



April 5, 2021

BY EMAIL AND CERTIFIED MAIL

LATHAM & WATKINS LLP
Dean W. Baxtresser
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Washington, DC 20004-1304
Email: Dean.Baxtresser@lw.com

Re: Supplier Disagreement Resolution No. SDR-21-TR-005

Dear Mr. Baxtresser:

This letter responds to your business disagreement dated March 4, 2021, submitted on behalf of American Airlines Inc. ("American") to the Supplier Disagreement Resolution Official (the "SDRO") concerning the noncompetitive award of a Commercial Air contract to Southwest Airlines ("Southwest"). I find that the February 12, 2021 initial disagreement lodged with the contracting officer was a "disagreement[] that concern[ed] the award of a contract." 39 C.F.R. § 601.107(b). I deny the March 4, 2021 disagreement because the February 12, 2021 initial disagreement was not lodged with the contracting officer "within 10 days of the date the supplier received notification of award," as required by 39 C.F.R. § 601.107(b).

Background

In 2017, the Postal Service competitively awarded multiple-award, indefinite-quantity contracts for Commercial Air ("CAIR") transportation services for domestic mail to six airlines, including American. See November 30, 2020 Disagreement, p.1. In 2020, the Postal Service noncompetitively awarded an indefinite-quantity CAIR contract to Southwest. The Postal Service followed its internal processes in making the noncompetitive award to Southwest.

On November 30, 2020, American lodged an initial disagreement with the contracting officer concerning the noncompetitive award to Southwest and requested that the Postal Service "treat this letter as a protest of that apparent non-competitive procurement and contract award." American claimed that it learned that Southwest was transporting mail for the Postal Service on November 20, 2020. See November 30, 2020 Disagreement, p.2. On January 7, 2021, American withdrew its November 30, 2020 initial disagreement to the contracting officer. See February 12, 2021 Disagreement, p.1.

On February 12, 2021, American lodged another initial disagreement with the contracting officer requesting that the Postal Service "treat this letter as a protest of USPS's non-competitive award to Southwest." See February 12, 2021 Disagreement, p.3. On February 22, 2021, the contracting officer denied the February 12, 2021 initial disagreement deciding, in part, that, "Having voluntarily withdrawn its November 30, 2020 disagreement on January 7, 2021, any disagreement concerning the award of a CAIR contract to Southwest would now be untimely." See March 4, 2021 Disagreement, Ex. C.

Discussion

In the March 4, 2021 disagreement, American argued that its “dispute has always been centered on USPS’s noncompetitive award of a sole-source contract to Southwest[.]”¹ It argued that its February 12, 2021 disagreement to the contracting officer was timely because it “objected **within ten days of learning that USPS’s award of the noncompetitive contract to Southwest would adversely affect American**, contrary to USPS’s express representations in settlement negotiations.” (emphasis added). See March 4, 2021 Disagreement, p.2. However, “disagreements that concern the award of a contract” must be lodged with the responsible contracting officer “**within 10 days of the date the supplier received notification of award.**” 39 C.F.R. § 601.107(b) (emphasis added).

In its withdrawn November 30, 2020 initial disagreement to the contracting officer, American claimed that it learned that Southwest was transporting mail for the Postal Service on November 20, 2020. On the issue of the timeliness of the November 30, 2020 initial disagreement, American expressly argued that:

American’s protest is timely under SPP § 7-4.2 because it is filed as soon as American knew of the potentially improper contracting activity with Southwest. As explained above, American first learned of Southwest’s potential involvement with USPS on November 20, 2020. This letter is being filed within ten (10) calendar days of that date.

See November 30, 2020 Disagreement, p.1. By its own admission, American’s February 12, 2021 initial disagreement was not lodged with the contracting officer “within 10 days of the date the supplier received notification of award,” as required by 39 C.F.R. § 601.107(b).

American argued that the basis for its February 12, 2021 initial disagreement emerged when it discovered that the Postal Service was “using Southwest instead of American for the transport of domestic mail by air – even though American ... presently offers and provides the same service – on the same routes serviced by Southwest – at a lower price.”² See March 4, 2021 Disagreement, p.3. However, that bears no relationship to when “the supplier received notification of award” as set forth in 39 C.F.R. § 601.107(b).

¹ American argued that the Postal Service was statutorily barred from noncompetitively awarding Southwest the CAIR contract. It quoted 39 U.S.C. § 5402(e)(1), which states, “The Postal Service may determine rates and contract with any air carrier for the transportation of mail by aircraft in interstate air transportation **either through negotiations or competitive bidding.**” (emphasis added). See March 4, 2021 Disagreement, p.6. However, on its face, the statute does not bar the noncompetitive award of an air transportation contract.

² I have reviewed the written settlement communication sent by the Postal Service to American on December 16, 2020, which stated, in part, “**Aside from the contract minimum, representing the minimal volume of mail necessary to enable the Postal Service to evaluate Southwest’s performance and enable Southwest to implement scanning**, the Postal Service will allocate mail among carriers in the same manner as under the 2017 CAIR contracts, *i.e.*, to obtain the best price while taking into consideration performance deficiencies.” (emphasis added). See March 4, 2021 Disagreement, Ex. C. In light of the caveat concerning the contract minimum, incurring a higher price to tender mail to Southwest is not inconsistent with the aforementioned statement.

SDRO Decision

I have reviewed the matter and conclude that American's February 12, 2021 initial disagreement was a "disagreement[] that concern[ed] the award of a contract" and that it was not lodged with the contracting officer "within 10 days of the date the supplier received notification of award," as required by 39 C.F.R. § 601.107(b). Therefore, it is my decision to deny American's March 4, 2021 business disagreement. In accordance with 39 C.F.R. § 601.108(g), this is my final and binding resolution of this matter.

Sincerely,

Nicholas Faiola
Supplier Disagreement Resolution Official
Manager, Supply Management Infrastructure

cc: Robert Kuchera, Contracting Officer