

John W. Chierichella, Esq.  
Direct Dial: (202) 218-6878  
jchierichella@sheppardmullin.com

July 2, 2007

Agreed Upon

**REDACTED VERSION**

~~CONTAINS PROTECTED MATERIAL TO BE  
DISCLOSED ONLY IN ACCORDANCE WITH  
GOVERNMENT ACCOUNTABILITY OFFICE  
PROTECTIVE ORDER~~

**VIA FACSIMILE TRANSMISSION  
AND ELECTRONIC MAIL**

Mr. David A. Ashen, Esq.  
Deputy Assistant General Counsel  
Office of the General Counsel  
Government Accountability Office  
Procurement Law Control Group, Room 1103  
441 G Street, N.W.  
Washington, D.C. 20548

**Re: B-299145.5 *et al.*, First Supplemental Protest of  
Sikorsky Aircraft Corporation to Amendment No. 4  
Under United States Air Force, Air Force Materiel Command  
Request for Proposals No. FA8629-06-R-2350**

Dear Mr. Ashen:

On behalf of Sikorsky Aircraft Corporation ("Sikorsky"), 6900 Main Street, P.O. Box 9729, Stratford, CT 06497, telephone (203) 386-4000, facsimile (203) 998-4603, we hereby file this timely first supplement to the protest previously filed herein on June 25, 2007 against the improprieties of Amendment No. 4 (the "Amendment" or "Amended Solicitation") to Request for Proposals No. FA8269-06-R-2350 (the "RFP" or the "Solicitation") issued by the United States Air Force Materiel Command, Aeronautical Systems Center (the "Air Force" or the "Agency") for the Combat Search and Rescue Replacement Vehicle ("CSAR-X").

### TIMELINESS

This first supplement to Sikorsky's protest is based on new information disclosed in the Air Force's June 22, 2007 production of documents. This protest is filed within ten (10) calendar days of June 22, 2007, and is thus timely. 4 C.F.R. §21.2(a)(2).

### SUPPLEMENTAL PROTEST GROUNDS

**A. The Air Force Intends Unreasonably to Deflate the Projected Cost of Fuel By Basing the Evaluation of Fuel Costs on Peacetime Requirements While Inconsistently Inflating the Projected Cost of Maintenance By Basing the Evaluation of Maintenance Manpower Costs on Wartime Staffing Levels**

It is well established under CICA, the FAR, and GAO case law that an agency's evaluation methodology must accurately measure the likely cost to be incurred under competing proposals. *See* 10 U.S.C. § 2305(a)(3); FAR § 15.404-1(d); *CW Government Travel, Inc.*, B-295530.2., July 25, 2005, 2005 CPD ¶ 139 (sustaining protest against solicitation's price evaluation methodology where disregard of transaction and management fees precluded agency from meaningfully evaluating proposal's cost to the Government). Thus, in conducting its most probable cost analysis, an agency must evaluate all likely costs of offerors' respective proposals to the Government, and may not evaluate only a portion of such costs. *See, e.g., CW Government Travel, supra; Lockheed, IMS*, B-248686, Sept. 15, 1992, 92-2 CPD ¶ 180 (sustaining protest where agency failed to consider significant portion of likely costs); *Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 (noting concern with evaluation methodology that excluded certain costs).

In the present case, the Amended Solicitation informs offerors that fuel costs will be evaluated by the Air Force and included in the O&S component of the MPLCC. AR, Tab 1, Amended Solicitation, § M.13.2 (Exhibit 1 hereto). The Air Force is required to assess such costs reasonably, to conduct its evaluation in a manner that accurately reflects offerors' proposed solutions, and to ensure that its evaluation includes all relevant costs. *See, e.g., Lockheed, IMS, supra*. The fuel cost evaluation methodology disclosed in the Amended Solicitation, as interpreted by the Air Force, however, does not meet the foregoing test.

