147762

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: FFA Flugzeugwerke Altenrhein AG

File: B-248640.5

Date: September 14, 1992

David B. Dempsey, Esq., Akin, Gump, Hauer & Feld, 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 has no obligation to seek clarification of an alleged clerical mistake in a proposal where the agency could not reasonably have been expected to know that a clerical error had occurred.

DECISION

FFA Flugzeugwerke Altenrhein AG 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, for 125 training aircraft and related contractor logistics support. FFA contends that the agency improperly failed to seek clarification of an omission in FFA's best and final offer (BAFO) and that the awardee's proposal does not comply with one of the RFP's mandatory requirements.[1]

We dismiss the protest in part and deny it in part.

---

[1]FFA's original protest contained an additional protest ground concerning the life cycle costs of Slingsby's aircraft. The agency report addressed that issue, but FFA's comments did not reply to the agency position or otherwise mention the issue. Accordingly, we consider that issue abandoned and do not discuss it further. See Hampton Rds. Leasing, Inc., B-244887, Nov. 25, 1991, 91-2 CPD ¶ 490.

The RFP states that award would be made to the offeror whose proposal the source selection authority determined could best satisfy the needs of the government, based on the RFP requirements. The four evaluation areas, in descending order of importance, were technical/operational utility, most probable life cycle cost (MPLCC), management/schedule, and logistics support. The technical/operational utility area was 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.

The RFP states that the contractor will be required to analyze the environmental control system (ECS), which is essentially the heating, air-conditioning, and ventilation system, to determine information such as the heat-up and cool-down rates at various outside temperatures. The original RFP also required that aircraft to be used at one location (Hondo Field, Texas) be equipped with air conditioning. The RFP's instructions to offerors directed them to provide a technical description of their proposed ECS and supporting data concerning performance of the ECS for critical ground and flight conditions. Offerors were also required to discuss the impact of the ECS weight and power requirements on the proposed aircraft.

In the initial evaluation, FFA's proposal was criticized for not providing the required supporting data related to the ECS. The Air Force states that this failure caused the agency to have concern regarding FFA's understanding of the effort required and FFA's ability to perform the task. As a result, the Air Force issued a deficiency report (DR) on December 15, 1991, asking FFA to submit the required supporting data. FFA responded by submitting a one-paragraph description and an eight-page schematic and outline of its air-conditioning system performance. The only reference in this submission to the heating system was the following:

> "The heating system in the production [model] was found to be adequate to heat and maintain the cockpit at a comfortable temperature during the harsh Swiss winter climate. Therefore, no modifications nor heating tests were deemed necessary, and no data other than prior experience is available."

The agency evaluators reviewed FFA's response to the DR and found it inadequate. Their January 21, 1992, review noted that schematic and supporting data regarding the heating system were still lacking and that further information was required (such as details of the size and weight) concerning both the air-conditioning and the heating systems, as well as data regarding ventilation, humidity, and temperature

uniformity. Accordingly, FFA's response to the DR was disapproved and the agency decided to raise the ECS issue during oral discussions.

Before those discussions were conducted, because of fiscal constraints, the Air Force canceled the requirement that the aircraft used at Hondo be equipped with air conditioning. This was accomplished through an amendment issued on January 15, 1992. That same amendment, however, also added several new requirements to the statement of work (SOW) in the ECS area: the contractor was to study the potential of adding an air-conditioning system that would not be ozone-depleting and that would achieve a temperature between 65 and 90 degrees at Hondo; and the aircraft to be used at Hondo were to include provision for a non-ozone-depleting air-conditioning system. Such provision was to include adequate weight, power, and space so that the air-conditioning equipment could be installed without alteration of the equipment or the aircraft.

The agency prepared an agenda for the face-to-face negotiations. That agenda, which was provided to FFA several weeks before the negotiations, included the following paragraph pertaining to the ECS:

> "Please provide heater capacity, cabin warming rates, air-conditioner size, weight, power requirements, and data on capability to meet . . . requirements on ventilation, air-velocity, smoke/fume evacuation, relative humidity of ECS air, and temperature uniformity data."

At the negotiations, which were conducted on March 2, 1992, FFA provided a document which was almost identical to the eight-page schematic and outline submitted in response to the DR. FFA also submitted to the contracting officer at those discussions a one-page outline entitled "Aircraft Missionization." That outline describes the power, controls, size, and weight of FFA's air-conditioning system; it also names a particular refrigerant which is described as non-ozone-depleting. The outline also briefly addresses air velocity and smoke/fume evacuation.

