competition furthers the public interest identified. We will consider a protester's arguments that the D&F relies on facts that have no relation to the stated public interest, or that the D&F relies on materially inaccurate information. We will not, however, sustain a protest based on the protester's mere disagreement with the conclusions set forth in the D&F. See Raytheon Co.-Integrated Def. Sys., B-400610 et al., Dec. 22, 2008, 2009 CPD ¶ 8 at 6.

Here, Sikorsky does not challenge the D&F's identification of the public interest furthered by the limited competition, *i.e.*, the requirement to support the development of the Afghanistan Air Force and its need for a multipurpose helicopter. AR, Tab 21, D&F, at 1-2. Instead, the protester argues that the facts set forth in the D&F do not support the Acting Secretary of the Navy's conclusion that limiting the competition to the Mi-17 is necessary to meet the identified public interest. Specifically, the protester argues that the facts set forth in the D&F concerning the training requirements associated with providing other than Mi-17 helicopters, and the performance requirements of the Mi-17 with regard to altitude do not support the D&F.⁵ For the reasons discussed below, we conclude that Sikorsky does not demonstrate that the D&F was defective.

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requirements. FAR § 6.302-1(c). The Navy explains that the use of the public interest exception was appropriate here because the selection of the Mi-17 was not based solely on the performance characteristics of that brand of helicopter, but rather a broader set of concerns regarding experience of the Afghanistan Air Force in using the Mi-17 and the effect on the war effort arising from the effort and time required to transition to a new helicopter platform. AR at 7-8. Sikorsky does not substantively respond to the Navy's explanation. On this record, we agree with the agency and find no merit to the protester's argument.

⁵ Sikorsky raises other challenges, including the D&F's failure to consider the life-cycle costs of the Mi-17 as compared to other aircraft, such as the S-61. The protester cites no authority that requires an agency to consider life-cycle costs in exercising the public interest exception to full and open competition. Because the agency justified limiting the competition to the Mi-17 helicopter, we do not think that the agency was required to have considered the life-cycle costs of the Mi-17 as compared to other helicopters. We have considered all of the arguments raised by the protester, and find none has merit.

The Afghanistan Air Force's Familiarity with the Mi-17 Helicopter

As discussed above, the D&F stated that “[i]t is important for the United States to sustain a familiar platform for the Afghans to support the war effort.” AR, Tab 21, D&F, at 2. The D&F cited numerous grounds for limiting the competition of the Mi-17 helicopter, including the Afghanistan Air Force’s 30 years of experience with the Mi-17, the established corps of 140 pilots trained to fly the Mi-17, and the difficulty in recruiting and training new pilots and maintainers as well as retraining current personnel. Id. at 2-3. The protester primarily argues that the D&F improperly relies on unsupported or conclusory statements, some of which are contradicted by the record.

In light of the requirement for a D&F to set forth “enough” facts to “clearly and convincingly” support the public interest exception—the standard set by FAR § 1.704—we do not think that the protester’s general argument that more detailed facts could have been cited in the D&F provides a basis to sustain the protest. We think that the record shows that the statements cited in the D&F are adequately supported by the reports regarding the Mi-17 provided by DOD to Congress, a report prepared by the Air Force concerning Afghan airpower requirements, and the report prepared by the CAPTF Commanding General. See AR, Tab 17, Memorandum by CAPTF Commanding General Re: Mi-17 Helicopters (Feb. 23, 2010); Tab 18, Afghanistan National Security Forces Airpower Requirements Review (Feb. 28, 2010); Tab 20, DOD Report to Congress Re: Mi-17 Helicopters (Mar. 23, 2010). We further think that the statements in the D&F provide a clear and convincing justification, on their face, that the restriction of competition to the Mi-17 furthers the public interest in supporting the missions of the CAPTF and the Afghanistan Air Force.

To the extent that Sikorsky contends that the D&F relies on incorrect facts or statements, we conclude that the protester’s arguments do not identify materially incorrect or clearly erroneous facts or conclusions, but instead represent the protester’s mere disagreement with the Navy’s positions.

For example, the protester argues that the Afghanistan Air Force will be required to train new pilots and maintenance crews, regardless of whether it is provided Mi-17 helicopters or another helicopter platform. In this regard, the protester contends that the current experience of the Afghanistan Air Force, e.g., 140 pilots qualified to fly Mi-17s and the maintenance crews, does not represent a “sunk investment” that merits a continued use of Mi-17s. Protester’s Comments at 5.

However, the record shows, and Sikorsky does not dispute, that the Afghanistan Air Force has a long history using the Mi-17 helicopter, and that challenges exist in the training of new and retraining of current personnel. In this regard, the D&F and other documents included in the record state that training new and existing staff in English has proven difficult; for this reason, training and retraining efforts are and will be reliant on experience of existing staff, who are familiar with the Mi-17. AR, Tab 18, Afghanistan National Security Forces Airpower Requirements Review,

at 15-16, 19, 21, 27, 37-38; Tab 21, D&F, at 2-3. Further contributing to the difficulties of these efforts is the low level of literacy in the Afghan population, which limits the available pool of new recruits and increases the Afghanistan Air Force's reliance on the knowledge of current personnel who are familiar with the Mi-17. AR, Tab 18, Afghanistan National Security Forces Airpower Requirements Review, at 19, 37-38; Tab 21, D&F, at 2.

We do not think that the protester demonstrates that the D&F's statements regarding the challenges posed by training and retraining Afghan personnel are clearly incorrect. At most, the protester expresses disagreement as to the scope of the problem, and the degree of difficulty that would be posed by a transition to a different helicopter platform, such as the S-61. We think that the protester's disagreement with the agency's judgments does not demonstrate that the facts cited in the D&F are incorrect or insufficient to justify the restriction of competition to the Mi-17.