Various briefing materials produced by the Air Force reveal, for the first time, that the Agency interprets the Amended Solicitation to contemplate evaluation of "Fuel required for peacetime flight ops" only. *E.g., AR, Tab 5, Redacted Payton Brief, 20Apr07 FINAL at 34* (Exhibit 2 hereto). Thus, the Amended Solicitation precludes any consideration of the costs that will be incurred for the relatively larger quantities of fuel that will be consumed in the far more

demanding context of wartime operations, such as those currently underway in Iraq and Afghanistan. The cost of fuel consumed during wartime operations, however, is just as “real” and quantifiable as the cost of fuel consumed during peacetime operations. Thus, there is no rational basis for the Air Force to include the cost of peacetime fuel consumption in, but exclude the cost of wartime fuel consumption from, the MPLCC.

The Air Force’s failure to consider wartime fuel consumption indisputably will prejudice Sikorsky. As reflected in the offerors’ respective proposals, and summarized below, the Block 0 HH-92 will consume [REDACTED] less gallons of fuel per hour than the Block 0 HH-47, while the Block 10 HH-92 will consume [REDACTED] less gallons of fuel per hour than the Block 10 HH-47. Compare Boeing Proposal, Attachment 13, O&S Data Form (Exhibit hereto 3) with Sikorsky Proposal, Attachment 13, O&S Data Form (Exhibit hereto 4).

	Block 0 Fuel Consumption Per Hour	Block 10 Fuel Consumption Per Hour
Boeing	[REDACTED]	[REDACTED]
Sikorsky	[REDACTED]	[REDACTED]
Sikorsky Fuel Savings Per Hour vis-à-vis Boeing	[REDACTED]	[REDACTED]

Even if one were to ignore the fully burdened cost of fuel, and instead use the understated \$2.53 per gallon figure included in Attachment 13 of the Amended Solicitation, each flight hour of wartime operations excluded from the Air Force’s MPLCC calculations will result in the failure to consider between [REDACTED] (Block 0) and [REDACTED] (Block 10) in additional HH-92 cost savings. If the cost of delivering fuel to the battlefield is considered, as it necessarily must be in any reasonable cost evaluation, then – based on at least one DOD estimate of the burdened cost of fuel – the Block 10 differential of [REDACTED] per hour would grow by a factor of 16, to as much as [REDACTED] per hour. See Chris DiPetto, Deputy Director for Systems & Software Engineering, Office of the Secretary of Defense, Presentation, Energy Leadership – A Fuel Efficient Force at 10 (Nov. 8, 2006) (Exhibit 5 hereto). The Air Force’s decision to overlook, and indeed to assume away, these plainly material cost savings results in an unreasonable Cost/Price evaluation methodology that does not realistically reflect the actual cost of the offerors’ respective aircraft to the Government. Accordingly, Sikorsky’s protest should be sustained on this basis.

The Air Force's decision to evaluate fuel costs based exclusively on peacetime fuel consumption is improper for the additional reason that it is inconsistent with the assumptions underlying other aspects of the Agency's cost evaluation. In particular, the Amended Solicitation indicates that the plug numbers derived from the MER and included in the MPLCC, as well as the potential maintenance manpower efficiencies to be evaluated pursuant to Attachment 23 and excluded from the MPLCC, are based upon **wartime** staffing requirements. *See, e.g.*, AR, Tab 5, Redacted Payton Brief, 20Apr07 FINAL at 168 ("The MER represents the manpower required to execute the CSAR mission in a wartime scenario.") (Exhibit 6 hereto); AR, Tab 1, Amended Solicitation, Attachment 23 at 2 ("Offeror proposed required maintenance personnel by UTC shall reflect a 2 shift operation based upon 12 hours per shift, 7 days per week representing wartime manning.") (Exhibit 7 hereto). Thus, the Air Force's Cost/Price evaluation methodology assumes that the CSAR-X aircraft will require additional personnel due to the rigors of wartime operations, while simultaneously assuming for the purposes of the fuel cost evaluation that the aircraft will be operated only in peacetime conditions.

