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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: American Airlines, Inc.

File: B-258271

Date: December 29, 1994

Thomas E. Hill, Esq., Haynes and Boone, for the protester. James T. Lloyd for USAir, Inc.; Joel Stephen Burton, Esq., Ginsburg, Feldman and Bress, for United Air Lines, Inc.; Steve A. Cossette for Continental Airlines, Inc.; Vincent F. Caminiti for Delta Air Lines, Inc.; Peter B. Kenney, Jr., Esq., for Northwest Airlines, Inc.; interested parties.
Emily C. Hewitt, Esq., Michelle Harrell, Esq., and Janet L. Harney, Esq., General Services Administration, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the General Services Administration (GSA) improperly is considering offers from American air carriers that participate in the Department of Defense's Civil Reserve Air Fleet (CRAF) program and that have code-sharing agreements with foreign airlines is denied since the request for proposals does not preclude the acceptance of such offers and since code sharing has been held not to violate the Fly America Act.

2. Whether allowing offers from American air carriers that have code-sharing agreements with foreign airlines is consistent with the Department of Defense (DOD) goal of maintaining the U.S. airlift mobilization base and whether American air carriers that code share with foreign airlines should be allowed to participate in DOD's Civil Reserve Air Fleet (CRAF) program are matters of executive policy to be resolved by DOD and cooperating agencies, such as the General Services Administration, rather than through the bid protest process.

DECISION

American Airlines, Inc. protests request for proposals (RFP) No. FCXS-T4-940004-N which was issued by the General Services Administration (GSA) to obtain air passenger transportation services for a large number of domestic and

international routes in fiscal year 1995. American Airlines contends that GSA improperly is considering offers by and may award contracts (multiple awards will be made) for international routes to American air carriers that have "code-sharing" agreements[1] with foreign air carriers. American Airlines believes that acceptance of offers from domestic carriers that code share is inconsistent with participation in the Department of Defense's Civil Reserve Air Fleet (CRAF) program[2] and the Fly America Act.[3]

We deny the protest.

Issued on May 3, 1994, the RFP solicited proposals for 1-year requirements contracts to provide air transportation services for government employees traveling on official business. The RFP contains more than 5,000 line items for air transportation to and from specified "city pairs"[4] of which 1,114 line items, representing international routes between American and foreign cities, are relevant to the protest because some offerors may code share with foreign air carriers to provide transportation on these routes. The RFP states that in order to be eligible for contract awards offerors must either participate in the Department of Defense's (DOD) Civil Reserve Air Fleet (CRAF) program or be certified as technically ineligible to participate in the CRAF program by DOD's Air Mobility Command, which oversees the program.

By letter of July 6 (initial offers were to be submitted by July 7), American Airlines protested to the contracting agency the contracting officer's decision to consider offers submitted by American air carriers for international routes where the American carriers intend to fulfill some of their contract obligations through the use of code-sharing

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[1]A code-sharing agreement is an arrangement between a U.S.-flag air carrier and a foreign air carrier in which the U.S.-flag carrier provides passenger service on the foreign air carrier's regularly scheduled, commercial flights. See generally 70 Comp. Gen. 713 (1991).

[2]The CRAF program is made up of American commercial air carriers that voluntarily commit cargo and passenger aircraft to support military airlift requirements during national security emergencies.

[3]Formerly 49 U.S.C. app. § 1517 (1988), recodified at 49 U.S.C. § 40118 by Pub. L. No. 103-372, § 1(e), 108 Stat. 1116-1117, July 5, 1994.

[4]A city pair represents both the city of origin and the destination city of a specified air route.

agreements with foreign air carriers. By letter of August 9, the contracting officer denied American Airlines's agency-level protest, and by letter of August 23, American Airlines protested to our Office.

American Airlines contends that GSA's allowing offerors that code share with foreign air carriers to compete defeats "the very purpose of imposing the CRAF participation requirement: to maximize the business incentives for eligible carriers to participate in CRAF" and is inconsistent with tying city pairs contract eligibility to participation in the CRAF program. The protester asserts that GSA has created a "loophole" that allows foreign air carriers to obtain city pairs contracts even though they are not eligible to participate in the CRAF program. American Airlines maintains that it is at a competitive disadvantage because it must incur considerable expenses to fulfill its CRAF obligations while non-CRAF foreign firms do not.

While American Airlines argues that allowing domestic airlines to code share with foreign air carriers will create a disincentive for U.S.-flag air carriers to join the CRAF program, the contracting agency and several domestic air carriers that are interested parties to the protest argue to the contrary. For example, in denying the agency-level protest, the contracting officer stated her opinion that it is the desire to receive government business under the city pairs contracts, not code sharing, that influences a domestic air carrier's decision whether to join the CRAF program. One of the domestic offerors, USAir, contends that permitting code sharing may actually increase the incentive for carriers to participate in the CRAF program because code sharing expands the number of city pairs for which U.S.-flag carriers can make offers, thus increasing the potential government business they can receive under city pairs contracts.

