COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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December 3, 1973 40239

Falcon Jet Corporation
Teterboro Airport
Teterboro, New Jersey 07608

Attention: Thomas S. McCool, Esq.
General Counsel

Gentlemen:

We refer to your letter of October 2, 1973, and prior correspondence, protesting against the award of a contract to Rockwell International (Rockwell) by the Federal Aviation Administration (FAA), Department of Transportation, under request for proposals (RFP) WA5M-2-1038.

The RFP, issued July 5, 1972, called for the following aircraft and services:

> "Lease with option to purchase without pilot, and excluding cost of fuel oil, and maintenance, eleven (11) U.S. certificated turbojet or fanjet aircraft, with an option to lease/purchase from one (1) to four (4) additional aircraft within the term of this contract, for exclusive use of Federal Aviation Administration (FAA). These aircraft shall be in accordance with this Schedule, the attached specifications and the General Provisions set forth in this RFP."

According to the administrative report, the aircraft were procured for use in support of FAA flight inspection missions and thus were required to be equipped with "numerous and costly avionics systems" as set forth in the specifications.

Technical proposals were received from three concerns on August 21, 1972. The proposals of Rockwell, which offered the Sabre 75A aircraft, and your concern, which offered the Falcon Fanjet Model 20C aircraft, were found to be technically acceptable. After negotiations and submission of best and final offers, award was made to Rockwell, the lowest priced technically acceptable offeror, on April 23, 1973.

Protest Against FAA Contract Award]

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You contend that the award should be declared a nullity since the aircraft offered by Rockwell was not "U.S. certificated." Specifically, your letter of October 2, 1973, commenting upon the administrative report, makes the following points:

> "An aircraft must posses [sic] a type certificate which is the license for the basic airframe and engine combination. The Falcon 20-E aircraft received this license in 1970. The Sabre 75A has not yet received this license. * * *
>
> "If minor additions, such as avionics or cargo doors which do not change in-flight characteristics to the basic type certificated aircraft are desired, then the owner of the aircraft must seek FAA approval of these additions to the basic fully tested type rated aircraft.
>
> "This license is called a supplemental type certificate. The Falcon, as the FAA states, did not have this license at the time of award, but was ready immediately to begin the installations and tests required therefor. The crucial distinction is between major changes affecting the airframe, engines and flight performance, and those minor additions or changes related to the unique desired use of the aircraft. The Sabre 75A not only needed a supplemental license as does the Falcon 20-E, but it first needed a major type certification."

You further contend that in order to receive a type certification, the Sabre 75A must undergo extensive structural modification related to the mating of the engines and nacelles to the basic airframe, and that FAA should have been aware of this fact during the evaluation of proposals. You conclude that:

> "* * * The special problems inherent in the complex aerodynamic changes caused by new engines and nacelles which require an amended type certificate are substantial. The extent of these changes, we believe, removes from plausible interpretation that 'U. S. certificated' was meant to be only a technical requirement that could be satisfied at any time prior to delivery.
>
> "The type certification requirement, in our opinion, relates to the bidders' responsiveness, and the critical

> time for satisfying such an obligation is at the time of the award. Falcon Jet believes that a bid which failed to offer a type certificated product at the time of the award violated a clearly established integral item of bid responsiveness essential to the timely furnishing of the end product with amended, supplemental, and airworthiness certificates. * * *"

A review of the RFP reveals no provision stating that in order for a proposal to be acceptable, the offered aircraft must possess a type certificate at the time the offer is submitted or prior to award. No provision of this kind is set forth in the eight evaluation criteria contained in Article XXVI, as modified by Amendment No. 2. FAA certifications and standards which must be met are set forth in the "General Requirements," which contains 43 paragraphs of technical specifications. All of these provisions appear to speak prospectively of the requirements which aircraft furnished under the contract shall meet, including paragraph A.2, which is apparently the only provision referring specifically to aircraft type certification:

> "The aircraft shall be certificated as a Transport Category Airplane under the FARs applicable at the time of initial type certification of the type design."

From the foregoing terms, it does not appear that prior aircraft certification was required as a condition of proposal acceptability. Furthermore, even if your contention that Rockwell's offer indicated that special problems would be encountered in furnishing certificated aircraft is true, this would not establish that prior certification was required. The standards for agency determination of what constitutes an acceptable offer are established by the meaning of the RFP terms themselves, not by the content of the offers submitted in response to those terms.

In view of the RFP provisions discussed above, we agree with FAA that the certification terms are no different from any other technical requirement of the specifications. FAA has stated that it considered Rockwell's proposal, determined that it offered to meet the requirement of certificated aircraft, and accepted it as being responsive to the RFP. The determination of whether a proposal is technically acceptable is a matter of administrative judgment, and we will not disturb that judgment in the absence of a clear showing that the agency acted arbitrarily or unreasonably. 52 Comp. Gen. 382 (1972). In the present case, no such showing has been made.

Accordingly, your protest is denied.

Sincerely yours,

Paul G. Dembling

for the Comptroller General
of the United States