

September 27, 2002

P.S. Protest Nos. 02-01, 02-02, 02-03, 02-04

**AMERICAN AIRLINES, INC., NORTHWEST AIRLINES, INC.,
DELTA AIRLINES, AND CONTINENTAL AIRLINES, INC.**

Solicitation No. IAT 2002-01

DIGEST

USPS, under 39 USC 5402, found to have the authority to contract for foreign air transportation of mail at rates other than those set by DOT. PM does not require USPS to confer with industry and DOT on changes to contracting practices, nor does PM require USPS to hold pre-proposal conference. Postal Service found not to be seeking additional capacity for foreign air transportation but rather to exercise its contracting powers under 39 USC 5402. Protests denied.

DECISION

Four airlines: American, Northwest, Delta, and Continental, have timely protested the terms of Solicitation No. IAT 2002-01 for air transportation of mail from San Francisco, California to Tokyo, Japan.

The solicitation was issued on February 8, 2002, with proposals originally due on February 21, 2002. By a series of amendments, the time for proposal submission was extended, first to February 28 and then indefinitely to accommodate discussions between the airlines, the Postal Service, and the Department of Transportation. The protests were submitted between February 21 and March 1, 2002.

THE SOLICITATION

The solicitation was for a negotiated purchase and called for the submission of fixed price proposals for the transport of mail by air between San Francisco and Tokyo on specific flights to be proposed by the airlines and on particular dates and at specified times. The possibility of multiple awards was provided for and further emphasized in Amendment 1 to the solicitation. During the contract term, successful offerors were required to maintain a "certificate of public convenience and necessity issued under Section 401 of the Federal Aviation Act of 1958 or a permit issued under Section 402 of

the Act, authorizing the holder to engage in air transportation or foreign air transportation.”¹

The solicitation called for the award of one or more indefinite delivery, indefinite quantity contracts (IDIQ) supported by a minimum order of \$500 worth of mail transportation.² The mail was to be containerized for transportation of at least 750 pounds per flight of parcels and no more than five percent letter mail, based on weight.³ For evaluation purposes, price was considered more important than technical factors in making the award decision.⁴ The original period for contract performance was to have been May 28, 2002 through November 29, 2002.

The Postal Service’s stated reason for issuing this solicitation was to achieve greater service performance than presently provided under the system of tendering mail to U.S. carriers at rates established by the Department of Transportation. The Postal Service asserts that under the current regulated rate method, it is difficult to be responsive to changes in service requirements, and that the practice of withholding mail or assessing monetary penalties for mail handling irregularities has not resulted in better service.⁵

THE PROTESTS

The protests all state a number of grounds in common, and so they will be treated here issue by issue. The protesters ask for relief in the form of restructuring the solicitation to conform to their interpretations of the law and regulations. The allegations raised are as follows:

- (i) To the extent that the solicitation permits contract awards to foreign flag carriers, it exceeds any grant of statutory authority to the Postal Service, and yet the solicitation provides for the possibility of award to foreign carriers;
- (ii) The statutory grant of authority to the Postal Service to contract for foreign air transportation (39 USC § 5402) does not authorize contracts at rates other than those set by the Department of Transportation (DOT), and yet the Postal Service proposes to do so;

¹ IAT 2002-01, § B.2.

² id., §§ G.5; J.1

³ id., § A.1

⁴ id., § M.2, as amended by Amendment No. 1, February 15, 2002

⁵ Statement of Contracting Officer Terri L. Ballard, at page 1, dated April 30, 2002

- (iii) The *Purchasing Manual (Issue 2)*, at § 3.1 requires the Postal Service to confer with industry and the DOT prior to making any unexplained changes to contracting practices, and that was not done;
- (iv) The *Purchasing Manual (Issue 2)*, at § 4.2.2.f requires the Postal Service to hold a pre-proposal conference, and that was not done;
- (v) Statutory authority found at 49 USC § 41107 provides the Postal Service a lawful means of obtaining additional capacity for foreign air transportation by petitioning the DOT to issue new certificates or modify existing ones, and the Postal Service has failed to do so thus confirming that current lift is adequate for its purposes.

Subsequent to the filing of these protests, the protesters met with representatives of the Postal Service and DOT, on March 12, 2002. The result of the meeting was that the first issue referenced above was resolved by the Postal Service's amending the solicitation to eliminate the possibility of award to foreign carriers.⁶

DISCUSSION

a) Interested Parties

To be eligible for relief under the protest procedures, a protester must establish that it is an "interested party."⁷ The protest regulations define "interested party" as: "An actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract."⁸

As a threshold matter, the contracting officer asserts that Continental is not an interested party to this solicitation as it does not provide scheduled service between San Francisco and Tokyo. The conclusion we are asked to reach is that since Continental does not fly on the route for which the Postal Service is seeking to provide service, Continental cannot have any expectation of an award and hence no economic interest in the terms or the outcome of the solicitation at issue here.

