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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sabreliner Corporation

File: B-248640; B-248640.4

Date: September 14, 1992

Kenneth B. Weckstein, Esq., Epstein Becker & Green, P.C., for the protester.
Carl L. Vacketta, Esq., Pettit & Martin, for Slingsby Aviation, Ltd., an interested party.
Roger Paul Davis, Esq., William D. Cavanaugh, Esq., Susan V. Podsedly, Esq., and Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably concluded that proposal was technically unacceptable for failure to comply with a mandatory solicitation requirement where the offeror's best and final offer explicitly withdrew its commitment, made earlier in response to a deficiency report, to comply with that requirement.

DECISION

Sabreliner Corporation protests the award to Slingsby Aviation Limited of a contract under request for proposals (RFP) No. F33657-91-R-0004, issued by the Department of the Air Force. Sabreliner contends that the agency unreasonably excluded the protester's proposal from consideration for award on the basis of a perceived deficiency with respect to crew seats. Sabreliner also asserts that award to Slingsby violated the RFP's Domestic Source Restriction (DSR) clause, to Sabreliner's prejudice.

We deny the protests in part and dismiss them in part.

The Air Force issued a draft RFP on April 26, 1991, for the acquisition of 125 training aircraft and related contractor logistics support (CLS).[1] The aircraft, referred to as "Enhanced Flight Screener" (EFS) aircraft, are used for training novices and judging their suitability as pilots.

The final RFP, which contemplates a firm, fixed-price contract for a base year and six 1-year options, was issued on September 20, 1991. The RFP states that award will be made on the basis of the proposal which the Source Selection Authority (SSA) determines can best satisfy the needs of the government, based on the RFP requirements. The four evaluation areas, in descending order of importance, are technical/operational utility (divided into five items), most probable life cycle cost (MPLCC), management/schedule, and logistics support. The technical/operational utility area is to be evaluated both for the soundness of the offeror's approach and for the offeror's having demonstrated understanding of, and compliance with, the RFP requirements. Evaluation is based on Air Force Regulation 70-30, which provides for the assignment of color codes and risk codes to various aspects of the proposals.

The RFP states that meeting the requirements of the statement of work (SOW) and system requirements document (SRD) is mandatory for an acceptable rating. Among the SRD requirements is the following:

> "3.3.4.4.1 CREW SEATS. The crew shall sit in a side-by-side fashion in seats that are certified to the requirements of Federal Aviation Regulation [FAvR] 23.561 and 23.562 as a minimum."

The Air Force established this requirement because of concern arising from two serious back injuries which Air Force personnel had incurred due to seats that were not certified to the FAvR requirements.

The final RFP incorporates by reference Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.214-7001, "Domestic Source Restriction (AUG 1987)." The DSR clause provides that only domestic and Canadian sources are eligible for award. The DSR clause was not included in the draft RFP, nor was it incorporated by reference or otherwise mentioned in that document. The Air Force apparently incorporated the clause in the final RFP without consideration of its meaning. The agency never

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[1]The number of aircraft was later reduced to 113 through a modification request. In addition, we note that two contracts were actually issued: one for the aircraft and a separate one for the CLS.

intended to limit the procurement to domestic and Canadian sources, and throughout the source selection process the agency treated the proposals as if the DSR clause were not in the RFP.

Sabreliner's initial proposal failed to address the crew seat certification requirement, which led to the agency's issuing a deficiency report (DR) to the offeror. That DR stated: "SRD paragraph 3.3.4.4.1 requires the crew seats to be certified to U.S. [FAvR] Part 23.561 and part 23.562. The offeror does not propose to meet this certification requirement. Please address the deficiency."

In response to the DR, Sabreliner wrote the Air Force on January 10, 1992, that the offeror had "revised [the system specification] to reflect our intent to comply with this requirement." With its response, Sabreliner submitted the revised system specification, which explicitly stated: "The crew shall sit . . . in seats that are certified to the requirements of Federal Aviation Regulation 23.561 and 23.562."

During face-to-face negotiations conducted on February 27, 1992, Air Force representatives raised the issue of crew seat certification because a table in Sabreliner's proposal showing the certification basis for various elements of the aircraft still failed to list the proper certification basis for the crew seats. Sabreliner's Vice President confirmed during the negotiations that the offeror would provide properly certified crew seats; he initialed the following handwritten addition to Sabreliner's certification table: "Crew Seats: [FAvR] 23, amendment 23-36, paragraphs 23.561, 23.562."

Sabreliner's best and final offer (BAFO), dated March 30, 1992, explicitly retracted the commitment to provide seats certified to the requirements of FAvR 23.561 and 23.562. Instead, the BAFO stated:

"Sabreliner and Agusta [Sabreliner's subcontractor] conducted a rigorous technical evaluation with the intent to comply with the [FAvR] 23.562 requirement and have concluded since our 27 February 1992 discussions that adequate industry and FAA data is not available to predict the cost and/or schedule for this significant effort. To our knowledge no other airplane has had seats certified to [FAvR] 23.562. This is

considered a development program which creates cost and schedule risk to both the USAF and Sabreliner.

. . . . .

