



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Flight International Group, Inc.

File: B-238953.4

Date: September 28, 1990

Richard J. Conway, Esq. and William M. Rosen, Esq., Dickstein, Shapiro & Morin, for the protester. Kenneth B. Weckstein, Esq., Epstein Becker & Green, P.C., for Sabreliner Corporation, an interested party. Margaret A. Olsen, Esq., and Mark O. Wilkoff, Esq., Department of the Navy, for the agency. David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation did not advise offerors that financial condition would be considered in the evaluation of proposals, small business concern's financial condition related solely to its responsibility; accordingly, agency's rejection of its proposal on the basis of inadequate financial capacity but under the guise of a comparative, "best value" evaluation effectively constituted a finding of nonresponsibility which the agency was required to refer to the Small Business Administration.

2. Where solicitation provided for evaluation of "any other costs to the government attributable to the offeror's proposal," agency was required to take into account in its evaluation of price the relative cost to the government of providing fuel for contractor-furnished aircraft.

DECISION

Flight International Group, Inc. protests the Department of the Navy's award of a contract to Sabreliner Corporation, under request for proposals (RFP) No. N00019-88-R-0137, for flight training services in support of the Undergraduate Naval Flight Officer (UNFO) Training Program. Flight International challenges the evaluation of its proposal and contends that Sabreliner failed to comply with certain mandatory solicitation requirements.

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We sustain the protest.

The solicitation requested proposals for a firm, fixed-price contract to provide flight training services for naval flight officers for 5 base years and up to 3 option years; the services to be provided include contractor-furnished pilots flying contractor-owned aircraft (modified business jets), the use of radar training devices, maintenance and support, and instructor training. The RFP required offerors to furnish sufficient information to verify the performance and technical characteristics of the proposed aircraft, including: (1) structural design criteria and a plan for substantiation of the structural integrity of the aircraft; (2) aircraft fatigue criteria, a summary of fatigue test results and a fatigue analysis; (3) a strength summary and report on operating restrictions; and (4) a "structural flight demonstration plan including the performance of mission profiles," as set forth in the Functional Description incorporated in the solicitation. The solicitation provided for award to the offeror whose proposal offered the "best value" to the government, as determined on the basis of three evaluation factors; two of the factors were technical approach and price, which were of equal weight and significantly more important than management, the third factor.

Three proposals were received in response to the solicitation and all were included in the competitive range. After written and oral discussions with offerors, the agency requested best and final offers (BAFOs).

Based upon evaluation of BAFOs, the Navy's Source Selection Advisory Council (SSAC) determined that Sabreliner's proposal offered the overall best value to the government. Sabreliner proposed to purchase for performance of the contract used Sabreliner 40 and 40A aircraft manufactured between 1963 and 1974. The SSAC found that this approach offered "medium risk" and necessitated "special contractor emphasis and close government monitoring" because of possible difficulty in accounting for the past and remaining fatigue life of used aircraft, and because of the agency's concern with respect to demonstration of the structural strength of the Sabreliner 40 and 40A aircraft and their ability to meet the specification requirement for maneuvering capability. Notwithstanding its concern in these areas, however, the SSAC adopted the Source Selection Evaluation Board's (SSEB) conclusion that Sabreliner's proposed aircraft met or exceeded all flying qualities and performance requirements. In addition, the SSAC noted that Sabreliner's evaluated price (\$241,584,400) was approximately

\$10.5 million lower than Flight International's (\$252,040,900), the next lowest price, and that Sabreliner's management proposal was rated highly satisfactory with low risk.

The SSAC found Flight International's technical proposal to be highly satisfactory and characterized by low risk. The SSAC adopted the SSEB's determination that the aircraft--new Lear M-35A business jets--and radar proposed by Flight International afforded performance that "significantly exceeds" all performance and endurance requirements and that the proposed ground-based training system would provide "very realistic training." Nevertheless, the SSAC concluded that Flight International's overall proposal was characterized by management risk arising from certain financial considerations and that, as a result, award to Flight International was not justified.