The contracting officer is incorrect as to Continental's status. A check of the Official Airline Guide dated September 14, 2002 (updated weekly) reveals that Continental does fly the route in question, but that Delta does not currently have any scheduled flights on that route. However, Delta asserts in its protest (No. 02-03, dated February 27, 2002) that it "...has Department of Transportation issued authority to carry U.S. mail in foreign air transportation."

⁶ Amendment No. 4, March 26, 2002

⁷ PM § 3.6.3.a

⁸ PM § 3.6.2.a

The search for a direct economic interest that would be affected by the award or failure to award a contract is a factual inquiry into whether the protester is either an actual or prospective offeror and has the capability to perform. In *XTRA Lease, Inc.*, P.S. Protest No. 00-24, March 9, 2001, a protester's direct economic interests were found to be affected when the Postal Service relaxed a delivery schedule critical to the protester's participation without informing the protester who otherwise would have submitted an offer. In construing a virtually identical definition of "interested party" for purposes of standing, the Court of Appeals for the Federal Circuit found that a potential supplier of security guard services was not an interested party since it could not show that it had the man-power to supply the number of guards needed, nor could it provide evidence of successful past performance of similar services. *Myers Investigative and Security Services v. United States*, 275 F3d 1366 (Fed. Cir. 2002). See also *American Federation of Government Employees, et. al. v. United States*, 258 F3d 1294 (Fed Cir. 2001) finding that since a federal employee union and individual federal employees could not be offerors under a contracting out process pursuant to OMB Circular A-76, plaintiffs could not be interested parties. That is, if they could not make an offer, then they had no direct economic interest within the meaning of the definition and thus no standing.⁹

As to Delta, we accept as valid its unrebutted assertion that it has DOT authority to carry mail in foreign air transportation. Since it has that authority, we find that it could establish a scheduled flight on the route in question through the proper processes at DOT for flights by Delta itself or through code-sharing.¹⁰ Thus, it could be an offeror on the IAT solicitation and has a direct economic interest in the award of any contracts arising from this solicitation. Further, we find the contracting officer to be mistaken as to Continental's status, and so find that Continental is an interested party. The other offerors also provide service on the San Francisco to Tokyo route and thus have standing to pursue this protest.

b) USPS's Authority to Contract

It is asserted, as to this solicitation, that the Postal Service's authority to contract for air transportation services under 39 USC § 5402(a) does not permit contracting for rates other than as prescribed by the DOT. That is, up to the present, the Postal Service has contracted under § 5402(a) only for carrying of the mail in a non-time sensitive manner

⁹ The virtually identical definition of "interested party" upon which the court relied was found at 31 USC 3551(2), the Competition in Contracting Act, which the court adopted as the correct definition of "interested party" for the purpose of the Tucker Act's grant of jurisdiction over bid protests. 28 USC

§ 1491(b)(1).

¹⁰ Code-sharing is the process whereby a U.S. flag carrier partners with a foreign carrier to fly the route, but contracts in its own name to do so and receives the contract payments itself rather than the foreign carrier. Such arrangements do not run afoul of requirements in this solicitation to contract directly with U.S. flag carriers.

at rates set by DOT; whereas, the current IAT solicitation calls for certainty of time with respect to carrying the mail.

The Postal Service has commonly provided for the foreign air transportation of mail by entering into contracts for what has been known as “International Surface Air Lift” (ISAL) mail. When mail moves by that means, it is tendered to an air carrier which transports the mail to the destination country on a space-available basis. This means that its placement on those aircraft is uncertain as to time; hence, the difficulties referenced earlier with respect to certainty and timeliness of arrival of the mail at foreign locations. Those difficulties with ISAL, as mentioned above, led the Postal Service to alter its practice of contracting under § 5402(a) in this instance.

The Postal Service’s authority for contracting for foreign air transportation of mail is stated in the following language:

The Postal Service may contract with any certificated air carrier, without advertising for bids, in such manner and under such terms and conditions as it deems appropriate, for the transportation of mail by aircraft between any of the points in foreign air transportation between which the carrier is authorized by the Secretary of Transportation to engage in the transportation of mail. Such contracts shall be for the transportation of at least 750 pounds of mail per flight, and no more than 5 percent, based on weight, of the international mail transported under any such contract shall consist of letter mail. Any such contract shall be filed with the Secretary of Transportation not later than 90 days before its effective date. Unless the Secretary of Transportation shall determine otherwise (under criteria prescribed by section 40101(a) of title 49) not later than 10 days prior to the effective date of the contract, such contract shall become effective. (39 USC § 5402(a))

The authority of the DOT is not to the contrary. Rather, it is clear that the Postal Service’s authority to contract found in Title 39 is an exception to DOT’s authority to prescribe prices: “*Except as provided in section 5402 of title 39 ... the Secretary shall prescribe and publish (1) after notice and an opportunity for a hearing on the record, reasonable prices to be paid by the Postal Service for the transportation of mail by aircraft in foreign transportation...*” 40 USC § 41901(b)(emphasis added)

