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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Prisoner Transportation Services, LLC; V1 Aviation, LLC; AAR Aircraft Services

File: B-292179; B-292179.2; B-292179.3

Date: June 27, 2003

Chuck Zubarik, Prisoner Transportation Services, LLC; Chip Hunter, V1 Aviation, LLC; and Frederick W. Claybrook, Jr., Crowell & Moring, for AAR Aircraft Services, for the protesters.

Allen Weh, CSI Aviation Services; Joseph W. Tasler, Air Charter Team; and James P. Flynn, Aviation Enterprises, Inc., for the intervenors.

Gerald M. Auerbach, Esq., and Joni M. Gibson, Esq., Department of Justice, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation term limiting offers to particular make and model of aircraft unduly restricts full and open competition, where the agency concedes that other aircraft can meet its needs.
 2. Solicitation term limiting offers to aircraft manufactured after 1990 is reasonably related to the agency's needs because the agency has shown that limitation was designed to avoid the problems associated with aging aircraft.
 3. Protest that agency should have provided for multi-year pricing instead of requiring proposals based on a 1-year contract with multiple options totaling 10 years is denied, where the agency has the discretion to decide whether to allow multi-year contracts under 41 U.S.C. § 254c(a) and reasonably determined that the approach included in its solicitation will provide economy in administration, performance, and operation.
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DECISION

Prisoner Transportation Services, LLC; V1 Aviation, LLC; and AAR Aircraft Services protest the terms of request for proposals (RFP) No. MS-03-R-0008 (RFP -0008), issued by the United States Marshals Service (USMS), for the lease and maintenance

of six Boeing 737 passenger aircraft for up to 10 years for prisoner transfer and other purposes.

We sustain the protests of Prisoner and AAR in part and deny them in part, and deny the protest of VI Aviation.

The USMS currently operates a fleet of aircraft to transport prisoners and criminal aliens throughout the United States and to certain countries in Latin America, and seeks to replace this fleet with a long-term lease for jet aircraft.

Before issuing a solicitation for these aircraft, the USMS conducted several market studies in 2000 and 2002 to assess the best methods of fulfilling the agency's needs. After considering acquisition costs, support and maintenance costs, operational costs, and availability, the agency's study concluded that "the Boeing 737-300 [and] 400 and the [McDonnell Douglas (MD)] 83 through 90 series aircraft are the aircraft that would best meet the [agency's] mission requirements, and would be readily available in the desired quantities to meet the [agency's] needs." USMS Market Research, Large Aircraft Replacement Program, at 2; see Large Aircraft Replacement Study for USMS (Sept. 2000), at 26; Agency Report at 4. One study concluded that the Boeing 737-300 and -400 aircraft provided "the most cost effective solution," and that the MD-83 through -90 aircraft provided the "next most cost effective" solution because its costs were "very close" to those of the Boeing 737-300 and -400 models. Large Aircraft Replacement Study for USMS (Sept. 2000), at 26. This study also found that the Boeing 737-300 and -400 aircraft were "not in abundant supply," and that the MD aircraft had better availability, which the agency noted "may translate into a somewhat lower purchase price or lease cost." Id.

After the studies were completed, the USMS issued an RFP on June 7, 2002, under commercial items procedures, for the long-term lease and maintenance of jet aircraft, under which offerors were permitted to propose different makes or models of aircraft. The RFP stated a preference for aircraft less than 10 years old and noted that aircraft manufactured earlier than 1990 would not be excluded, but would be given a lower rating in the evaluation process. RFP No. MS-02-R-0012 (RFP -0012) § II, Part A, ¶ B.1.k. Moreover, the proposed aircraft were required to meet detailed performance and design requirements, including meeting requirements included in three trip scenarios. The solicitation finally provided for three alternate pricing formats: a 10-year lease using a multi-year approach with cancellation ceilings; a 5-year lease using a multi-year approach with cancellation ceilings; or a 1-year lease with nine 1-year options that could be unilaterally exercised by the government; offerors could complete one or all alternates as their price proposal. RFP -0012 § I, ¶ A.

Four proposals were received in response to the solicitation. The agency selected for award CSI, Inc.'s alternate proposal of a Boeing 737-300 aircraft. The agency found that the Boeing 737-300, as compared to models of aircraft proposed by the other offerors, exhibited the most cost-effective solution based on the total

operational cost of the aircraft. The award was protested to our Office primarily on the grounds that the awardee's proposed 737-300 aircraft did not meet certain performance requirements, particularly those included in one of the three trip scenarios. After considerable case development, the agency took corrective action and cancelled the solicitation, and we dismissed the protest as academic. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100, at 2-4. Subsequently, we recommended that the protester be reimbursed the costs of filing and pursuing the protests because the agency had unduly delayed taking corrective action in the face of a clearly meritorious protest.¹ Id. at 10.

