

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

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FILE: B-183396

DATE: June 26, 1975

MATTER OF: Globe Air, Inc.

DIGEST:

1. Where (1) minimum requirements (size and speed for air tankers at given base) are determined by experience data, and (2) even though tankers larger than minimum size might arguably be more cost effective on ton-mile-per-hour basis but would not be competitive on flat rate evaluation performed by Forest Service, we conclude that specifications are not unduly restrictive for there is insufficient evidence to find that they were unreasonably derived.
2. Requirement in IFB for air tanker services that bidder bid all subitems (bases) in any given item is not unduly restrictive of competition since (1) IFB did not require bidder to own or even control aircraft at time of bidding; (2) Forest Service's combination of subitems within item was determined without consultation or agreement with any private companies; and (3) Forest Service's determination to have only one contractor per base is not without reasonable basis.
3. Question of alleged antitrust violation is matter not cognizable by our Office.
4. Situation regarding Government's policy decision to utilize "in-house" capability rather than contracting out is matter under OMB Circular A-76 which does not establish legal rights and responsibilities and hence not within decision function of our Office.

The Forest Service issued invitation for bids (IFB) No. 49-1-75 seeking bids for the performance of air tanker services at various bases throughout the United States. Subsequent to bid opening and the rejection of its bid, Globe Air, Inc. (Globe), filed a protest against the failure of the Forest Service to award it items 10(a) and 12(b) which were awarded to other bidders.

The protester states the following bases for its protest:

- "1. The aircraft specifications for all items are unnecessarily restrictive and unduly limit competition.
- "2. The aircraft specifications requiring combinations of aircraft to be bid result in unfair favoritism as to particular contractors and unjustifiably result in de facto sole source procurement.
- "3. The combination requirements also unjustifiably require joint venture bids in violation of the antitrust laws and are therefore illegal.
- "4. To the extent private contractors have combined, conspired or agreed with Forest Service personnel to issue these specifications, their conduct also violates the antitrust laws and is illegal.
- "5. The pilot qualification requirements are also unfairly restrictive."

While there is some question as to the timeliness of these arguments, we need not address that question since Globe has also protested in a timely manner and on the same bases the congruent provisions of another Forest Service air tanker solicitation-- No. 49-5-75.

The IFB's in question required bidders to bid on an item-by-item basis. Many of the items had subitems. Per the IFB, failure of a bidder to bid on each subitem of any item caused the bid for that item to be rejected. Each subitem required the successful bidder to furnish a plane with a minimum payload and minimum cruise speed at the base(s) designated,¹ for example:

<u>Item 4</u>	<u>Designated base(s)</u>	<u>Minimum payload</u>	<u>Minimum cruise speed</u>
Subitem 4(a)	De Land, Florida ¹ Troutdale, Oregon ¹	18,250 lbs.	170 mph
Subitem 4(b)	De Land, Florida ¹ Everett, Washington ¹	25,000 lbs.	215 mph

1. Note: Where more than one base was designated in a subitem, the aircraft would be stationed at one base for the initial part of the fire season and at the other designated base the other part of the season.

The protester asserts that in many instances the minimum payload, minimum cruise speed and other base-dictated technical requirements are the precise performance characteristics of particular types of aircraft. Moreover, it is also claimed that while it is theoretically possible to bid aircraft which exceed the minimum payload and/or cruise speed requirement, larger planes are more costly to operate than smaller aircraft. Their superiority and net cost effectiveness, it is argued, lie in their ability to carry larger payloads more quickly so that the net ton-mile-per-hour cost is less.² The protester states that competition is effectively limited to the particular aircraft which is the smallest meeting the agency's stated requirement at each base.

The Forest Service does not deny that the minimum capacity, minimum speed and number of aircraft may result in the award to bidders proposing to use those types of aircraft the specifications of which closely correspond to the IFB stated minimums. However, it does state that "* * * the minimum requirements for an air tanker at a given base are determined by the experience data in the Forest Fire Management Plans. These plans give the needed documentation of facts to determine whether one aircraft or three aircraft are needed and whether one should be at the 16,000 lbs capacity or at 27,000 lb capacity."

Our Office has consistently stated that specifications should be drawn so as to maximize competition. However, as we stated in Winslow Associates, 53 Comp. Gen. 478, 481 (1974), we will not interpose our judgment for that of the agency's unless the protester shows by "* * * clear and convincing evidence that the agency opinion is in error and that a contract awarded on the basis of such specifications would, by unduly restricting competition * * *, be a violation of law [*Italic supplied.*] 40 Comp. Gen. 294, 297 (1960); B-178158, * * * [May 23, 1973]; see 49 id. 156 (1969) and 17 id. 554 (1938)."

2. It should be noted in this regard that while IFB No. 49-1-75 required bidders to submit prices per actual flight hours with the Forest Service paying the contractor a fixed availability rate for nonflying time, IFB 49-5-75 fixes the per hour flight rate and requests bids on the daily availability rate.

