

Protest of)	Date: March 23, 1990
)	
AIR TRANSPORT ASSOCIATION)	
OF AMERICA)	
)	
Solicitation No. ANET 89-01)	P.S. Protest No. 90-02

DECISION

On behalf of three airlines,^{1/} the Air Transport Association of America (ATA) protests the Postal Service's use of Emery Worldwide Airlines, Inc. (Emery), for the one-time carriage of mail destined to American servicemen in Germany on a flight from Chicago, IL, to Frankfurt, Germany with a return to New York, NY on the weekend of December 16-17, 1989. ATA alleges that the Postal Service did not determine that scheduled U.S. carriers were unable to transport the mail before obtaining the service from Emery by contract modification.

Background

The Postal Service contracts with Emery^{1/} under contract ANET 89-01 to provide overnight air transportation service utilizing 17 jet aircraft on a hub-and-spoke network between 31 cities in the United States and Puerto Rico. The contract specifies that the aircraft are dedicated to Postal Service use twenty-four hours a day and that "[u]se of dedicated aircraft for the transportation of mail during 'downtime' may be directed by the contracting officer in accordance with the CHANGES clause of the contract." The Changes clause states in pertinent part, "the contracting officer may, in writing . . . order changes within the scope of this contract in the following . . . [u]se of aircraft (including use during periods otherwise scheduled as 'downtime.'" On December 5, 1989, the contracting officer and Emery agreed orally for one-time DC-8 service between Chicago, IL, and Frankfurt, Germany, on the weekend of December 16-17 with a return to New York, NY, should the limits of available lift for mail to Frankfurt on scheduled U.S. air lines be exceeded. On December 11, the

^{1/}American Airlines, Inc., Pan American World Airways, Inc., and Trans World Airlines, Inc.

^{2/}The protester and the contracting officer both refer to Air Train, Inc., as the contractor on ANET 89-01 throughout their submissions. While award of contract ANET 89-01 was made to Air Train, Inc., the firm changed its name to Emery Worldwide Airlines, Inc., on August 28, 1989. See Southern Air Transport P.S. Protest No. 89-56, October 3, 1989. We use the latter name throughout this decision.

contracting officer ordered the agreed trip and executed an amendment to ANET 89-01 effecting the contract modification. By a wire of December 12, the Postal Service informed the industry of its plan to use Emery to supplement the lift available to Frankfurt and that the return flight would carry military mail.^{1/} In a December 21 letter to the contracting officer, ATA protested the Chicago-Frankfurt-New York flight. The contracting officer forwarded that protest to this office for resolution.

The Positions of the Parties

ATA argues that the use of Emery for the carriage of military mail violates the Postal Service's statutory obligation to tender mail to scheduled certificated U.S. carriers up to their available lift between points in foreign air transportation before arranging for charter operations.^{1/} ATA contends that the December 12 wire did not state scheduled

^{3/}The wire read:

Re: Special Airlift - Operation Reindeer

Due to the heavy volumes of military and civil mail destined to Europe from ORD [Chicago O'Hare] in particular we intend to fly the USPS charter airframe from ORD to FRA [Frankfurt] the 16/17 December. This is the last weekend of value for the military in Germany to receive mail prior to Christmas. Our AC [aircraft] will depart ORD on Dec 15 arrive FRA Dec 17 and return to JFK [New York Kennedy] Dec 17. We do not wish to fly the return leg empty so we have asked the military O/S [Overseas] to give boarding priority of military mail to this AC. Depending on the mix of mail loaded Pri/MOM/SAM [Priority Mail, Military Ordinary Mail, Space Available Mail], all US carriers can expect to transport 15,000 kilos less than would normally be available to the commercial carriers at this time. This is expected to be a one time for Christmas. Our purpose of this message is to advise all US carriers serving Germany of our plans to launch Operation Reindeer. Merry Christmas and Happy Holidays.

Transportation Handbook, Series T-7 (T-7), "Handling, Dispatching, and Transporting Military Mail by Air" indicates MOM is official mail sent by military departments which is to be tendered to U.S. scheduled commercial air carriers after the space for all priority and civil airmail has been satisfied and that it has a higher priority than commercial air freight for loading.

