

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-186096

DATE: June 21, 1976

MATTER OF: T & G Aviation

61011

98414

DIGEST:

1. Cancellation of certain items of procurement for air tanker services, including items on which protester was low, and downgrading of size of air tankers on resolicitation was proper since procuring activity determined that bid prices for canceled items was excessive and smaller air tankers would meet its needs. Rejection of bids is matter of administrative discretion since request for bids does not import obligation to accept any of bids received, including lowest conforming bid. Unreasonable price and reduced requirement for services being procured are considered adequate reasons for cancellation.
2. Even though protester may have purchased supertankers in reliance on Forest Service's statement that it would need more supertankers for 1976 season, Forest Service is not obligated to award contracts for supertankers at excessive price.
3. Although protester argues that Forest Service should not be allowed to establish "post-bid inflation ceiling" and that ceiling should have been included in IFB so that bidders could have tailored bids to comply with ceiling, there is no requirement that ceiling be put in IFB and contracting officer is entitled to reject bids determined to be unreasonable as to price. GAO's review in protest situations regarding reasonableness of price is confined to whether contracting officer acted reasonably and not to second-guessing contracting officer's determination.
4. There was reasonable basis for award of group of tanker bases to bidder even though bid price for one base exceeded "inflation ceiling," since bidder offered 10-percent discount contingent on receipt of all three bases and (1) bidder was low on all bases and (2) award had to be made to cover fire emergency conditions in southeast United States.

5. Inasmuch as Forest Service has indicated that ton-mile-per-hour bid evaluation method is unworkable because it does not consider necessary variables in aerial fire fighting operations and none of air tanker companies that responded to canvass of industry as to utilization of method favored it, on basis of record, it cannot be concluded that method is most cost effective evaluation.
6. Concession that P-2V supertanker might be more cost effective to operate does not establish in general that supertankers are superior to smaller air tankers for fire suppression work.
7. Protest against award of items to another firm on basis that firm does not have equipment to perform contract will not be considered on merits, since procuring activity has determined that successful bidder is responsible and our Office has discontinued practice of reviewing affirmative determinations of responsibility, except in certain situations not applicable in present case.

On January 19, 1976, the Division of Administrative Services, United States Forest Service, issued invitation for bids (IFB) 49-76-03 requesting bids for furnishing air tankers to operate out of designated air bases located throughout the United States for the purpose of dropping retardant on forest and range fires.

According to the Forest Service, when the bids were opened, it was determined that, if all the items were awarded, the total projected cost of the 1976 air tanker program would be \$9,180,000 as compared to \$6,830,000 in 1975, a 34-percent increase. This was considered to be an excessive increase in cost. As the result of a reevaluation of its fire control plan, the Forest Service decided to cancel a major portion of IFB 49-76-03. Four bases were awarded because prices were determined to be reasonable. Awards were made on six other bases because the bid included bases in Tennessee and Florida where emergency fire conditions existed. IFB 49-76-05 was issued on March 3, 1976, calling for air tanker

services for a reduced number of bases as well as a reduction in the number and size of tankers at several other bases.

By telex of March 12, 1976, and supplemental letters dated March 26, 1976, T & G Aviation (T & G) lodged a protest with this Office. T & G protests the refusal by the Forest Service to award under IFB 49-76-03 items 3a and 3b on which T & G was the low bidder. Items 3a and 3b called for planes with a minimum payload of 22,000 pounds and a minimum cruising speed of 215 knots which could only be satisfied by supertankers (DC-6's, DC-7's or P2V's). T & G states that the Forest Service had advised potential bidders that for its 1976 requirements the Forest Service planned to procure 19 to 21 supertankers and in reliance on this advice T & G had purchased five DC-7's at a cost of \$1,000,000.

