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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193595 DATE: August 22, 1979

MATTER OF: Intercontinental Technical Air Coordinators; Prototype Development Associates, Inc.

DIGEST:

DC 02610
DG 02611
AGC 0030

1. Protests ~~based on~~ involving agency failure to advise protesters of agency interpretation of requirement are, in part, sustained, where record shows: (1) that agency failed to communicate its interpretation; and (2) that such information ought to have been communicated. However, claims for proposal preparation costs are denied where neither protester had acceptable proposal under RFP and it is conjectural whether they would have received award if agency had amended RFP to clearly state requirement.

2. Protests that agency rendered performance schedule unreasonable by delaying contract award are denied where: (1) delay was attributable to agency efforts to raise protesters' proposals to acceptable status; (2) training schedule allowed no further tolerance in delaying award; and (3) one of two protesters was able to meet performance schedule.

3. Protest against award to high offeror is moot where all other offers were properly rejected as technically unacceptable.

4. Protester has not carried burden to sustantiate its claim that award was delayed so that incumbent could develop required performance capability and its claim that agency overstated its actual requirements.

Intercontinental Technical Air Coordinators (ITAC) and Prototype Development Associates, Inc. (PDA), protest the award of a contract for Manned Aircraft

~~006217~~

CN00824

Tow Target (MATT) services to Flight Systems, Incorporated (FSI), under request for proposals No. DAAH01-78-R-0700, issued by the Army Missile Material Command, Redstone Arsenal, Alabama. FSI is the incumbent contractor.

AGC00314

The MATT services, which support air defense weapons training at Fort Bliss, Texas, consist of flying an aircraft in a prescribed flight profile (altitude, course, and speed) over a predetermined target course at times with (in Automatic Weapons (AW) presentations) and at times without (in Redeye Missile Tracking (RMT) and Operational Readiness Evaluation (ORE) presentations) a deployed tow target (banner). During AW presentations live ammunition is fired at the banner while the aircraft is tracked at high speed throughout RMT and ORE presentations. The RFP requires presentations at speeds approaching those experienced in combat.

GROUNDS OF PROTEST

There are five grounds of protest. Both protesters (ITAC and PDA) contend: (1) that the RFP's Federal Aviation Administration (FAA) regulation compliance requirement was prejudicially misapplied; and (2) that Army delay caused an initially acceptable performance schedule to become unreasonable and prejudicial by failing to allow for mobilization time. It is further contended: (3) by ITAC, that award was improperly made to the highest offeror rather than the lowest; (4) by PDA, that award was delayed so that FSI might develop the required performance capability; and (5) by PDA, that the Army prejudicially overstated its actual AW performance requirement. Both protesters request reimbursement of their proposal costs.

We are in part denying and in part sustaining the protests. The protesters' proposals were rejected for technical deficiencies. ITAC was unable to meet the performance schedule; PDA was unable to establish that it could furnish the required AW presentation speed. We believe that the Army's rejection of the proposals was proper under the circumstances. Consequently, even though we believe there is merit in their first

ground of protest, it is an insufficient basis to afford the protesters all the relief which they have requested. We find no merit in the second ground of protest. The third ground of protest is moot because of our conclusion that both protesters' proposals were properly rejected. The fourth and fifth grounds are not, in our opinion, substantiated by the record. We therefore are denying the protesters' claims for reimbursement of proposal costs. However, we are sustaining the protests to the extent that we are affording remedial relief in our recommendation that the Army not exercise its option under the current contract.

BACKGROUND - CURRENT PROCUREMENT

The RFP was issued in July 1978 with an August 3, 1978, closing date for receipt of initial proposals. The closing date was subsequently extended to August 10, 1978. As initially issued, the RFP contemplated an October 1, 1978, start date for performance.

Three RFP requirements underlie both the above-stated five grounds of protest and the basis of the Army's decision to reject the protesters' proposals. The three requirements are: (1) The FAA requirement; (2) the performance schedule requirement; and (3) the AW presentation speed requirement. These requirements are set out below.