' 321.1 and ' 324.1. SAM is also to be tendered to scheduled United States certificated air carriers. T-7, ' 334.

T-7 further states,

SAM consists of personal and military parcel mail . . . which move[s] to or from United States gateways via surface transportation within the U.S. at other than First-Class postage rates and by air to, from, or between U.S. gateways and points overseas on a space available basis.

T-7, ' 331.1.

^{4/}The contracting officer suggests that ATA is challenging the Postal Service's action as contrary to 49 U.S.C. ' 1375(d) and 39 U.S.C. " 5401 and 5402 which, read together, direct the Postmaster General to tender mail for foreign destinations to scheduled certificated U.S. carriers, if possible. This view of ATA's protest is consistent with a December 15 letter from counsel

U.S. air carriers serving Frankfurt could not accommodate the mail. ATA further argues that even if available lift at Chicago was exceeded, the Postal Service could have transported mail to other gateways to use other U.S. carriers' available lift to Frankfurt.^{1/} Further, ATA asserts that use of the aircraft to carry westbound military mail on the return was unjustified and not even addressed by the Postal Service wire as required by the unavailability of scheduled U.S. carriers' lift.

ATA asserts that reliance upon charter operations is unfair to scheduled air carriers since they go to considerable lengths to assure adequate lift for mail during the Christmas season, including reductions in the marketing of cargo services in anticipation of the demand by the Postal Service. In light of these preparations, ATA urges that it is essential that the Postal Service contact scheduled air carriers in an attempt to exhaust their lift, since any space allocated for additional mail volumes and not utilized represents revenue lost to the carrier forever.

Responding to ATA's submission, the contracting officer urges this office to dismiss ATA's protest on three jurisdictional grounds:

- (1) The procurement of service by contract modification was a matter of contract administration not within the bid protest jurisdiction of this office;
- (2) The challenging airlines lack standing to challenge the award of the modification since none of them could have provided service using cargo-configured aircraft as the contract modification required; and
- (3) The protest is moot since the modification to the contract has been fully

for TWA to the Office of Transportation and International Services. Because TWA is a party represented here, we incorporate the TWA correspondence as part of ATA's contentions.

TWA raises two statutory objections to the contracting officer's action. First, the Postal Service action is said

to violate the spirit if not the letter of 49 U.S.C. ' 1517(a). That statute requires executive agencies and other government instrumentalities to procure foreign air transportation (that is, carriage of persons, property, or mail between the United States and a place outside the United States, see 49 U.S.C.

' 1301 (24)) from certificated U.S. air carriers. Second, the

use of Emery is said not to comply with the requirement of 39 U.S.C. ' 5402(a), which allows the Postal Service to contract

for the transportation of mail in foreign air transportation without advertising for bids when there is at least 750 pounds

of such mail and no more than 5% of it, by weight, is letter mail, if the contract is filed with the Department of Transportation not later than 90 days before its effective date.

^{5/}The contracting officer indicates that only American offers scheduled direct service between Chicago and Frankfurt. Other gateways offering direct service include St. Louis, Dallas, New York, Philadelphia and Miami.

performed and the relief requested by the protester has been granted.^{1/}

On the merits, the contracting officer asserts that the delays in departure of mail from Chicago constituted a postal emergency which justified the amendment of ANET 89-01. Section 5001 of Title 39, United States Code, allows the Postal Service to make arrangements for the transportation of mail on a temporary basis when it determines an emergency exists.^{1/}

The Postal Service's primary concern during the holiday season is to maximize pre-Christmas delivery. Before the 1989 holiday season the Postal Service requested estimates of available lift between Chicago and Frankfurt from the U.S. air carriers providing such service. Based on those estimates and past experience, the contracting officer approached Emery to assure its concurrence with a modification to ANET 89-01 to secure supplemental lift during the Christmas season, should available lift on scheduled air carriers prove inadequate to provide timely delivery of military mail to Germany.

