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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: CW Government Travel, Inc. d/b/a Carlson Wagonlit Travel; American Express Travel Related Services Company, Inc.

File: B-283408; B-283408.2

Date: November 17, 1999

Lars E. Anderson, Esq., Wm. Craig Dubishar, Esq., and Paul N. Wengert, Esq., Venable, Baetjer and Howard, for CW Government Travel, Inc. d/b/a Carlson Wagonlit Travel; and Hamilton Loeb, Esq., and A. Jeff Ifrah, Esq., Paul, Hastings, Janofsky & Walker, for American Express Travel Related Services Company, Inc., the protesters.
Diane L. Celotto, Esq., Department of the Navy, for the agency.
Paul Jordan, Esq., Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests that solicitation requirement for commission-based pricing of travel services is impermissibly inconsistent with customary commercial practice is denied where record, including documents submitted by the protester, demonstrates that a significant portion of the travel service industry continues to rely on commission revenues to fund performance of travel services.

2. Where protesters have submitted declarations stating that they will not respond to a solicitation unless the solicitation's commission-based pricing provisions are removed, and protests challenging those pricing provisions are denied, protesters are not interested parties to challenge other solicitation terms.

DECISION

CW Government Travel, Inc. d/b/a Carlson Wagonlit Travel (Carlson) and American Express Travel Related Services Company, Inc. (Amex) protest the terms of request for proposals (RFP) No. N00140-99-R-M417, issued by the Department of the Navy for travel management services in the Navy's Eastern Region.[1] Carlson and Amex

[1]The Navy's Eastern Region includes seventeen states in the eastern part of the United States and extends to the Caribbean Sea area, South America, and Europe.

protest that the pricing provisions of the RFP violate the requirements of the Federal Acquisition Regulation (FAR) concerning the acquisition of commercial services, unreasonably restrict competition, and provide an unfair competitive advantage to the incumbent contractor. The protesters also challenge certain other RFP provisions as exceeding the agency's minimum needs or as being otherwise inappropriate.

We deny the protests.

BACKGROUND

These protests flow from ongoing changes in the manner in which travel agencies receive compensation for the services they provide, particularly with regard to the sale of airline tickets. At the time of airline deregulation in 1978, travel agencies sold about half of the airlines' tickets, with the airlines themselves selling the other half; at that time, airlines paid travel agencies commissions on the ticket sales that averaged approximately 8 percent of the value of the tickets sold. Following deregulation, the airlines sought to lower their marketing costs, shifting more of their ticket sales to travel agencies and increasing the commissions paid. Domestic Aviation: Effects of Changes in How Airline Tickets are Sold, GAO/RCED-99-221, July 28,1999 at 3-7. Commission rates for domestic fares peaked at about 10 percent in 1994. Since then, commission rates have steadily declined.[2] Id.

As airline commissions increased, along with total travel agency revenues due to the higher volume of sales, travel agencies competed for travel service contracts by, among other things, offering to share a portion of the airline commissions they received with the buyer for which the travel services were being provided. Since 1995, as commissions have decreased, an increasing number of travel agencies have begun to charge transaction or service fees as compensation for the services they provide. Id. at 10.

With regard to the solicitation at issue here, the Navy contracting officer states that she received a request to procure the travel services in February 1999 and, thereafter, conducted market research to determine whether the Navy's needs could

[2]In 1995 the airlines capped commissions at $25 for one way domestic tickets and $50 for round trip domestic tickets. In 1997, the standard commission was reduced from 10 percent to 8 percent. In 1998, caps were imposed for international travel. In October 1999, while these protests were being considered, most of the airlines reduced the commission paid from 8 percent to 5 percent.

be met by acquiring "commercial items," as that term is defined in the FAR.[3] Contracting Officer's Statement at 2. The Navy's market research consisted of: reviewing past performance evaluations of offerors under prior procurements for similar services; conducting discussions with the Navy's current travel service provider; and conducting discussions with Navy officials, as well as with officials from other government agencies.[4] Id.

