



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

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April 19, 1973

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Paul B. Boyd, Esq.
Attorney at Law
P. O. Box 358
Boise, Idaho 83701

BEST DOCUMENT AVAILABLE

Dear Mr. Boyd:

Reference is made to your letters of May 31 and September 21, 1972, protesting on behalf of Idaho Aircraft Company, Inc. (Idaho), against the solicitation of offers under, and the award of any contract pursuant to, Request for Proposals (RFP) No. R3-72-83, issued March 24, 1972, by Region 3 of the Forest Service of the United States Department of Agriculture.

The record discloses that, for the past several years, Idaho has qualified as a fixed-base resident operator at Boise, Idaho, and has contracted with the Forest Service to provide air tanker availability at the Boise Forest Service base for the purpose of forest fire control. Prior to issuance of the 1972 Request for Proposals, a team from the Forest Service Division of Fire Control, Region 4, visited Idaho on March 8, 1972, to survey that firm's facilities. Under Forest Service regulations, personnel from the Division of Fire Control are responsible for designating resident bases. As a result of that survey, the Division of Fire Control notified the Assistant Regional Forester on March 10, 1972, that, in its opinion, although Idaho was a fixed base operator, the company did not meet the requirements of a resident operator as defined under regulation 46-3.7102-1 (Definition of Resident Operator) of the Forest Service Procurement Regulations (FSPR). A report detailing the results of the survey and documenting these findings was prepared on March 21, 1972.

Concurrently, in the interest of effecting a monetary saving in the procurement of air tanker services, the Forest Service was contemplating combining the Forest Service bases at Grand Canyon, Oregon (Region 3), and Boise, Idaho (Region 4). As the Division of Fire Control responsible for both regions had determined that the air tanker requirements of Region 3 would terminate at approximately the same time that the air tanker requirements of Region 4 would begin, only one extended term contract was deemed necessary. Therefore, when Idaho was determined not to

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qualify as a resident operator at Boise, Idaho, RFP No. R3-72-88 was composed so as to solicit proposals for one inter-regional aircraft contract. The aircraft in question were to be shared by the Boise and Grand Canyon bases, with the solicitation describing Boise, Idaho, as a nonresident base.

By letter of April 7, 1972, Mr. Paul F. Short, contracting officer for Region 4, formally informed Mr. M. G. Smilanich, president of Idaho, of the Forest Service's determination that Idaho did not qualify as a resident operator, and the reasons for that determination. Prior to receipt of the April 7, 1972, letter from Mr. Short, Mr. Smilanich transmitted to Mr. Short a letter dated April 8, 1972, inquiring as to why the solicitation in question listed Boise as a nonresident base, and what steps were necessary for Idaho to reacquire the preferred status of a resident operator. On April 11, 1972, Idaho advised Mr. Short that it would review the April 7, 1972, letter of the Forest Service. On April 16, 1972, Idaho dispatched a letter to Mr. Short protesting the decision of the Forest Service to declare the Boise base a nonresident base in the solicitation issued by Region 3. Upon receipt of that letter, Mr. Short advised Idaho to direct its protest to Region 3.

Between April 8 and April 16, 1972, Mr. Smilanich conversed with Mr. Bowman, the contracting officer for Region 3. Mr. Smilanich alleged that his "grandfather rights" in relation to the Boise base were violated; that he had sold several aircraft because he was under the impression that the Forest Service would furnish him other aircraft and because the Forest Service informed him that certain of his aircraft were unsuitable as air tankers; that it was unfair for the Forest Service to change aircraft requirements without affording the air tanker operators involved proper notice; and that Boise was incorrectly determined to be a nonresident base. On April 16, 1972, Mr. Smilanich returned his proposal solicitation package in an uncompleted state, and enclosed a letter of protest addressed to the contracting officer for Region 3.

On April 27, 1972, the offers received were opened. Proposals were received from Hawkins and Povers Aviation and from Stell Aviation, with Idaho's incomplete proposal and letter of protest noted. The successful offeror was determined to be Hawkins and Povers Aviation.

On May 4, 1972, Mr. Bowman replied to Idaho's April 16, 1972, letter, protesting the various actions of the Forest Service. He denied the protest, stating that all similarly situated aircraft operators were treated fairly and were judged by the same criteria; that Idaho neither owned an air tanker aircraft nor was involved in the air tanker business; that adequate notice of the types of aircraft required by the Forest Service was given to air tanker operators; and that the Boise and Grand Canyon bases were properly combined.

On May 18, 1972, Mr. Smilanich protested to our Office against solicitation of offers and award of a contract for fixed wing air tankers by the Forest Service under Solicitation No. R3-72-88. On May 31, 1972, you submitted to our Office, on behalf of Idaho, a memorandum in support of that protest. During the pendency of the protest, in view of the urgent and compelling need for initial attack air tanker services, award of the contract was made on June 27, 1972, to Hawkins and Powers Aviation.