USAir also refutes American Airlines's argument that it is at a competitive disadvantage because it must spend considerable funds to meet CRAF obligations while foreign code sharing airlines do not, stating:

> "The foreign carrier is not the city pair bidder or contractor--it is not offering, selling or engaging in air transportation under the city pair contract and is not a party to the contract of carriage (i.e., ticket)--the U.S. CRAF carrier is. The U.S. carrier is liable under the city pair contract and contract of carriage to provide the service; the U.S. carrier is bound by its relevant tariffs; the U.S. carrier is responsible for its contract fares; the U.S. carrier must offer the required reservations services; the U.S. carrier

> must furnish its flight schedules; the U.S. carrier must maintain the appropriate insurance; the U.S. carrier must undergo the DOD technical evaluation and audit; the U.S. carrier is obligated to comply with all applicable laws and regulations; and the U.S. carrier remains liable for any refunds on unused tickets. In short, the U.S. carrier--whether code-sharing or not--bears the responsibility for the city pair contract commitment, the associated CRAF commitment, and the attendant CRAF costs and risks. American [Airlines] is in no worse or different position than any other eligible bidder." [Emphasis in original.]

The record also contains a point paper prepared by the Air Mobility Command in response to the protest. Among other things, the Air Mobility Command states that code sharing actually benefits the CRAF program by: (1) providing increased access to international markets for CRAF members; (2) increasing the income received by American carriers; and (3) keeping American carriers financially sound, thus maintaining the American mobilization fleet.

While the protester, GSA, DOD, and other interested parties have expressed widely divergent opinions concerning whether allowing code sharing will create an incentive or disincentive for domestic airlines to join the CRAF program, there is nothing in the record to support either position and, in any event, the issue does not provide a basis for sustaining the protest.

First, American Airlines specifically requests our Office to direct GSA not to permit code sharing in this procurement, that is, American Airlines wants us to direct GSA to include in the RFP more restrictive provisions that would specifically exclude offers from domestic firms that code share with foreign firms. Our Office, however, generally will not consider contentions that specifications should be made more restrictive, particularly where, as here, they are based on the argument that the less restrictive requirement set forth in the RFP is contrary to what, in the protester's view, is best for the agency. See Simula, Inc., B-251749, Feb. 1, 1993, 93-1 CPD ¶ 86. Our role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to consider assertions that the needs of the agency can only be satisfied under more restrictive specifications than the agency believes necessary. Id. Moreover, while American Airlines argues that it is at a disadvantage in this procurement because it does not code share--an argument that is disputed by the agencies and some of the interested parties--in our opinion, the alleged disadvantage is

attributable to American Airlines's business judgment (i.e., choosing not to enter into code sharing agreements), which the agency is not required to ameliorate. Id. Furthermore, whether allowing offers from firms that code share with foreign airlines is consistent with DOD's goal of expanding the U.S. airlift mobilization base and whether American air carriers that code share should be allowed to participate in the CRAF program are matters of executive policy to be resolved by DOD and cooperating agencies, such as DTA, rather than through the bid protest process. See True Mach. Co., B-215885, Jan. 4, 1985, 85-1 CPD ¶ 18.

Second, the protester argues that code sharing with foreign carriers on routes where U.S.-flag carriers are available violates the Fly America Act's requirement that air transportation be secured aboard a U.S.-flag carrier if available. However, in our decision 70 Comp. Gen. 713, supra, we held that, under certain conditions, service provided by a U.S. certificated air carrier using space on aircraft owned and operated by a foreign air carrier under a code-sharing agreement could be considered transportation provided by a U.S.-certificated air carrier for the purpose of the Fly America Act.[5] American Airlines has not shown any legal errors in our 1991 decision or provided new information that would warrant modifying that decision.[6]

The protest is denied.

Ronald Berger
for Robert P. Murphy
General Counsel

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[5]We recently stated in response to a request from the National Air Carrier Association asking us to reconsider our position that we had no basis to question our 1991 decision on this matter. Letter dated July 14, 1994.

[6]We are currently in the process of soliciting the views of cognizant government agencies as well as members of the air carrier industry concerning code-sharing agreements. In addition, our evaluators are currently engaged in a review of Department of Transportation practices related to approval of code-sharing arrangements. At the conclusion of this effort, we will determine whether any change to the conclusion reached in 70 Comp. Gen. 713, supra, is required.