In this regard, the initial preaward survey undertaken by the cognizant Defense Contract Administration Services Management Area (DCASMA) after the submission of initial proposals found Flight International's financial capability satisfactory and recommended complete award. According to the contracting officer, however, she became aware (possibly prior to the December 27, 1989, request for BAFOs) of an October 2 newspaper report stating that Flight International had withdrawn its financial statements for fiscal year 1989 and "was considering options to meet liquidity problems"; upon consulting DCASMA, she was advised that its evaluation of Flight International remained the same. Transcript (TR) at 42-43.1/ On January 12, the contracting officer requested a second preaward survey based upon newspaper reports on December 12 that Flight International was engaged in discussions concerning the possible sale of the company, and on December 22 that the firm had failed to make debt payments due in December. Subsequently, in its January 22 BAFO, Flight International referred to "widespread discussions about [its] continued viability"; nevertheless, it expressed confidence in its continued ability to provide quality products and services.

1/ A conference on the written record was conducted to aid in our consideration of this matter. References are to the transcript of that conference.

On February 16, however, DCASMA, based on its resurvey, recommended to the contracting officer against award to Flight International. DCASMA noted that the firm's long-term debt had been converted to short-term debt upon its default under its loan agreements and that, as a result, Flight International possessed current assets amounting to approximately 10 percent of its current liabilities and possessed none of the estimated \$131 million in working capital required for contract performance. Until Flight International could secure the additional financial backing for which it claimed to be negotiating, DCASMA viewed its financial capability as unsatisfactory.

Subsequently, as reflected in the SSEB report and in her presentation to the SSAC, the contracting officer made a preliminary determination that Flight International was nonresponsible due to lack of financial capability. In her presentation to the SSAC, the contracting officer noted not only the DCASMA recommendation against award, but also several changes made by Flight International in its BAFO. Specifically, Flight International advised the government that while it was offering a fixed price to fly up to the 19,000 hours annually specified in the solicitation, it had based its cost and pricing on the expectation that actual demand would amount to no more than 15,000 flight hours annually; any additional hours would be funded from reduced profit.^{2/} Further, Flight International included in its estimated costs a "fee" factor of zero percent; it explained that its projected profit would be derived from the residual market value of the assets (e.g., aircraft) acquired to perform the contract, assets whose acquisition cost would be amortized over only 5 of the potential 8 contract years, and that any requirement for additional funds to support the cost of performance could be met by extending the repayment schedule for the assets.

In informing the SSAC of her findings, the contracting officer cautioned that since Flight International is a small business, the agency would be required to refer a nonresponsibility determination to the Small Business Administration (SBA) for final consideration under its certificate of competency (COC) procedures. According to a memorandum prepared by the chairman of the SSAC after the filing of Flight International's protest, the members of the SSAC were advised by counsel that consideration of Flight

^{2/} The Navy has recently advised our Office that its requirement has been reduced from 19,000 flight hours annually to 15,000 hours, and that Sabreliner's contract will be modified accordingly.

International's responsibility would be inappropriate; they therefore subsequently agreed not to consider the question of responsibility in their deliberations, and instead reexamined the conclusion of the SSEB management team that Flight International's proposed management was "Highly Satisfactory with low risk." As documented in the SSAC's contemporaneous evaluation:

"The SSEB indicated that their rating focused on the team specifically assigned to the UNFO program. The SSAC expressed concern regarding where the program-specific management team for UNFO ends and where the corporate-level management begins. In particular, the SSAC noted that while [Flight International's] price was about \$10.5 million more than the lowest offer, [Flight International] had stated that the price was based on only 15,000 flight hours per year, instead of the 19,000 hours called out in section B of the RFP, and that, furthermore, [Flight International] proposed no fee to perform this contract. The SSAC felt that [Flight International] was putting itself at considerable financial risk, and by extension, the UNFO program. The higher price, in combination with the management risk, did not justify an award to [Flight International], despite the technical merit of their offer." (Emphasis added.)

