



Comptroller General  
of the United States

1214229

Washington, D.C. 20548

## Decision

**Matter of:** Scheduled Airlines Traffic Offices, Inc.

**File:** B-257310; B-257292.5; B-256863.3

**Date:** September 21, 1994

Kenneth S. Kramer, P.C., and James S. Kennell, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.  
Ronald M. Pettit, Esq., and Matthew O. Geary, Esq., Defense Logistics Agency, for the agency.  
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of solicitation's terms providing for payment of required concession fees to contracting agency for distribution to the U.S. Treasury (for fees related to official travel) or to a non-appropriated fund instrumentality (NAFI) (for fees related to unofficial travel) as violating laws governing the expenditure of appropriated funds and collection of public moneys is denied where the solicitation requires strict accounting by the contractor and provides adequate safeguards to keep official and unofficial travel funds separate, and where the required payment of concession fee to the NAFI for unofficial travel sales is derived solely from receipts from travel paid for with travelers' personal funds, not government funds.
2. Solicitation terms providing for the evaluation of proposed unofficial (leisure) travel services for the award of travel service contract for official and unofficial travel services is reasonable where bona fide agency-related benefits are derived from the provision of the unofficial travel services.
3. Mandatory minimum concession fee requirement is reasonable where it is based on competitive procurement history, is reasonably reflective of the market value of the contract, and does not exceed the agency's minimum needs.

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**DECISION**

Scheduled Airlines Traffic Offices, Inc. (SatoTravel) protests the terms of request for proposals (RFP) No. SPO710-94-R-0014, issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency, for commercial travel management services. SatoTravel contends that the solicitation improperly includes both official and unofficial (leisure) travel services and provides for the contractor to pay certain fees allegedly in violation of the laws governing the expenditure of appropriated funds; that is, SatoTravel contends that the RFP will allow for appropriated funds to be diverted to non-appropriated fund instrumentalities (NAFI). SatoTravel also challenges the RFP's consideration of leisure travel in the evaluation of proposals for award on the basis that the agency will receive no direct benefit from the provision of leisure travel services. The protester further contends that the RFP's requirement for offerors to propose a mandatory minimum concession fee on the gross sales of both official and unofficial travel is restrictive of competition and exceeds the agency's minimum needs. Finally, the protester requests reconsideration of our dismissals of two previous post-award protests filed by SatoTravel that challenged similar solicitation provisions to those protested here as untimely.

We deny the protest and affirm the dismissals.

The RFP, issued on April 4, 1994, contemplates the award of a single contract for both official travel and unofficial travel services at no cost to the government. Under the RFP, the government is to furnish to the contractor office and storage space, utilities, telephone lines, and on-base mail service, while the contractor is required to staff and operate a full travel office at DCSC for both official and unofficial travel. Official travel is defined as travel performed under valid orders at government expense. Unofficial travel is defined as leave, furlough, vacation, and leisure travel paid for from personal funds for personal use.

The successful contractor under the RFP is to be compensated through commissions it receives from industry travel providers (e.g., airlines, hotels, and transportation providers). The RFP requires the contractor to pay a minimum 3-percent concession fee on the gross sales of both official and unofficial travel--for official travel, the proposed concession fee is to be deposited in the U.S. Treasury; for unofficial travel, the proposed concession fee will be directed to the local Morale, Welfare and Recreation

(MWR) account, a NAFI.<sup>1</sup> The RFP requires the successful contractor to keep an accurate accounting of all official and unofficial travel and related fees.

Section M of the RFP provides that award will be made based on the best overall proposal (i.e., that proposal determined to provide the best overall benefit to the government). Section M of the RFP sets forth the following evaluation factors (which are listed in descending order of importance) and evaluation subfactors (which are of equal importance): technical (including program management, equipment capability and staffing, and personnel qualifications); business management (including offeror qualifications, financial capability, and business affiliation); and concession fee (including amount of concession fee, method for computation of the concession fee, and adequacy of internal controls).

SatoTravel filed its protest of the terms of the RFP with our Office on May 13, prior to the scheduled closing time for the receipt of initial proposals. The protester protests the procurement of both official and unofficial travel services under the RFP as violative of the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (1988), which provides:

"except as provided by section 3718(b) . . . an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

SatoTravel contends that, due to the combination of services in a single contract, moneys used by the contractor to pay the proposed official and unofficial travel concession fees will necessarily be commingled so that appropriated funds (in the form of public moneys due the government) may be improperly diverted to a NAFI; in this regard, the protester contends that payment through the proposed concession fee for unofficial travel to the MWR fund would be unlawful since public moneys received by the government from the contractor must be deposited into the U.S Treasury, not a NAFI. SatoTravel states that this combination of unofficial and official travel services will result in a "clear

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<sup>1</sup>Amendment No. 3 to the RFP requires that the concession fee percentage offered for official travel be greater than or equal to the minimum concession fee of 3 percent offered for unofficial travel services.

disadvantage [to] the federal taxpayer" and allow "the potential for an unlawful subsidy," such that a contract under the RFP would be void as a matter of law.