The Air Force and FFA disagree with respect to the content of the discussions. According to FFA, the offeror explicitly agreed at that meeting to comply with the ECS-related aspects of the January 15, 1992, amendment to the RFP. FFA also contends that the Air Force's ECS specialist engaged in a long exchange with FFA's chief engineer, in the course of which the agency's ECS specialist directed "a rapid series of highly technical and mathematical questions" at FFA's engineer. The latter responded by throwing up his

hands and saying that he could not solve the problems on the spot. FFA's program manager then asserted that FFA would do whatever was required.

According to the Air Force's quite different version of the meeting, FFA's statements during the negotiations heightened the agency's concern that the offeror did not understand the task or was incapable of performing. The agency agrees that FFA's representatives agreed to comply with every page of the specification and the SOW. According to the agency, however, FFA's engineer indicated that the company had not performed some of the necessary calculations; later in the meeting, he threw up his hands and admitted that he did not know how to perform them. It was after that admission, according to the Air Force, that FFA's program manager made the blanket statement that FFA would do whatever was required. The Air Force points out that, both in the March 2, 1992, discussions and in the written request for BAFOs, FFA was reminded that changes in the BAFO would have to be fully explained and substantiated.

FFA's BAFO failed to provide the information required about the ventilation system. In addition, the BAFO deviated from the language of the revised SOW. The BAFO did not contain the requirements added in the January 15, 1992, amendment so that, for example, no mention was made of the requirement that the contractor conduct a study of the potential of adding a non-ozone-depleting air-conditioning system.

The Air Force's evaluators gave FFA's BAFO a negative evaluation. They noted that the offeror had not indicated its intent to study the possibility of adding a non-ozone-depleting air-conditioning system and that FFA had not submitted the required information pertaining to ventilation and temperature uniformity. Those failures led to FFA's proposal's being assigned an unacceptable rating for the key missionization item, which effectively eliminated FFA from consideration for award.

FFA contends that the failure to include the language concerning a study of a non-ozone-depleting air-conditioning system in its BAFO was the result of an oversight, caused by its inadvertent use of a word processing diskette containing the original RFP's superseded language.[2] According to FFA, the agency had an obligation to seek "clarification" for what FFA describes as "an irregularity or clerical mistake." FFA notes that the Federal Acquisition Regulation (FAR) permits agencies to clarify minor informalities,

---

[2]FFA does not explain the failure to provide the required information in the area of ventilation and temperature uniformity.

irregularities, and apparent clerical mistakes without reopening discussions with all offerors. See FAR § 15.607(a). FFA argues that, in light of FFA's repeated and explicit agreement to comply with the language added in the January 15, 1992, amendment, the agency should have contacted FFA to inquire whether the offeror intended to deviate from that language. FFA also argues that the problem was easily correctable and would have no significant impact on FFA's price.

Contracting officers have an obligation to examine all proposals for minor informalities or irregularities and apparent clerical mistakes. FAR § 15.607(a). FFA is correct that FAR § 15.607(a) provides that, where an agency is on notice of such minor mistakes, the agency may seek clarification without reopening discussions. An agency's obligations in this regard are limited, however, to mistakes which should reasonably be detected and identified as such by the agency. Standard Mfg. Co., 65 Comp. Gen. 451 (1986), 86-1 CPD ¶ 304. Here, FFA's allegation that the Air Force acted improperly in not clarifying the matter fails because the Air Force evaluators had no reasonable basis for inferring that the deficiencies in FFA's BAFO arose from a clerical mistake.

Although agencies are encouraged to allow correction of errors, it is the responsibility of offerors to exercise due care and diligence in preparing their proposals. Standard Mfg. Co., supra. The record demonstrates that FFA was on notice of the Air Force's ongoing concern about the offeror's willingness, or ability, to comply with the RFP's ECS-related requirements. FFA knew of that concern from the DR that it received; and the Air Force's repeating that concern in the agenda for the face-to-face negotiations put FFA on notice that the company's response to the DR had not satisfied the agency's concern. In addition, however unfair FFA may have found the agency's inquiries regarding ECS-related analysis at the negotiations, the Air Force's pressing FFA on that issue surely put FFA on notice that the Air Force expected more from FFA than FFA was providing, and that ECS was an area where, in the agency's view, FFA was not complying with the RFP requirements. Against this background, FFA should have expected that its BAFO discussion of the ECS would be subject to particular scrutiny by the agency.