Sabreliner does not wish to add cost or schedule risk and therefore has prudently included in this BAFO an alternate level of effort . . . to conduct initial tests of the seat system in accordance with the intent of [FAvR] 23.562. An assessment report to the U.S. Air Force shall be made summarizing the capability of the . . . seat installation compared to [FAvR] 23.562 dynamic crash load requirements. Should changes to the seat installation be identified and desired by the U.S. Air Force, then they would be the subject of an ECP [engineering change proposal] . . . ."

Consistent with this approach, Sabreliner's BAFO deleted the references to FAvR 23.562 that had been added during negotiations. In the offeror's system specification, the BAFO deleted the commitment that the crew seats would be certified to FAvR 23.562. Instead, the proposed specification stated, "testing shall be performed in accordance with FAA Advisory Circular 23.562.1 to assess and report to the USAF the capability of the EFS seat configuration as compared to the requirements of [FAvR] 23.562."

The agency's evaluation of Sabreliner's BAFO noted that the offeror had retreated from the earlier commitment to comply with the requirement for certification to FAvR 23.562. The agency also recognized that the Air Force would have to agree to an ECP, presumably increasing the cost to the government, if certification were required. The evaluation stated that Sabreliner's BAFO did not comply with the RFP requirement. Sabreliner's decision not to comply with the mandatory certification requirement caused the Air Force to exclude that offeror's proposal from consideration for award. A contract was awarded to Slingsby on April 29, 1992.

Sabreliner contests the agency's determination that the treatment of the crew seat certification issue in its BAFO rendered the proposal ineligible for award. Sabreliner appears to claim all of the following: (1) the Air Force's interpretation of the crew seat certification requirement was unreasonable because it would require substantial developmental work; (2) Sabreliner's BAFO complied with the requirement, as properly interpreted; (3) Sabreliner's BAFO substantially complied with the crew seat certification requirement, even under the Air Force's unreasonable

interpretation; and (4) if Sabreliner's BAFO failed to comply with the requirement as interpreted by the Air Force, the failure was readily correctable.

This ground of protest is, in essence, an untimely protest against the RFP requirements. Although it now contends that its proposal substantially complied with the crew seat certification requirement and that the Air Force's rejection of Sabreliner's BAFO was based on an unreasonable "interpretation" of the RFP provision, the record establishes irrefutably that Sabreliner was fully aware that the agency required compliance with both FAvR 23.561 and 23.562. As explained above, Sabreliner's proposal received a DR for failing to satisfy the requirement. At that point, Sabreliner had the opportunity to express what it now terms its "interpretation" of the requirement--that nothing more was required than certifying to FAvR 23.561 and providing merely testing under FAvR 23.562, unless the Air Force agreed to an ECP. Instead, Sabreliner agreed in writing to comply with the entire requirement, unambiguously agreeing that the crew seats would be certified to both FAvR 23.561 and 23.562. There are not two reasonable interpretations of Sabreliner's written commitment to the Air Force, in response to the DR in this area, that "[t]he crew shall sit . . . in seats that are certified to the requirements of Federal Aviation Regulation 23.561 and 23.562," just as there are not two reasonable interpretations of the RFP requirement itself.

Thus, at the time Sabreliner was preparing its BAFO, there were not any alternate "interpretations" at issue. Sabreliner simply decided, in its BAFO, not to satisfy the agency's requirement. Sabreliner's BAFO makes unmistakably clear that the offeror understood it was reneging on a commitment made during the face-to-face discussions: The BAFO explains that, "since our 27 February 1992 discussions," Sabreliner had conducted further review and decided that the cost and schedule for satisfying the Air Force's requirement were unpredictable. We view Sabreliner's BAFO language as establishing conclusively that the offeror knew what the Air Force wanted and had made a business judgment to offer "an alternate level of effort," rather than complying with the RFP's clearly understood requirement. Sabreliner did not claim to be offering "substantial compliance" with any "interpretation" of the RFP requirement.

Even if Sabreliner's proposal had purported to comply with the FAvR 23.562 certification requirement, the agency had no obligation to find Sabreliner in substantial compliance with that requirement. Sabreliner is correct in contending that an agency may determine that a proposal is technically acceptable where it is in substantial, although not total,

compliance with a solicitation requirement. See, e.g., National Projects, Inc., B-237212, Feb. 5, 1990, 90-1 CPD ¶ 150. The propriety of such a determination turns on whether it prejudices any other offeror and whether the proposal meets the agency's needs. Id.

Here, the record establishes that the Air Force had a reasonable basis to determine that Sabreliner's BAFO did not satisfy the agency's needs. By offering merely to test the crew seats to FAvR 23.562, Sabreliner provided the government no contractual assurance that the seats would actually comply with the standards of that regulation. Under the terms of its BAFO, Sabreliner could test its seats to FAvR 23.562 and, in the event they failed, the contractor would not be contractually bound to do more than inform the government of that failure. In light of the history of back injuries which led the agency to impose the certification requirement, the agency could reasonably conclude that testing, without a contractual obligation that certification be obtained, did not satisfy the agency's needs and thus did not substantially comply with the RFP requirement.