T & G also protests the Forest Service's improper preference for certain air tanker companies, namely members of the California Air-Tanker Association (also referred to as the Associated Air Tanker group). According to T & G, while the Forest Service refused to make an award for the supertankers at Wenatchee, Washington (items 3a and 3b), and has chosen to resolicit several other items, downgrading these items from DC-6's and DC-7's to smaller tankers such as B-17's and C-119's, this has had little effect on members of the California Air-Tanker Association. T & G explains that the reason for this result is that IFB 49-76-03 called for supertankers in the southeastern United States in combination with the certain western bases and these items were awarded to members of the California Air-Tanker Association. Thus, these members were able to utilize all of their supertankers except one. Moreover, T & G contends that these members derived a further benefit from the resolicitation in that they were able to bid their remaining B-17's and C-119's on the resolicitation. As evidence of the fact that the awards favored certain air tanker companies, T & G points out that none of the members of the Associated Air Tanker group (Butler Aircraft, T.B.M. Inc., Sis-Q Flying Service, Aero Union and Hemet Valley Flying Service) bid against each other. Secondly, the Forest Service awarded every item on which one of these companies was the low responsive bidder with the exception of Hemet Valley's bids on items 11 and 30 and canceled or rebid all the remaining items with the exception of items 6a, 6b, 2a and 2b (on which none of the California group bid) and item 29.

T & G also takes issue with the Forest Service's position that the excessive increase in cost justified the partial cancellation of IFB 49-76-03. T & G states that the Forest Service is not entitled to establish a post-bid inflation ceiling since if an inflation ceiling is to be one of the bid requirements, bidders are entitled to tailor their bids to comply with the ceiling, T & G further states that the imposition of requirements after bids are received gives the Forest Service unbridled discretion to set it at such a point as to favor some bidders and discriminate against others. In this connection, T & G states that it was informed by the Forest Service that items 3a and 3b are canceled because T & G's bid exceeded its previous year's bid by more than 13 percent (15 percent for item 3a and 9 percent for item 3b according to T & G), yet the Forest Service awarded Redmond, Oregon (items 5a and 5b), to Butler Aviation even though Butler's bid exceeded its bid for the previous year by 27 percent. Also, T & G contends that the imposition of such an inflation ceiling is based on a false cost savings premise since the most cost effective basis for evaluating this type work is ton-mile-per-hour, rather than the flat rate system. Also, T & G contends that the downgrading to smaller planes will cost the Forest Service more money because the larger planes are more efficient.

Additionally, T & G states that the Forest Service justified awarding items involving the southeastern United States on the basis that a critical fire condition existed in that portion of the country, while there were aircraft available, presumably at a lower cost, under last year's contracts which could have covered that region until the items were rebid.

Finally, T & G protests the award of items 6a and 6b on IFB 49-76-03 to Central Air Service on the basis that it does not have the equipment to perform the contract.

Regarding the Forest Service's refusal to award T & G items 3a and 3b, this was one of the bases and two of the planes eliminated by the partial cancellation of IFB 49-76-03. According to the Forest Service, T & G's bid on these items was considered to be too high. Thus, by eliminating this base a substantial savings could be realized since according to the Forest Service the area serviced by this base could be serviced by tankers from other bases. While T & G may question the propriety of this decision, as well as the propriety of the Forest Service's decision to cancel

other bases and to downgrade the size of planes at certain other bases, the fact remains that the IFB did reserve to the Government the right to reject any or all bids. See paragraph 10(b) of GSA Standard Form 33-A, "Solicitation Instructions and Conditions."

Also, in this respect, it should be pointed out that both our Office and the courts have held that the rejection of all bids (in this case a rejection of all bids for a particular item) is a matter of administrative discretion, and that a request for bids does not import an obligation to accept any of the bids received, including the lowest conforming one. See B-168562, January 14, 1970, and cases cited therein.

We find nothing in the record to indicate that the action taken in canceling portions of IFB 49-76-03 was an abuse of this discretion. We are aware of the fact that the House Committee on Appropriations has criticized the Forest Service for reducing the level of air tanker service below that contained in the original solicitation and that the Committee has directed the Forest Service to comply with the original level. See House of Representatives Report No. 94-1027, Second Supplemental Appropriations Bill, 1976, 94th Congress, 2d session, page 41. It is our understanding that the Forest Service has corresponded with the Committee in defense of the criticism and the direction. Thus, that is a matter between the Committee and the Forest Service, our action in protest cases being limited to a legal review of the protested activity.

In this case, the Forest Service determined that its needs could be met by fewer bases and smaller planes. T & G questions the determination since it contends that on a ton-mile-per-hour rate larger aircraft are less expensive to operate than smaller aircraft. However, the Forest Service has indicated that in its judgment the cut-backs made in the air tankers brought the total projected costs in line with the benefits received while providing the essential coverage. In this connection it should be noted that both unreasonable price and a reduced requirement for the services being procured are considered adequate reasons for cancellation. See FPR § 1-2.404-1 (1964 ed. circ. 1). The record indicates that the Forest Service did express the opinion to the air tanker industry that there was a need for more supertankers for the 1976 season than were obtained for the 1975 season.

