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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: EADS North America, Inc.

File: B-291805

Date: March 26, 2003

Brian A. Bannon, Esq., and Wayne A. Keup, Esq., Blank Rome, for the protester.
Rand L. Allen, Esq., Paul F. Khoury, Esq., Scott M. McCaleb, Esq., and David B. Walker, Esq., Wiley Rein & Fielding, for the Boeing Company, an intervenor.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Statutory provision precluding use of appropriated funds to lease aircraft "under any contract entered into under any procurement procedures other than pursuant to" the Competition in Contracting Act of 1984 (CICA) did not preclude agency from awarding a lease on a sole-source basis; although CICA generally mandates use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (2000), it also specifically provides that "other than competitive procedures" may be used under certain limited circumstances, including where, as here, the agency determines that the agency's need can be met by only one responsible source. 10 U.S.C. § 2304(c)(1).

DECISION

EADS North America, Inc., on behalf of itself and its affiliate Airbus North America, Inc., protests the Department of the Air Force's actions under contract No. F33657-02-C-0017, for C-40 series special mission aircraft. EADS asserts that the Air Force is required by recent statutory changes to terminate its order for two C-40 aircraft already ordered under the contract and to compete that requirement, and also to compete any future orders for C-40 aircraft that obligate Fiscal Year 2003 funds.

We dismiss the protest because EADS lacks the requisite interest to challenge the agency's actions.

Section 8159 of the Department of Defense (DOD) Appropriations Act for Fiscal Year 2002 provided as follows:

> The Secretary of the Air Force may, from funds provided in this Act or any future appropriations Act, establish and make payments on a multi-year pilot program for leasing general purpose Boeing 767 aircraft and Boeing 737 aircraft in commercial configuration.

Defense Appropriations Act for Fiscal Year 2002, Pub. L. No. 107-117, § 8159(a), 115 Stat. 2230, 2284 (2002). On March 15, 2002, the Air Force synopsized its intent to award under section 8159 a sole-source contract to the Boeing Company for the lease of, and maintenance support for, "four commercial Boeing 737 special mission aircraft (C-40B/C)," on the basis that "[t]he Boeing Company is the manufacturer of the C-40B and C-40C special mission aircraft and the only contractor that has demonstrated the expertise and working knowledge necessary to provide these aircraft." Federal Business Opportunities (FedBizOpps), Mar. 15, 2002. The synopsis stated that "any capable and qualified offeror that has the ability and capacity to supply C-40 aircraft and meet the required delivery schedule is invited to respond to this notice documenting these qualifications not later than 1 Apr[il] [20]02." Id.

EADS previously had responded to a request for information concerning the agency's requirement for Boeing 767 tanker aircraft, generally advising that the "Airbus A320 transport aircraft family configurations compete directly with the Boeing 737 family." EADS Response to Feb. 20, 2002 Request For Information, Mar. 6, 2002, § 1.3.5. However, EADS did not respond to the March 15 synopsis by documenting its qualifications. Air Force Motion to Dismiss, Jan. 10, 2003, at 2; EADS Comments, Jan. 22, 2003, at 4. Subsequently, according to EADS, during a telephone conversation on or about May 15, and again during a June 12 meeting, the Air Force advised EADS that it would not consider EADS for award of a lease of C-40 aircraft. Protest at 2. On June 5, the Assistant Secretary of the Air Force for Acquisition executed a justification and approval (J&A) for award of a contract to Boeing on a sole-source basis for up to four Boeing 737 (C-40) aircraft; the J&A justified use of noncompetitive procedures on the basis that Boeing was the only source capable of furnishing the aircraft and services. On September 17, the agency awarded a contract to Boeing, for the lease of two C-40 aircraft, with options for two additional aircraft.

On October 23, the DOD Appropriations Act for Fiscal Year 2003 was enacted. Section 8147 of that Act provides that: "None of the funds appropriated by this Act may be used for leasing of transport/VIP aircraft under any contract entered into under any procurement procedures other than pursuant to the Competition [in] Contracting Act." Pub. L. No. 107-248, § 8147, 116 Stat. 1519, 1572 (2002). Following enactment of this provision, EADS requested that the Air Force provide EADS with an opportunity to compete for the C-40 aircraft requirement, on the basis that the lease contract had not been awarded after full and open competition, as it alleged was required by section 8147. The Air Force (by letter of December 11) responded that it had met the relevant statutory requirements and therefore would not conduct a competition. EADS thereupon filed this protest with our Office on December 23.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2000) (CICA), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a) (2003). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2.