Additionally, the protester contends that the current Afghanistan Air Force fleet of Mi-17 helicopters is comprised of different Mi-17 variants. Protester's Comments at 28, citing AR, Tab 16, Navy Sources Sought Briefing, at 3 (stating that procurement of new Mi-17 helicopters is appropriate because existence of different variants of the Mi-17 "is not conducive to fleet commonality.") The protester argues that because the Afghanistan Air Force maintenance crews must maintain different variants of the Mi-17, the "D&F and the Agency Report fail to articulate how adding the S-61 helicopter to this mix would materially frustrate the [Afghanistan Air Force]." Protester's Comments at 28. We think that the protester's argument here makes an unsupported assumption, i.e., that the Mi-17 variants are so dissimilar that the delay or disruption to ongoing war efforts would not be significant if the S-61 were also introduced, and constitutes no more than disagreement with the Navy's judgment.

In sum, although the protester argues that the D&F lacks sufficient information to support the restriction of competition to the Mi-17, we think that the protester's arguments do not demonstrate that the D&F's conclusions that a change in helicopters would create unacceptable disruption and delay to the war effort is clearly erroneous or relies on materially incorrect facts.

Altitude Performance Requirements

Sikorsky argues that the D&F does not support the use of other than full and open competition on the basis that only the Mi-17 helicopter can meet the specified altitude performance requirements. As noted above, the D&F stated that only the Mi-17 helicopter can meet the Afghanistan Air Force's requirements for "fully-loaded helicopters to operate in excess of 15,000 feet in altitude, with some missions up to 19,000 [feet] in altitude." AR, Tab 21, D&F, at 2; see Tab 20, DOD Report to Congress Re: Mi-17, at 25. Sikorsky does not challenge D&F's statement concerning the altitude requirements. Instead, Sikorsky initially stated that, absent the restriction of competition to the Mi-17, the protester could provide an S-61 helicopter, which could

satisfy the altitude requirements identified in the D&F.⁶ The protester stated that it is currently providing S-61 helicopters to the Department of State for use in Afghanistan.

In its report on the protest, the Navy noted that a variant of the S-61 helicopter provided by Sikorsky under the Department of State contract requires a modification of its rotor blades in order to reach an altitude of 13,000 feet. AR at 3, citing AR, Tab 20, DOD Report to Congress, at 25. The Navy also noted that a July 21, 2010 industry news article quoted Sikorsky's Director of S-61 programs as stating that the company anticipated it would, within 18 months, complete upgrades that would allow the S-61 to match the altitude performance of the Mi-17. AR at 3; Supp. AR at 5-6; AR, Tab 30, AINonline News Article, at 1. The Navy therefore argues that the protester will not be able to provide a helicopter that meets the Afghanistan Air Force's requirements.

In its comments on the supplemental agency report, Sikorsky stated that the S-61 model referenced in the new article was not the same as the model it could provide to meet the requirements here. The protester submitted a declaration by Sikorsky's Director of S-61 Programs, which, for the first time, identified [deleted] variant of the S-61 to meet the altitude performance requirements set forth in the D&F. The Sikorsky Director also stated, however, that "I am not at liberty to provide the specifics of aircraft performance or the test data in this declaration." Protester's Comments on Supp. AR, attach. 1, Decl. of Sikorsky's Director of S-61 Programs, at 1.

In sum, we think that the performance requirements, including those related to altitude, set forth in the D&F, on their face, also support the conclusion that procurement of Mi-17 helicopters is required to meet the public interest of supporting the Afghanistan Air Force mission. The protester has not shown that its proposed alternative can meet the same performance requirements.⁷

Buy American Act and Balance of Payments Program

Finally, Sikorsky argues that the restriction of the competition to the Mi-17 helicopter violates the Buy American Act and the Balance of Payments Program.

⁶ We note, however, that Sikorsky did not respond to the Navy's sources sought synopsis with an offer of S-61 helicopters.

⁷ Sikorsky also argues that under various performance factors, such as load capacity, the S-61 compares favorably to the Mi-17. This also represents mere disagreement with the D&F, and in light of the protester's failure to provide evidence that its [deleted] helicopter can meet the altitude requirements, we need not address these additional arguments.

The Buy American Act, by its own terms however, does not apply to work to be performed outside the United States. 41 U.S.C. § 10a (2006); Systems & Def. Servs. Int'l, B-254254.2, Feb. 9, 1994, 94-1 CPD ¶ 91 at 5. In contrast, the Balance of Payments Program states that DOD shall “[a]cquire only domestic end products for use outside the United States,” absent a determination that the requirement should not apply. DOD FAR Supp. (DFARS) § 225.7501. A CO may determine that the Balance of Payments Program requirements do not apply if “that a requirement can best be filled by a foreign end product.” DFARS § 225.7501(a)(7).

Here, the CO states that, as part of his determination to issue the solicitation limiting the competition to the Mi-17 helicopter under the authority of the D&F, he necessarily determined that only a foreign end product—the Mi-17 helicopter—satisfied the agency’s requirements. CO Statement at 4. The CO also states that he will document this finding in the final contract negotiation memorandum. Id. In light of our conclusion that the D&F justifies the restriction of competition to the Mi-17 helicopter, the protester’s argument that the solicitation was required to include clauses implementing the Balance of Payments Program is denied.

The protest is denied.

Lynn H. Gibson
Acting General Counsel