The third proposal, submitted by Cessna Aircraft Company, was found "unsatisfactory" because of exceptions taken to the technical requirements. In addition, Cessna's price (\$306,134,700) was more than \$64 million higher than Sabreliner's. Concurring with the SSAC's recommendation, the SSA thereupon selected Sabreliner for award. Upon learning of the subsequent award, Flight International filed this protest with our Office.

Flight International maintains that the Navy improperly considered its responsibility under the guise of conducting a comparative evaluation so as to avoid the necessity for referring the question of Flight International's responsibility to the SBA for consideration under its COC procedures. According to Flight International, the SSA was concerned that award to Flight International would result in unacceptable delay. Flight International notes that its management proposal was evaluated by the SSEB as highly satisfactory with low risk and was only questioned after the contracting officer, having advised the SSAC of her intention of finding Flight International nonresponsible for

lack of financial capability, cautioned that a nonresponsibility determination would necessitate referral to the SBA. In this regard, Flight International points out that the SSA has stated that the cognizant Navy training authority had identified this procurement as "key to accomplishing his mission," and that the "training mission will tolerate few delays in the availability of equipment and services." According to the SSA:

"We were getting hounded by the [training authority] that he needed the services. He was very, very upset. We were already running behind schedule.

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"I sure didn't relish the idea of having anything disrupt the contract so that we could get on with the services."

TR at 71-72. Flight International further questions why, if the SSAC in fact had decided not to consider Flight International's responsibility, the SSA nevertheless was advised that Flight International preliminarily had been determined to be nonresponsible on the basis of lack of financial capability and that as a small business, it would be entitled to apply to the SBA for a COC. TR at 60-61, 63.

The Navy denies that the evaluation under the management factor was based upon Flight International's financial condition. The agency argues that instead, the determination of management risk resulted from its concerns: (1) that Flight International's attempts to address its financial problems would lead to a change in ownership and a consequent change in management; and (2) that the firm's decision to forego a fee and base its price on only 15,000 flight hours annually could place it in a loss situation and thereby diminish its incentive to perform properly. In this regard, the SSA has stated that, although he was advised of the preliminary nonresponsibility determination, he "wiped it out of the record, from my mind"; according to the SSA, he was concerned not with the adequacy of Flight International's financial resources, but instead with whether a contractor losing money on a contract would seek to minimize its losses by offering degraded service. TR at 52, 54, 61.

It is clear, however, that the Navy's concern extended beyond simply the risk of poor performance should Flight International be forced to furnish additional flight hours; the Navy was concerned with whether the firm could finance the additional contract effort. Although the SSA has denied

that he considered Flight International's financial capacity, the contemporaneous documentation of the evaluation indicates that Flight International's financial position in fact was considered in the evaluation with which he concurred. TR at 52; see Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398. The SSAC's recommendation noted not only Flight International's reliance upon flying fewer hours than specified, but also its proposal of no fee. TR at 47. Since Flight International's BAFO clearly indicated that it expected to earn a specified substantial level of profit from the post-contract sale of the assets acquired for performance, the agency's concern with the firm's failure to propose an annual fee or profit factor in its cost estimate could only amount to a concern with how the firm would finance any additional costs of performance during the course of the contract. In this regard, we note that the SSAC determined that Flight International had placed both itself and the training program "at considerable financial risk" (emphasis added) by relying on flying fewer hours than specified and proposing no fee. This language likewise suggests a concern with Flight International's financial condition.