On August 1, 1972, in response to our request of May 19, 1972, the Forest Service submitted an initial administrative report on this matter dated June 28, 1972, and a supplemental administrative report dated July 28, 1972. By letter dated September 12, 1972, the contracting officer for Region 3 submitted an additional report to the effect that the Forest Service had never insisted nor requested that the protestant sell or dispose of any aircraft in any manner. In response to these reports, you submitted to our Office, by letter dated September 21, 1972, a memorandum in opposition to the Forest Service position, supplemented, on September 27, 1972, by a memorandum drafted by Mr. Smilanich entitled "Summary of Idaho Aircraft Co., Inc.," dated September 21, 1972.

In response to a request of Mr. Smilanich confirmed by you in a letter dated October 16, 1972, a conference on the matter was scheduled on November 2, 1972. At that meeting, attended by Mr. Smilanich and representatives of both the Forest Service and the General Accounting Office, the issues involved in this matter were discussed. Subsequently, in response to a request of our Office dated November 17, 1972, Mr. Blaine Bowen of the Forest Service, by memorandum dated December 21, 1972, and submitted on December 27, 1972, elaborated on specific points of his agency's procurement practice and procedure.

Initially, you contend that the regulations employed by the Forest Service in reference to this procurement were not in effect and therefore were illegally utilized because the regulations were not circulated, nor were they published in the Federal Register, nor were they properly adopted by the Forest Service according to the requirements of law. In support of this contention you allege that Mr. Blaine Bowen, Chief of Forest Service Procurement Management, stated, in a letter dated June 16, 1972, that the new Procurement Regulations were not adopted as of that date. Thus, you argue that the entire solicitation negotiated pursuant to these regulations should be declared null and void, and that the contract should be resolicited.

The Federal Regulations pertaining to the General Procedures of the Forest Service of the Department of Agriculture provide, in part (36 CFR 200.4(b), (c), (d)(1)):

(b) Procedures for the conduct of Forest Service activities are issued as directives by the central office of the Forest Service and by the field offices listed in Sec. 200.2.

(c) Directives include: (1) The Forest Service Directives System comprised of the Forest Service Manual and related Forest Service Handbooks * * *

(d) Forest Service Directives System issuances are published under delegated authority as follows:

(1) The Forest Service Manual and Forest Service Handbook issuances are published in the Office of the Chief by the Division of Administrative Management for use by all Forest Service units. (Emphasis added.)

The FSPRs are issued, under such delegated authority, as Volume 28 of the Forest Service Handbook, in conjunction with the applicable provisions of the Code of Federal Regulations and the Department of Agriculture Procurement Regulations (AGPR).

AGPR 4-1.008 (Agency Implementation) states, in pertinent part:

* * * agencies within the Department may publish in the FEDERAL REGISTER implementing regulations deemed necessary * * *. Detailed instructions of interest primarily for internal agency guidance will not be published in the FEDERAL REGISTER.

As FSPR 4G-1.104-7 provides that "the FSPRs are written to provide directions and standards of performance for agency internal use of (a) warrent material in FPR and ASPR and (b) other material from special laws and regulations peculiar only to the Forest Service," it is apparent that the FSPRs are not required to be published in the Federal Register. Furthermore, the record indicates that the Forest Service had distributed copies of the proposed procurement regulations to the air tanker operators, as provided by a Forest Service memorandum dated March 24, 1972, to the Regional Foresters, and had circulated among the operators earlier proposed drafts prior to that date. Thus, it is our opinion that the Forest Service has also provided adequate exposure to its proposed procurement regulations pertaining to procurement of air tanker services.

Although, in relation to this specific procurement, the Forest Service has implemented the principles contained in the proposed revised FSPRs, in addition to those contained in the published regulations, such action does not require this Office to recommend cancellation of the procurement. The FSPRs do not enumerate a specific procedure whereby proposals are made effective, and in fact 36 CFR 200.4 contemplates a system whereby such internal policies and procedures can be amended and implemented on short notice. In this instance, the Forest Service has indicated that the principles contained in the proposed revised FSPR should

be made applicable to the procurement in question. There is no indication in the published regulations that proposed regulations cannot be implemented prior to the proposed regulations' effective date, and in the instant procurement all interested offerors were cognizant of the proposed regulations and were equally subject to their parameters. In such a situation, where the competition appears to have occurred on an equal basis and where no offeror is prejudiced by the exercise of the agency's discretion, it would be imprudent to assert that the agency has violated the offeror's competitive rights and that the subject solicitation should be declared null and void. B-176425, October 18, 1972; B-167609, November 13, 1969. We therefore are of the opinion that your contention that the procurement was conducted illegally, because regulations not yet in effect were followed, is without merit.