The FAA requirement appears at two places. First, attachment "A," Scope of Work (SOW), paragraph 3, provides:

"MATT OPERATIONS:

"3.1 The contractor shall:

"3.1.1 Comply with all Federal Aviation Administration (FAA) and local civilian and military aircraft operating and safety SOP's [standard operating procedures], rules, and regulations for aircraft as modified for and operated in support

> of this contract to include obtaining necessary FAA certifications for the modified aircraft. All aircraft and aircraft as modified for MATT must have at least a current FAA approved special airworthiness certificate issued for an appropriate experimental certificate purpose."

Second, paragraph 7 provides:

> "To conduct satisfactory MATT flights and satisfactory presentation, the contractor shall:
>
> * * * * *
>
> "7.2 Determine in conjunction with FAA, and obtain, as required by FAA regulations, operational waivers, and airworthiness certificates for aircraft and aircraft as modified for MATT operation. All aircraft and aircraft as modified for MATT and assigned to this contract shall be operated and maintained in accordance with the current FAA authorized certificate, associated airworthiness certificate and applicable FAA regulations."

The FAA requirement is also mentioned in section C-24, Instructions for Proposal Preparation, which requires offerors to provide:

> "3.2.7 Written evidence to show that aircraft used to support this contract will satisfy the SOW certification requirements."

The performance schedule requirement, section "E" of the RFP, comtemplated 12 months of service commencing on October 1, 1978, and continuing through September 30, 1979. Section C-24 required offerors to:

> "3.2.6 Discuss planning and show by event and schedule the actions and phasein of personnel,

aircraft, modification, cable, ground support equipment, FAA certification, vehicles and facilities required to assure that MATT ORE and AW capability is available to begin support on 1 Oct 78." (Emphasis supplied.)

On October 19, 1978, amendment No. 4 shortened the period of service to 10 months, beginning December 1, 1978, and continuing through September 30, 1979.

The AW presentation speed requirement appears in attachment "A," SOW, paragraph 5, which reads in part:

"MATT PERFORMANCE CAPABILITIES:

* * * * *

AW Speed	150 - 300 KTAS [KNOTS TRUE AIR SPEED]"

This statement of the requirement was clarified twice prior to the initial closing date, on August 1, 1978, and again on July 25, 1978, in amendments No. 1 and No. 2, which furnished a series of questions and answers for offerors to consider in the submission of their proposals. Amendment No. 1 stated:

"QUESTION: During AW missions, is the target's speed and altitude to be held constant while the target is within the firing fan? If not, please clarify.

"ANSWER: The target speed and altitude may vary from presentation to presentation during a single MATT mission. However, the target speed and altitude during a single presentation is constant." (Emphasis supplied.)

Amendment No. 2 stated:

"QUESTION: Request clarification of desired tow speed of 300 KTAS and contractor responsibilities concerning satisfactory target presentation at 300 KTAS.

"ANSWER: The MA-1 Banner will withstand speeds in excess of 300 KTAS. Therefore, the contractor is responsible within the terms of the contract to provide satisfactory AW target presentations at speeds up to 300 KTAS."

PROPOSALS

Three proposals were received by the August 10, 1978, closing date. Each proposal gave a rationale for the selection of a particular tow aircraft and discussed the FAA regulation compliance requirement. The protesters' proposals also discussed the time which they would require, after notification of award, to become fully operational.

ITAC selected the Learjet Model 24 (Lear-24), a business jet, as its proposed tow aircraft. The Lear-24 was used overseas in similar missions in support of the Swedish Armed Forces and various NATO countries. ITAC expressly rejected the use of surplus military aircraft because of: (1) high operating cost, (2) limited flexibility, and (3) nonavailability of spare parts.

PDA selected the propeller-driven Douglas AD-4N "Skyraider" (AD-4) because in PDA's opinion: (1) it was faster than business jets and (2) it could comply with all FAA regulatory requirements in towing operations. PDA stated in its proposal that it interpreted the SOW's FAA requirement to preclude its use of military surplus jet aircraft because of its understanding that the FAA had determined that routine target towing operations could not be performed with experimental category aircraft.

FSI proposed the continued use of its military surplus, single engine jet, Canadair T-33 (T-33), tow aircraft for three reasons: (1) it could meet the AW speed requirement; (2) its military design included a towing capability, and (3) it was economical to purchase and maintain. FSI rejected business jets because the effort required to modify them for towing was too costly and inefficient. FSI further rejected the AD-4 because it could not meet the AW speed requirement.

