

Protest of) Date: August 14, 1992
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 MAJESTIC AIRLINES)
)
 Solicitation No. W3-03-92) P. S. Protest No. 92-43

DECISION

Majestic Airlines (Majestic) timely protests the award of emergency solicitation W3-03-92 for air transportation service between Salt Lake City, UT, and Billings, MT, to B&M Enterprises, Inc. dba New Mexico Flying Service (New Mexico), the low bidder. Majestic contends that New Mexico cannot perform the required service consistent with the solicitation.

The Salt Lake City Transportation Management Service Center (TMSC) issued the emergency solicitation on June 10, 1992, to change the schedule for air transportation service between Salt Lake City and Billings, then being operated by Majestic under a previous emergency contract.^{1/} The TMSC also issued a solicitation for permanent service with the same requirements, W3-01-92. The TMSC intended the emergency contract to provide service until service could be established under a permanent contract. Both solicitations required an aircraft capable of carrying up to 7,500 pounds of mail and possessing up to 1,000 cubic feet of cargo space to complete the 387 mile trip between Billings and Salt Lake City within 22 hours six days a week (Mondays excepted). The solicitation incorporated, among other documents, "Form 7451, General Provisions w/amendments." Section 3 of the General Provisions imposes the following obligations upon contractors:

^{1/} Procurement regulations do not permit the TMSC to change service requirements on an emergency contract without approval of the next higher level of contracting authority. Procurement Manual (PM) 12.4.12 f. The record reflects that the contracting officer did not undertake to obtain such approval.

3. Laws and Regulations Applicable

This contract and the services performed thereunder are subject to the applicable laws and regulations made pursuant thereto. This includes the provisions of Publication 171, "Transportation of Mail by Air Taxi Operators," which are an integral part of air taxi contracts. The Contractor shall faithfully discharge all duties and trusts imposed upon him by such laws and regulations.

Publication 171, in turn, requires that contractors maintain and operate their aircraft "at all times in accord with parts 135 and 91, FAR [Federal Aviation Regulations], as applicable to IFR [Instrument Flight Rules] passenger operational requirements."

On June 15, the TMSC awarded the emergency contract to New Mexico, which bid \$3.35 per mile using a DC-3 aircraft. Majestic's protest was received June 16.

In its protest, Majestic contends that New Mexico "cannot fly 7,500lbs. of mail IFR between Salt Lake City, Utah and Billings, Montana" and that New Mexico cannot "complete the run in the 22 hour block as specified in the contract."^{1/} Majestic contends that it is the only operator that can lawfully meet the solicitation requirements with a DC-3 aircraft. Specifically, Majestic contends that FAA safety rules require that a DC-3 be able to clear the highest obstruction on its intended flight path by at least 1,000 feet with one engine impaired. See FAR 135.391(a). Because a DC-3 operates at a speed of only 180 miles per hour, the required 22 hour trip time between Salt Lake City and Billings can be met only if flight path V465 is used. Majestic asserts that due to high terrain the minimum safe enroute altitude on route V465 is 16,000 feet. Because the DC-3 can safely operate only at 9,800 feet or less with one engine impaired, the DC-3 cannot meet the requirement to operate in accordance with FAR 135 and 91 on route V465 without a special exemption pursuant to FAR 135.391(b). The exemption allows the use of a "drift down" procedure, with FAA approval, to reduce altitude on a specified route in the event one engine fails. Majestic contends that it is the only DC-3 operator of those bidding which has an approved drift down procedure for route V465. Consequently, according to Majestic, it is the only DC-3 operator which can meet Postal Service requirements.

New Mexico contends that immediately upon commencing service it applied for the necessary FAA approval to operate under drift down procedures on route V465, and

^{2/} Two other firms, Air Alliance and Air Safaris had earlier protested the award of the contract for permanent service under solicitation W3-01-92 to McNeeley Charter Service, Inc. (McNeeley) on grounds similar to those asserted by Majestic here. Majestic has requested that its comments in those protests, P.S. Protests Nos. 92-26 and 92-31, respectively, be considered in this protest. As discussed infra, the protests of the award of permanent service have been rendered moot.

expected FAA approval shortly. New Mexico points out that these procedures are not unusual or especially difficult and that it can perform them as well as Majestic. In a subsequent statement, New Mexico also points out that the FAA requires requests for drift down exemptions to be submitted 120 days before commencing service. Since the emergency solicitation required service to commence seven days after the solicitation was issued, no one other than an incumbent operator on route V465 could have had approved drift down procedures in place for the emergency service.

Although in his initial report the contracting officer agreed that Majestic was the only DC-3 operator already approved to use drift down procedures on route V465, he submitted a supplemental report which stated that no DC-3 operator could meet the requirements of the permanent or emergency solicitations because they incorporated requirements that the aircraft be operated in accord with "applicable IFR passenger operational requirements." Although the FAA permits drift down exemptions for cargo operations, they are not allowed for passenger service. Compare FAR 135.181(a)(2) to FAR 135.391(a) and (b). Consequently, the contracting officer subsequently canceled the solicitation for permanent service and stated that he would issue a new solicitation for that service, and this office found the protests of the award for permanent service to be moot.

The contracting officer, however, did not cancel New Mexico's contract for emergency service. In response to further inquiries from this office, the contracting officer stated that he was informed by the FAA that New Mexico's operation of its cargo DC-3 between Salt Lake City and Billings complied with FAA requirements (presumably because it employs acceptable drift down procedures) but he admits that the emergency solicitation applies more stringent passenger aircraft rules which do not permit drift down exemptions. He recommends that future solicitations apply only the more permissive cargo rules. He concludes, however, that Majestic's protest should not be sustained because New Mexico can perform the service in the same manner Majestic had performed in the past.

Discussion

Our procurement regulations require that "[t]o be considered for award, bids must comply in all material respects with the solicitation requirements." PM 12.7.4 a. See Scandura, Inc., P.S. Protest No. 80-49, January 6, 1981, (where a bid sample failed to meet the requirements of the specifications, award to that firm was improper). In the present case, the contracting officer concedes that New Mexico's service does not comply with the solicitation requirement that aircraft be operated in accordance with IFR passenger operational requirements. Consequently, New Mexico should not have been considered for award. The contention that New Mexico suffices by complying with cargo requirements and operates in the same manner as past operations is not convincing. The Postal Service's apparently unknowing acceptance of nonconforming past service does not justify the knowing waiver of the contract's requirements.

The contracting officer is directed to resolicit for service on terms and conditions which meet the Postal Service's minimum needs,^{4/} and to terminate the emergency contract with New Mexico upon the establishment of the replacement service.

The protest is sustained.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

^{3/} Depending upon the circumstances, such service might a) allow sufficient block time so that lower altitude routes could be used or b) not require operation pursuant to passenger rules. Care needs to be taken, however, to assure that the FAA requirement for approval of drift down procedures for cargo operation does not unnecessarily restrict the eligibility of potential offerors.