

Office of Dispute Resolution for Acquisition

Federal Aviation Administration

Washington, D.C.

FINDINGS AND RECOMMENDATION

Matter: Protest of Helicopter Adventures, Inc.

Pursuant to Solicitation DTFA02-98-R-90500

Docket: ODRA Docket 98-ODRA-00107

Appearances:

For the Protester, Helicopter Adventures, Inc.: Patrick Corr, President

For the FAA, Mike Monroney Aeronautical Center: A. Lester Haizlip, Senior Counsel

I. Introduction

This protest of Helicopter Adventures, Inc. ("HAI"), filed with the FAA's Office of Dispute Resolution for Acquisition ("ODRA"), relates to an acquisition of helicopter flight training services for the FAA's Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma (hereinafter the "Center"), under Solicitation No. DTFA02-98-R-90500, Helicopter Pilot Qualification Training. HAI challenges a contract award under that solicitation to Green River Aviation, Inc. d/b/a/ North East Helicopter (hereinafter "GRA"). HAI alleges that GRA was not technically qualified to compete for the contract, because FAA approvals for 4 of 7 specified courses had expired and were not current and in effect as of the time proposals were submitted. For the reasons set forth herein, the ODRA concludes that the Center had a rational basis for determining that GRA was technically acceptable as an offeror and was entitled to an award as the lowest-priced, technically acceptable offeror. Accordingly, the ODRA recommends that the protest be denied.

II. Findings of Fact

1. On July 9, 1998, the Center issued a Screening Information Request (SIR) under Solicitation No. DTFA02-98-R-90599, Helicopter Pilot Qualification Training. The SIR called for proposals on the provision of seven helicopter pilot training courses for a base

period of one (1) year, with two one (1) year renewal options. Agency Response, Contracting Officer's Statement II (hereinafter "AR"), Tab 1, Schedule B.

2. SIR Schedule B required offerors to list proposed course hours based on "the training hours contained in the contractor's FAA approved training program." The numbers of hours listed were to equal or exceed the minimum numbers of hours specified by the SIR for each course. *Id.* This clearly implied that the offeror's training program had to be in existence and approved by the FAA as of the date of proposal submission. Section C.3 of the SIR, "GENERAL TRAINING REQUIREMENTS (FEB 1997)," spoke more directly of a "training program" which was "existing" and "approved":

All instruction must comply with the contractor's **existing training program**, which has been **approved by the FAA** under Federal Aviation Regulations (FAR) Part 121, 135, 141, or 142 as appropriate. Although the FAA requires minimum hours for training which may not be the exact hours in the contractor's approved program, the contractor is requested to supplement systems training to meet the required minimums. The contractor is expected to exercise its best training efforts.

Id., Section C.3(a) (emphasis supplied).

3. SIR Section L.6, "QUALIFICATION CRITERIA (JAN 1997)," similarly made plain that, to be considered "qualified," an offeror would need "an applicable training program approved under FAR Part 121 or FAR Part 135 or a training course approved under FAR Part 141 or FAR Part 142 for the aircraft identified herein" -- *i.e.*, for helicopters. In requesting information within offeror's technical proposals on courses being offered, SIR Section L.6 made reference to "the current FAA-approved program."

4. Finally, SIR Section M.1, "EVALUATION OF PROPOSALS (JAN 1997)" spoke of evaluation of technical proposals on an "Acceptable" or "Not Acceptable" basis in terms of an overall "current FAA-approved program," to include individual approved courses, referred to as "the initial, recurrent, and standardization training programs":

Technical proposals will be evaluated according to the categories listed below which are all equal in importance and rated as Acceptable or Not Acceptable:

1. **Current FAA-approved program, including the initial, recurrent, and standardization training programs (as appropriate);**
2. Systems training proposed to determine that it meets the FAA minimum hours;
3. Approved transition training program.

Id., Section M.1(a) (emphasis added). This SIR section concluded by stating that "award may be made to the lowest-priced, technically acceptable, responsible offeror." *Id.*

5. On July 15, 1998, the Center issued an Internet notice for the proposed acquisition. The notice provided, in pertinent part:

The Federal Aviation Administration has a requirement for the acquisition of services to provide helicopter pilot training in the following:

* * *

Contractor must possess a pilot school certificate issued under Federal Aviation Regulation (FAR) Part 141, meet recent training activity requirements outlined under FAR Part 141.5, and all training must comply with the **contractor's approved existing training program**.

* * *

Contractor is required to submit copies of their **approved program**, including a course syllabus and any proposed additions/changes, in sufficient detail to determine compliance with the minimum hourly requirements of the Screening Information Request (SIR).

* * *

AR, Tab 2 (emphasis supplied). In neither the SIR nor the subsequent Internet notice were the terms "current approved program" and "approved existing training program" further defined.

6. The date established for receipt of proposals, initially set for July 24, 1998, was extended to August 5, 1998 by SIR Amendment 1, and to August 14, 1998 by SIR Amendment 2. AR, Tabs 3 and 4. Contracting Officer's Fact File (December 22, 1998) (hereinafter the "COFF"), Tab G.