EVALUATION

Between August 11, 1978, and September 27, 1978, the Army evaluated the three offers. On September 29, 1978, the evaluators made two recommendations: (1) that the RFP be amended and (2) that award be made to FSI which was considered to be technically qualified. ITAC was found technically unqualified on four grounds: (1) its MATT system had not been demonstrated; (2) its personnel had not been trained in the use of its MATT system; (3) it would not be operational until 30 to 60 days after contract award; and (4) it was not expected to be able to meet the AW speed requirement of 300 KTAS. PDA was found to be technically unqualified on three grounds: (1) its MATT system had not been demonstrated; (2) it required 8 weeks after contract award to become operational and (3) it did not appear able to meet the AW speed requirement of 300 KTAS.

NEGOTIATION AND AWARD

Between October 19, 1978, and November 27, 1978, the Army conducted negotiations with all three offerors. On October 19, 1978, all offerors were asked to submit revised proposals based on a 10 months' base period. At that time, FSI's contract was extended 2 months to November 30, 1978. While FSI was advised that its offer was technically acceptable, both ITAC and PDA were told that additional information was required before the Army could reach a determination regarding their technical acceptability. The Army set a November 1, 1978, deadline for responses from all offerors.

On November 22, 1978, the Army advised all offerors that best and final offers were due November 27, 1978, and that an award date of November 30, 1978, was contemplated. Again both ITAC and PDA were asked to provide additional information.

On November 28, 1978, ITAC filed its protest. The Army made an award to FSI notwithstanding the protest on November 30, 1978. At that time the Army advised both ITAC and PDA of the bases for the rejection of their proposals. On December 4, 1978, PDA filed its protest against the award.

TIMELINESS

The Army urges that the first and second grounds of protest are untimely because they relate to the propriety of the solicitation. It characterizes the first and second grounds as essentially contending: (1) that the RFP contained an inadequate provision regarding the FAA certification of aircraft and (2) that the RFP should have allowed for mobilization time. The Army believes that these issues ought to have been raised prior to the August 10, 1978, closing date, since they were apparent on the face of the solicitation.

We disagree. ITAC and PDA read the FAA requirement one way, while FSI and the Army read it a different way. We do not believe that the protesters are objecting to the provision, rather they are objecting to an award which, in their view, is inconsistent with the provision.

When, on November 30, 1978, the Army awarded FSI the contract, the protesters questioned whether FSI proposed to fulfill its obligations under the FAA requirement in the same way that it had fulfilled its obligations under the previous contract's somewhat similar FAA requirement. The affirmative answer to this question forms the basis of their contention that the FAA requirement was prejudicially misapplied. Therefore, both ITAC's November 28, 1978, protest and PDA's December 4, 1978, protest are, in our opinion, timely filed with respect to the FAA requirement issue. 4 C.F.R § 20.2(b)(2) (1979).

The issue of the performance schedule is also timely filed, in our view. The solicitation, as originally issued, had an August 10, 1978, closing date and an October 1, 1978, commencement date. However, the Army's evaluation of the proposals continued until September 29, 1978. It was not until October 19, 1978, that an amendment was issued setting a new commencement date of December 1, 1978. Under the amended solicitation, negotiations continued up until November 27, 1978. At all times, the protesters advised the Army that a certain mobilization time, following award, would be required before they could initiate operations. The Army indicated to the protesters that it wanted the services to begin on the specified commencement date. Notwithstanding that, ITAC continued to seek 30 days

in which to mobilize, apparently in the hope that the Army would again relax the commencement date. PDA, on the other hand, heeded the Army advice and assumed the cost and risk involved in mobilizing for the December 1, 1978, start date. In any event, it was not certain until the November 30, 1978, award to FSI that the Army would not relax the commencement date. Consequently, both protests are in this respect timely filed. 4 C.F.R., supra.

PROPRIETY OF ARMY REJECTION OF PROTESTERS' PROPOSALS

We have already stated our opinion that the protesters' proposals were properly rejected.