Over the last nine years the volume of holiday mail from the Chicago area to Germany, particularly Frankfurt, has increased by 10% annually. The increases have resulted in difficulties in delivering holiday mail to soldiers before Christmas. To maximize the use of available lift on U.S. air carriers, the Postal Service procured surface transportation from Chicago to other gateways to Frankfurt, including St. Louis, Dallas, New York, Philadelphia, and Miami which offer direct service to Germany.^{1/} The Postal Service also routed mail to Paris and London and permitted air carriers to truck mail to Germany from these points at their expense. Notwithstanding these measures, delays were experienced in the departure of military mail tendered to air carriers in Chicago. As early as December 4 containers of military mail were delayed by one and two days

^{6/}The protest requested a meeting between the Postal Service and industry representatives to "discuss . . . the Postal Service's procedures for ascertaining available scheduled air carrier capacity." Such a meeting was held on January 17, 1990.

^{7/}That statute provides in pertinent part:

Notwithstanding any other provision of this title, the Postal Service may make arrangements on a temporary basis for the transportation of mail when, as determined by the Postal Service, an emergency arises. Such arrangements shall terminate when the emergency ceases and the Postal Service is promptly able to secure transportation services under other provisions of this title.

39 U.S.C. ' 5001.

^{8/}The contracting officer notes that there is a contraction of lift available to the Postal Service throughout the air transportation system during the holiday season because of increased passenger traffic with increased baggage. In cases of mail routings involving connecting service to end destinations, i.e. Chicago to New York to Frankfurt, mail from the origin cities to the end destination cities competes with mail from the origin cities to the intermediate points. To avoid this problem the Postal Service used surface transportation to intermediate points from which direct service to Germany was available.

in dispatch from Chicago. By December 10, the delay in departure for mail to Germany had reached four days in some cases. Based on such delays and in light of the three to four day delivery requirement in Germany, the contracting officer, in consultation with managers in Chicago, decided to utilize Emery to supplement the lift from Chicago, negotiated the arrangements for such service, and executed the amendment for the service. In considering alternatives to the contract amendment, the contracting officer contacted Evergreen Airlines, Inc. (Evergreen), the only other air carrier which he knew to have cargo planes available during the holiday season, in order to determine whether it could provide charter service to Frankfurt utilizing a cargo-configured aircraft. Evergreen had available aircraft but its rate for the trip would have exceeded the cost of the service provided by Emery. The contracting officer states that the charter aircraft returned to New York with mail for the New York City area, since by implication, the authority to contract for service in a postal emergency includes the authority to utilize the aircraft on return in order to avoid waste of rate-payers' money.¹⁰

The contracting officer notes that after the Emery charter, the Postal Service continued to tender large quantities of mail to the scheduled airlines and continued to experience delays in the dispatch of that mail.¹¹

Replying to the contracting officer's statement, ATA urges this office not to dismiss its protest on jurisdictional grounds. ATA argues that the difference between the subject matter of the contract and the service required by the amendment causes the added service to be beyond the scope of the original contract, subjects it to competitive procurement, and, therefore, places it within our authority to review. ATA points out that ANET 89-01 is a contract which provides for a network for the domestic carriage of Express Mail and general language in the contract relating to the availability of the aircraft for Postal Service use does not change the contract's basic nature to include the work contemplated by the amendment, i.e., foreign air transportation of military mail.¹²

ATA argues its standing to challenge the Postal Service's action in this matter, since its members were, are, and will be, adversely affected by the kind of Postal Service action challenged in this protest. As to the final jurisdictional challenge, ATA states that although it appreciated the opportunity to meet with Postal Service staff to discuss its concerns, its objections to the December 16-17 Emery charter remain. The protest is not moot since the possibility of out-of-scope modifications may arise at anytime.

⁹The contracting officer does not specifically address the issues raised by TWA counsel. See footnote 4, supra. He does indicate with regard to 49 U.S.C. '1517(a) that Emery is a certificated U.S. carrier.

¹⁰The Postal Service tendered 79,442; 35,499; 24,973; and 79,234 pounds of mail destined for Germany on December 16 through 19. On December 19 Chicago ramp clerks reported mail containers destined for Germany which had been tendered up to six days earlier.

¹¹ATA mistakenly suggests that ANET 89-01 was created only for the transportation of Express Mail. Although the solicitation may have been issued with the specifications driven primarily by concerns for the timely delivery of Express Mail, the contract requires the carriage of mail of other classes. See DHL Airways, Inc., P.S. Protest No. 89-45, July 31, 1989.