On April 9, 2003, the USMS issued the solicitation at issue here as a commercial item acquisition under Federal Acquisition Regulation (FAR) Part 12. This solicitation sought proposals to lease the six jet passenger and transport aircraft, but limited those aircraft to Boeing 737 model numbers -300 or -400 manufactured in 1990 or later. RFP -0008, § II, Part A, at 1. The solicitation provided for award of a fixed-price contract based upon a 1-year base lease period, with nine options that combined form a 10-year period of performance. RFP -0008 § I, at 1. Award was to be "made to the lowest priced-technically acceptable offeror," based upon an evaluation of the technical proposal (which included an assessment of aircraft acceptability, and the offeror's maintenance and logistics plan), price, and past performance. RFP -0008 § VII, at 1-2, 5. Offerors were provided 30 days from issuance of the solicitation to submit proposals. RFP -0008, Cover Letter, at 1. Three protests were filed challenging the solicitation's terms.

Prisoner and AAR contend that the solicitation requirement limiting aircraft to only the Boeing 737-300 and -400 models unlawfully restricts competition, since both MD and Boeing aircraft can satisfy the agency's needs.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, and include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253a(a) (2000). Contrary to the agency's assertion, the CICA mandate for full and open competition is not satisfied by the agency's view that "adequate" competition has been obtained. See Marine Research Specialists, B-265869, Jan. 2, 1996, 96-1 CPD ¶ 1 at 5 n.7. The FAR also provides that:

¹ The record indicated that the agency failed to reasonably determine that CSI's proposed 737-300 aircraft satisfied the requirements of one of the trip scenarios, given the evidence in the record that they did not. AAR Aircraft Servs.--Costs, supra, at 6-8.

Agency requirements shall not be written so as to require a particular brand-name, product, or feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless --

(a) The particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs[.]

FAR § 11.105.² When a protester challenges a solicitation provision as unduly restrictive of competition, we will review the requirements to ensure that they are reasonably related to the agency's needs. CairnsAir, Inc., B-278141, Jan. 2, 1998, 98-1 CPD ¶ 1 at 2.

Here, in its report on the protest, the agency concedes that aircraft other than the Boeing 737 models meet its needs, specifically the MD-83 through -90 series identified in its market studies. Agency Report at 4. Moreover, during the original competition, proposals offering the MD series aircraft were specifically found to be acceptable, and the agency does not claim that its needs have changed. Thus, the solicitation restriction is more limiting than is necessary to meet the agency's needs and therefore unduly restricts full and open competition.

The agency argues only that Boeing models are more desirable because they are more cost efficient, in that they "would reduce maintenance costs, significantly reduce operational costs by reducing fuel consumption, and provide greater aircraft reliability," and that because, in contrast to the MD series aircraft, "the Boeing 737 series aircraft are still in production, [the agency] is assured of the availability of parts and support." Agency Report at 4; Contracting Officer's Statement at 2-3. However, the agency's conclusions, as it readily concedes, are based upon the same market studies that resulted in the issuance of the first solicitation, which sought proposals for multiple makes and models of aircraft. Agency Report at 4. The agency has not explained why, based upon this same survey information, it is now "necessary" to further restrict the competition. Furthermore, the agency's market studies indicate that the MD aircraft are "very close" in cost effectiveness to the Boeing models and are more advantageous in terms of availability, and that the product support for the MD-83 through -90 series aircraft "will be almost as good" as

² Where such a brand name restriction is used, an agency is required to obtain a written "justification[] and approval[]" for other than full and open competition. FAR § 11.105(b).

that for the Boeing 737 series aircraft.³ Large Aircraft Replacement Study for USMS (Sept. 2000), at 17, 26. Moreover, the protesters assert that the significantly lower lease prices of the MD series models will more than offset the higher fuel efficiency costs. Based on the foregoing, we find the agency has not advanced a reasonable basis for the restriction of this competition to Boeing 737 series aircraft, and we sustain Prisoner's and AAR's protests on this basis. See ITT Courier Terminal Sys., B-218563, Aug. 8, 1985, 85-2 CPD ¶ 148 at 3; Cleaver Brooks, B-213000, June 29, 1984, 84-2 CPD ¶ 1 at 3.