ITAC's proposal stated that it could provide all specified services within 30 days after award of the contract. One reason for the 30-day delay was ITAC's need to make two minor modifications on the Lear-24 (installation of the cockpit pod control panel and installation of three pod attachment fittings). On October 19, 1978, the Army, at the same time that it established the December 1, 1978, commencement date, queried ITAC:

> "5. Does ITAC understand that the RFP does not provide for a demonstration period? Further, that the successful bidder will be expected to have full MATT capability on the first day of performance period? Request comment."

On November 1, 1978, ITAC responded:

> "Answer - ITAC understands that the RFP does not provide for a demonstration period. ITAC's aircraft and tow systems will be fully flight tested during modification and FAA certification for the MATT mission, and will not require on-site demonstrations. ITAC further understands the requirement for full MATT capability on the first day of the performance period.

> "1. ITAC has the capability, per our original response to RFP DAAH01-78-R-0700, to be operational within 30 days of contract award with: two aircraft with full AW/RMT/ORE mission capability; one aircraft with RMT/ORE capability (full capability for AW/RMT/ORE mission within 45 days ARO for third aircraft)."

On this record it is clear that ITAC could only have met the December 1, 1978, commencement date if the Army had awarded it the contract on October 31, 1978, the day before the date of ITAC's response. Further, the Army clearly advised ITAC of the nature of the deficiency. While ITAC was free to gamble on the possibility that the Army might extend the commencement date, the Army was not obliged to do so. Moreover, the fact that the service contract solicited was funded by an annual appropriation meant that its initial term could not extend beyond the end of the Fiscal Year (September 30, 1979). Thus, any further relaxation of the commencement date would necessarily entail a shortening of the period of contract performance. ITAC is on record as objecting to the Army's first relaxation of the commencement date on the ground that reducing the performance period from 12 months to 10 months provided FSI with an unfair price advantage. ITAC reasoned that it was forced to use a shortened period over which to allocate its startup costs, a risk which the incumbent did not incur. In any event, the Army reports that the time required: (1) to issue an amendment reducing the performance period from 10 months to 9 months; (2) to receive revised proposals; and (3) to evaluate such proposals would have adversely impacted on its air defense weapons training program. We therefore believe that both the decision not to relax the commencement date and the decision to reject ITAC's proposal were proper under the circumstances.

PDA was excluded because the aircraft it proposed was incapable of attaining the required AW presentation speed. The record indicates that prior to the submission of its offer PDA had some basis for knowing that its aircraft was incapable of towing the banner at a constant speed of 300 KTAS while maintaining a constant altitude. On June 2, 1978, prior to the issuance of the solicitation, PDA wrote the Army regarding the merits of its proposed tow aircraft as follows:

> "The AD4 has demonstrated the ability to operate from short runways (3,000 ft), with large payloads, under adverse weather conditions, for up to 3.8 hours, while towing large scale targets with 5,000 ft of towline as slow as 130 KIAS [Knots Indicated Air Speed] or as fast as 275 KIAS. The AD4 is a self-sufficient aircraft. It operates on standard aviation gas and requires no peculiar ground support equipment for operation." (Emphasis supplied.)

PDA's proposal, in relating PDA's past towing experience, stated that PDA had undertaken assignments where:

> "Target towing speeds have ranged from 100 KTAS to 275 KTAS * * * "

Moreover, PDA's proposal advised the Army that it would provide the required 300 KTAS AW presentation air speed "by climbing to a point above the maneuver threshold, then diving to gain airspeed." PDA noted that "For presentations starting at airspeeds above 250 KTAS, the airspeed will decrease somewhat during the presentation."

One reason for PDA's inability to convince the Army that it could achieve the required constant speed at constant altitude with an AD-4 appears to be the nonavailability of 145 octane aviation fuel. PDA states in its proposal:

> "Unfortunately, the 145 octane fuel that the engine was designed for is no longer available. Consequently, maximum performance is slightly reduced because only 40.5 inches of manifold pressure and the lower supercharger speed can be used with the presently available 100 octane fuel."