On the merits of the contracting officer's position, ATA argues that characterizing the foreseeable difficulties which arise in the transportation of holiday mail from Chicago to Frankfurt as a postal emergency constitutes an unjustified expansion of the normal meaning of that term. ATA allows that if the Postal Service ascertained from scheduled U.S. air carriers that a shortfall of lift from Chicago to Frankfurt existed and other routings were not sufficient, the use of emergency contracting authority would have been justified, but maintains that no such determination was made, nor were alternate routings through other gateways explored, and, therefore, the invocation of emergency contracting power was not justified.

ATA asserts that the amendment to ANET 89-01 was agreed to on December 5, with the specific dates of performance fixed at that time. ATA argues that this indicates that the amendment was intended to respond to a specific transportation need identified at its inception and not to an unforeseen transportation problem that developed during the holiday rush justifying emergency contracting. ATA points out that in any case, nothing in the contracting officer's report indicates that a postal emergency existed due to a shortfall of lift on the westbound segment (Frankfurt-New York) to justify the carriage of mail on that segment of the contract.

In a response to ATA's comments, the contracting officer reiterates the reasons that led him to determine that a postal emergency existed necessitating immediate postal response to assure that a backlog of holiday mail to Germany, primarily parcels, would arrive before Christmas. He disputes ATA's allegation that the Postal Service failed to communicate with the scheduled air lines regarding their available lift to Germany. To the contrary, he states that personnel at the Chicago Air Mail Facility were in daily contact with the scheduled air carriers regarding this issue. The contracting officer asserts that ATA offers neither persuasive evidence that available capacity to Germany went unused nor reason to believe that, had the Postal Service not made use of the Emery charter, the mail carried would have reached its destinations in Germany before Christmas.

As to the use of the aircraft to transport mail on the westbound segment, the contracting officer asserts that failure to utilize the space would have been in contravention of 39 U.S.C. ' 101(a) which mandates that the Postal Service operate in an efficient manner.^{12/} Finally, the contracting officer reiterates his view that, in light of Emery aircraft dedicated to Postal Service use for such contingencies as this and available at the incremental cost for any additional flight time, it would not have been possible to procure a charter competitively on short notice and at a price acceptable to the Postal Service.

^{12/}The cited statute states in pertinent part:

[The Postal Service] shall provide prompt, reliable, and efficient services to patrons in all areas. . . .

39 U.S.C. '101(a).

Discussion

We first review ATA's standing to maintain this protest and the other jurisdictional arguments raised by the contracting officer.

First, the contracting officer suggests that this office lacks jurisdiction over this protest because it relates to a contract modification which falls within matters of contract administration, citing E-Z Copy, Inc., P.S. Protest No. 89-85, December 1, 1989, and G. L. Reubush, P.S. Protest No. 89-61, September 20, 1989. While it is the case that decisions concerning the administration of existing contracts are generally outside our purview, there is an exception when the amendment is challenged as outside the scope of the contract. M. L. Hatcher Pickup and Delivery Service, Inc., P. S. Protest No. 77-25, July 29, 1977. (Adopting the Comptroller General's standard as expressed in Symbolic Displays, Incorporated, B-182847, 75-1 CPD & 278, May 6, 1975.) This remains the Comptroller General's standard:

We generally do not consider protests against contract modifications since modifications involve contract administration, which is the responsibility of the contracting agency, not our Office. We will consider, however, situations where it is alleged that a modification improperly exceeds the scope of the prime contract and therefore should be the subject of a new procurement.

CAD Language Systems, Inc., Comp. Gen. Dec. B-233709, April 3, 1989, 89-1 CPD &34. (Citations omitted.)

