

C. Melody



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Flight Systems, Inc.

File: B-225463

Date: February 24, 1987

DIGEST

1. Under request for proposals (RFP) for aerial target towing services, contracting agency was not required to reject offeror's initial proposal as technically unacceptable for failing to meet one of the performance standards in the RFP for the towing aircraft, where the deficiency in the proposal was due to offeror's misinterpretation of provision in RFP, and proposal was reasonably susceptible to being made acceptable by substituting a different model aircraft.

2. Contracting agency did not engage in technical leveling by asking offeror whether aircraft it proposed for aerial target towing services complied with performance standard in RFP and later issuing a clarifying amendment to RFP once it became apparent that the offeror had misinterpreted RFP provision setting out the performance standard.

DECISION

Flight Systems, Inc. (FSI) protests the award of a contract to Canfield Aviation under request for proposals (RFP) No. F44650-86-R-0010, issued by the Air Force for aerial target towing services for the Tactical Air Command. The protester argues that the Air Force acted improperly by giving Canfield an opportunity to revise its initial technical proposal after the Air Force learned that the towing aircraft proposed by Canfield did not meet one of the performance requirements in the RFP. We deny the protest.

The RFP, issued on April 28, 1986, called for the award of a fixed-price requirements contract for aerial target towing and related support services. Offerors were to submit both price and technical proposals addressing the specific requirements set out in Attachment 1 to the RFP, the performance work statement. Under section M-2(b) of the RFP, award was to be made to the lowest priced, technically acceptable

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offeror. Three offerors, including FSI and Canfield, submitted proposals by the initial due date, June 13; only FSI and Canfield were found to be in the competitive range.

The RFP did not specify a particular model of aircraft to be used for the target towing services. After the initial review of Canfield's technical proposal, it was unclear to the Air Force whether the aircraft proposed by Canfield, an F-86E model, would meet the performance standards in the RFP. Specifically, the Air Force's questions focused on paragraph 2.2.2 of the performance work statement, which provided:

"Tow Aircraft: A jet engine aircraft capable of flying to an initial altitude of 20,000 to 25,000 feet MSL with a pattern altitude of 20,000 feet MSL down to 10,000 feet MSL and a minimum altitude of 7,500 feet AGL during recovery. Aircraft must be able to fly 350 to 450 KIAS at 3.5 to 4.5 positive Gs. These parameters must be maintained for a period of not less than 5 minutes within the pattern altitude parameters."

This provision in essence establishes a 5-minute "duration of presentation" requirement at the specified speeds and altitudes which, the Air Force states, was intended to apply to the aircraft while towing a target.

On July 1, the contracting officer called Canfield and inquired whether its proposed aircraft, the F-86E, would perform as specified in paragraph 2.2.2 with a target in tow. According to the Air Force, Canfield told the contracting officer that it had not interpreted paragraph 2.2.2 to apply to the aircraft with a target in tow, and that the F-86E would meet the performance standards specified only while flying without a target. In order to clarify the intended meaning of paragraph 2.2.2 in light of Canfield's misinterpretation of the provision, the Air Force issued amendment No. 4 to the RFP on July 7. In pertinent part, the amendment revised the last sentence in paragraph 2.2.2 to provide that the towing aircraft must meet the specified speed and altitude requirements "while towing a deployed TDJ-10 Aerial Gunnery Target."

On August 26, Canfield submitted a revised proposal substituting a different model aircraft which would meet the requirement of paragraph 2.2.2 with a target in tow, instead

of the F-86E originally proposed. In early September, discussions were held with both offerors, who then submitted best and final offers by the September 17 due date. On October 29, the Air Force made award to Canfield as the lowest priced, technically acceptable offeror.^{1/}

FSI argues that the Air Force acted improperly by asking Canfield whether its proposed aircraft would meet the standards in paragraph 2.2.2 of the performance work statement and then issuing an amendment clarifying that provision. According to FSI, as soon as it became clear that Canfield's initial proposal did not satisfy paragraph 2.2.2, the proposal should have been rejected as technically unacceptable; by giving Canfield the opportunity to revise its proposal, FSI argues, the Air Force engaged in technical leveling. We see no basis to object to the Air Force's action.^{2/}

^{1/} After the best and final offers were adjusted to include the cost of fuel, as provided in section M-2(b) of the RFP, Canfield's price (\$16,409,508) was approximately \$170,000 below FSI's.

^{2/} FSI also challenges the Air Force decision not to release to FSI certain documents related to the procurement such as the abstracts of offers and the contracting officer's responsibility determination regarding Canfield. To the extent that FSI's complaint relates to the Air Force's duty to furnish documents in connection with the protest pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), the contracting agency has the initial responsibility for determining which documents are subject to release. Cottage Grove Land Surveying, B-223207, Sept. 12, 1986, 86-2 CPD ¶ 291. To the extent that FSI is requesting the release of documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), only the contracting agency and the courts have the authority to decide what information the agency must disclose under the FOIA. The documents withheld from FSI were provided to our Office, however, and we have examined them in camera in connection with our consideration of the protest. Moreover, we do not think that the abstract of offers would be particularly useful to the protester in view of the issues raised in the protest. The responsibility determination contains a significant amount of information which appears to be proprietary and thus would not be releasable.