As has been seen, the Army's initial evaluation cited PDA's inability to meet the AW presentation speed requirement as a basis for rejection of its proposal. Moreover, the Army, on October 19, 1978, specifically identified PDA's deficiency with the following question:

> "2. Data provided by PDA reveals that the MATT system will not satisfy ORE and RMT speed requirement of 350 KTAS nor AW speed requirement of 300 KTAS except during a continuous MATT descent. Request comment, particularly in the drag associated with the banner/scorer and 5,000 feet of cable and its effect on the MATT AW aircraft speed capability."

PDA argues that the AW speed requirement for the aircraft is distinguishable from the AW speed requirement for the banner. On this basis, PDA contends that the RFP, as issued, addressed the aircraft speed requirement and that amendment No. 1 addresses the banner speed and altitude requirement. Therefore, PDA concludes that, notwithstanding amendment No. 1, the RFP was never modified to make constant altitude and constant speed a requirement applicable to the aircraft. However, PDA never states that its banner will maintain the constant speed and altitude the RFP required. In any event, we think the above quoted, October 19, 1978, request for comment put PDA on notice that, in the Army's view, the constant speed, constant altitude constraints were applicable to the entire MATT system (aircraft and banner).

Since PDA was unable to establish that the AD-4 could meet the required AW presentation speed, we believe PDA's proposal was properly rejected.

Since both the ITAC and the PDA proposals were technically unacceptable, we believe the Army had reasonable bases for its disqualification and rejection. We further believe that the nature of ITAC's technical disqualification is such that it was not prejudiced by deficiencies in the procurement because it would not, in any event, have received the award. See Humanics Associates, B-193378, June 11, 1979, 79-1 CPD 408. However, for the reasons set out below, we believe that PDA may have been prejudiced.

FAA REQUIREMENT

The solicitation's FAA requirement assumes a role beyond a mere licensing requirement because the protesters' interpretation of the requirement influenced their respective selections of tow aircraft. The AW presentation speed requirement makes the selection of a fast aircraft a prerequisite of technical acceptability. An offeror must provide a fast aircraft which meets the solicitation's FAA requirement. The problem is what the FAA requirement is. Is it a requirement that offerors furnish a certificated aircraft which is to be operated at all times in accordance with the terms of the certificate or is it merely a requirement that offerors furnish a certificated aircraft? In our opinion, the procurement was deficient in that the Army ought to have amended the RFP so as to inform the offerors that, in the Army's ultimate view: (1) offerors could avail themselves of "public aircraft" status and (2) possession of an experimental certificate would suffice to meet the requirement.

FAA REQUIREMENT - BACKGROUND

In Condur Aerospace Corporation, B-187347, March 9, 1977, 77-1 CPD 174 (Condur), we considered the Army's initial procurement of MATT services and concluded that, there, the FAA requirement could reasonably be read as requiring no certification at all. The RFP required:

"3. MATT OPERATIONS:

3.1 The contractor shall:

"3.1.1 Comply with all Federal Aviation Administration (FAA) and local civilian and military aircraft operating and safety SOPs [standard operating procedures], rules, and regulations for Manned Aircraft Tow Target operations to include obtaining necessary FAA MATT certifications.

* * * * *

"7. To conduct satisfactory MATT flights including flights required for demonstration and satisfactory presentations, the contractor shall:

* * * * *

"7.2 Determine in conjunction with FAA and obtain, as required by FAA regulations, operational waivers, airworthiness, and safety certificates for the aircraft as modified for MATT operation.

"7.3 Operate and maintain FAA certified MATT compliance with all FAA flight regulations. Only FAA certified MATT shall be operated by the contractor in support of this contract."

In Condur the FAA issue arose when FSI proposed the use of T-33 aircraft. Under FAA regulations, there are two varieties of aircraft certificates which pertain to the FAA requirement issue: the FAA "type certificate," indicative of some degree of FAA design approval, and the FAA "airworthiness certificate," indicative of a particular aircraft's safety. There are no "FAA MATT certifications," nor is there such a thing as "FAA certified MATT." Further, there are two classifications of aircraft under the FAA's statutory authority: (1) "public aircraft," which is an "aircraft used exclusively in service of any government or of any subdivision thereof" (49 U.S.C. § 1301(32) (1976)), and (2) "civil aircraft," which is "any aircraft other than a public aircraft" (49 U.S.C. § 1301(14) (1976)). It was agreed in Condur, as it is here, that aircraft flying MATT missions in support of the Army are properly classified as "public aircraft." "Public aircraft" are not required to have airworthiness certificates. FAA Handbook, 8130.2A CHG6, June 26, 1972, chapter 1.11.b.