Perhaps some companies, such as T & G, acted on this advice to their detriment. However, that did not obligate the Forest Service to award contracts for supertankers at an excessive price.

While the evidence indicates that members of the California Air-Tanker Association were successful bidders for certain items under both contracts, it has not been established that the awards were the result of an improper preference for the particular companies. Two members of the California Air-Tanker Association (Butler Aircraft and Sis-Q Flying Service) were awarded six items under IFB 49-76-03 which called for the use of nine supertankers. Both of these bidders offered a discount if they were awarded the three items on which they bid (items 1, 5 and 7 in the case of Butler and 2, 4 and 9 in the case of Sis-Q). Included in the three items of each bidder were bases in Tennessee and Florida where emergency fire conditions existed. Award of these items would appear to have been justified in light of the fire emergency conditions. Since, taking into account the 10-percent discount, Butler and Sis-Q were low on all six items and the Forest Service determined that it was to the advantage of the Government to make group awards to these two bidders in order to get the 10-percent discount, we are unable to conclude that there was no reasonable basis for this determination. We note that T & G bid on two of the six items, but was not the low bidder for these items. Although Butler and Sis-Q were in the fortuitous position of being able to utilize nine supertankers while still being able to bid their smaller tankers on IFB 49-76-05, that can be attributed to (1) the fact that, as a result of the 10-percent discount, they were low bidders on the items in question and (2) the existence of fire emergency conditions on three of the items.

T & G's additional contention, in support of the alleged favoritism towards members of the California Air-Tanker Association, is that the Forest Service awarded every item on which one of these companies was the low responsive bidder with the exception of items 11 and 30 and canceled or rebid all of the remaining items excepting 6a, 6b, 2a, 2b and 29. First it should be pointed out that the companies in question only bid on nine of the 30 items and six of the nine items involved the group awards to Butler and Sis-Q which included the southeastern bases where a fire emergency condition existed. Of the three items bid on by the third company in question, Hemet Valley Flying Service, award was only made on one item and that was not to Hemet. Also, items 6a and 6b, 20, 26a and 26b, and 29 were awarded to companies who were not members of

the California Air-Tanker Association. These latter awards were made because the prices were considered to be reasonable by the Forest Service. Four of the seven companies receiving awards under IFB 49-76-03 were not members of the California Air-Tanker Association. While T & G states that IFB 49-76-05 was structured so as to insure continuation of the Forest Service's improper preference for certain air tanker companies, we are unable to conclude from the record that there was an improper preference by the Forest Service for members of the California Air-Tanker Association on either contract.

T & G has contended that the Forest Service could not justify its partial cancellation of IFB 49-76-03 with the reason that there was an excessive increase in the projected 1976 costs over the 1975 costs. It is T & G's position that the Forest Service should not be allowed to establish a "post-bid inflation ceiling" and that any ceiling should have been included in the IFB so that bidders could have tailored their bids to comply with it. However, there is no requirement that a ceiling be stated in the IFB and the contracting officer is entitled to reject any bids that he determines are unreasonable as to price. FPR § 1-2.404-2(c) (1964 ed. amend. 121). In the present case the contracting officer determined that the bids were 34 percent higher than 1975 and that inflation did not fully account for the increase. Our review in protest situations is confined to whether the contracting officer acted reasonably in the circumstances and not to second-guessing the contracting officer's determination, since FPR designates the contracting officer as the person to determine reasonableness of price. Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350. In view of the basis advanced for the contracting officer's decision, we are unable to conclude that the contracting officer acted unreasonably in this case. Although T & G contends that the contracting officer acted unreasonably in that he rejected its bids on items 3a and 3b because they exceeded the previous year's bids by more than 13 percent when at the same time he awarded items 5a and 5b to Butler at prices 27 percent in excess of the previous year, as previously mentioned, 5a and 5b were in the group awarded to Butler which included the bases in the southeastern United States on which award had to be made because of the fire emergency conditions. A 10-percent discount was offered by Butler contingent upon the award of the group and since (1) Butler was the low bidder on all the items in the group and (2) award had to be made to cover the southeast, it was decided by the Forest Service contracting officer

that award of the group to Butler would be advantageous to the Government. It is our view that the contracting officer had a reasonable basis for the award of item 5 to Butler.