In support of its position, SatoTravel cites Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992), in which the United States District Court found a travel service contract null and void for providing for the payment of concession fees by the successful contractor to the local MWR fund in violation of 31 U.S.C. § 3302(b). The court found that the concession fees to be paid to the MWR were public moneys paid by the contractor to purchase the exclusive use of government property and were funds "derived directly from public sources" since the fares paid were for air travel "almost exclusively by military personnel, their dependents and government contractor employees--all of which were purchased, or for whom the purchases were reimbursed, by the United States." Id. at 421. Based upon those facts, the court found that the laws governing the expenditure of appropriated funds and the collection of public moneys had been violated.

We do not find the court's holding in Reeve controlling here since, as the agency points out, the facts in that case are materially different than those before us. Specifically, the contract in Reeve involved the contractor's payment of concession fees to the MWR fund derived from the contractor's total travel sales, which involved official travel which was almost exclusively paid for by the government; the concession fees, a return of government funds in that case, were therefore considered public moneys. Here, however, according to the agency, the 3-percent minimum concession fee for official travel adequately reimburses the government for the facilities being provided the contractor. The 3-percent minimum concession fee for unofficial travel relates to privately funded travel only and is therefore not governed by the appropriation laws cited by the protester. See 64 Comp. Gen. 217 (1985).

In light of the RFP's requirements for strict accounting by the contractor to keep official and unofficial travel transactions and fees separate as well as the explicit safeguards imposed, the record does not support the protester's contention that award of a contract for a combination of official and unofficial travel, as provided for under the RFP, will violate appropriations law or that the MWR fund will receive an "unlawful subsidy" from the payment of public moneys. To the extent SatoTravel contends that the contractor will nonetheless commingle funds and divert moneys related to official travel sales toward the payment of its unofficial travel concession fee, or lower its proposed concession fee for official travel in order to increase its proposed concession fee for unofficial travel,

and thus not provide the best benefit to the government, the firm's allegations are speculative at best, and the reasonableness of such allegations is not supported by the record before us. Accordingly, we deny the protest of the alleged statutory violations.

SatoTravel next states that since the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (Supp. V 1993), and the terms of the RFP require award to be made to the offeror offering the proposal providing the best overall benefit to the government, the RFP improperly permits evaluation of proposals on the basis of unofficial travel services proposed in addition to the official travel services proposed. SatoTravel contends that the leisure travel services solicited by the RFP provide no direct benefit to the government, but instead only serve DCSC personnel's private interests, and should not have been considered in the evaluation for award.

The agency points out that the Secretary of the Army is responsible for conducting all affairs of the Department of the Army, including meeting the morale and welfare needs of its personnel. 10 U.S.C. § 3013(b)(9) (1988). Army Regulations (AR) implementing this statutory mandate state that the MWR program is "a quality of life program linked directly to readiness of the force"; the regulations also state that MWR activities are supported by available appropriated funds and generated non-appropriated funds. Morale, Welfare and Recreation Update, Issue No. 16, Oct. 10, 1990, AR 215-2, para. 2-1. Specifically, Army Regulations set forth the following objectives of the agency's MWR program:

- "a. Support combat readiness and effectiveness.
- "b. Support recruitment and retention of quality personnel.
- "c. Provide a quality of living comparable to that which our soldiers and civilians are pledged to defend.
- "d. Promote and maintain the mental and physical fitness and well-being of personnel, primarily active duty military personnel.
- "e. Foster a sense of community, soldier morale, and family wellness, and promote esprit de corps among individual units.
- "f. Ease the transition of individuals into military life and the relocation of personnel and accompanying family members.

"g. Provide facilities and programs that meet the assessed needs of today's soldier, family and community."

Id. at para. 2-3. These agency regulations require the provision of unofficial travel services to Army personnel to meet the stated MWR program objectives. Id. at para. 6-63.<sup>2</sup> The agency states that it is appropriate to evaluate proposals for the travel services considering both official and unofficial travel since both areas relate to the mission of the agency and provide direct benefits to the agency.

We believe the agency has reasonably determined that the provision of unofficial travel services promotes the morale, welfare, and recreation of its personnel, and thus does provide a benefit to the agency in fulfilling its mission. The agency states, among other benefits, that unofficial travel benefits "esprit de corps and mental and physical fitness" to promote and maintain soldier readiness, and that the on-base provision of such services helps to provide a working and living environment conducive to attracting and retaining quality personnel. Having a direct impact on morale, performance of official duties and retention of trained and qualified personnel, the provision of leisure travel services at DCSC does have a direct correlation to the interests of the government. Thus, although unofficial travel services are arranged and paid for by agency personnel in their personal capacity, the record shows that bona fide agency-related benefits are realized by the provision of the services under the contract.