Sabreliner at some points suggests that it substantially complied with the requirement, since any deficiency was, in the protester's words, "readily correctable." In that connection, Sabreliner cites our decision in A.R.E. Mfg. Co., Inc., 66 Comp. Gen. 26 (1986), 86-2 CPD ¶ 395, in which we held that an agency acted improperly in finding a proposal technically unacceptable where any deficiency in the proposal was readily correctable.

Sabreliner's claim that the deficiency was readily correctable cannot be given credence. Sabreliner itself has argued vehemently that the certification requirement imposed substantial risks and costs on the company, that it required developmental work, and that Sabreliner's partial compliance was "about as close to full compliance as any offeror could be." Moreover, we find it inconceivable that an offeror would make a last minute decision not to stand by a commitment made during discussions and ratified in writing unless the company believed that satisfying that commitment could not be readily done.

The A.R.E. Mfg. Co., Inc. decision upon which Sabreliner relies is readily distinguishable for another reason as well. In that case, the agency rejected a proposal without advising the offeror of the perceived deficiencies, and our decision was explicitly based on that failure. Here, the Air Force informed Sabreliner--repeatedly--of the

certification deficiency, and the protester has never alleged, nor would it have a basis to allege, that it did not understand the agency's position on the mandatory nature of satisfying the requirement.

Once the allegations about substantial compliance and differing interpretations have been denied as without merit, what remains is an untimely challenge to the RFP's inclusion of the requirement that crew seats be certified to FAvR 23.562. Protests based upon alleged improprieties in a solicitation which are apparent prior to time set for receipt of proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1992). If Sabreliner believed, as it now claims, that it was improper for the agency to include developmental work in the RFP (and, as noted above, Sabreliner's BAFO asserted that the certification requirement involved such work), Sabreliner was required to protest the requirement prior to the date for submission of proposals. Similarly, if Sabreliner believed that the requirement for certification to FAvR 23.562 was not properly included in this RFP for any other reason, to be timely, a protest against that requirement had to be filed prior to the date for submission of proposals.

The final allegation that remains to be addressed is Sabreliner's contention that it could have complied with the certification requirement if it had known that the agency did not intend to enforce the DSR clause--that is, if it had known that foreign sources would be permitted. Essentially, Sabreliner is claiming that, were it not for the DSR clause, its foreign subcontractor could have served as the prime contractor and, as such, the foreign company would have been able to manufacture crew seats certified to FAvR 23.562 and would have been willing to assume the risk inherent in providing such seats.

This argument is without merit. Sabreliner has provided no evidence either that the foreign company could have complied with the certification requirement or that the DSR clause deterred it from doing so.[2] Moreover, we note that the

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[2]There is no support in the record for Sabreliner's undocumented claim that its foreign subcontractor was unwilling to agree to manufacture the crew seats unless it could be the prime contractor, which (so Sabreliner at times indicates it believed) was allegedly precluded by the DSR clause. Sabreliner has provided no evidence that the option of crew seat manufacture by the foreign subcontractor was even discussed with the foreign company, much less that the subcontractor ever expressed unwillingness to accept the risk allegedly involved unless it became the prime contractor.

argument concerning the way the DSR clause affected Sabreliner's ability to comply with the crew seat certification requirement is inconsistent with Sabreliner's purported understanding of the DSR clause. Sabreliner claims to have understood that clause to mean that having a domestic company as the prime contractor satisfied the DSR clause, even if much of the actual manufacturing is performed by foreign subcontractors outside the United States. Thus, under Sabreliner's interpretation, it could have satisfied the DSR clause by having its foreign subcontractor manufacture crew seats certified to FAVR 23.562. Sabreliner offers no credible explanation for not having done so.

In sum, we conclude that neither the DSR clause nor any of the other contentions raised by Sabreliner renders unreasonable the agency's determination to exclude Sabreliner from consideration for award because of the offeror's failure to comply, in its BAFO, with the FAVR 23.562 certification requirement. Because Sabreliner's proposal was reasonably found unacceptable, Sabreliner is not an interested party for the purpose of challenging the agency's acceptance of Slingsby's proposal.[3] Dick Young Prod. Ltd., B-246837, Apr. 1, 1992, 92-1 CPD ¶ 336.

The protests are denied in part and dismissed in part.

for James F. Hinchman
General Counsel

[3]In connection with Sabreliner's claim that, in accepting Slingsby's offer, the agency improperly "waived" the DSR clause, we note that Sabreliner has failed to show that it was prejudiced by the agency's action. Prejudice, however, is an essential element of any protest. Corporate Jets, Inc., B-246876.2, May 26, 1992, 92-1 CPD ¶ 471. Despite Sabreliner's protestations to the contrary, the protester's contemporaneous documents demonstrate that, throughout the proposal preparation process, Sabreliner believed that foreign companies were competing for the contract as prime contractors--which suggests that Sabreliner did not believe, prior to these protest proceedings, that foreign companies were barred from doing so. Based on the record before us, we conclude that Sabreliner's proposal was not affected by the presence of the DSR clause, so that Sabreliner cannot demonstrate any prejudice from the agency's waiver of that clause.