This conclusion is further corroborated by the statement of agency officials that their concern arose from the fact that Flight International's profit appeared to be predicated upon the sale of assets at the end of the contract, and that therefore it was unclear how the firm could use the profits to finance ongoing performance; specifically, it was unclear "how easy or difficult it would be for Flight to restructure those payments [on the assets], so we thought that was risky." TR at 197-198, 200, 204-206. In other words, according to the chairman of the SSEB, the issue raised was one of "ready cash"; it was "not obvious how prepayment of a loan is going to help a cash flow problem." TR at 205.

Contracting agencies are required by statute to include in solicitations all significant evaluation factors and their relative importance. 10 U.S.C. § 2305(a)(2)(A) (1988). Federal Acquisition Regulation § 15.605(e) also requires that solicitations disclose "any significant subfactors" to be considered in the award decision, and inform offerors of the "minimum requirements that apply to particular evaluation factors and significant subfactors." However, a contracting agency need not specifically identify the subfactors comprising the evaluation criteria if the subfactors are reasonably related to the stated criteria, Washington Occupational Health Assocs., Inc., B-222466, June 19, 1986, 86-1 CPD ¶ 567, and the correlation is sufficient to put offerors on notice of the additional

criteria to be applied. Kaiser Elecs., 68 Comp. Gen. 48 (1988), 88-2 CPD ¶ 448; Hoffman Management, Inc., B-238752, July 6, 1990, 90-2 CPD ¶ ____.

In this case the solicitation provided for a comparative evaluation under the management factor of "the extent to which the offeror's proposal shows the ability to manage the program required by the solicitation." The subfactors were identified as the "ability to meet the published schedule requirements of the Government at an acceptable level of risk" and "performance potential and management dedication," which was described as including an assessment of management organization, key personnel, management controls, and demonstrated past performance. The solicitation did not specifically advise offerors that financial condition would be considered in the evaluation of proposals.

Traditionally, when management is identified as an RFP evaluation criterion, agencies evaluate such factors as: management philosophy, methodology and technique, see, e.g., De La Rue Giori, SA, B-225447, Mar. 19, 1987, 87-1 CPD ¶ 310; management structure and organization, see, e.g., Esco, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450; chain of command and lines of communication, see, e.g., DRT Assocs., Inc., B-237070, Jan. 11, 1990, 90-1 CPD ¶ 47; Tracor Marine, Inc., B-226995, July 27, 1987, 87-2 CPD ¶ 92, planning and reporting, see, e.g., The Associated Corp., B-225562, Apr. 24, 1987, 87-1 CPD ¶ 436; experience of proposed management personnel, see, e.g., Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93; and demonstrated ability of management to perform. See, e.g., Pacific Architects and Eng'rs Inc., B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494. Thus, a solicitation notice that management will be an evaluation factor does not itself place offerors on notice that an offeror's financial condition will be included in the evaluation of proposals.

Although we have expressed concern over the use of financial condition as an evaluation factor, see Andover Data Sys., Inc., B-209243, Mar. 2, 1983, 83-1 CPD ¶ 465, in special circumstances financial condition may be used to assess the relative merits of individual proposals. See E.H. White & Co., B-227122.3; B-227122.4, July 31, 1988, 88-2 CPD ¶ 41. Here, however, the solicitation did not explicitly establish financial condition as an evaluation criterion or subfactor, and we do not believe it did so implicitly. Cf. Delta Data Sys. Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984).

We think that offerors, reading the management evaluation criterion and its reference to the "ability to meet the

published schedule requirements," would expect the evaluation to encompass the ability of an offeror to manage corporate resources so as to meet the required schedule, as demonstrated by management philosophy, methodology and technique, management structure and organization, chain of command and lines of communication, planning and reporting, experience of proposed management personnel, and demonstrated ability to perform. Not only did this RFP not establish financial condition as an evaluation factor or subfactor, but the agency has not shown any special circumstances here that would warrant consideration of financial condition in the evaluation of proposals. Accordingly, the Navy could not properly evaluate financial condition under the RFP evaluation criteria.

