



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Evergreen International Airlines, Inc.  
**File:** B-244284  
**Date:** August 15, 1991

Townsend Hyatt, Esq., and Mark S. Dodson, Esq., Ater, Wynne, Hewitt, Dodson & Skerritt, for the protester.  
Kenneth D. Holliday for Private Jet Expeditions, Inc., an interested party.  
Allen W. Smith, Department of Agriculture, for the agency.  
Barbara C. Coles, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest challenging propriety of award under solicitation for aircraft services on the basis that the awardee did not, prior to award, meet the solicitation requirement that the contractor possess Military Airlift Command approval is dismissed, since such approval was not a definitive responsibility criterion which was a condition to award, but rather was a contract performance requirement, and the General Accounting Office thus has no basis to review contracting officer's determination that awardee is a responsible firm.

### DECISION

Evergreen International Airlines, Inc. protests the award of a contract to Private Jet Expeditions, Inc. under invitation for bids (IFB) No. 49-91-05, issued by the Forest Service, Department of Agriculture, for jet aircraft services. Evergreen contends that the award to Private Jet is improper because Private Jet failed to comply with two solicitation requirements.

We dismiss the protest.

The IFB, issued on April 8, 1991, contemplated the award of a firm, fixed-price contract for 1 base year and four 1-year option periods. The IFB requires the contractor to provide "aircraft services . . . fully operated by qualified personnel . . . for transportation of fire suppression crews throughout the United States, including Alaska." Section C.1.2.4 of the IFB, entitled "Certifications and Operations," provides that "[t]he Contractor shall possess a current contract air carrier approval from the Department of

Defense Military Airlift Command (MAC) for the duration of the contract period and any renewal period,"<sup>1/</sup> With regard to the requirements for the aircraft equipment, section C.2.2.1.1 states that the contractor must furnish aircraft with the capability of carrying at least 101 passengers.

The Forest Service received four bids by the April 8 bid opening date. After determining that Private Jet was the low, responsive bidder, the contracting officer awarded the contract to Private Jet on May 28. Evergreen's protest to our Office followed.

Evergreen contends that the award to Private Jet is improper because Private Jet did not comply with two requirements in the solicitation. Initially, Evergreen claimed that the contracting officer should have rejected Private Jet's bid as nonresponsive because the aircraft it proposed to furnish did not have the capability of seating 101 passengers. In its subsequent comments on the agency report, Evergreen failed to address this issue again. Under these circumstances, we deem the issue of Private Jet's compliance with the passenger seating requirement to be abandoned. See VMX, Inc., B-241281.2, Mar. 22, 1991, 91-1 CPD ¶ 316.

Evergreen also argues that the agency improperly overlooked Private Jet's failure at the time of award to meet the IFB requirement concerning MAC approval. Evergreen contends that the MAC approval requirement constitutes a definitive responsibility criterion with which bidders had to comply before award. Evergreen charges that it should have received the award because, unlike Private Jet, it did have MAC approval prior to the award.

Whether a prospective contractor has the ability to obtain MAC approval concerns the firm's ability to perform and is therefore a matter of responsibility. See Protective Materials Co., Inc., B-225495, Mar. 18, 1987, 87-1 CPD ¶ 303. We will not review an affirmative determination of responsibility by the contracting officer absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation

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<sup>1/</sup> According to the agency, the MAC approval requirement is based on the potential need to dispatch aircraft to transport military personnel to aid in fire suppression. The agency states that while normally only civilian personnel are transported under the contract, during periods of intense fire activity, referred to as preparedness level V, military personnel have in the past been provided as firefighting personnel. Military personnel may be transported only in aircraft that are MAC-approved.

were not met. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.3(m)(5)). Definitive responsibility criteria are specific and objective standards established by the agency to measure a bidder's ability to perform the contract. Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128. These special standards put firms on notice that the class of prospective contractors is limited to those who meet qualitative or quantitative criteria deemed necessary as prerequisites for contract award. Id. Such criteria do not involve an offeror's performance obligations under the contract. Hettich GmbH and Co. KG, B-224267, Oct. 24, 1986, 86-2 CPD ¶ 457.

Contrary to the protester's suggestion, the requirement for MAC approval does not constitute a definitive responsibility criterion. This is not a case where the IFB requires bidders to possess MAC approval and, thus, establishes compliance with the requirement as a necessary prerequisite to award. Rather, the IFB specifically stated that "[t]he contractor shall possess a current contract air carrier approval from [MAC] for the duration of the contract period." (Emphasis added.) In light of the fact that the solicitation did not require bidders to possess MAC approval before award, but rather required that the contractor possess such approval for the duration of the contract period, the requirement here is a contract performance requirement--not a definitive responsibility criterion. As such, neither Private Jet nor any of the other bidders responding to the IFB were required to show that they possessed this approval prior to award. Cumberland Sound Pilots Ass'n--Recon., B-229642.2, June 14, 1988, 88-1 CPD ¶ 567. Since it does not establish any precondition to award, the MAC approval requirement simply raised an issue for the contracting officer's consideration in making the determination of Private Jet's responsibility. W.H. Smith Hardware Co., B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110. As a corollary, since the requirement does not constitute a definitive responsibility criterion, we have no basis to review the contracting officer's ultimate finding that Private Jet is a responsible firm. Id.

To the extent that Evergreen argues that Private Jet is performing the work called for and still does not have MAC approval,<sup>2/</sup> this concerns the administration of an existing

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<sup>2/</sup> The contracting officer states that he has provided Private Jet a reasonable period of time after contract award to obtain MAC compliance because MAC assured him that its approval could be obtained shortly after contract award.

contract, an issue not subject to our Office's bid protest jurisdiction. See 56 Fed. Reg. 3,759, supra (to be codified at 4 C.F.R. § 21.3(m)(1)); United States Elevator Corp., B-241772, Mar. 5, 1991, 91-1 CPD ¶ 245.

The protest is dismissed.

*Christine S. Melody*

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