Based on the research conducted, the contracting officer determined that the services required by the Navy under this procurement fall outside the FAR definition of commercial services; that is, that portions of the travel service requirements were not sold in substantial quantities in the commercial marketplace based on established catalog or market prices performed under standard terms and conditions. See FAR § 2.101(f). Specifically, the contracting officer identified several mandatory tasking requirements that she believed precluded the procurement from being considered an acquisition of commercial services, including: required contractor response to mobilization, contingency operations, and evacuations; mandatory booking of lodging in government bachelor quarters; and required contractor reconciliation of the centrally billed accounts of the Navy's charge card contractor. See Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474 (1999) (procurement for removal of five different types of waste was not acquisition of commercial services where there was no established catalog or market price for one of the five items).

Consistent with the determination that the services were not commercial items, the Navy published a procurement synopsis in the Commerce Business Daily (CBD) incorporating note 26, which states:

> Based upon market research, the Government is not using the policies contained in Part 12, Acquisition of Commercial Items, in its solicitation for the described supplies or services. However, interested persons may identify to the contracting officer their interest and

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[3]The FAR defines a "commercial item" as including "services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions." FAR § 2.101(f). A determination that services to be acquired are "commercial items" generally requires an agency to conduct the procurement following the procedures contained in FAR Part 12, "Acquisition of Commercial Items."

[4]The contracting officer also notes that she has been the contracting officer for three similar Navy travel service contracts awarded during the past 6 years, and that, "by virtue of the continuous nature of [the Navy's travel management program] and its procurement cycle, I am continually reviewing the Navy's travel management services needs." Contracting Officer's Statement at 10.

> capability to satisfy the Government's requirements with a commercial item within 15 days of this notice.

No one contacted the contracting officer to identify its interest in and capability of satisfying the Navy's requirements with a commercial item within the 15 day period specified in the CBD notice.

On March 12, 1999, the Navy issued this RFP, seeking proposals to provide travel services during a base-year performance period with eight 6-month option periods. As the Navy had done under its prior travel service procurements, the solicitation contemplated award of a "no-cost" contract; that is, a contract in which the Navy is not billed for the contractor's performance, but rather the contractor's performance is funded by the commissions paid by airlines and other transportation providers, along with commissions paid by hotels and car rental agencies. As in the past, the RFP also provided for offerors to propose to share a portion of the airline commissions with the Navy. As amended, the RFP provided:

> Discount for Official Air Travel. The Contractor shall propose a percentage of commissions earned on official air travel sales . . . . The proposed percentage of commissions shall be provided to the Government in the form of airfare discounts on domestic airfare sales, with non-air rebates and/or discounts (for example, bus, rail, water, lodging and car rental) considered in the proposed percentage of commissions.

RFP amend. 12, at 3.

In May, both Carlson and Amex filed agency-level protests challenging, among other things, the commission-based pricing provisions in the solicitation. In response to these protests, and in recognition of the possibility that airline commissions could decrease, the agency amended the RFP to include a provision which reduced contractor risk by automatically decreasing the Navy's portion of the shared commission if the airlines decreased their standard commissions. Specifically, as amended, the RFP stated:

> [I]f the current Airline industry standard commission of 8% declines and/or the current commission cap . . . declines, the Government's portion of shared commissions shall be adjusted to account for this decline. The Contractor's portion of shared commissions will not be adjusted.

Id. at 4.

The RFP was also amended to provide that if airline commissions decline beyond the Navy's portion of the commission, the contract would be renegotiated or terminated. Id. at 5.

Prior to Amex and Carlson filing these protests with our Office, the closing date for submission of proposals had been August 20, 1999. Carlson and Amex filed these protests on August 9, and the closing date has been postponed pending resolution of the protests.