Since financial condition could not properly be considered in the evaluation of proposals, it could be considered only in connection with an offeror's responsibility. Uniserv Inc.; Marine Transp. Lines, Inc., B-218196; B-218196.3, June 19, 1985, 85-1 CPD ¶ 699. Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), the SBA has conclusive authority to determine the responsibility of a small business concern. When a procuring agency finds that a small business is nonresponsible, the agency is required to refer the matter to the SBA for a final determination under the COC procedures. See Sanford and Sons Co., B-231607, Sept. 20, 1988, 88-2 CPD ¶ 266. An agency may not find that a small business is nonresponsible under the guise of a relative assessment of responsibility factors and thereby avoid referring the matter to the SBA. Id.

Based on our finding that the Navy relied upon concerns with respect to Flight International's ability to finance contract performance to exclude the firm from consideration, we must conclude that the Navy effectively made a determination of nonresponsibility which the agency was required to refer to the SBA.

Furthermore, we find that the evaluation of proposals was otherwise flawed. Flight International contends that the Navy failed to properly consider the superior fuel efficiency of its proposed Lear jets relative to that of the Sabreliner aircraft. The solicitation provided that in evaluating price, "any other costs to the Government attributable to the offeror's proposal will be included in the total price to the Government." Under the intended contract, the agency and not the contractor would be responsible for the cost of fuel. The Navy reports that it did not plan to evaluate exact fuel costs, believing that actual fuel consumption could not be objectively evaluated because of uncertainty as to typical flight profiles and the

effect of modifications on the aircraft. The Navy states, however, that an estimate of the additional fuel usage and costs attributable to the Sabreliner aircraft, nevertheless, was furnished to the SSAC; the estimated \$4 million in additional cost to the government was deemed by the SSAC to be "insignificant." As a result, according to the SSA, relative fuel costs were not taken into consideration in evaluating overall cost to the government. TR at 81-82.

We conclude that since the solicitation provided for considering "any other costs to the government," the Navy was clearly required to take into consideration in evaluating the price to the government the fact that award to Sabreliner would result in additional fuel costs to the government. Our conclusion, in this regard, is consistent with the understanding of the contracting officer, who has stated her belief that it was necessary to examine the cost of fuel in order to determine the best value to the government. TR at 219-220.

Furthermore, we find that the impact of considering the additional fuel costs would have been significant. The agency now concedes that under the contract as awarded, depending on the mix of missions flown, and based on the current cost of fuel without consideration of possible inflation over the 8-year contract, award to Sabreliner will result in \$7.5 million to \$10.8 million in additional fuel costs to the government.^{3/} Flight International, on the other hand, contends that the fuel factor to be imputed to Sabreliner's price must take into account the likely actual, inflated cost of fuel in future contract years; according to Flight International, award to Sabreliner will result in at least \$12 million in additional fuel costs at current prices and at least \$16 million in additional costs when Department of the Air Force projections of future fuel price escalation are taken into consideration.

We question the Navy's failure to make any allowance for inflation in its estimate of fuel costs. The contract price to the government is otherwise calculated on the basis of the actual dollars to be paid in future contract years, and we see no basis for not likewise calculating fuel costs. In any case, it is clear that under any reasonable approach to calculating fuel costs, the additional cost to the government resulting from the lesser fuel efficiency of the Sabreliner aircraft would have largely eliminated Sabreliner's evaluated cost advantage over Flight International.

^{3/} The Navy's estimate reflects the prices then current and precedes recent developments in the Middle East.