EADS concedes that, as the manufacturer of Airbus aircraft, it has no interest in leasing Boeing aircraft to the Air Force, but it asserts that neither section 8159 nor the March 15 synopsis of the proposed sole-source award is limited to award of a lease for Boeing 737 aircraft. EADS Comments, Jan. 22, 2003, at 3. This argument is without merit. Section 8159 expressly authorizes the lease of "Boeing 737 aircraft in commercial configuration." Pub. L. No. 107-117, § 8159(a), 115 Stat. 2230, 2284. More importantly, the synopsis of the proposed sole-source award to Boeing described the aircraft in question as "four commercial Boeing 737 special mission aircraft (C-40B/C)," and recited as the justification for use of noncompetitive procedures the fact that "[t]he Boeing Company is the manufacturer of the C-40B and C-40C special mission aircraft." FedBizOpps, Mar. 15, 2002. These provisions unequivocally called for the leasing of Boeing aircraft, leaving no room for consideration of Airbus aircraft.

Since EADS is not interested in furnishing the Boeing aircraft--that is, Boeing 737 aircraft in a C-40 configuration–called for under this procurement, it is not an interested party to question the sole-source lease awarded to Boeing for these aircraft.

In any case, we find that EADS's protest is without merit. EADS's argument is that the agency's obligating Fiscal Year 2003 funds for the Boeing lease contract violates section 8147 because that contract was not entered into on the basis of full and open competition, which it believes section 8147 mandates. We do not agree with EADS's reading of the statutory requirement.

As noted by the agency, by its plain terms, section 8147 provides that none of the funds appropriated by the Act may be used for leasing of transport/VIP aircraft "under any contract entered into under any procurement procedures other than pursuant to the Competition [in] Contracting Act." Pub. L. No. 107-248, § 8147, 116 Stat. 1519, 1572. Although CICA, to which the section apparently refers, generally mandates that an agency obtain full and open competition through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (2000), it also provides that an agency "may use procedures other than competitive procedures" under certain limited circumstances. 10 U.S.C. § 2304(c). These circumstances include where the property and services needed by the agency are available from only one responsible source. 10 U.S.C. § 2304(c)(1). As noted, the Air Force's J&A justified the

sole-source award to Boeing on this very basis--that only Boeing could furnish the property and services needed by the agency. Since section 8147 required only that the transport/VIP aircraft lease in issue here be entered into pursuant to CICA--making no mention of the use of competitive versus noncompetitive procedures--and the agency conducted the procurement under the provisions of CICA authorizing the use of noncompetitive procedures, the agency's actions were consistent with section 8147.

In arguing that section 8147 required the use of full and open competition, EADS notes that the author of section 8147 stated during the Senate's consideration of the DOD fiscal year 2003 appropriations bill that this provision "calls for full and open competition in the case of a lease of a transport/VIP aircraft." 148 Cong. Rec. S7709 (July 31, 2002) (Statement of Sen. McCain). According to Senator McCain:

> This legislative provision would prohibit spending $30.6 million for leasing of Boeing 737 VIP Executive aircraft under any contract entered into under any procurement procedures other than pursuant to the Competition [in] Contracting Act which promotes full and open competition procedures in conducting a procurement for property or services. I believe this amendment would ensure full and open competition with respect to Boeing 737 VIP Executive aircraft. Although last year's DOD Appropriations bill specified 4 Boeing 737 aircraft, it did not authorize the lease solely from the Boeing Company. Yet the Air Force only negotiated a sole source contract totaling nearly $400 million with the Boeing Company, seemingly in direct violation of this statutory language if they disburse funds for this VIP Executive aircraft lease without a fair and open competition.

148 Cong. Rec. S10520 (Oct. 16, 2002) (Statement of Sen. McCain).

As our Office recently noted, we generally hold to the view that, in matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of the Congress. If it does, the matter ends there, for the unambiguous expressed intent of the Congress must be given effect. Resource Consultants, Inc., B-290163, B-290163.2, June 7, 2002, 2002 CPD ¶ 94 at 5-6; see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). While views expressed in a statute's legislative history may sometimes be relevant in statutory interpretation, those views are not a substitute for the statute itself where the meaning of the statute appears plain on its face. AAA Eng'g and Drafting, Inc., et al., B-225605, May 7, 1987, 87-1 CPD ¶ 488 at 5.

Since section 8147, by its plain terms, only requires compliance with CICA, and does not provide that competitive procedures must be used for the Boeing transport/VIP aircraft procurement, we find no basis for reading such a requirement into the provision. Accordingly, EADS's protest furnishes no basis for us to challenge the

agency's actions with respect to the C-40/Boeing 737 lease contract awarded to Boeing.

The protest is dismissed.

Anthony H. Gamboa
General Counsel