7. On August 14, 1998, timely proposals were received from three offerors, including HAI and GRA. The offerors' technical proposals were forwarded to the cognizant FAA office, AMA-260, for technical review on approximately September 7, 1998.

8. Subsequently, AMA-260 determined the offer of both GRA and HAI to be technically acceptable. On December 3, 1998, award was made to GRA as the lowest price, technically acceptable offer, in accordance with SIR Section M.1, and all three offerors were so advised.

9. By letter dated December 3, 1998, received by the Center (AMQ-310) on December 3, 1998 and by the ODR on December 7, 1998, HAI filed its protest of the Center's award decision. In the protest letter, HAI contended that GRA did not have approval for all

courses it was offering, "at least at the time of submittal" of its offer. The protest cited two courses in particular purportedly as not having FAA approval under FAR Part 141: (1) Helicopter Pilot Refresher Courses for Category/Class and IFR per FAR Part 141, Appendix K; and (2) Helicopter Instrument Instructor Rating Course -- Helicopter per FAR Part 141, Appendix G.

10. Pursuant to an agreement of the parties, the protest was submitted to an Alternative Dispute Resolution (ADR) process, in an attempt to narrow the issues presented and possibly achieve an overall settlement. The ODRA's Mr. William J. Sheehan was designated a Dispute Resolution Officer ("DRO") for purposes of administering the ADR process. Through ADR, HAI was satisfied that there was no problem associated with the two helicopter courses specifically cited in its protest. However, HAI maintained that GRA was required to have approval for all courses specified as of the date of proposal submission and that, in fact, it did not have such approval. By letter to Mr. Sheehan dated December 23, 1998, HAI asserted that, as of the date its proposal was submitted, August 14, 1998, GRA "did not have authority to teach five of the required courses." In that December 23, 1998 letter, HAI went on to state:

This [lack of authority to teach five of the required courses] was not noticed by the AMT Contracting Team. Had it been noticed at the time, GRA would have to have been disqualified from bidding. GRA then used the next three months to put in place the necessary approvals.

On this alleged basis, HAI concluded its letter with a demand that GRA "be disqualified" and that a "directed judgement [sic]" be issued in HAI's favor, "in accordance with Paragraph M.1(c) of the SIR."

11. By letter dated December 22, 1998, the Center's Contracting Officer submitted to the ODRA his COFF. In response to the COFF and HAI's letter to Mr. Sheehan of December 23, 1998, Richard C. Walters, the ODRA's DRO for purposes of adjudication of the protest, by letter to the parties of January 5, 1999, sought supplementation of the record in the form of an Agency Response, and made the following observation and request:

From the protester's letter of December 23, 1998, it appears that, based on the ADR proceedings, the issues to be resolved by adjudication under the Default Adjudicative Process have been narrowed to a single issue: whether offerors were required to have obtained current course certifications on or before the date of proposal submittal -- more specifically, whether an offeror was precluded from participating in the procurement, in the absence of such certifications. **The Agency Response should focus on this issue and on the Center's position regarding it.** (Emphasis in original).

12. Thereafter, on January 27, 1999, the Center filed its Agency Response with the ODRA. Subsequently, by letter dated February 2, 1999, HAI submitted comments with respect to the Agency Response (hereinafter the HAI "Comments"). In its Comments,

HAI -- based on a matrix furnished by a Mr. Kenneth D. Roach, Manager of the cognizant FAA Flight Standards District Office ("FSDO"), located at Windsor Locks, Connecticut -- cited the following four courses as having been approved subsequent to the proposal submittal date of August 14, 1998:

<u>Course Name</u>	<u>Approval Date</u>
Commercial Add-on Course	9/11/98
Instrument Instructor -- Helicopter	9/11/98
Instrument Rating -- Helicopter	10/6/98
ATP -- Helicopter	10/6/98

HAI contends that, whereas, prior to August 4, 1998, GRA's courses had had FAA approval, that approval had expired on August 4, 1998, by reason of FAR Part 141.53(c)(1), which HAI quotes as follows:

A training course submitted for approval prior to August 4, 1997 may, if approved, retain that approval until one year after August 4, 1997.

Based on this language, HAI, in its Comments, asserts that flight schools had a grace period of one only year, from August 4, 1997 through August 4, 1998, within which to revise their previously approved courses and to obtain renewed FAA approval. Because some of GRA's courses specified for the instant helicopter training contract had yet to receive renewed FAA approval, HAI maintains that GRA was not technically qualified and should not have received the contract award.