Further, evaluation of the combination of services is reasonable since combining the two types of services provides a convenient approach for personnel to obtain both types of services--especially in scheduling family travel and when leisure travel coincides with official travel. The record shows that by including the unofficial travel services, increased volume of services may lead to lower rates charged by the transportation industry to the government for official travel and, while leisure travel demands may, at times, not justify a separate travel office on the base, combination of the services with official travel in one contract ensures the availability and

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<sup>2</sup>Paragraph 6-64 of AR 215-2 also provides that "[o]fficial and unofficial travel requirements will be combined within a single contract administered by geographic region" to help minimize duplication, expand available services and maximize profit, and further provides for the payment of a concession fee on all unofficial travel revenue paid to or received by the commercial travel service contractor.

convenience of the services for DCSC personnel on t  
Since bona fide benefits to the government are realized  
through the procurement of official and unofficial travel  
services in a single procurement, we see no basis to  
question the reasonableness of the RFP's provision for  
evaluation of both types of services in determining which  
proposal offers the best overall benefit to the government.

SatoTravel next protests the RFP's mandatory minimum  
concession fee of 3 percent of the gross receipts of both  
official and unofficial travel sales. The protester  
contends that this mandatory minimum fee amount is  
unreasonable because it restricts competition and exceeds  
the agency's minimum needs. SatoTravel also contends this  
concession fee requirement improperly subverts the  
evaluation scheme since "concession fee" is listed in the  
RFP as the least important evaluation factor for award, yet  
it is a requirement that must be met in order to be  
considered for award.

The agency's rationale for the mandatory minimum concession  
fees is that, based upon past competitive procurement  
history for similar services, 3 percent of the gross sales  
for both official and unofficial travel represents a  
reasonable estimate of the fair market value of the service  
contract and ensures receipt of reasonable prices. In this  
regard, the agency points out that the successful contractor  
will be the only travel service provider on the base and  
will receive the benefits of DCSC's substantial official and  
unofficial travel business.

Given the benefits received by the contractor under the "no  
cost" contract contemplated under the solicitation, we do  
not find unreasonable the agency's imposition of a minimum  
concession fee requirement to assure that it receives a fair  
monetary return in the form of a discount for the value of  
the contract. SatoTravel has not persuasively rebutted the  
agency's reasonable support for its determination that  
3 percent of the gross sales of both official and unofficial  
travel is a reasonable representation of the contract's fair  
market value. In this regard, the record shows that this  
minimum concession fee amount is based upon competitive  
procurement history and is in line with concession fee  
amounts paid under several other similar travel services  
contracts. The agency's need to ensure fair and reasonable  
concession fees for services under the contract, as well as  
to offset the cost of government-furnished space, supplies  
and services and to provide funding to its MWR account out  
of unofficial travel sales fees, provide adequate support

for the reasonableness of the minimum fee requirement.<sup>3</sup> Although SatoTravel argues that travel industry price fluctuations over the period of the contract may cause the contractor's payment of these minimum (or higher) proposed fee to render the contract unprofitable, we believe such industry price fluctuation over the contract period, if any, was reasonably taken into account by the agency through its consideration of past contracts providing substantially similar services in determining its estimate of the current contract's fair market value. Thus, the 3-percent minimum concession fee is a reasonable requirement and there is no evidence that it is unduly restrictive of competition.

Nor does the minimum concession fee requirement subvert the RFP's stated evaluation scheme. Under the RFP, proposals of concession fees in excess of 3 percent will be evaluated as the least important of the evaluation factors for award, where quality of services will be evaluated as more important than the actual fee proposed; thus, we do not view the evaluation criteria, when read in conjunction with the complete solicitation, to be inconsistent with the RFP's requirements. Accordingly, we deny the protest of the evaluation terms and concession fee requirements.

Finally, SatoTravel requests reconsideration of our June 2 dismissal of its protest of RFP No. DAHC22-94-R-0002, issued by the Department of the Army, and our July 5 dismissal of its protest of RFP No. M67001-93-R-0033, issued by the Marine Corps, both for commercial travel management services. We dismissed these post-award protests of similar solicitation terms as those protested here as untimely filed because the allegations of apparent solicitation improprieties were not filed prior to the closing time for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1)(1994). In its reconsideration requests, the protester contends that our Office should nonetheless review the merits of those protests, even if untimely, since the issues presented are significant to the procurement

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<sup>3</sup>The record shows that the minimum official travel concession amount is sufficient to reimburse the government for the government-furnished space, supplies and services.

community. In light of our denial herein of SatoTravel's protest of these same matters, we see no reason to invoke the significant issue exception.

The protest is denied and the dismissals are affirmed.

*for James A. Spangenberg*  
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Acting General Counsel