Regarding T & G's contention that the most cost effective way to evaluate bids on this type work is on a ton-mile-per-hour basis, our Office, in Globe Air, Inc., B-183396, June 26, 1975, 75-1 CPD 389, suggested to the Forest Service that it seriously examine the feasibility of using a ton-mile-per-hour method of evaluation. The Forest Service stated that the ton-mile-per-hour method had been explored in the past but no satisfactory formula had been found which would assess the many contingencies present in aerial fire fighting operations. However, the Forest Service stated that in response to our suggestion, it did canvass the air tanker industry requesting their input and recommendations. The record indicates that there were four responses to the canvass, including T & G, and of the companies who responded none favored the ton-mile-per-hour method. Regarding your proposed "Productivity coefficient" formula, according to the Forest Service the formula submitted does not consider any of the necessary variables such as aborted loads, partial drops, being put in hold pattern, changed location after in-flight, high density areas and runway limitations. It is the Forest Service's view that the formula is unworkable. The record indicates that the ton-mile-per-hour method favors the larger planes, i.e., the so called super-tankers, which the Forest Service states are not always the most efficient aircraft with which to fight a fire, depending on such factors as the need for maneuverability, terrain, and need for small quantities of retardant. T & G contends that the larger planes are more effecient. In this regard, T & G in its letter of April 29, 1976, states that Mr. John R. McGuire, of the Forest Service, "concedes the superiority of the DC-6's and DC-7's * * *" and that Mr. Carl Hickerson, Director of Fire Management for the Forest Service in Region 6," states in the strongest terms why he believes the large air tankers (DC-6's, DC-7's and P2V's) are substantially superior to the smaller aircraft." However, there is no evidence of record that either Mr. McGuire or Mr. Hickerson conceded the superiority of the DC-6's and DC-7's. Mr. Hickerson did state:

"Concerning your reference to your analysis of air tanker loads and costs on the Tonto fires, (your letter of 8/15), if it proves anything it might support the idea that the P-2V is a more

cost-effective air tanker than the others. Some of us even thought it was an excellent air tanker five years ago! Even further, in the area of availability costs which you could not evaluate, if the Government retained ownership and contracted operation and maintenance, several benefits would become evident. Among them, our availability costs would not have to reflect amortization of capital investment in the aircraft (except the tank and necessary modification) nor interest (or profit) on that investment. It so happens the P-2V is a post World War II, modern aircraft, built to withstand the stress of dropping a load (which the DC-6 and 7 are not). And finally, I do not see how this could result in anything except lower availability cost (fewer taxpayer dollars) compared to any other comparable air tanker - C-119, DC-6 or 7. To top it off, the taxpayers already own a large number of them and with determination and fortitude they could be brought into our air tanker fleet."

Nevertheless, this does not appear to be a concession that the supertankers, in general, are superior to the smaller air tankers, but only that the P-2V might be more cost effective to operate.

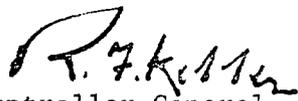
Accordingly, on the basis of the record, we are unable to conclude that the supertankers are more efficient or that the ton-mile-per-hour method is the most cost effective method for evaluating this type of work.

T & G has contended that the Forest Service need not have made the awards for the southeastern bases, since there were tankers available under last year's contracts which could have covered that region until the items were rebid. The Forest Service states that such a course of action was considered, but it was determined that the ferry costs for these planes made it more expensive to use them than to go ahead with the awards for these bases under IFB 49-76-03. Therefore, we are unable to conclude that the decision by the Forest Service not to use tankers available under last year's contracts was without a reasonable basis.

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Finally, T & G protested against the award of items 6a and 6b on IFB 49-76-03 to Central Air Service on the basis that it does not have the equipment to perform that contract. The Forest Service inspected Central Air Service's aircraft and determined that the aircraft were satisfactory for performance of the contract. This amounts to an affirmative determination of responsibility. our Office has discontinued the practice of reviewing bid protests against affirmative determinations of responsibility, except in certain situations not applicable here. Berlitz School of Languages, supra. Accordingly, we will not consider the protest against Central Air Service's responsibility on the merits.

For the above reasons, the protest by T & G is denied.


Deputy Comptroller General
of the United States