O&S costs should and must be evaluated on a common set of assumptions so that the evaluation reflects what each offered system will actually cost the Government under the anticipated conditions of usage. If the anticipated conditions are wartime conditions, then all of the O&S costs should be evaluated against those conditions; if the anticipated conditions are peacetime conditions, then all O&S costs should be evaluated accordingly. The Air Force cannot have it both ways. It cannot assume maximum (indeed, overstated) maintenance staffing on the purported assumption that the increased wartime flight hours require such staffing, while concomitantly presuming, for the purposes of the fuel cost evaluation, that those increased wartime flights will not occur. Accordingly, the Air Force's decision to evaluate manpower costs based upon wartime staffing, while evaluating fuel costs based upon peacetime consumption, is contradictory, and, thus, inherently unreasonable.<sup>1</sup>

---

<sup>1</sup> In point of fact, the inherent inconsistency reflected in the record in this respect suggests that the Air Force's actual needs are unsettled and that the evaluation methodology does not square with what those needs actually may be. The appropriate course of action under such circumstances would be for the Air Force to withdraw Amendment 4, make a final assessment of what its needs actually are, develop evaluation criteria that are designed to assess offers against those needs, and issue an "Amendment 5," or a new consolidated RFP, that reflects a harmonious communion of needs and evaluation factors.

The need for an evaluation of O&S costs on a common basis is important because it will eliminate concerns with respect to fairness of the O&S model. As currently structured, the Air Force's O&S cost evaluation methodology systematically favors the HH-47, thereby increasing the likelihood that the Air Force will simply confirm its award to Boeing without any meaningful assessment of best value. See U.S. Federal News, *Connecticut Delegation Calls on Air Force to Re-Open CSAR-X Bid Process*, 2007 WLNR 4455369, at \*2 (Mar. 8, 2007) ("I'd like to stay with what we got and get this program going as fast as possible.") (Exhibit 8 hereto); E-mail from Secretary Wynne to Lt. Gen. Hudson (Mar. 3, 2007) ("I would like to stay with our selection") (Exhibit 9 hereto).

On the one hand, Sikorsky will not receive credit for the full cost savings resulting from the enhanced maintainability and reliability of the HH-92 because the Air Force has chosen to evaluate manpower requirements based, not upon maintenance man hours per flight hour, but upon manpower staffing, and upon maximum manpower staffing based on wartime conditions. This, of course, decreases Sikorsky's cost advantage over Boeing, whose HH-47 is far larger, far heavier, and – as reflected even in the understated comparative quantitative assessments already made by the Air Force against the SRD – is far more costly to maintain. See SSA Final Evaluation Briefing at 64-67 (Oct. 21, 2006)) (Exhibit 10 hereto); Tr. (Marcum) at 159, 161, 164, 173, 176.<sup>2</sup>

Conversely, Sikorsky will not receive credit for the full cost savings resulting from the enhanced fuel efficiency of the HH-92 because the Air Force has chosen to evaluate fuel costs based solely upon peacetime aircraft use. The advantage that this confers on the fuel inefficient HH-47 in the cost evaluation is, as noted above, staggering.

Thus, both of the Air Force's contradictory assumptions benefit Boeing at the expense of Sikorsky. They do, as noted, enhance the prospect that the Air Force will reaffirm its award to Boeing but neither of these assumptions reasonably provides any basis for a true and accurate

---

<sup>2</sup> The record actually reflects an Air Force determination that when MMH/FH is used to develop a "bottoms up" estimate of manpower requirements, [REDACTED]

[REDACTED] Having so determined, the Air Force then proceeded to disregard this determination, which would have had an obvious adverse impact on confirmation of the award to Boeing, stating [REDACTED]

[REDACTED] AR, Tab 6, E-mail from Mr. Chapin to Lt. Col. LaPuma (March 26, 2007) (Exhibit 11 hereto).

assessment of the O&S costs of the competing systems, a defensible MPLCC, or a rational “best value” analysis. Accordingly, the inconsistencies inherent in the Air Force’s manpower and fuel evaluations constitute an additional basis for sustaining Sikorsky’s protest.

