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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Sabreliner Corporation

File: B-290515.4

Date: November 20, 2002

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Clarence D. Long, III, Esq., and John C. Gatlin, Esq., Department of the Air Force, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester was not prejudiced by agency's allegedly defective evaluation of awardee's proposal under transition plan technical evaluation subfactor, where the record does not evidence that the protester would have had a reasonable possibility for award, given its significantly higher price.

DECISION

Sabreliner Corporation protests the award of a contract to Canadian Commercial Corporation/Orenda Aerospace Corporation under request for proposals (RFP) No. F34601-02-R-53859, issued by the Department of the Air Force, for the repair and overhaul of J-85 engines and their components.[1]

We deny the protest.

The RFP provided for the award of a fixed-price, indefinite-quantity contract for a base period of 3 years with four 1-year options. The RFP stated that award would be

[1] The contract awarded under the RFP is for the J-85 overhaul and repair program for the Air Force, Navy, National Aeronautics and Space Administration, and foreign military sales customers. Agency Report (AR) (June 20, 2002) at 1.

made to the offeror whose proposal represented the best value to the government, based upon the following evaluation factors: technical, past performance, and price. The RFP provided that technical proposals would be evaluated only for technical acceptability, and that the technical evaluation factor was comprised of the following four subfactors: transition, management, personnel, and participation of small disadvantaged business. The RFP also stated that "[a]n unacceptable subfactor assessment will result in an overall technical unacceptable rating." RFP § M-002(g). The RFP added that, in selecting a proposal for award, "[t]radeoffs [would] only be made . . . between past performance and price," with past performance being considered significantly more important than price. RFP § M-002(b).

With regard to the transition subfactor to the technical evaluation factor, the RFP requested that proposals include "a comprehensive plan" detailing how the contractor proposed to meet the requirement that within the first 24 months of contract performance, the successful contractor "transition from GFM [government furnished materials] to CFM [contractor furnished materials]." RFP § M-002. The RFP added that this transition phase was "not to exceed 24 months." RFP, app. A, Technical Requirements Document (TRD) § 3.1.1. Offerors were advised elsewhere that they were "allowed to transition prior to the 24-month deadline." Intervenor's Submission (May 30, 2002), exh. 3, Agency Clarifications to RFP (Feb. 5, 2002), response 3.

The transition from performing the contract using GFM to performing the contract using CFM had been emphasized by the agency during an industry day/ pre-solicitation conference, and was the subject of a number of clarifications issued by the agency during the solicitation process. For example, during the industry day the agency stressed that it was "looking for ideas from industry on the most effective way to accomplish this transition." AR (June 20, 2002), Tab 4, Industry Day Briefings (Nov. 15-16, 2001). The agency explains that once the transition is completed, certain delays associated with the supply and use of GFM will be avoided. Hearing Transcript (Tr.) at 31.

The agency received proposals from only Sabreliner (the incumbent contractor) and Orenda by the solicitation's closing date. The proposals were evaluated, and the agency provided each offeror with written discussions by way of issuance of evaluation notices (EN). AR (June 20, 2002), Tab 11, ENs. The offerors' responses to the ENs were received and evaluated, and final revised proposals (FRP) were requested and received.

Sabreliner's and Orenda's proposals were both evaluated as "acceptable" under each of the four technical evaluation subfactors, and both received "very good/significant confidence" ratings under the past performance factor. AR (June 20, 2002), Tab 11, Source Selection Decision, at 2-4. Sabreliner's total evaluated price for the base and the four option periods totaled $166,434,595, while Orenda's evaluated price totaled

$128,928,259. AR (June 20, 2002), Tab 11, Price Competition Memorandum. Given that the proposals received the same technical and past performance evaluation ratings, and the significantly lower price of Orenda's proposal, the agency selected Orenda's proposal for award as representing the best value to the government. AR (June 20, 2002), Tab 11, Source Selection Decision.