In light of FFA's repeated failure to satisfy the agency's concern about FFA's understanding of, and ability to perform, the ECS-related requirements, the Air Force had no reason to infer that FFA's failure to address the non-ozone-depleting air conditioning issue in the BAFO was the result of a mistake--any more than the agency could have been expected to infer that FFA's continued failure to submit the

required information pertaining to ventilation and temperature uniformity arose from a mistake. We note that FFA does not claim that the latter failure was the result of a mistake.

Even if the Air Force had suspected a mistake, there was no reason for the agency to have guessed that the mistake was caused by a clerical error. On the contrary, the mistake could have been a substantive one reflecting the offeror's understanding of the RFP requirements. Thus, if FFA was refraining from committing to perform the additional ECS-related tasks in its BAFO because the offeror had concluded that the Air Force did not take the ECS-related requirements seriously, FFA was making a substantive mistake which demonstrated a lack of appreciation of the mandatory nature of the tasks set forth in the RFP. A mistake on that order would not fall within the scope of the "minor informalities or irregularities and apparent clerical mistakes" of FAR § 15.607(a). Because nothing in FFA's BAFO indicated that a clerical mistake was the cause of FFA's failure to comply with the ECS-related RFP requirements, the agency had no duty to clarify the cause for that failure. The agency had a reasonable basis to conclude that FFA had failed to comply with an RFP requirement, rendering the proposal technically unacceptable, so that the decision to exclude FFA from consideration for award was reasonable.[3]

FFA also claims that the awardee's proposal fails to comply with the requirements of the RFP. Specifically, FFA contends that Slingsby's proposal fails to provide adequate substantiation of the claimed time between overhauls (TBO) for the aircraft engine and peripherals (such as the engine governor) and for the engine shutdown rate. We dismiss this protest ground, for multiple reasons. First, as the offeror of a proposal which the agency reasonably found technically unacceptable, FFA is not an interested party to raise this challenge. Dick Young Prods. Ltd., B-246837, Apr. 1, 1992, 92-1 CPD ¶ 336. Second, FFA is unable to demonstrate prejudice arising from this matter, although prejudice is an essential element of any protest. Corporate Jets, Inc., B-246876.2, May 26, 1992, 92-1 CPD ¶ 471. Since FFA proposed precisely the same engine as Slingsby and has no quarrel with the agency's evaluation of the engine in its

---

[3]FFA also contends that the agency acted improperly in adjusting FFA's MPLCC to take into account the offeror's perceived failure to comply with the RFP's ECS-related requirements. Because the agency otherwise had a reasonable basis for eliminating FFA from consideration for award, we need not address the question of FFA's MPLCC.

proposal, FFA can hardly allege that the agency prejudiced FFA by finding Slingsby's engine acceptable, as to either the TBO or the engine shutdown rate.

Instead, FFA argues that, even if Slingsby's engine and peripherals meet the RFP requirements, Slingsby failed to satisfy the RFP requirements for substantiating the performance of those components in its proposal. In fact, the record indicates that Slingsby did provide substantiating documentation to the agency in support of the offeror's performance claims. FFA points to no particular documentation or item which it alleges was required by the RFP but not provided by Slingsby. In the absence of such a particularized requirement, judging whether an offeror's substantiation is adequate is a subjective matter within the discretion of the agency. Since the Air Force evaluators determined that Slingsby had provided adequate support for its claimed performance, and FFA does not contend that the performance claims were unjustified, FFA could have no basis for protest in this area, even if it could establish prejudice.[4]

The protest is dismissed in part and denied in part.

for James F. Hinchman
General Counsel

---

[4]FFA attempts to draw an analogy between the agency's acceptance of substantiation that Slingsby allegedly offered outside the four corners of its proposal, such as during discussions, and the agency's supposed setting aside of FFA's commitment, during the face-to-face negotiations, to perform everything required in the ECS area. The analogy is specious. The Air Force had to make a subjective judgment concerning whether Slingsby had substantiated its performance claims, and the Air Force concluded that those claims were well-founded (a conclusion which FFA does not dispute). As to FFA, that company made a generalized commitment during discussions, but then, in its BAFO, it appeared to renege on that commitment. In that situation, the Air Force properly concluded, as it had warned offerors that it would, that an unexplained deviation in the language of the BAFO was unacceptable.