Flight International further contends that Sabreliner's proposed aircraft fail to satisfy specification requirements concerning performance of mission (flight) profiles, maneuverability, and approach to assuring continued structural integrity. For example, Flight International notes that the Sabreliner aircraft carry insufficient fuel to be able to fly all of the mission profiles included in the solicitation; Sabreliner concedes that its aircraft can fly only 5 of the 12 mission profiles, while Flight International claims that the Sabreliner aircraft, in fact, can fly only 4 mission profiles. The mission flight profiles were described in the Functional Description under paragraph 3.1.2:

"Aircraft Performance. The aircraft shall be capable of achieving performance levels outlined in paragraphs 3.1.2.1 through 3.1.2.6 The [mission] profiles in Appendix I are examples of the typical operational environment in which the aircraft will be flown."

The solicitation's instructions to offerors required offerors to furnish a "structural flight demonstration plan including the performance of mission profiles in the Functional Description in accordance with the requirements stated in Attachment (5) of the RFP."

We do not agree with Flight International that the inability of the Sabreliner aircraft to fly all of the mission profiles renders Sabreliner's proposal unacceptable. Initially, we note that although the Functional Description required that "the aircraft be capable of achieving" certain specified performance levels, it did not include language of a similar, mandatory nature when referring to the mission profiles. In any case, we consider determinative, in this regard, the agency's response to an offeror's preproposal question as to whether "proposed aircraft [are] required to meet the complete range of mission profiles." The agency responded by amending Attachment No. 5 to the solicitation, cited above in paragraph 3.1.2 of the Functional Description. This attachment originally required that a test plan be prepared by the contractor for tests demonstrating that the aircraft and associated radar meet several minimum requirements, "including the complete range of mission profiles as reflected in the Functional Description." (Emphasis added.) As amended, however, the underlined reference to mission profiles was deleted, thereby indicating, in our view, that they were not mandatory requirements.

On the other hand, we conclude that the agency was required to consider in its comparative evaluation of proposals the ability to fly the mission profiles. The solicitation requirement that offerors document their plan for performance of the mission profiles, when considered with the solicitation technical evaluation criterion for evaluating "the extent to which the proposed aircraft . . . satisfies the . . . Functional Description," clearly indicates that the extent to which the aircraft could fly the mission profile would be subject to comparative evaluation. We find no evidence that the evaluation of SSAC took into consideration the fact that the Sabreliner aircraft could fly no more than 5 of the 12 mission profiles. In particular, we question why Sabreliner was rated as meeting or exceeding all flying qualities and performance requirements without any qualification concerning its inability to fly most of the mission profiles, which were described by the solicitation as examples of the typical operational environment and by agency technical personnel as the missions currently being flown. TR at 232.

We therefore find that Sabreliner's evaluation under the technical factor lacked a reasonable basis and, as a result of the failure to properly take into account Sabreliner's weakness in this regard, that Flight International's superiority under the technical factor was understated. Again, Sabreliner's perceived advantage with respect to price--the other most important evaluation factor--was in error. Since the management factor was significantly less important than technical and cost, we find no basis in the evaluation record for concluding that any weakness of Flight International's management proposal offset Flight International's superiority under the significantly more important technical factor. Thus, absent consideration of financial capability, award to any offeror other than Flight International would be an abuse of discretion.

The Navy had a legitimate concern that Flight International lacked the financial resources to perform the contract. This concern properly was for consideration in the context of a responsibility determination, with any finding of nonresponsibility referred to the SBA for consideration under its COC procedures. The agency's action in effectively rejecting Flight International's proposal on the

basis of a lack of financial capacity but under the guise of a comparative, "best value" evaluation was improper.4/

The protest is sustained.

By letter of today to the Secretary of the Navy, we are recommending that the agency determine the responsibility of Flight International, and, if the firm is found nonresponsible, refer the matter to the SBA. If the SBA issues a COC to Flight International, the contract awarded to Sabreliner should be terminated for the convenience of the government and award should be made to Flight International. In any case, we find that Flight International is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1990); see Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

for Milton L. Fowler
Comptroller General
of the United States

4/ In view of our conclusion, we need not address Flight International's remaining contentions that Sabreliner's proposed aircraft fail to meet other allegedly mandatory specification requirements.