FSI's T-33 aircraft had no "type certification" because of their military origin and were classified as belonging to the experimental category. The T-33's did, however, have "airworthiness certificates" issued for research and development work in the field of banner towing and target development. FSI's use of the T-33's was, and still is, subject to the following operating limitations:

"OPERATING LIMITATIONS: EXPERIMENTAL - RESEARCH AND DEVELOPMENT

MAKE: CANADAIR MODEL: T33 Mk3 SERIAL NO. 306

REG. NO. N306FS

THESE LIMITATIONS SHALL BE ACCESSIBLE TO THE PILOT

"1. No person may operate this aircraft for other than the purpose for which the special purpose airworthiness certificate was issued. This certificate was issued for the purpose of research and development, re: flight testing of new aircraft equipment, new aircraft installations, and new aircraft operating techniques associated with the development of a new target towing system.

"2. The aircraft shall be operated in accordance with the applicable FAA Air Traffic and General Operating Rules.

* * * * *

"13. No person may operate this aircraft for carrying persons or property for compensation or hire."

The protester in Condur contended that FSI was not in compliance with that solicitation's FAA requirement because the above operating limitation precluded the use of the T-33 in repetitive commercial operations such as banner towing for hire. There was agreement that certification and compliance with the operating limitations accompanying certification were only applicable to the MATT aircraft if the Army, by contract provision, rendered them so. Thus, the FAA took the position that FSI's--

"T-33 is being operated in the 'public category' as defined by the Federal Aviation Act of 1958 as amended. The fact that a Certificate of Airworthiness has been issued and

> is being carried aboard an aircraft does not negate 'public category' status of the aircraft when the operation is under the exclusive use of a governmental body and does not involve the carriage of persons or property for hire. In this particular case the T-33 is being used exclusively by the U.S. Army for training purposes, does not involve the carriage of persons or property for hire, and therefore is operating in the public category. The Experimental Certificate is immaterial with regard to the training operation. In effect, the training activity at El Paso is being conducted without benefit of any Airworthiness Certificate. Therefore, there is no known violation of the FAA regulations and/or the Experimental Certificate operating limitations." (Emphasis supplied.)

The protester, however, read the RFP to require that offerors furnish and operate their aircraft, at all times, in full compliance with FAA regulations as if they were "civil aircraft." FSI and the Army, on the other hand, argued that the RFP required compliance with FAA regulations only to the extent necessary to perform the contract work in conformity with applicable law which included the "public aircraft" exception to the certification requirement. We agreed with the FSI/Army position in light of the conditional and somewhat ambiguous nature of the RFP's statement of the FAA compliance requirement and in view of our inability to discern a basis upon which to conclude that the Army intended to exact compliance with "civil aircraft" standards of maintenance and operation.

However, we did recommend that the Army take steps to insure the lucidity of future FAA solicitation requirements.

The Army acknowledged our recommendation and advised that the procuring activity would implement the following corrective actions:

"a. Solicitation provisions concerning necessary FAA approvals will be more specifically drafted so as to provide all proposers with the clear intent of the Government in this regard.

b. Solicitation provisions concerning necessary FAA approvals will be an item of discussion on the agenda of oral negotiations held in any future procurement of this nature.

c. Closer coordination will be made with the Federal Aviation Administration prior to the issuance of any solicitation for a requirement which includes any FAA approval as a condition of technical acceptability and/or responsibility."

FAA REQUIREMENT - INSTANT PROTEST

On May 1, 1978, the Army wrote FAA, in part, as follows:

"3. Although it is understood that aircraft operated exclusively in support of this effort are defined as public aircraft and do not require airworthiness certificates, it is the US Army's intent to require all aircraft and modified aircraft used in support of the inclosed SOW to be issued an FAA airworthiness certificate and to operate and maintain the aircraft in compliance with the FAA issued certificate and FAA regulation. Only aircraft and modified aircraft with FAA airworthiness certificates shall be used in support of this SOW.

