

18734

VICKERS  
PHI

**DECISION**



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

FILE: B-200837

DATE: July 7, 1981

MATTER OF: Air America Incorporated

**DIGEST:**

1. Protest that contracting officer acted unreasonably in not awarding contract under Civil Reserve Air Fleet Enhancement Program--Government pays cost differential in converting passenger aircraft to one with cargo capability and excess costs of operating aircraft for 16 years-- is denied as record shows protester was not in competition with other successful offeror, but did not receive contract because contracting officer, acting reasonably, did not accept cost figures and would not allow profit or fee.
  
2. Contracting officer did not act unreasonably in requiring that air carrier have firm purchase commitment from manufacturer prior to negotiations to assure air carrier intended to purchase passenger carrying aircraft rather than one with cargo capability as required by Air Force program. Commitment was necessary to have firm cost figures for negotiations.

Air America Incorporated (Air America) has protested the failure of the United States Air Force to award Air America a contract under request for proposals (RFP) No. F11626-80-R-0031.

The RFP was issued for the Air Force's Civil Reserve Air Fleet Enhancement Program. The purpose of the program is to create additional cargo capability by incorporating cargo airlift characteristics in wide body passenger aircraft on order or to be ordered by United States air carriers. The Government pays the cost difference between a passenger

~~017505~~ 115727

aircraft and a convertible aircraft and the excess costs of operating the aircraft for a 16-year period due to the increased weight.

Offers were received in response to the RFP from Air America and United Air Lines (United), and United was awarded a contract. Initially, Air America protested the award to United. Upon being advised, in the report from the Air Force on the protest, that the award to United did not preclude a separate award to Air America because sufficient funds had been appropriated to support multiple awards, Air America withdrew that aspect of its protest. Therefore, matters raised by Air America regarding the award to United, except as concerns the cost comparison of the two offers, will not be discussed.

Air America's protest is based, in the main, on the allegation that the contracting officer acted unreasonably in not awarding Air America a contract at its offered price of \$17.1 million while a contract was awarded to United at \$17.4 million for less cargo capability. Air America contends that this price comparison, on its face, shows the actions of the contracting officer to be unreasonable and arbitrary.

Air America contends that its proposal was superior to the United proposal and that the contracting officer acted unreasonably in requiring a firm purchase commitment by Air America with an aircraft manufacturer and in refusing to negotiate a profit or fee for Air America.

In attempting to show that its proposal was superior, Air America has submitted a chart comparing the proposals of United, offering a DC-10-10 and Air America offering a DC-10-30. Excluding cost which will be discussed below, Air America contends that based on this comparison, its offered plane is faster, has greater cargo capacity and would have been delivered 3 months sooner than United's plane. As noted above, the two proposals were not in direct competition with each other. Each offeror had to justify its costs to the satisfaction of the contracting officer to receive a contract. Therefore, a comparison of the two proposals in the above regards is not germane to the protest.

With regard to cost, United's contract price includes \$7.2 million in costs which were not applicable to Air America's proposal. United had already ordered the aircraft which was to be converted and it was committed to United commercial service. The contracting officer determined that \$7.2 million was a proper cost figure for the delay in delivery of the plane to United because of the manufacturer's adding the cargo capability. Since Air America had not yet ordered its plane, these costs were not a factor in the consideration of its proposal.

Air America contends that the contracting officer acted unreasonably in requiring Air America to have a firm commitment with a manufacturer to purchase a passenger aircraft before the contracting officer would negotiate with it. Air America states that there is no requirement in the program legislation for such a commitment and that this was just a barrier raised by the contracting officer so that negotiations would not have to be conducted.

The contracting officer has responded that the commitment for the passenger aircraft was necessitated by the fact that if an air carrier was already planning to purchase a cargo capable aircraft, the Government would be needlessly subsidizing a purchase that was going to occur anyway. Further, the firm commitment was needed to support the proposed costs submitted by the carrier during negotiations.

We fail to see how this requirement was unreasonable or prejudiced Air America. Such a commitment would have to have been made at some point in time because the program is for those air carriers which had placed or would place an order for passenger aircraft. In any event, Air America was able to fulfill this requirement upon which negotiations were conducted. Further, we agree the cost figures derived from such a commitment were necessary for the negotiations.

Air America intended to order its aircraft with a maximum gross takeoff weight (MGTOW) of 580,000 pounds, an increase of 30,000 pounds over the standard capacity of the aircraft. This increase in capacity cost \$936,692.

Based on the range of the plane, this increased capacity would cost \$80,710 per ton while the basic capacity of the aircraft costs \$141,795 per ton of capacity. Air America states the contracting officer acted unreasonably in agreeing to pay for the basic capacity but refusing to pay 43 percent less for the extra capacity.

The contracting officer has responded that the additional capacity Air America offered in its proposal exceeded the MGTOW required by the program and it was not deemed necessary to pay the additional costs associated with the excess capacity to meet the needs of the program.

While Air America states that the Air Force has recognized the cost effectiveness of such an increase in capacity as shown when the Air Force purchased the military version of the DC-10-30CF and increased its capacity from 580,000 pounds to 590,000 pounds, this was a direct procurement by the agency and irrelevant to the program. Notwithstanding the argument by Air America that the increase is a cost effective option, if the Air Force does not need the capacity, it would be an expenditure of almost \$1 million for unneeded capacity.

Finally, Air America argues that while the contract was to be of the firm-fixed-price type, the contracting officer refused to negotiate on any basis except the provisions of the Defense Acquisition Regulation (DAR) relating to cost-reimbursement-type contracts. However, the contracting officer refused to recognize certain types of allowable costs under these provisions, namely, a fee as a profit to the contractor.

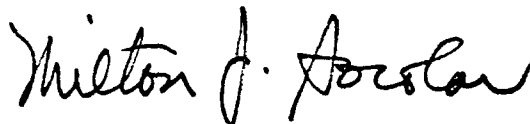
While the solicitation resulted in a firm-fixed-price contract, the solicitation made clear that the purpose of the contract was to pay the cost differential between acquiring a passenger aircraft and one with cargo capability. Therefore, we believe it was reasonable for the contracting officer to look to the cost principles contained in DAR in arriving at the contract figure. Further, while the contracting officer utilized a cost analysis in approving costs and Air America contends a price analysis would have revealed

that its price was reasonable in view of the amount paid United, we must again state the proposals were not in competition. Therefore, a price analysis would have been of no benefit to Air America since the contracting officer and Air America could not agree to the cost figures. In addition, we observe that United was similarly treated.

As regards the failure of the contracting officer to allow, or even discuss, a profit or fee to Air America, we believe this was an exercise of business judgment which we find reasonable. We note United received no profit or fee in its contract. While Air America cites the four motivations for profit objective set forth in DAR § 3-807.2 (1976 ed.) (i.e. (1) undertake difficult work with higher skill; (2) assumption of cost risk; (3) undertake development work at own risk; and (4) reward productivity increases), we do not see the applicability of these standards to the instant contract.

Here, an air carrier is paid in a lump-sum payment upon delivery of the aircraft to the air carrier the cost differential for the conversion of the aircraft, work done by the manufacturers of the aircraft and the increased cost of operating the aircraft for 16 years. We fail to see any cost risk assumed by the carrier, any difficult or development work or possible productivity increases. The contracting officer acted reasonably in denying any profit or fee.

The protest is denied.



Acting Comptroller General  
of the United States