With respect to your argument that the Forest Service's determination that Idaho did not qualify as a resident air tanker operator was arbitrary, capricious and unsupported by the facts, the Forest Service contends that Idaho would not presently qualify as a resident operator under the definitions contained in either FSPR 4G-3.7108 (1969) or FSPR 4G-2.7102-1 (proposed), or the definition presented in A Study of Forest Service Procedure For Contracting Air Tanker Services and A New Policy For Such Contracting (October 7, 1954), approved by our Office in B-157954, December 15, 1955.

It is our considered opinion that the Forest Service determination that Idaho would not have qualified as a resident operator under any of the three definitions cited above is supported by substantial evidence. Pursuant to these aforementioned definitions, a resident operator is required to maintain an office at a specific airport, to have maintenance facilities, owned air tanker aircraft, employees, qualified pilot(s) and mechanic(s), spare parts, tools and equipment for the type(s) of aircraft owned. The March 10, 1972, letter from the Region 4 Division of Fire Control to the Assistant Regional Forester indicated that Idaho did not own an air tanker aircraft, did not employ a sufficient number of mechanics, and did not possess tools, equipment and spare parts for approved air tankers. In the administrative report dated June 22, 1972, the Forest Service further advised that four air tankers were sold by Idaho, in 1971, and the one TEM air tanker presently owned by Idaho was inoperable. Although the Forest Service indicated to our Office by letter dated December 27, 1972, that a reasonable amount of aircraft repair can be allowed an operator between the time his facilities are surveyed and the time the aircraft is required, all indications pointed to the conclusion that an inordinate amount of time was required to return the aircraft in question to a state of adequate repair. We believe the accumulation of the listed deficiencies, especially the failure to maintain an operable air tanker, provide adequate

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support for a determination, pursuant to any or all of the three definitions in question, that Idaho could not qualify as a resident operator. B-172177, August 17, 1971.

It is your contention that Idaho's "grandfather rights" on the Boise, Idaho, base were violated by the Forest Service. Although you do not specifically identify these rights, nor do you refer to a provision of the regulations and/or contract where such "rights" are contained, we believe that you may refer to the provision contained in both FSPR 4G-3.7105 (1969) and FSPR 4G-3.7105-1 (proposed), whereby a contract may be renewed for two additional years by mutual agreement of both the contractor and the Forest Service. As the June 22, 1972, report of the Forest Service indicated that the contract between the Forest Service and Idaho (No. 50-255) was entered into on April 4, 1969, and renewed for the allowable time in February of 1971, the two-year renewal period had expired. Additionally, the Forest Service has expressed its desire to contract for these services on different terms with a potentially different contractor. Therefore, it is our opinion that any renewal rights Idaho may have had expired when the Forest Service declined to exercise its option to contract with the protestant. B-167003, September 9, 1969.

You next argue that the FSPRs required the Forest Service to notify operators of changes in contract equipment requirements by November 1 preceding the date of the new contract; that the Forest Service failed to so notify Idaho; that Idaho relied on the agency's failure to supply the notice as a representation by that agency that the status quo was to be maintained and thus did not procure new equipment; that as a result of this justifiable reliance Idaho was prejudiced; and that the Forest Service therefore has effectively violated the protestor's right to due process.

Although proposed FSPR 4G-3.7107 does not require a request for contract action to be submitted prior to November 1, an early draft of that section did so require. However, as that requirement was deleted when the final draft was composed, and as that section never required the contracting officer to communicate to the operators the contents of the request, we consider your reliance on this "requirement" to be incorrect. Additionally, while the Forest Service practice of informally notifying air tanker operators of aircraft requirements before the issuance of Request for Proposals may be beneficial, and although the Forest Service contends that Idaho was given adequate notice of the aircraft changes, we can find no regulation requiring notice of changes of equipment in advance of the RFP. It is our opinion, moreover, that each air tanker operator is afforded adequate notice of the Forest Service requirements because, pursuant to regulation 4G-3.7103 (Request for Proposals), the RFP provides "all prospective contractors with information they need to furnish proposals that are complete and responsive to the requirements."

In reference to the combining of the Grand Canyon and the Boise bases, you are of the opinion that such action was illegal, and in violation of the ISPRs. You further contend that such action, even though it is effected pursuant to a program of fiscal responsibility, drives away the responsible operators and subjects the United States to contracting with unreliable transient operators who are singularly motivated by profit and who provide less than adequate service. You base your argument on the fact that regulation 4G-3,7102 (1969) states, concerning Forest Service policy relative to negotiating contracts for air tanker services, "The policy is to select and negotiate contracts for each base." You therefore contend that the Forest Service is unable to negotiate one contract for two bases, i.e., an inter-regional contract.