Prisoner and AAR also protest that the solicitation requirement limiting competition to aircraft manufactured after 1990 unduly restricts competition. The agency explains, and the protesters do not dispute, that the age requirement "was designed to avoid the problems associated with aging aircraft, while guaranteeing that the USMS would have newer, more reliable, aircraft with improved capability to perform its missions throughout the ten year life of this lease." Moreover, older aircraft have to comply with additional Federal Aviation Administration (FAA) Aging Fleet requirements that take effect when aircraft reach 20 years of age, including additional inspections and repairs, which increase aircraft downtime and maintenance expenses; imposing a requirement that aircraft be of more recent manufacture makes the imposition of the FAA requirements less likely. The agency also explains that aircraft manufactured after 1990 are adequately available, so that the agency could avoid most of the aging fleet issues. Contracting Officer's Statement at 2; see Large Aircraft Replacement Study for USMS (Sept. 2000), at 3-4.

In response, AAR argues only that the age restriction should be lifted since the prior solicitation allowed older aircraft to be proposed, and Prisoner argues that the restriction should be lifted for "cost competitive reasons" and disagrees with the agency's conclusions concerning the reliability and cost impact of an aging fleet. With regard to this requirement, the agency's market survey study concluded:

To avoid the problems associated with aging aircraft, the aircraft to be acquired should not be older than 10 years at the time of acquisition. This means that at the [end of 10 years] the aircraft will be 20 years old, which is the point at which aging aircraft inspection programs start.

Large Aircraft Replacement Study for USMS (Sept. 2000) at 7. While the agency does not explain why it permitted such older aircraft to be proposed under the prior solicitation (albeit with the caveat that proposals offering such aircraft would be lower rated), the protesters have not shown that the agency's determination,

³ Although the agency now contends that availability of the Boeing aircraft "is no longer an issue," Agency Report at 5, this is disputed by the protesters. In any event, the agency is free to include factors such as availability, cost effectiveness (or life-cycle costs), and reliability as part of its selection criteria in the solicitation.

consistent with its market research, that aging aircraft would not meet its needs was unreasonable, and we deny this protest basis. See DGS Contract Servs., Inc., B-249845.2, Dec. 23, 1992, 92-2 CPD ¶ 435 at 2-3.

Finally, VI Aviation and AAR protest that the 1-year lease requirement unduly restricts competition because it is more expensive to lease aircraft for 1-year increments as opposed to a longer period of years. As noted above, this too is a change from the prior solicitation, which permitted offerors to propose multi-year pricing.

The Federal Acquisition Streamlining Act of 1994 (FASA), as implemented by FAR Subpart 17.1, gave agencies the authority to enter into multi-year contracts as follows:

An executive agency may enter into a multiyear contract for the acquisition of property or services if--

* * * * *

- (2) the executive agency determines that --
 - (A) the need for the property or services is reasonably firm and continuing over the period of the contract; and
 - (B) a multiyear contract will serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency's programs.

41 U.S.C. § 254c(a) (2000) (emphasis added).

That is, FASA has provided agencies with the discretion, but does not require them, to enter into multi-year contracts where certain conditions are satisfied. Simply because the agency previously allowed for proposals on a multi-year basis does not preclude the agency from declining to use this authority, even if the conditions allowing the use of this authority are satisfied. Here, while it may be that lower prices could be obtained through a multi-year contractual vehicle, the agency could reasonably prefer to have a single year contract with multiple options, since then the agency can terminate its relationship with a contractor by simply not exercising an option. The agency made its decision not to provide for a multi-year contract approach based on the results of the first competition, in which half of the competitors proposed the same prices for a 1-year contract with multiple options as for a multi-year contract, all of which prices had been determined to be reasonable. The agency thus declined to accept multi-year contract pricing because a "long term lease using the [single year with multiple options] approach will provide economy in administration, performance, and operation." Contracting Officer's Statement at 3. Under the circumstances, we find no basis to object to the agency's decision not to allow for a multi-year contract pricing, and deny this protest basis.

The protests of Prisoner and AAR are sustained in part and denied in part, and the protest of V1 Aviation is denied.

We recommend that the agency amend its solicitation to allow consideration of all make and model aircraft that meet its needs.⁴ We also recommend that the agency reimburse Prisoner and AAR the reasonable costs of filing and pursuing the portion of their protests that we sustained. The protesters are to file their certified claims for costs, detailing the time expended and costs incurred, with the agency within 60 days of this decision. 4 C.F.R. § 21.8(f) (2003).

Anthony H. Gamboa
General Counsel

⁴ The protesters also challenged the 30-day proposal response time set forth in the solicitation. However, the agency has suspended the closing date in response to the protests. In any case, in light of our recommendation, this issue is academic and we therefore do not address it.