Under the circumstances, we must conclude that these specifications are not unduly restrictive for we have not been presented with sufficient evidence to find that they were unreasonably derived. See B-178158, supra.

On the other hand, we think that the evaluation system proposed by the protester does have a number of valid aspects and might lead to ultimately lower costs to the Government for air tanker services. In this regard, we would suggest that the Forest Service seriously examine the feasibility of using in the future a ton-mile-per-hour method of evaluation.

Globe also argues that the IFB by requiring bidders to bid on each subitem of any given item is unduly restrictive. It is asserted that this requirement unduly favors those operators which happen to have the particular combination of aircraft required, a fact that the Forest Service was aware of when setting up the combination requirement.

We note at the outset that the IFB did not require that the bidder own or even control the aircraft which it bids at the time of bidding. Rather, the IFB merely required that the bidder demonstrate at the time of the preaward survey either ownership of the appropriate aircraft or a firm lease agreement. Thus a bidder need not have owned a specific inventory of planes in order to bid any base, provided that he could have provided evidence of his legal control of the aircraft at the time of the preaward survey. Moreover, the Forest Service states that:

"The combination of bases is determined at the Washington Office level without any consultation or agreements with private companies. The air tanker industry has historically leased and bought aircraft from each other to bid on a particular combination package and for other reasons.
* * *"

At a conference held in our Office on the instant protest, the Forest Service advised that the subitem combinations were utilized to prevent more than one Forest Service contractor from operating out of any single base at any given time. The Forest Service felt that the friction created, under somewhat normal fire season conditions, between contractors essentially competing to get into the air as much and as fast as possible (so as to receive their hourly flight rates in lieu of the lesser availability rate) would create a chaotic situation.

We do not necessarily agree with the protester that "Any unwarranted friction can be resolved by the Forest Service's administration of the operation and if necessary by termination of the contract involved." Moreover, even if we were to conclude that there is a better way to "police" the situation at the subject bases, we cannot say that the Forest Service's determination to have only one contractor per base is without a reasonable basis. It is true, as the protester notes, that in emergency fire situations many operators under the Forest Service's total mobility plan may operate out of a single base. However, we have little doubt that those circumstances due to their very nature lend themselves to a chaotic situation and, therefore, we can see some wisdom in the Forest Service's attempt to minimize and/or eliminate any analogous chaos in the more usual circumstance.

With regard to the alleged antitrust violation aspects of this matter, as noted above, the combination requirements do not "require joint venture bids" or any other collusive bidding scheme. In any event, this question is not cognizable by our Office being a matter pertaining solely to violation of the bidder's certificates of independent price determination and/or the antitrust statutes. See 50 Comp. Gen. 648, 652 (1971).

Globe raises additional issues relating to the Forest Service's alleged failure to allow the air tanker industry sufficient leadtime to acquire and refit aircraft of a type which the Forest Service has specified. In view of the unique nature of the air tanker industry and both the long leadtime and significant expense necessary for potential contractors to obtain aircraft, we agree that discussions of the Forest Service's needs should be held with all potential bidders well in advance of the issuance of large scale IFB's for air tanker services. Moreover, the Forest Service should consider expanding the time between issuance of the IFB and bid opening. A significantly longer period could give operators the time necessary to obtain and/or refit aircraft which they otherwise might not have had. The result would appear to be a probable increase in competition. In spite of our views in this regard, we do not feel that failure in the instant case to provide this longer leadtime was improper or affected the legality of the award.

Lastly, the protester raises questions surrounding the Forest Service-Air Force program of emergency backup. The Forest Service indicates that when all commercial air tankers

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under contract are committed to specific fire situations, but additional emergency air tanker services are required, specially equipped Air Force C-130 Hercules aircraft will be utilized. It is contended by Globe that this use of Air Force equipment is an encroachment upon commercial firms.

This is in essence a situation regarding the Government's policy decision to utilize an "in-house" capability rather than contracting out. As such, it is a matter under Office of Management and Budget Circular A-76.

As we stated in 53 Comp. Gen. 86, 88 (1973), which also involved the procurement of airplane services:

"OMB Circular A-76 and the Defense Department's implementing directives (DOD Instruction 4100.33, Air Force Regulation 26-12), express a general policy preference for contracting with private, commercial enterprises as opposed to the Government's performing the required services 'in house.' However, the Circular specifically provides for the use of Government-furnished services when the 'service is available from another Federal agency.' * * * In any event, we have always regarded the provisions of Circular A-76 as matters of Executive policy which do not establish legal rights and responsibilities and which are not within the decision functions of the General Accounting Office. B-170079, September 15, 1970." (Emphasis added.) See Federal Leasing, Inc., B-182534, April 18, 1975, 54 Comp. Gen. _____.

For the reasons set forth above, the protest is denied.


Deputy Comptroller General
of the United States