DISCUSSION

Both Carlson and Amex challenge the commission-based pricing provisions of the RFP, arguing that requiring travel agencies to rely on commissions paid by airlines and other service providers is no longer consistent with customary commercial practice. In making this argument, the protesters first assert that the travel services here should be considered "commercial items" for purposes of triggering the requirements of FAR Part 12--and then refer to FAR § 12.301, which states:

> [C]ontracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses— . . . .
>
> (2) Determined to be consistent with customary commercial practice.

As noted above, the Navy responds that certain portions of its requirements are not sold in substantial quantities in the commercial marketplace based on established catalog or market prices and, therefore, the services being acquired do not meet the definition of commercial items. See FAR § 2.101(f).

Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. Aalco Forwarding, Inc. et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 11. However, here we need not resolve whether the Navy reasonably determined that the services being acquired are not commercial items, since, even if the services are considered commercial items, the record clearly establishes that a significant portion of travel service providers in the marketplace continue to rely on the type of commission-based funding which the protesters are challenging in this solicitation.

Specifically, in pursuing this protest the protesters provided various documents regarding existing practices in the marketplace. For example, Carlson submitted a June 11, 1998 news item, printed from the Internet site of the American Society of Travel Agents (ASTA),[5] http://www.astanet.com, which states:

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[5]The ASTA characterizes itself, at http.www.astanet.com/pub, as "the world's largest travel trade association," stating that "we serve the public and the travel industry by championing the rights of travelers and the industry."

> Today, the American Society of Travel Agents (ASTA) released the results of its 1998 ASTA Agency Service Fees Report, which scientifically surveyed ASTA member travel agencies on their implementation of client services fees. The survey showed that nearly two-thirds (64%) of responding agencies now charge service fees in their agencies.[[6]]

Additionally, Carlson submitted an article reporting on a survey conducted by the travel industry publication Travel Weekly,[7] which surveyed travel service <u>users</u> rather than travel service <u>providers</u>, stating:

> The study found that 80% of respondents do not currently pay a service fee to their retail agent. Twelve percent of respondents said they do pay a fee, and 8% were not sure if they are assessed a fee.
>
> . . . . .
>
> On average, respondents who pay service fees said they began paying 11 months ago.

Travel Weekly, Jan. 28, 1999, at 1, 4.

Based on the record, and in particular the protester's own submissions, it is clear that, while there is a current trend in the industry toward increased use of service fees by travel agencies, a significant portion of the industry continues to rely on commission revenues to fund performance of travel services. Thus, assuming <u>arguendo</u> that this procurement should have been conducted as an acquisition of commercial services pursuant to FAR Part 12, there is still no merit in the protesters' assertions that the commission-based pricing provisions in the Navy's RFP are not "consistent with customary commercial practice." Rather, the record clearly

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[6]The ASTA subsequently reported that the portion of travel agencies charging service fees has increased to 75 percent. The July 28, 1999 GAO Report, cited above, references the 1998 survey, and elaborates as follows:

> Between 1995 and 1997, the percentage of agencies charging service fees for processing airline tickets increased from 19 percent to 42 percent for leisure travel and from 10 percent to 38 percent for business travel.

Domestic Aviation: Effects of Changes in How Airline Tickets are Sold, <u>supra</u>, at 10.

[7]Amex refers to Travel Weekly as "one of the travel industry's leading publications." Protester's Comments, Sept. 30, 1999, at 4.

establishes that, notwithstanding the relatively recent trend towards use by the travel industry of service fees, the challenged commission-based provisions are customary for from 25 percent to as much as 80 percent of the marketplace. Accordingly, to the extent the protesters rely on the FAR Part 12 requirements regarding consistency with customary commercial practice as a basis to challenge the RFP's commission-based pricing provisions, the protests are denied.

Carlson also protests that the commission-based pricing provisions impose an unreasonable level of risk for new contractors and, thereby, unduly restrict competition.

A procuring agency is not required to eliminate all contract risk. On the contrary, it is within the ambit of administrative discretion to offer to competition a proposed contract imposing maximum risks upon the selected contractor. Argus Servs., Inc., B-234016.2, B-234017.2, Sept. 12, 1989, 89-2 CPD ¶ 227 at 3.