"4. Your assistance is requested to review and concur with the wording and/or recommend new wording which will eliminate confusion as regards aircraft certification and preclude recurrence of a protest based on certification wording."

On May 15, 1978, the FAA responded with several recommended changes in the SOW, all of which were adopted by the Army.

FSI's proposal contained a lengthy explanation of public aircraft status and the rationale of our Condur decision. It stated FSI's belief that it could "continue to conduct routine MATT operations with its T-33 aircraft classified as Public Aircraft during actual MATT operating periods." ITAC's proposal simply indicated that the Lear-24 would meet the FAA requirement. The record does not indicate wherein the FAA requirement influenced ITAC's aircraft selection. However, PDA's proposal stated its view that use of military surplus jet aircraft was precluded because the FAA would not sanction the use of experimental category aircraft in routine target towing operations. The FAA had earlier denied PDA's subcontractor's petition for an exemption so as to permit the subcontractor's use of an AD-4, which carried an experimental certificate of airworthiness for research and development purposes, in routine commercial target towing operations. The subcontractor had previously conducted research and development on a towed target and at the time of the petition sought permission to go into routine commercial operations using the developed product under the preexisting experimental certificate. The FAA was of the view that allowance of the exemption would have an adverse effect on safety; would clearly disregard applicable regulations; and would ultimately negate the effectiveness of experimental certificates. The FAA advised the subcontractor that:

> "To be used for routine towing operations, a civil aircraft must be type certificated in the normal or utility category or, under certain conditions, in the restricted category."

For this reason, PDA's subcontractor applied for a restricted category airworthiness certificate for the purpose of towing targets. We understand that the process of qualifying an experimentally certificated aircraft for restricted certificate is both lengthy and expensive. However, such qualification is a prerequisite for operation under an FAA certificate of waiver which authorizes the use

of the aircraft in routine towing operations. Special provision No. 12 of the subcontractor's certificate of waiver states:

> "12. The aircraft used must be an appropriately restricted category civil aircraft and be operated in accordance with FAR [Federal Aviation Regulations] 91.39."

The Army's May 1, 1978, statement of intent to FAA shows that the Army required: (1) MATT aircraft with airworthiness certification and (2) MATT aircraft operated and maintained in compliance with such certification. Paragraph 7.2 is consistent with this intent. It describes the process that PDA's subcontractor went through in order to qualify the AD-4 for routine towing operations. The subcontractor consulted with FAA and it obtained both the appropriate restricted certificate of airworthiness, for the purpose of towing targets, and the certificate of waiver authorizing it to operate the aircraft: (1) for target towing, (2) at a speed in excess of 250 knots below 10,000 feet, and (3) near a busy airport where passenger operations are conducted. However, paragraph 3.1.1's statement that "[All] aircraft * * * must have at least a current FAA approved special airworthiness certificate issued for an appropriate experimental certificate purpose" appears to permit the use of experimental certificated aircraft notwithstanding operating limitations which accompany such certificates. However, we also think that paragraph 7.2 could have reasonably led the protesters to believe that they could not avail themselves of "public aircraft" status. The Army's May 1, 1978, statement of intent shows that the Army, at one time, required the FAA certificates and operation in compliance with the certificates notwithstanding the public aircraft status of the towing aircraft. As has been seen, FSI, upon reading the SOW's FAA requirement, felt obliged to clearly indicate to the Army that the performance it proposed to tender was contingent upon the availability of public aircraft status. FSI was proposing experimental category aircraft (1) with airworthiness certificates limited to research and development and (2) which could not qualify for an FAA certificate of waiver authorizing

the use of the aircraft in routine towing operations. On the other hand, PDA's proposal clearly indicated that in PDA's view the FAA requirement prevented its selection of military surplus jet aircraft. This view was subsequently confirmed when one FAA official advised PDA's subcontractor:

> "That routine target towing is not within the purposes specified for the issuance of an experimental airworthiness certificate. Moreover if the aircraft is not operated in accordance with the appropriate FAR [Federal Aviation Regulations] and the special provisions applicable to the airworthiness certificate that certificate becomes invalid.
>
> "Public aircraft are not required to have an airworthiness certificate; however, if one is placed in the aircraft, it must be maintained and operated in accordance with its provisions."