Proposed FSPR 4G-3,7108 (Request for Proposals) provides that "* * * Except when two or more bases are to be contracted under one contract, a Request for Proposals should be issued for each designated base * * *." In this connection, it should also be noted that FSPR 4G-3,7109 (1969) authorized the contracting officer to prepare a Request for Proposals for either a base or an area. We interpret the term "area," as distinguished from the term "base," to denote the circumstance whereby two or more bases are located in one contiguous geographic location, and therefore one prospectus soliciting such an inter-regional contract for that location would also have been proper under the previous regulations. In view thereof it is our opinion that the action of the Forest Service in combining the bases and issuing one inter-regional contract was proper.

You also allege that several other operators had advance notice from the Forest Service itself of the aircraft desired by the Forest Service in 1972. You contend that such action was detrimental and prejudicial to the Idaho Aircraft Company. In support of your argument you refer to the letter dated February 28, 1972, from R. S. McBride to the Director of Fire Control in which a change of equipment for 1972, with the concurrence of the operators affected, was formally proposed. The Forest Service, in its report dated July 19, 1972, denied that the two operators mentioned were contacted. The Forest Service submitted a supporting statement indicating that such a contingency was never discussed with the operators in question, since the proposal to change aircraft was at that point quite tenuous. In view of its contents, it is our opinion that the above-referenced letter indicates that Region 4 would, at that time, have preferred to operate the P 2V aircraft mentioned, assuming that the concerned operators would agree, but that the letter does not stand as evidence supporting the allegation that the operators were contacted concerning the use of different aircraft in 1972 before Region 4 submitted its reply.

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Finally, Idaho argues that the Forest Service, and particularly Mr. Paul Short, have misled and injured the company by deliberate misrepresentation of facts. Idaho contends that it was harmed when the Forest Service indicated that no changes in either equipment or the resident operator at the Boise base were contemplated for the forthcoming year, thus causing Idaho to believe that it would again qualify as the Boise resident operator. Additionally, Idaho alleges that the Forest Service withdrew its resident operator status because, among other reasons, the company did not own an air tanker aircraft, notwithstanding the fact that Idaho had disposed of several operable air tankers as a consequence of advice from the Forest Service that such air tankers were obsolete in that region. Idaho has failed, however, to submit any documentary proof of the veracity of such allegations.

In reply to such charges, the Forest Service specifically and categorically denies that it ever represented such facts to Idaho, and states that the Forest Service never acted in any way to mislead Idaho as to the proposed equipment changes, the status of the Boise base resident operator, or the value or utility of the Idaho aircraft air tankers. It is, of course, the responsibility of the protestant to document and substantiate the grounds for his protest. B-171755, January 5, 1972; B-163718, June 28, 1968. In consideration of the record before us, and in view of the lack of documentary evidence presented by the protestor supporting these charges, we must accept the position of the Forest Service as being correct.

In view of the foregoing, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States



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

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The Honorable Earl L. Butz
The Secretary of Agriculture

Dear Mr. Secretary:

Reference is made to a protest of Idaho Aircraft, Inc., against the offer and solicitation of bids pursuant to Request for Proposals (RFP) No. R3-72-88, issued March 24, 1972, by Region 3 of the Forest Service of the United States Department of Agriculture, which was the subject of several reports from the Director, Office of Plant and Operations, to this Office.

Although we have denied the protest, copy enclosed, we believe the proposed Forest Service Procurement Regulations relating to negotiated contracts for air tanker services are, in several instances, somewhat vague and susceptible to various interpretations. Additionally, the procedure utilized by the Forest Service whereby final drafts of FSPRs are made effective and put into operation is not enumerated in FSPR 4G-1.1, and thus the revision of these regulations may foster confusion concerning the status of various FSPR provisions.

We therefore suggest that consideration be given to amending the Forest Service Procurement Regulations to reflect more specifically the credentials and equipment desired by the Forest Service of the resident operators. Thus, in relation to FSPR 4G-3.7102-1, the regulation might well reflect whether the owned air tanker is required to be presently operable, and that at least one air tanker so owned must be of the type desired by the upcoming solicitation. In reference to FSPR 4G-1.1, we believe the procedure whereby final drafts of proposed regulations are made effective as Procurement Regulations and the process pursuant to which such proposed regulations could be implemented prior to the applicable effective date, should be specified. Finally, consideration should be given to promulgation of an FSPR section which would state the conditions, if any, under which proposed revisions to the Forest Service Regulations may be implemented prior to their adoption.

The files received with the several reports from the Director are returned.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States