After requesting and receiving a debriefing, Sabreliner filed several protests with our Office. In Sabreliner Corp., B-290515 et al., Aug. 21, 2002, 2002 CPD ¶ __, we sustained Sabreliner's protests in part and denied them in part. We denied Sabreliner's protest regarding the past performance evaluation. We also denied Sabreliner's protest asserting that Orenda's proposal should have been rejected because Orenda proposed to purchase directly from the government materials remaining after Orenda's proposed GFM-to-CFM conversion, and to use the materials as CFM. We sustained Sabreliner's protest on the basis that the record did not evidence that the agency had performed a meaningful evaluation of Orenda's proposal under the transition subfactor, inasmuch as the record did not evidence that certain apparently material paragraphs of Orenda's proposal (quoted below) relating to the GFM-to-CFM transition were considered in the Air Force's evaluation. We therefore found that the agency's evaluation of Orenda's proposal under this subfactor as "acceptable" could not be considered reasonably based. We recommended, among other things, that the agency evaluate Orenda's transition plan, and document the evaluation. We added that if the agency determined as a result of its evaluation that discussions were necessary, it should reopen discussions with Orenda and Sabreliner, and request and evaluate new FRPs.

The Air Force responded 2 weeks after the decision was issued by informing our Office and the parties to the protest that it had completed its reevaluation of Orenda's transition plan, and had again found it technically acceptable. In support of its findings, the agency provided a nine-page narrative explaining the agency's reasoning. AR (Sept. 26, 2002), Tab 6, Memorandum: Action Taken in Response to GAO Decision. This protest followed.

Sabreliner again protests that Orenda's proposal should have been found technically unacceptable under the transition subfactor. Specifically, the protester again points to the following paragraphs of Orenda's proposal:

> During the first six months following award of the contract we propose to operate using GFM. We ask that during this period the Air Force and Defense Logistics Agency (DLA) cancel all outstanding Purchase Requisitions for J85 unique, depot level material. The only exception will be for emergency procurements needed to support operations during the first year of the contract period.
>
> At the end of the initial six months, Orenda will purchase all the J85 unique, depot level material held by DLA/USAF. We will also enter into

> negotiations to assume responsibility for all outstanding DLA/USAF contracts for this material. This will relieve the Government of any charges related to termination for convenience and, at the same time assure a continuous supply of parts.[2]

AR (June 20, 2002), Tab 18, Orenda's FRP, at 39 of 117. Sabreliner argues that the above-quoted paragraphs in the transition plan in Orenda's proposal impose terms and conditions that are neither contemplated by the solicitation nor appropriate. For example, Sabreliner contends that these paragraphs improperly require that the Air Force and DLA cancel all purchase requisitions for J85 unique, depot level materials, and allow Orenda to assume both the Air Force's and DLA's contracts with private vendors for such materials. The protester maintains that the agency's determination that Orenda's plan was "acceptable" was therefore unreasonable.

While conceding that these paragraphs of Orenda's proposal are "inartful," the agency explains that contrary to Sabreliner's interpretation, it did not read or evaluate Orenda's proposal as requiring that either the Air Force or DLA engage in anything that is inconsistent with the terms of the solicitation or otherwise improper. AR (Sept. 26, 2002), Agency Legal Memorandum, at 4. In this regard, the Air Force explains that, considered in the context of this acquisition, the statement in Orenda's proposal that "[w]e ask that during this period the Air Force and Defense Logistics Agency (DLA) cancel all outstanding Purchase Requisitions for J85 unique, depot level material," does not require that the Air Force and DLA each cancel their purchase requisitions for all J85 depot level material; rather, the Air Force contends that this section of Orenda's proposal refers only to the Air Force's requisitions for materials from DLA, with the word "and" being used because both the Air Force and DLA are parties to such requisitions. AR (Sept. 26, 2002), Tab 6, Memorandum: Action Taken in Response to GAO Decision, at 6; Tr. at 62, 65; Agency Post-Hearing Comments at 18. Accordingly, in the Air Force's view, it was only being asked to cancel its requisitions to DLA for certain materials. AR (Sept. 26, 2002), Tab 6, Memorandum: Action Taken in Response to GAO Decision, at 6; Tr. at 62, 65. The Air Force adds that it was planning to do this anyway, given that Orenda's GFM-to-CFM transition period is only 6 months, and the Air Force does not care to have in its possession any J85 materials after the completion of the transition. AR (Sept. 26, 2002), Tab 6, Memorandum: Action Taken in Response to GAO Decision, at 7; Tr. at 75-76.