Second, the contracting officer argues that because none of the ATA members could have provided the required cargo-configured aircraft used in the charter, they (and ATA) lack standing to challenge the Postal Service's procurement at issue here, citing the general principle that only an "interested party" has standing to protest. See PM 4.5.2.^{13/} While our decisions have interpreted "interested party" to be an individual who would be eligible for award should the protest be upheld, see AHJ Transportation, Inc., P.S. Protest No. 89-02, March 24, 1989, citing Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985, in appropriate cases, others may be included. For example, we recently noted that a potential supplier to a prime contractor may be an interested party:

In certain limited circumstances, however, a potential supplier may be an interested party where no other immediate party has a greater interest concerning the issue raised, and where there is a possibility that recognizable interests would be inadequately protected were access to our protest forum limited to potential awardees. Consideration must be given to the nature of the

^{13/}That section states

"Protest" means a written objection by any interested party concerning the terms of a solicitation, the award or proposed award of a contract, or any other action relating to the solicitation or award of a contract. (emphasis added).

issues raised and the direct or indirect benefit or relief sought by the protester. We must examine the degree to which the interest is both established and direct.

York International Corporation, P. S. Protest NO. 89-77, January 19, 1990. (Citations omitted.) ATA's members have a clearly established direct relationship to the issue raised arising out of the loss of mail volume by reason of the contract amendment. (This loss was specifically identified, at least as to westbound mail, in the December 12 wire. See footnote 3, supra.) If ATA is denied access to our protest forum, their interest in the economic benefit conferred on ATA's members by the statutory scheme for the carriage of mail in foreign air transportation may be inadequately protected. This is sufficient to afford the ATA members standing.

The contracting officer also argues that the protest should be dismissed as moot since the requested relief has been granted and the contract has been fully performed, citing Hardigg Industries, Inc. & Zero Corporation, P.S. Protest No. 86-69, October 10, 1986. Hardigg is inapposite here. In Hardigg the protester was to receive award after a second pre-award survey had established its responsibility, thus rendering a challenge to the first pre-award survey moot. Here the protester has challenged postal procurement authority; while substantial or complete performance may preclude corrective action with respect to the challenged matter, our decisions have reflected the prospective usefulness of the resolution of the questions presented. See, e.g., ACCO Industries, Inc., P. S. Protest No. 79-49, January 30, 1980.¹⁴

Before reviewing the circumstances regarding the contract award at issue here, we discuss as a preliminary matter, the efforts undertaken by the Postal Service to utilize available lift.

ATA maintains that its members were not consulted to determine the availability of lift to Frankfurt before the Emery charter was utilized. Furthermore, ATA alleges that the Postal Service did not transport mail to other gateways in an effort to maximize the use of scheduled U.S. air carriers' lift to Germany. The contracting officer asserts the opposite, stating that Chicago postal personnel were in daily contact with the scheduled airlines regarding available lift, that the Postal Service undertook surface transportation at its own expense to various other gateways to Germany, in order to maximize the use of scheduled carriers, and that the carriers were allowed to utilize flights to London and Paris with surface transportation from those points to Germany.

In resolution of these matters we have noted that:

our bid protest forum, unlike a judicial one, is ill-suited to resolving factual disputes, as we cannot conduct adversary functions to any significant extent or degree. International Mailing Systems, Inc., P.S. Protest No. 84-13, April 27,

¹⁴In this regard we consider ATA's protest as requesting more than a meeting with the contracting officer to express its views; clearly the protester seeks resolution of the matters presented. Since the protester has pursued the protest since the requested meeting was held, it is clear that in its view the matter has not been resolved.

1984; Southern California Copico, Inc., P.S. Protest No. 83-76, March 5, 1984. In a factual dispute we adopt the contracting officer's position absent sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's action. Harper's Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976; Alta Construction Co., P.S. Protest No. 85-2, February 26, 1985; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986.

Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988. In the absence of substantive evidence presented by ATA to contradict the contracting officer's position or to substantiate its own, we accept the contracting officer's descriptions of the existence of the mail backlog and the remedial efforts taken to correct it. ATA has not borne its burden of persuasion to the contrary. Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988; Craig Pattison, P.S. Protest No. 87-115, December 29, 1987. Accordingly, to the degree that ATA challenges the extent of the contracting officer's undertaking to arrange for delivery of the Frankfurt-bound Chicago mail by scheduled U.S. carriers, we deny the protest.

ATA's challenges to (1) the Postal Service's declaration of an emergency to justify the contract in the circumstances presented by this protest and (2) the modification of ANET 89-01 to provide the service as opposed to the use of a solicitation for new service remain.