**B. The Agency’s Intended Approach for Correcting Errors Made in the Evaluation of Boeing’s Proposal Is Inconsistent with the Terms of the Amended Solicitation and Results in Prejudicially Unequal Treatment**

“It is a fundamental principle of government procurement law that an agency must treat all offerors equally and evaluate them consistently.” *Barnes Aerospace Group*, B-298864, B-298864.2, Dec. 26, 2006, 2006 WL 3849071. Likewise, it is axiomatic that an agency must conduct its evaluation in accordance with the terms of the solicitation, and may not deviate from the disclosed evaluation methodology without amending the solicitation and notifying offerors accordingly. *See, e.g., Atlantic Res. Marketing Sys., Inc.*, B-292743, Dec. 1, 2003, 2003 CPD ¶ 218. In the present case, the Air Force has violated both of these “fundamental” requirements by informing offerors in the Amended Solicitation that it will not reevaluate their respective technical proposals or MPLCCs, even though it intends to reevaluate both aspects of Boeing’s proposal.

Paragraph L.1.2 of the Amended Solicitation informs offerors that “[t]he SSA will perform a new integrated Best Value assessment using the results of the October 2006 final evaluation as supplemented by Potential Maintenance Manpower Efficiencies . . . .” AR, Tab 1, Amended Solicitation, § L.1.2 (emphasis added) (Exhibit 14 hereto). Further, in its answers to offerors’ questions, the Air Force expressly stated that it would not reconsider any aspect of its prior evaluation. In this regard, the Air Force’s disclosed intent could not be more clear:

The Air Force will not re-evaluate any aspects of Mission Capability, Proposal Risk, Past Performance, or any portion of the Price/Cost factor outside of the AFSC-Based Maintenance Manpower Approach. . . .

AR, Tab 7, Answers to Offerors’ Questions, General Question 11 (Exhibit 12 hereto).

Although the Air Force has informed offerors that it will not reevaluate their technical proposals or its MPLCC calculations, it is now apparent, for the first time, that the Agency intends to reevaluate both aspects of Boeing’s proposal. In this regard, the Contracting Officer’s Contemporaneous Memorandum provides, in relevant part, as follows:

[REDACTED]

[REDACTED]

[REDACTED]

AR, Tab 4, Contracting Officer's Justification for Request for Proposal (RFP) Amendment 4, at 9 (Exhibit 13 hereto).

Thus, contrary to the terms of the Amended Solicitation and the information disclosed in its answers to offerors' questions, the Air Force actually intends to correct purported errors in Boeing's evaluated MPLCC and to permit the SSA to reevaluate Boeing's Proposal under the Product Support subfactor. This undisclosed evaluation methodology is plainly inconsistent with the disclosed terms of the Amended Solicitation, and, thus should not be permitted.

Even if the Air Force's strategy for correcting its prior evaluation errors could be squared with the terms of the Amended Solicitation – which it plainly cannot – the course of action contemplated by the Agency is improper for the additional reason that it treats offerors disparately. Even if one assumes that the Air Force made certain errors in its evaluation of Boeing's proposal, it is clear from the record established in the prior protests that the Air Force also made numerous objectively determinable factual errors in its evaluation of other offerors' proposals. For example, [REDACTED] the Air Force's [REDACTED] lead, admitted in his GAO hearing testimony that the Agency overlooked [REDACTED]

[REDACTED] Tr.  
(Stephens) at 2108 (“Question: [W]ere you ever told or were you aware that [REDACTED]  
[REDACTED] Answer: No, I was not.”).

If the Air Force intends to cure errors made in its evaluation of Boeing's proposal, it is obligated, pursuant to the fundamental requirement to treat offerors equally, to correct the foregoing error, as well as all other errors and oversights, made in the evaluation of Sikorsky's proposal. The Contracting Officer's Contemporaneous Memorandum, however, does not include any discussion of the Air Force's intent to afford other offerors the benefit of the same reevaluation that will be conducted for the potential benefit of Boeing. Accordingly, the Amended Solicitation, as interpreted by the Air Force, results in prejudicially unequal treatment, and Sikorsky's protest must be sustained.