The Air Force further explains that, contrary to Sabreliner's interpretation, the proposal's reference to "J85 unique, depot level materials" cannot be equated to a

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[2] In accordance with the terms of the RFP, Orenda's technical proposal (including the section that set forth the above-quoted language) was incorporated and made part of the contract awarded to Orenda under the RFP. RFP at 22; Agency Response to Interrogatories (July 12, 2002) at 5.

reference to virtually any material to be used in the repair or overhaul of the J85 engine. Rather, the Air Force maintains that Orenda's reference here is to those J85 materials that the Air Force would requisition from DLA for the Air Force's depot, or, put otherwise, the Air Force depot's "market share" of those materials. AR (Sept. 26, 2002); Tab 6, Memorandum: Action Taken in Response to GAO Decision, at 7; Tr. at 72; Agency's Post-Hearing Comments at 4.

With regard to the second of the above-quoted paragraphs, the Air Force takes the position that the proposal's reference to "J85 unique, depot level material" has the same meaning as it does in the preceding paragraph, that is, the phrase is referring to the Air Force depot's market share of the J85 materials held by DLA. Additionally, the Air Force explains that, in its view, the proposal's statement that Orenda "will enter into negotiations to assume responsibility for all outstanding DLA/USAF contracts for this material" is not meant to pertain to any contracts held by either DLA or the Air Force with private sector vendors. Tr. at 85-87. In this regard, the Air Force maintains that Orenda is only stating here that while it intends to purchase all of the Air Force depot's market share of the J85 materials held by DLA or the Air Force after the first 6 months of the performance, it also intends to assume responsibility for any requisitions made by the Air Force to DLA that have not been either canceled or filled at that time. AR (Sept. 26, 2002), Tab 6, Memorandum: Action Taken in Response to GAO Decision, at 7; Agency's Post-Hearing Comments at 7. While again conceding that Orenda's proposal is not a model of clarity, the Air Force maintains that Orenda's use of the terms "contracts" and "termination for convenience" in the following sentence is due to Orenda's lack of familiarity with the mechanisms by which the Air Force obtains materials from DLA, rather than Orenda's plan to attempt to assume contracts that either the Air Force or DLA may have with private sector vendors for such materials. Tr. at 86-88, 90-92.

In our view, the Air Force's reevaluation of Orenda's transition plan, and its interpretation of the plan as set forth above, strain the bounds of reasonableness. They in essence require that the statement in Orenda's proposal that "[w]e ask that during this period the Air Force and [DLA] cancel all outstanding Purchase Requisitions for J85 unique, depot level material," be read as "we ask that the Air Force cancel all outstanding requisitions to DLA by the Air Force for the Air Force depot's market share of J85 unique, depot level materials." Additionally, they require that the references to "DLA/USAF contracts" either be read as referring to Air Force requisitions to DLA, or considered to have no meaning at all, and that the phrase "termination for convenience" be given no meaning at all, but rather, be attributed to Orenda's unfamiliarity with the Air Force's requisitioning process.

We need not decide, however, whether Orenda's proposal is reasonably susceptible to such a reading because the record shows that the Air Force and Orenda have agreed upon the Air Force's understanding of Orenda's transition plan. We note in this regard that Orenda has maintained throughout Sabreliner's protest that the Air Force's interpretation and understanding of Orenda's proposal were correct, in

that they are consistent with what Orenda intended to propose and how it plans to perform. Intervenor's Post-Hearing Comments at 40, 50. Moreover, both the Air Force and Orenda point out that representatives of the Air Force, DLA, and Orenda had a post-award meeting during which it was apparent that the Air Force's interpretation of Orenda's proposed transition plan, including the above-quoted paragraphs, was consistent with Orenda's intent and plan for performance.[3] Tr. at 221-24. In short, regardless of whether the agency's reading of Orenda' proposal can be found reasonable based upon the agency's consideration of the proposal itself, Orenda has confirmed that the agency's reading of its proposal was correct.

As such, the question becomes whether Sabreliner was prejudiced in any way by the agency's allegedly improper actions here. Prejudice is an element of every viable protest, and our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial prospect of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In this regard, should Orenda's protest submissions or the post-award meeting of representatives of the Air Force, Orenda, and DLA, confirming the Air Force's interpretation of Orenda's proposal as correct, be considered, for example, improper post-FRP discussions, we are left to consider from this record whether there is a reasonable possibility that Sabreliner would have lowered its price in an amount necessary for it to be in line for award, if it, too, had been accorded post-FRP discussions.[4] Newport News Shipbuilding and Dry Dock Company et al., B-261244.2 et al., Sept. 11, 1995, 95-2 CPD ¶ 192 at 13 n.12.