Here, the RFP contains specific and effective provisions to minimize contractor risk, in particular by providing for the automatic downward adjustment of the Navy's portion of the airline commissions in the event airlines decrease their standard commissions. Further, the RFP provides for renegotiation or termination of the contract if the commissions decline by a greater amount than the Navy can absorb. Accordingly, we find without merit the assertion that the RFP creates unreasonable risks for a new contractor.

Carlson also protests that the commission-based pricing structure creates an unfair competitive advantage for the incumbent contractor, Scheduled Airline Travel Offices, Inc. (SATO), complaining that "SATO apparently still has a 'sweetheart' arrangement with the airlines."[8] Carlson's Protest at 12-13.

In seeking competition, an agency is not required to structure its procurements in a manner that neutralizes the competitive advantage that some potential offerors (including incumbent contractors) may have over others by virtue of their own particular circumstances where the advantages did not result from unfair action on the part of the government. Group Techs. Corp.; Electrospace Sys., Inc., B-250699 et al., Feb. 17, 1993, 93-1 CPD ¶ 150 at 13.

Here, the record is devoid of any indication of unfair action by the Navy causing SATO to be more competitive than Carlson and, while complaining about an allegedly improper "sweetheart" relationship between SATO and the airlines, Carlson has presented no supporting evidence which would provide our Office a basis to sustain this protest allegation. Accordingly, we conclude that this portion of Carlson's protest reflects nothing more than Carlson's dissatisfaction with SATO's relative competitiveness in the current marketplace and is without merit.

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[8]Until recently, SATO was owned by several of the major airlines.

In sum, upon reviewing all of the protesters' bases for challenging the commission-based pricing provisions of this RFP—specifically, that these provisions violate the FAR requirements concerning the acquisition of commercial services, create unreasonable contractor risk, and are unfairly advantageous to the incumbent--we find no basis to conclude that these provisions violate any procurement law or regulation, or are otherwise prohibited. The determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion. Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 2, aff'd, B-250389.2, June 21, 1993, 93-1 CPD ¶ 472. Accordingly, the protesters' challenges to the commission-based pricing provisions of the RFP, which the agency concluded are best suited to satisfy its travel support services needs, are denied.

Carlson and Amex also challenge various other RFP provisions. However, in pursuing these protests both Carlson and Amex have categorically stated that they will not submit proposals in response to this solicitation unless the commission-based pricing provisions are removed. Specifically, Carlson submitted a declaration by its Director of Business Development, stating: "If a government travel services contract is structured as a no cost contract, making the contractor dependent upon commission revenue from the airlines, Carlson Wagonlit Travel will not respond to such a procurement." Carlson's Comments, Sept. 30, 1999, attach. 1, at 12. Similarly, Amex submitted a declaration by its Director of Account Development, stating: "Amex . . . will not submit a proposal for the Navy East RFP, so long as that RFP contains a commission based pricing structure." Amex's Comments, Sept. 30, 1999, attach. B, at 7.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (1994), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1999), a protest may be filed only by an "interested party," defined as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Determining whether a party is sufficiently interested involves consideration of a party's status vis-à-vis the procurement and the nature of the issues protested. Free State Reporting, Inc. et al., B-225531 et al., Jan. 13, 1987, 87-1 CPD ¶ 54 at 2-3.

Here, since Carlson and Amex both stated that they would submit proposals if the commission-based pricing provisions of the solicitation were removed, they are interested parties to challenge those provisions. However, in light of our denial of their protests regarding the pricing provisions--along with Carlson's and Amex's unequivocal statements that they will not participate if the challenged pricing provisions remain in the solicitation--Carlson and Amex are not interested parties to challenge any other terms of the solicitation. 4 C.F.R. § 21.0(a); Loral Fairchild Corp., B-242957, June 24, 1991, 91-1 CPD ¶ 594 at 5-6.

The protests are denied.

Comptroller General
of the United States