#### RELIEF

For the above reasons, and for the additional reasons set forth in Sikorsky's other protest submissions, the terms of the Amended Solicitation are unreasonable, inconsistent with the Air Force's obligations under CICA and the FAR, and contrary to the recommendations set forth in the GAO's February 26, 2007 decision sustaining Sikorsky's protest. Accordingly, Sikorsky respectfully requests that the Comptroller General sustain this protest and recommend that the Air Force: (1) modify the Amended Solicitation to comply with applicable procurement statutes and regulations; reopen discussions with offerors; solicit proposals revised to address any and all aspects deemed appropriate and necessary by the offerors in light of prior communications with the Air Force, the passage of time, and newly developed information; evaluate those proposals reasonably and in accordance with the disclosed evaluation factors; and conduct a new source selection decision in accordance with the requirements of the Solicitation; and/or (2) alternatively, cancel the Solicitation and re-advertise against a consolidated set of requirements that accurately reflects the Air Force's needs and utilize evaluation criteria that are properly constructed in accordance with legal requirements, and/or (3) recommend that the Air Force reimburse Sikorsky for its bid and proposal costs incurred in competing for the award of a contract under the Solicitation. Sikorsky further requests that it be declared entitled to the reasonable costs of filing and pursuing this protest, including attorneys' fees, and requests that the GAO grant whatever additional relief it may deem appropriate.

Sikorsky reserves the right to timely supplement this protest with additional information disclosed in the Agency Report or other documents made available pursuant to its pending requests for documents.

### RESERVATION OF RIGHT TO REQUEST A HEARING

Pursuant to 4 C.F.R. § 21.1(d)(3), Sikorsky reasserts its right to request a hearing in this protest should it become apparent that a hearing is necessary to resolve Sikorsky's protest allegations.

### REQUEST FOR DOCUMENTS

Pursuant to 4 C.F.R. §§ 21.1(d)(2) and 21.3(c), Sikorsky requests that copies of the following documents (whether classified or unclassified, in print or electronic media, or in draft or final form) be produced, in addition to those previously requested and those required to be produced as part of the Agency report in this protest.

- (29) All documents, media, and records relating to, reflecting, or concerning any analysis or estimate of (a) the number of flight hours flown by the HH-60 aircraft during times of peace and times of war and (b) the number of flight hours that will be flown by the CSAR-X aircraft during times of peace and times of war. These documents are relevant insofar as Sikorsky has specifically challenged the reasonableness of the Air Force's decision to evaluate staffing based upon wartime requirements and fuel costs based upon peacetime requirements and the requested documents will establish the extent to which Sikorsky was prejudiced by that decision.

The General Counsel  
July 2, 2007  
Page 10

PROPOSED REDACTED VERSION  
CONTAINS PROTECTED MATERIAL TO BE  
DISCLOSED ONLY IN ACCORDANCE WITH  
GOVERNMENT ACCOUNTABILITY OFFICE  
PROTECTIVE ORDER

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

---

By: John W. Chierichella  
Anne B. Perry  
Jonathan S. Aronie  
Keith R. Szeliga  
Jesse J. Williams  
George T. Coller  
Counsel to Sikorsky Aircraft Corporation

Attachments

cc: (via electronic mail):

Phillip Marcum, Contracting Officer, United States Air Force Materiel Command  
Barbara Fisher, Contracting Officer, United States Air Force Materiel Command  
Bryan R. O'Boyle, Esq., Air Force Legal Operations Agency, Counsel for the Air Force  
Marcia G. Madsen, Esq., Mayer Brown Rowe & Maw LLP, Counsel for LMSI  
Paul F. Khoury, Esq., Wiley Rein LLP, Counsel for Boeing