Concerning prejudice, Sabreliner does not argue that it would have lowered its price had further discussions been conducted, but only that it "may have been able to submit a different proposal" with regard to its transition plan. Protester's Post-Hearing Comments at 8. The protester fails to explain, and we cannot see, how the possibility that it may have submitted a different transition plan would in any

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[3] On September 30, 2002, the head of the contracting activity determined to override the stay of performance. Memorandum to the GAO from the Commander of the Air Force.

[4] Sabreliner has at no time asserted or otherwise argued that had it been provided with additional discussions that it would have been able to revise the past performance section of its proposal in a manner that would have positively affected the agency's evaluation of its proposal. Also, since the technical proposals were evaluated as either "acceptable" or "unacceptable," further discussions could not possibly improve Sabreliner's proposal's "acceptable" evaluation under the technical factor.

way have affected the outcome of this competition, given that Sabreliner's proposal was rated as "acceptable" (as opposed to the only other possible rating--"unacceptable") under the transition subfactor, and its price was $38 million higher than Orenda's.

This same basic reasoning applies to the remainder of Sabreliner's protest, where it argues that Orenda's proposal should have been rejected as technically unacceptable under the transition subfactor because it failed to adequately address the transition plan requirements as set forth in the solicitation. As noted, a "comprehensive" transition plan was required to be submitted under the RFP. RFP § M-002. Each proposed transition plan was to address the "identification of material sources and establishment of vendor contracts," as well as include "[d]etailed material requisition processes, ordering schedule[s], and source for . . . parts," and a "[p]lan . . . for use of GFM, CAP [Contractor Acquired Property], and CFM" over the proposed transition period.[5] RFP, app. A, TRD § 3.1.1.2.

Sabreliner argues that Orenda's transition plan should have been rejected as technically unacceptable because it fails to "demonstrate that [Orenda] had established a contract with DLA" for materials Orenda intends to purchase from DLA to use as CFM. The protester adds that Orenda's proposed transition plan did not address the requirement for a "requisition process or ordering schedule by which Orenda will acquire material from DLA for the second six month period of contract performance." Protester's Post-Hearing Comments at 4-6. The agency responds that offerors are not permitted to negotiate or enter into agreements with DLA for the purchase of materials, and as such, neither Orenda nor Sabreliner could have provided a transition plan with contracts in place or a specific ordering schedule for the materials to be purchased from DLA for use as CFM. Tr. at 94.

We need not address the propriety of the agency's evaluation of Orenda's transition plan as "acceptable," even though Orenda's proposal did not demonstrate that Orenda had established an agreement with DLA for certain of the materials required, and it did not specifically address the requirement for a requisition process or ordering schedule by which Orenda will acquire material from DLA. As noted in Sabreliner Corp., B-290515 et al., supra, at 7, Sabreliner's proposal also provided for the purchase of materials directly from DLA and use of those materials as CFM. However, there is nothing in the record to suggest that the agency, in evaluating Sabreliner's proposal, considered whether Sabreliner had established a contract with DLA for the materials it proposed to purchase from DLA for use as CFM, or whether Sabreliner addressed the requirement for a requisition process or ordering schedule

[5] Although the RFP as issued requested that the offerors' transition plans describe the requisition processes and use of GFM, CAP, and CFM "by piece part," offerors were informed that "[a] program plan that addresses procedural process will be sufficient." Agency Clarifications to RFP (Feb. 5, 2002), response 5.

for its acquisition of such materials. Nor is there anything in Sabreliner's proposal stating, or otherwise indicating, that it had established such an agreement, requisitioning process, or ordering schedule. Accordingly, given the agency's repeated statements that Orenda's (as well as Sabreliner's) proposal met the minimum requirements of the RFP with regard to its transition plan, the agency's assertion that it was in effect impossible for any offeror to meet the minimum requirements as they pertained to contracts with DLA, and that to the extent Orenda's plan was flawed as argued by the protester Sabreliner's plan was flawed in the same manner, we fail to see how Sabreliner was prejudiced by the agency's evaluation in this regard. Novartis Pharms. Corp., B-285038.4, B-285038.5, Feb. 1, 2002, 2002 CPD ¶ 33 at 7.

The protest is denied.

Anthony H. Gamboa
General Counsel