The plain language of Title 39 permits the Postal Service to undertake the contracting action in question. See *Glaxo Operations UK Limited v. Quigg*, 894 F2d 392 (Fed. Cir. 1990)(statutory words are to be interpreted taking their ordinary, contemporary, common meaning, and when the statutory language is so clear as to Congress’ intent, it

is generally unnecessary to look at the legislative history).¹¹ Any former contracting methods whereby the Postal Service refrained from full exercise of its authority by limiting its ISAL contracting on a space-available basis does not constitute a legal interpretation of section 5402(a); rather, it is merely a method of contracting that the Postal Service elected to undertake. The Postal Service is free to change its contracting methods and practices consistent with its statutory mandate, and in this case it has done so.¹²

c) Requirements of the Purchasing Manual

Two further arguments are presented based on provisions of the Postal Service's *Purchasing Manual* (the "PM"). First, it is asserted that PM section 3.1 requires the Postal Service to consult with industry or the DOT prior to departing from past practice. Second, it is asserted that PM section 4.2.2.f requires the convening of a pre-proposal conference. Neither of these actions asserted by protesters as being prerequisites to issuance of the instant solicitation were undertaken by the Postal Service.

According to PM section 3.1, it is Postal Service policy to establish mutually beneficial relationships with suppliers through its purchasing process. However, there is no requirement in those regulations that consultations be held with suppliers or any governmental entity such as the DOT. The regulations simply state generalized business objectives of working toward a common goal with suppliers, of using the purchasing process to enhance supplier relations, and to manage those relationships to ensure their "effectiveness, vitality and integrity."

PM section 4.2.2.f permits, but does not require, the Postal Service to hold a pre-proposal conference. The language of that section is plainly permissive:

Whenever circumstances suggest that it would add to the success of the purchase, such as when a solicitation contains complicated statements of work, a preproposal conference *may be held* to brief suppliers...(emphasis added)

¹¹ The legislative history on § 5402 is sparse to non-existent on the matter in question.

¹² Protesters are not helped by the argument that parcels may not be carried under the instant solicitation due to the Postal Service's having previously limited ISAL contracts to "letter-post" which is defined in postal Publication 51 as including, among other things, "letter packages" and "small packets." Since the Postal Service previously limited itself to contracting for the carriage of letter-post, it is asserted that the proper interpretation of section 5402(a) must be that parcels (which are larger than letter-post) cannot be carried under contract at rates different than those set by DOT. That interpretation cannot be correct given the plain language of section 5402(a). There is no restriction whatsoever in either title 39 or title 49 regarding the size or type of mail for which the Postal Service may contract. Similarly, protesters' tortured interpretation of 49 USC § 41903 concerning DOT's authority to prescribe maximum loads does not detract from USPS's authority which is an exception to DOT's rate making scheme.

The question of whether to hold a pre-proposal conference is therefore within the discretion of the contracting officer, and the IAT solicitation being a straight forward one for mail transportation, there is no indication that there are any circumstances which would compel the necessity to hold such a conference.

d) Additional Statutory Means to Address Postal Service Concerns

Finally, it is asserted that the Postal Service may seek additional capacity for foreign lift by petitioning the DOT to issue new certificates or modify existing ones for the carrying of mail in foreign transportation pursuant to 49 USC § 41107. That statutory section provides that:

When the United States Postal Service finds that the needs of the Postal Service require the transportation of mail by aircraft in foreign transportation...in addition to the transportation of mail authorized under certificates in effect, the Postal Service shall certify that finding to the Secretary of Transportation...[and] the Secretary shall issue a new certificate... or amend or modify an existing certificate...to provide the additional transportation...

However, the Postal Service does not seek additional lift. Rather, the Postal Service seeks to exercise its contracting powers under 39 USC § 5402(a) to purchase the services necessary to move mail on the route from San Francisco to Tokyo on a time certain basis. Several commercial air carriers already operate on that route, and there is no suggestion in the record that capacity is inadequate.

CONCLUSION

The Postal Service has the statutory authority to contract for the transportation of mail by aircraft in foreign air transportation so long as it does so in accordance with the provisions of 39 USC § 5402(a). That authority is an exception to the DOT's authority under 49 USC §§ 41901, 41903, to prescribe rates and maximum loads in foreign air transportation for the carrying of mail. Further, there is no limitation in either statute as to the types of mail that may be carried. In addition, no provisions of the PM require consultation with DOT or industry or the holding of a pre-proposal conference in the circumstances present in this series of protests.

The protests of American (02-01), Northwest (02-02), Delta (No. 02-03), and Continental (02-04) are denied for the reasons stated in this decision.

William A. Campbell
Managing Counsel
Purchasing and Commercial Protection Law