

Protest of) Date: May 1, 1987
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NORTHWEST AIRLINES, INC.)
)
Under Solicitation No. ASYS-87-01) P.S. Protest No. 87-20

Decision

Northwest Airlines, Inc. (Northwest) protests against award of a system air mail transportation contract to Cargo Development Corp. (CDG). It alleges that Eastern Airlines, Inc. (Eastern), Continental Airlines, Inc. (Continental), and CDG are subsidiaries of Texas Air Corporation and have been awarded system air contracts which allow CDG to pick and choose flights out of Eastern's and Continental's schedules and offer these flights at CDG's lower rate, giving Texas Air, the common parent, an unfair advantage over other air carriers.

Solicitation No. ASYS-87-01 was issued on January 16, 1987, by the Transportation Administration and Procurement Division of the Transportation and International Services Office at Washington, D.C. Proposals were due February 24. The solicitation requested proposals for the air transportation of mail on the offeror's entire transportation system for the term April 5 to October 24, 1987. "Contractor's system" is defined in Clause 15(ii) of the solicitation as the "contractor's entire domestic flight schedule as determined by the schedules published in the Official Airline Guide and by other schedules the contractor provides the Official Airline Guide for exclusive distribution to the Postal Service...." Clause 15(ii) B. permits the contractor, upon written request, to delete from its system "[f]lights on which the contractor has sold, leased or otherwise granted exclusive use of the entire cargo compartment, or of all of that portion of the cargo compartment not used or reserved exclusively for passengers' baggage to a single third party."

In its initial protest addressed to the contracting officer and received on March 12, Northwest alleged that permitting CDG to select certain flights out of Continental's and Eastern's schedules to offer CDG's lower rate^{1/} gives all three carriers an

^{1/} CDG's rates are \$0.00025 per pound-mile for mandatory carry line-haul, \$0.12000 per pound for mandatory carry terminal handling, \$0.00011 per pound-mile for optional carry line-haul and \$0.09000 per pound for optional carry terminal handling. Eastern and Continental both offered rates of \$0.0030, \$0.15000, \$0.00010, and \$0.15000, respectively, for these items. Northwest's rates for these items are \$0.00015, \$0.20905, \$0.00004, and \$0.15245.

unfair advantage over other carriers who must offer all the flights on their system. The contracting officer forwarded the protest to this office, and we asked the protester to clarify the grounds for the protest. Northwest's reply of April 17 repeated the allegation and added that CDG is able to offer the Postal Service a portion of the aircraft while other carriers must offer all the space after loading of passengers and their baggage.

The contracting officer, in his report as supplemented, states that the protest is against the terms of the solicitation and therefore is untimely filed. Contract Clause 15 permits air carriers to delete from their system any flights on which they have leased the cargo compartment to a third party. The possibility of awards both to carriers which have leased their cargo compartment and to firms holding such leases was apparent on the face of the solicitation and therefore any protest should have been filed by February 24.

Further, the contracting officer states that the Postal Service's decision on its requirements for a solicitation should be upheld if there is a reasonable basis for it, citing Portion-Pac Chemical Corp., P.S. Protest No. 84-48, August 1, 1984. He states that the Postal Service was aware that air carriers were leasing the cargo compartments to third parties, and if the solicitation had required access to this leased space, then the carriers would not have responded to the solicitation. Also, he asserts that concern that carriers could manipulate the market on selected flights is unrealistic since the system contracts are intended only for smaller and less predictable volumes of mail with no guarantee of any volume to be designated to any air carrier.^{2/} It would be implausible for carriers to make decisions on leasing whole cargo compartments in the hope of

^{2/} The contract provides that the Postal Service will order a minimum of \$500 of transportation services during the contract term.

increasing mail volume when there is no guarantee that any mail will be tendered.

CDG filed a comment stating that it is a wholly-owned subsidiary of Continental but submitted an independent offer to the Postal Service. CDG has purchased space from Continental, America West and Hawaiian Air and would be willing to purchase space from Northwest if they so desired. CDG states that its rate is fair and the protest should be denied.

We conclude that the protest is untimely and do not reach its merits. The protest is a protest against the terms of the solicitation. The possibility that an offeror could lease its cargo compartment to a third party who would be awarded a contract was apparent on the face of the solicitation. Postal Contracting Manual 2-407.8 d (1) provides that "protests based upon alleged deficiencies in a solicitation which are apparent before the date set for receipt of offers must be received by the date set for the receipt of offers." See Bula Forge, Inc., P.S. Protest No. 86-14, April 23, 1986.

The protest is dismissed.

William J. Jones
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Office of Contracts and Property Law

[Compared to original 2/23/93 WJJ]