In our view, the Army's intent, regarding the FAA requirement, shifted from that expressed in the May 1, 1978, letter (which sought both certification and operational compliance therewith) to that ultimately expressed (experimental certification in conjunction with public aircraft status). We believe that the Army should have amended the RFP immediately following receipt of the proposals and advised all offerors of its understanding of the ground rules applicable to the FAA requirement. See Signatron, Inc., 54 Comp. Gen. 530, 534 (1974), 74-2 CPD 386. The Army's failure to so amend the solicitation may have prejudiced PDA by precluding its consideration of aircraft similar to those proposed by FSI.

We recommend by way of remedial action that the Army not exercise the option in its current contract with FSI and that the requirement be resolicited. Should the Army decide that its minimum requirement necessitates the use of an FAA requirement, it is further recommended that the Army state precisely what it wants. If all the Army

wants is any kind of airworthiness certificate, and the aircraft does not have to be operated in accordance with the terms of the certificate, the RFP should say it. If, on the other hand, the Army's intent remains the same as it was on May 1, 1978, it should state that it wants an aircraft airworthiness certificate and an aircraft operated in compliance with the certificate and that the "public aircraft" status wil not be an exception.

PDA and ITAC have requested reimbursement of their proposal costs. We have recently observed that:

> "* * * the courts and our Office have allowed recovery of bid or proposal of bid preparation costs where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. Condur Aerospace Corporation--Claim for Proposal Preparation Costs, B-187347, July 14, 1977, 77-2 CPD 24; National Construction Company, B-185148, March 23, 1976, 76-1 CPD 192. However, Government action, to be arbitrary or capricious, must result from something more than "ordinary" or "mere" negligence. Groton Piping Corporation and Thames Electric Company (joint venture)-Claim for Bid Preparation Costs, B-185755, June 3, 1977, 77-1 CPD 389; Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. Moreover, proposal preparation costs may not be recovered unless it is reasonably certain that the disappointed offeror would have received the award had it not been for the complaint of Government action. International Finance Economics,

B-186939, October 25, 1977, 77-2 CPD 320; Morgan Business Associates, supra." Antenna Products Division, DHV, Inc., B-192193, February 9, 1979, 79-1 CPD 87.

Since neither PDA nor ITAC had acceptable proposals, neither was entitled to award under the RFP and it is conjectural whether either would have received the award if the Army had amended the RFP to clearly state the FAA requirement. We therefore lack any basis upon which to allow the respective claims for reimbursement. Accordingly, the claims for proposal preparation costs are denied.

PERFORMANCE SCHEDULE

We have stated our opinion that there is no merit in the second ground of protest: the protester's allegation that the Army delay caused an initially acceptable performance schedule to become unreasonable and prejudicial by failing to allow for mobilization time. We hold this view for three reasons: (1) the record indicates that the delay in the award of the contract was due solely to administrative delays in completing the technical evaluations, which administrative delays were, in turn, attributable to Army efforts to raise the protesters' proposals to an acceptable status and thus increase competition for the procurement, 52 Comp. Gen. 466 (1973); (2) the Army's training schedule allowed no further tolerance in delaying award, and (3) it appears that at least one of the protester's was able to mobilize within the required time.

OTHER ISSUES

In our view, the balance of the issues raised are also without merit. The third ground of protest concerning the estimated cost of the awarded contract is moot, since award was made to the only technically qualified offeror. The fourth and fifth grounds of protest: the allegations that award was delayed in order to favor the incumbent and that the Army has prejudically overstated its minimum AW presentation speed requirement are in our opinion not supported by the record. We believe that PDA has, in regard to these

issues, failed to present the information and evidence necessary to substantiate its case. Kurz-Kasch, Inc., B-192604, September 8, 1978, 78-1 CPD 181.

Since our decision contains a recommendation for remedial action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the agency submission to the named committees of written statements concerning the action taken with respect to our recommendation.

Deputy Comptroller General
of the United States