13. There is no dispute that GRA received formal FAA approval for some of the courses specified by the SIR after August 14, 1998, the date for proposal submission. Indeed, the affidavit furnished by Mr. Roach in support of the Agency Response indicates that, as of that date, the FSDO was reviewing materials submitted by GRA that amended the courses. By the same token, Mr. Roach explains in that affidavit that his office does not and would not move to suspend or revoke an operator's FAR Part 141 certification, pending completion of review of the operator's amendment efforts. Roach Affidavit, ¶11. He further states in that affidavit that the Windsor Locks FSDO did not revoke or suspend GRA's FAR Part 141 certificate and that GRA "remained a certificated FAR Part 141 school operator on August 4, 1998 [the date HAI contends FAA approval would have expired] and remains so to date [*i.e.*, January 27, 1999, the date Mr. Roach signed his affidavit]." *Id.*, ¶¶12-14. In his affidavit, Mr. Roach relates that neither the FSAS database, nor its ISIS subsystem -- records maintained by his office and "relied upon by FAA personnel as the FAA official record of current status of Airmen, Air Operators, Air Agencies, [and] School Operators" -- had been "amended, altered, or changed by FAA-FSDO Windsor Locks, Connecticut, to reflect any diminution or negative change in the FAR Part 141 school operator certification status or FAA approved course status" for GRA in this case, and that such records showed, not only that GRA continued throughout

as an FAA certified school operator, but that it offered all of the specified courses as FAA approved courses. *Id.*, ¶¶16-19

14. In its Comments, HAI discounts what was reflected in the FSAS/ISIS record and points out that, according to the matrix provided by Mr. Roach with his affidavit, the course approvals in question had "expired per regulation."

15. Upon receipt of the HAI Comments, the protest record was closed.

III. Discussion

In evaluating the merits of any bid protest, the ODRA will not substitute its judgment for that of Agency officials and will not recommend to the Administrator that Agency actions be overturned, provided such actions are not arbitrary, capricious, an abuse of discretion or undertaken without a rational basis. *E.g., Protest of Camber Corporation*, 98-ODRA-00102.

The issue presented here is whether the Center had a rational basis in concluding that GRA was technically qualified to participate in the instant acquisition and that it was entitled to an award in accordance with SIR Section M.1, based on its having the lowest priced, technically acceptable offer. More particularly, the ODRA must determine whether GRA had to be excluded from participation in the acquisition, simply because GRA's approval for certain of the courses specified by the SIR may have expired, by operation of the language of FAR 141.53(c)(1).

In the Findings and Recommendations in the *Protest of Haworth, Incorporated*, 98-ODRA-00075, the ODRA recommended that a protest of a firm excluded from participation in an acquisition be sustained. Such exclusion had arisen in that case, because the protester allegedly had failed to adhere to a "mandatory" requirement for "attendance" at a pre-proposal conference and thus supposedly was not qualified to submit a proposal under the SIR. There, the ODRA found that the SIR did not clearly specify that pre-proposal conference "attendance" had to be by a manufacturer's representative rather than a representative of a manufacturer's distributor. It also found inadequate notice either in the SIR or in subsequent communications with Agency personnel regarding the consequence of failure to "attend" in this manner, namely, that an offeror failing to so "attend" the pre-proposal conference would automatically be excluded from further participation in the acquisition and would be prevented from submitting a proposal. Absent such notice, the ODRA reasoned, there would be no authority or justification for imposing such a consequence.

In the present case, SIR Section L.6, when identifying criteria for technical qualification, spoke of "an applicable training program approved under FAR Part 121 or FAR Part 135 or a training course approved under FAR Part 141 or FAR Part 142 . . . ," but did not disclose any consequences to a potential offeror in terms of a bar to further participation

in the acquisition, in the event previously FAA-approved courses purportedly would lose their "approved" status upon the stroke of midnight on August 4, 1998, by operation of the language of FAR 141.53(c)(1). In this regard, it should be understood that the SIR initially called for proposals to be submitted on July 24, 1998. Finding 6. Thus, FAR 141.53(c)(1) and its supposed consequence on further participation in this acquisition would not have been in the contemplation of the drafters of the SIR and hardly could have been communicated to potential offerors.

Although the SIR and subsequent Internet notice spoke in terms of "*current* approved program" and an "approved *existing* training program," as we have found, those terms were not further defined. Finding 5. Indeed, it would seem that the FAA's contemporaneous interpretation of those terms, based on its taking no action to modify the official FSAS/ISIS record or to revoke or suspend GRA's school certification or course approval status, would be that the language of FAR 141.53(c)(1) would have no impact in terms of an offeror's continued qualification for participation in the present acquisition. In other words, notwithstanding FAR 141.53(c)(1), a previously approved program would retain current approval status with the FAA, pending the FSDO's review of proposed revisions. Roach Affidavit, ¶11.

Had the Center acted to bar GRA from submitting a proposal under these circumstances, and had a protest been filed by GRA, the ODRA may well have had to recommend that such a protest be sustained, based on the principles enunciated in *Haworth, supra*. Regardless of whether some of GRA's course approvals had technically "expired per regulation," absent adequate notice to the contrary within the SIR or otherwise, those courses remained "current FAA approved" courses for purposes of GRA's participation in this acquisition. We must therefore conclude that the Center's determination that GRA had a "current approved program" and was a qualified and technically acceptable offeror had a rational basis. The award to GRA as the lowest priced, technically acceptable offeror thus should not be disturbed.

Conclusion and Recommendation

For the reasons set forth above, the ODRA concludes that the award to GRA as the lowest priced, technically qualified offeror had a rational basis and recommends that the HAI protest be denied.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____

Anthony N. Palladino
Associate Chief Counsel and Director
Office of Dispute Resolution for Acquisition