Review of the exercise of emergency contracting authority is within our bid protest jurisdiction. Pan American World Airways, Inc., Air Transport Association of America P.S. Protest Nos. 86-17 and 86-22, May 22, 1986 (hereinafter Pan Am). The standard of review is whether the contracting officer abused his discretion in determining to use an emergency contract. Id.; Atchison, Topeka and Santa Fe Railway Company and Illinois Central Gulf Railroad, P.S. Protest Nos. 76-17, 76-18 and 76-19, July 15, 1976 (hereinafter ATSF).

Our regulations implementing the statutory authority to procure emergency transportation contracts, codified at 39 U.S.C. ' 5001, are found at PM 12.4.6 c.3. That regulation indicates that emergency contracts may be entered into when ". . . an unexpected increase in the volume of mail at regular locations, exceeds the mail hauling capacity of the Postal Service or regular contractors." PM 12.4.6 c.3.(e). On the facts before us, it would be difficult to conclude that the contracting officer exceeded his discretion in concluding that the volume of Frankfurt holiday mail at Chicago constituted an emergency. In that regard, it may be noted that the contracting officer made the arrangements for Emery's supplemental lift on a contingent basis, and that the amendment calling for the Frankfurt trip, while earlier agreed to, was not executed until the contracting officer determined that the available lift on scheduled air carriers was, in fact, inadequate. Such a situation seems to meet the "unexpected criteria" noted above. Each emergency situation is governed by the specifics of its circumstances, ATSF, supra.

However, while the contracting officer could have found an emergency and exercised the statutory authority to deal with it, it is not clear that the actions actually taken were

based on that authority. As noted above, the Postal Service has adopted regulations governing the exercise of the authority conferred by ' 5001. See generally, PM 12.4.6 and Mail Transportation Procurement Handbook (MTPH) Chapter 6. The authority is to be exercised by the execution of an emergency contract through competitive or (if justified) non-competitive solicitation. PM 12.4.6 c.3. The record does not reflect that the contracting officer complied with these requirements.

For example, we have been provided no evidence that the "written statement of determinations and findings" required for an emergency contract by MTPH 6.1.1 B was prepared, or that competition was obtained to the extent contemplated by MTPH 6.2. More to the point, nothing in the regulations governing service procured under the authority of ' 5001 contemplates the acquisition of service by amendment to existing contracts. In sum, the extent to which the procedure followed for the acquisition of the service obtained varied from the scheme established for the procurement of emergency service compels the conclusion that the service was not in fact procured under the authority of ' 5001.

Assuming the existence of an emergency concerning the eastbound holiday mail, the justification for the use of the flight for westbound mail is less evident. In this regard, our discussion in Pan Am, supra, is instructive. Pan Am involved an emergency contract for the transportation of Express Mail International Service (EMIS) and other mail between New York and Brussels and return. The contracting officer identified the emergency as arising out of the need to provide EMIS service promptly, something that could not be done under other available authority. The contracting officer appeared to concede that there was no particular emergency with respect to classes of mail other than EMIS, but that the cargo payloads of the aircraft available to meet the EMIS delivery requirements were so large that it would be uneconomic not to take advantage of the lift unused by EMIS. The decision concluded that to the extent it established payload needs based on mail other than EMIS, the solicitation overstated the Postal Service's emergency needs.

Similarly, here the record fails to set forth any satisfactory justification for the existence of an emergency for the return trip to the US. The contracting officer's economic justification is no different in kind than the justification rejected in Pan Am. Accordingly, we conclude that the determination that an emergency existed with regard to the Frankfurt-New York leg exceeded the contracting officer's discretion.

Because we conclude that this procurement is flawed we need not reach the issue of the interrelationship of postal emergency contracting authority and the statutory scheme for procuring foreign air transportation. Pan Am, supra. Nor need we resolve whether the modification of an existing contract for domestic air transportation to provide foreign air transportation constitutes a modification within the scope of the Changes clause.

The full performance of the contract modification precludes substantive relief. The protest is sustained with regard to the method used to procure emergency service and the use of the Emery aircraft to carry military mail on the return to New York. Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975.

The protest is sustained in part and denied in part.

William J. Jones
Associate General Counsel

[checked against original JLS 5/26/93]