As discussed above, the contracting officer decided to ask Canfield about the performance characteristics of its proposed aircraft because the initial review of Canfield's technical proposal raised the question of whether it could meet the standards in paragraph 2.2.2 of the performance work statement. During their conversation, the contracting officer learned that Canfield, contrary to the Air Force's intention, had interpreted paragraph 2.2.2 to apply only to the aircraft without a target in tow. FSI maintains that paragraph 2.2.2, when read in the context of the RFP as a whole, clearly referred to the aircraft with a target deployed. While FSI's interpretation is certainly more reasonable, once it became apparent, however, that Canfield, one of only two offerors in the competitive range, had misunderstood the provision, we see no reason why a clarifying amendment should not have been issued. See Jana, Inc., B-208581.2, Mar. 1, 1983, 83-1 CPD ¶ 205.

The fact that Canfield was alerted to a deficiency in its proposal does not mean that the Air Force's actions were improper; in fact, even if an amendment had not been issued, the Air Force properly would have raised the issue with Canfield during discussions, as part of its responsibility to point out deficiencies in an offeror's technical proposal. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610 (c)(2) (1986); Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190. In addition, issuance of the amendment put FSI on notice of the subject matter which had been raised with Canfield, and gave both offerors an opportunity to revise their proposals in any way they chose. See Mil-Air Engines & Cylinders, Inc., B-203659, Oct. 26, 1981, 81-2 CPD ¶ 341.

To the extent that FSI argues that Canfield's proposal should have been rejected as soon as the Air Force learned that its proposed aircraft did not comply with paragraph 2.2.2, we find the argument to be without merit. A contracting officer's decision to include a proposal in the competitive range is a matter of administrative discretion which we will not disturb unless it is arbitrary or unreasonable. KET, Inc., B-190983, Dec. 21, 1979, 79-2 CPD ¶ 429, aff'd on reconsideration, Jan. 12, 1981, 81-1 CPD ¶ 17. Here, the Air Force determined that Canfield's proposal was reasonably susceptible to being made acceptable because all that was required was a change in the type of aircraft proposed. Thus, the Air Force's decision to include Canfield's proposal in the competitive range was consistent with FAR, 48 C.F.R. § 15.609(a), which directs contracting agencies to include all proposals with a reasonable chance of award,

including deficient proposals which are reasonably susceptible to being made acceptable. KET, Inc., B-190983, supra. In addition, retaining Canfield in the competitive range fostered the ultimate goal of full and open competition since, had Canfield's proposal been rejected, only one offeror, FSI, would have remained in the competitive range.

FSI also argues that allowing Canfield to revise its proposal instead of immediately rejecting it was inconsistent with section M-2(a) of the RFP, which provides:

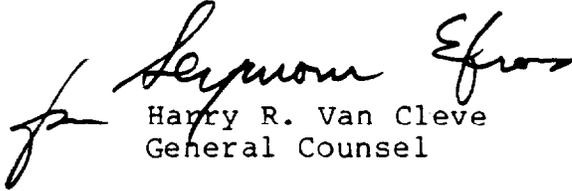
"Proposals will first be evaluated to ensure that they are technically acceptable. Technical Proposals will be determined unacceptable if acceptability can be obtained only through a complete Proposal revision. Any Proposal determined not technically acceptable will be deemed as 'Not Competitive.' Technical acceptability will be based on the offeror's demonstrated understanding and approach to meeting the technical requirements/specifications in the [performance work statement]." (Emphasis added.)

In our view, it is not reasonable to interpret this provision to apply to a proposal, like Canfield's, which is found deficient due to the offeror's misinterpretation of a provision in the RFP which the contracting agency later amends. In any event, while Canfield increased its prices in its revised proposal as a result of the change in aircraft, the basic elements of its proposal--Canfield's offer to perform the target sortie missions and its approach to management, training and maintenance of the towing aircraft--were not completely revised.

Finally, the contracting officer's inquiry to Canfield did not constitute technical leveling, defined in FAR, 48 C.F.R. § 15.610(d)(1), as helping an offeror bring its proposal up to the level of the other proposals by successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence or inventiveness in preparing a proposal. Here, the contracting officer raised the issue with Canfield once, followed by a clarifying amendment to the RFP, to which Canfield responded with a technically acceptable revised proposal; there were no successive rounds of discussions on the issue or any other indication of improper coaching which would constitute

technical leveling. See C&W Equipment Co., B-220459, Mar. 17, 1986, 86-1 CPD ¶ 258, aff'd on reconsideration, B-220459.2, June 10, 1986, 86-1 CPD ¶ 539.

The protest is denied.


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General Counsel