C. Easterwood

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DECISION

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

FILE: B-184398 DATE: APR 3 1979

MATTER OF: Saturn Airways, Inc.; Alaska International Air, Inc.

DIGEST:

1. Air carrier who was at all times eligible for contract to perform charter flights is interested party under bid protest procedures.

2. Intent of Section 5 of Fly America Act (49 U.S.C. 1517) is to prefer United States air carriers over foreign air carriers rather than to prefer certificated over non-certificated air carriers.

3. A carrier awarded a contract without the CAB authority needed to perform assumes the risk of obtaining the authority.

The Agency for International Development (AID), Department of State, solicited quotations from several air carriers for the transportation of two one-way outsized cargo charter flights from Carswell Air Force Base, Texas, to Rangoon, Burma. The solicitation was subject to Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. 1517 (Supp. V, 1975) (Fly America Act). None of the air carriers holding certificates of public convenience and necessity under Section 401 of the Federal Aviation Act of 1958, 49 U.S.C. 1371 (1970) (certificated air carrier), with the operating authority to serve Rangoon, responded to the charter solicitation. (There was no regularly scheduled cargo service to Rangoon from Carswell Air Force Base, although there was regularly scheduled service from one of the surrounding municipal airports.) Only two firms responded to the solicitation: Saturn Airways, Inc. (Saturn), a certificated air carrier; and Alaska International Air, Inc. (AIA), a commercial operator not holding a certificate of public convenience and necessity under Section 401 (non-certificated air carrier). Neither had operating authority to serve Rangoon. AID awarded the two charter flights to AIA which offered the low price.

AIA, by application filed June 20, 1975, asked the Civil Aeronautics Board (CAB) to issue an emergency exemption from the certificate requirement of Section 401 to perform the two charter

flights during the period June 24-27, 1975. Despite Saturn's opposition, the exemption was issued. See CAB Docket 27984, Order 75-6-111. Saturn's protest was received in GAO after the flights were performed.

The primary issue is whether one subclass of the class of "air carriers," defined in 49 U.S.C. 1301(3) (1970) as United States citizens providing common carriage by air--the subclass holding certificates issued under Section 401, represented by Saturn--is to be preferred in Government-financed international air transportation over the other subclass of air carriers--the subclass not holding Section 401 certificates but which operates under the exemption authority of the CAB, represented by AIA.

Saturn contends that the subclass of certificated air carriers is to be preferred over the subclass of non-certificated air carriers by the plain meaning of the clause in the first sentence of Section 5 of the Fly America Act, which states in pertinent part:

> "* * * transportation is provided by air carriers holding certificates under section 401 of this Act to the extent authorized by such certificates or by regulations or exemption of the Civil Aeronautics Board and to the extent service by such carriers is available."

Saturn argues that only a certificated air carrier, to the extent of its certificate, regulation, or exemption authority, is eligible to perform air transportation of this type and that the award and subsequent payment to AIA were prohibited because AIA was not a certificated air carrier.

AIA argues, on the other hand, that a non-certificated air carrier is equally eligible to perform this kind of carriage without holding a certificate if it is otherwise authorized by regulations or exemption of the CAB. AIA suggests that because Saturn had no authority to serve Rangoon, it is not an interested party whose protest should be considered under the GAO bid protest procedures.

We find that Saturn is an interested party under our bid protest procedures. Although in some situations persons ineligible to receive awards are not considered to be interested parties, Saturn was at no time ineligible to receive the award.

Section 5 of the Fly America Act does not mean that certificated air carriers have a preference over non-certificated air carriers.

The language of Section 5 must be considered in the context of the entire Fly America Act. Section 2 of the Act notes that "United States air carriers" or "United States carriers" are subject to a variety of discriminatory and unfair competitive practices. Section 3 establishes a monitoring and adjustment system for the charges made by foreign Governments to "air carriers" for their use of overseas airport or airway property. Section 4 discusses the rates charged for the transportation of mail in terms of competitive disadvantage to "United States flag air carriers." Section 6 encourages maximum travel on "United States carriers." Section 7 prohibits a travel agent, foreign air carrier, and "air carrier" from discriminating in their charges and grants the CAB access to certain property and records of any foreign air carrier or "air carrier." Section 8, the last section of the Act, prohibits soliciting or accepting rebates from air carriers and foreign air carriers. The entire Act is written in terms of and is concerned with the single class of "air carriers," previously defined as United States citizens, in contrast with the class of "foreign air carriers," defined in 49 U.S.C. 1301(19) (1970) as non-United States citizens providing foreign air transportation.

The legislative history of the Fly America Act clearly shows that its purpose was to help improve the economic and competitive position of the U.S.-flag carriers against the foreign air carriers. The Senate and House Reports (S. Rep. No. 93-1257, 93rd Cong., 2d Sess. (1974); H.R. Rep. No. 93-1475, 93rd Cong., 2d Sess. (1974) on the bills containing the identical language of Section 5 as enacted always referred to "U.S.-flag carriers," "U.S.-flag airlines," "U.S. carriers," "U.S. air carriers," "American-flag carriers," and "American airlines," having a preference over foreign air carriers, and the agency comments contained consistent references. The apparent intent was to include all United States air carriers in a single class. There is no indication of an intent to divide air carriers into two subclasses: certificated (to be preferred) and non-certificated. Therefore, we conclude that Section 5 should be construed to give a preference to air carriers authorized by certificate, regulation, or exemption of the CAB over foreign air carriers authorized by permit of the Board.

We note that the CAB agrees with our interpretation of the statute.

When AIA applied to the CAB for the exemption authority required to perform the charter flights for AID, Saturn argued to the CAB that the application should be denied because of an alleged preference under the Fly America Act for certificated air carriers over non-certificated air carriers. The CAB under Docket 27984 said in Order 75-6-111, June 24, 1975, in footnote 3 that, "* * * we do not read the statute as requiring that the Board must, in exercising its responsibilities, prefer one class of U. S. carriers to another," and granted AIA the exemption authority. The CAB in Order 75-6-113, June 24, 1975, has supported the Department of Defense (DOD) policy of preferring certificated air carriers over non-certificated air carriers by not granting exemption authority to a non-certificated air carrier to haul DOD cargo. But the CAB has made clear that the support of the DOD policy is peculiar to DOD traffic and finds no basis in the Fly America Act. In fact the CAB has stated, "* * * we believe that the phrase 'exemption or regulation [sic] of the Civil Aeronautics Board' contained in section 5 reflects an underlying intent to promote the use of all authorized U.S. flag carriers, not merely those possessing certificates." Order 76-5-84, May 19, 1976. See also Order 76-4-64, April 14, 1976.

We recognize that under our decision a contract may be awarded to a carrier who, after award, may be denied the authority by the CAB to perform the carriage. This is not materially different from the case of a contractor who is unable to obtain licenses and permits required to perform the work. It is a risk the contractor assumes.

Protest denied.

R.F. KELLER

Deputy

Comptroller General
of the United States