COSTTREND CONSULTING, INC.

Federally Funded Travel and Fly America Act: Best Practices and Common Exemptions

Government Contracts Update

Volume 3, October 2014

10/03/2014

Introduction

The Federal government spends billions of dollars annually procuring supplies and services from Government contractors. The Government has enacted rules and regulations to provide guidance on how Government contracts will be executed and how Federal funds will be spent. There are laws and regulations that decree that Agencies or Government contractors shall give preference to US companies over foreign companies while spending Federal funds on supplies or travel. This paper will briefly discuss the Fly America Act.

Fly America Act and Federal Regulations

The Fly American Act (49 U.S.C. 40118) was passed by Congress and has subsequently been incorporated into the Federal Travel Regulation (FTR). The Federal Acquisition Regulation (FAR) Subpart 47.405 discusses the implementation of the Fly America Act. The clause FAR 52.247-63 Preference for U.S-Flag Air Carriers (June 2003) is used to incorporate Fly America into Government contracts. The Fly America Act does not state that government employees or contactors must only select US-carrier airlines, but the intention of the regulation was for Government funded travel to *give preference* to US-carriers over non-US carriers.

Basically what this means is when Government contractors or government employees who are requesting that the Government refund travel costs for Non-US carriers, must provide satisfactory proof of the necessity for foreign-flag air travel via a certification. For Government contractors, without adequate proof of the necessity for foreign-flag air transport, the travel costs will be deemed unallowable.

Best Practices for Government Contractors

Since the Fly America Act has been incorporated into the Joint Travel Regulations (JTR) as well as the FAR, it would be reasonable for Government contractors to expect that Fly America will apply to its cost reimbursable contracts. In order to ensure compliance with the regulation, Government contractors should have an established written travel policy, which adheres to the Fly America requirement. Government contractors should also remember that they must fully comply with their stated travel policy.

If the contractor's travel costs are going to be reimbursed by Federal funds, then the contactor should make *all possible efforts* to travel on a US-carrier airline. As previously mentioned, the Government contractor must submit a certification that it was necessary to use a non-US carrier.

The information required for the certification can be located in §301-10.142 of the FTR and includes:

- Your name;
- The dates that you traveled;
- The origin and the destination of your travel;
- A detailed itinerary of your travel, name of the air carrier and flight number for each leg of the trip; and

- A statement explaining why you met one of the exceptions in §301-10.135, 301-10.136, or 301-10.137 or a copy of your agency's written approval that foreign air carrier service was deemed a matter of necessity in accordance with §301-10.138.

Since a Government contractor may be audited years after the travel expenses are incurred, it is very important that all necessary supporting documentation explaining the facts and circumstances for flying a non-US carrier be retained in accordance with the contractor's records retention policies. The Government contractor may be asked to supply supporting documentation to prove that their original certificate to select a non-US carrier was justifiable.

For example, the contractor may be allowed to select a non-US carrier because a US-carrier would cause an undue delay or the US-carrier was not available. When the contractor is audited years later, the contractor may be asked to prove that "no other US flights" were available. So it is not just about documenting your travel decisions but also the level of documentation you will need to prove your assertions to the US Government. Without both, a contractor's travel costs will be disallowed.

Even though flying on a Non-US carrier may less expensive and more convenient, if a Government contractor does not retain proper supporting documents, the decision to fly non-US carrier may cost the contractor more in the long run. In other words, the contractor may have to spend time and money defending their flying decision during an audit and the non-US carrier travel may ultimately be deemed unallowable.

So as a safeguard against potential future disallowed non-US carrier travel costs by a Government auditor, the contractor should notify the Contracting Officer and obtain prior approval when flying a non-US carrier and incurring travel costs.

Common Exemptions to the Fly America Act and Incorporated Clauses

There are several circumstances where a contractor would be exempt from the Fly America regulations and the selection of a non-US carrier would be justifiable and an allowable expense. The list of exemptions can be found in FAR Subpart 47.403.

Please be aware that these are general rules and each agency may have specific supplemental regulations. For example the "Open Skies" exemptions promulgated by the Department of Transportation and the State Department are not in effect for Department of Defense contracts.

A. International Travel

There are several exemptions for international travel. These rules describe when an US-carrier may be deemed unavailable. If a US-carrier is unavailable, then the travel on a non-US carrier is allowable. The exemptions for international travel are set forth in FAR 47.403-1 (d) and (e). When traveling from a point inside US to a foreign location or vice versa, a US-carrier may be deemed unavailable due to the following reasons.

- An US-carrier may be deemed unavailable if selecting the US-carrier will extend the travelers travel time by 24 hours.
- A US-carrier may be deemed unavailable if selecting a US-carrier will cause the traveler to have a 6 hour layover at an airport.

When the traveler is to travel between two foreign locations, a US-carrier may be deemed unreasonable for the following reasons:

- A US-carrier may be unreasonable if selecting non-US carrier would eliminate two or more aircraft changes for the travel route.
- A US-carrier may be unreasonable if selecting a US-carrier would extend the travel time by 6 hours.

B. Matter of Necessity

The FTR describes instances where taking a non-US carrier is necessary. These instances can be located in §301-10.138. Per the FTR is may be necessary to take a non-US carrier if a US carrier cannot provide the transportation needed or taking a US-carrier will not accomplish the agency's mission. The FTR also states that it may be necessary to take a non-US carrier for medical reasons or to avoid unreasonable risks. Finally, it may be necessary to take a non-US carrier if a certain type of ticket is not available on a US-carrier. For example it may be necessary to select a non-US carrier, if a US-carrier only has first class seats available.

C. Open Skies Bilateral Treaties-Impact on International Travel

The US has bilateral and multilateral trade agreements with the EU, Australia, Switzerland and Japan to promote international air travel and mutual commercial interests. These agreements are referred to as "Open Skies" agreements. These agreements generally allow for a contractor to select a non-US carrier (from the country with an Open Skies agreement) if the flight's destination or origin is in the cooperating country or if both points of the trip are outside of the US.

D. Code Sharing

Code Sharing is a term for when two airlines are selling tickets and operating the same flight. This is a standard industry practice, but it could cause issues for contractors engaging in Government funded travel. If a plane is being operated by an US-carrier and a non-US carrier (a jointly operated flight), does it meet the requirements for Fly America? Yes, but only if the US-carrier's flight number is listed on the actual ticket and receipt of the traveler (§301-10.134).

Applicability of Fly America

Contracting Officers are instructed to insert FAR clause 52.247-63 Preference for U.S-Flag Air Carriers (June 2003) into solicitations and contracts whenever it is possible that the US Government will be funding international travel.

FAR 52.27-63 does not apply to contracts:

- Awarded with the simplified acquisition procedures.
- Awarded under Commercial Items acquisitions.
- When travel is being funded by another source than the US Government.

However, Government contractors should be aware that FAR 52.247-63 may be flown down from prime contractors to subcontractors.

Conclusion

A contractor needs to determine which Federal rules and regulations are applicable to each solicitation and Federal award. It is also important for contractors to review any changes to Federal regulations so that they can assess the potential impact on their current Federal awards and ensure that their travel policies and procedures are in compliance with new regulations for future awards. Any changes in travel requirements must be disseminated throughout the organization or company.

In order to ensure compliance, the programs department as well as administrative departments must know which rules and regulations are applicable for each project/order/contract. In the current business climate, compliance with Federal regulations will be a point of emphasis for contractors and Federal regulators. As such, contractors should invest time and money to properly train their staff to identify, address, and resolve potential non-compliance travel issues before they become overbilling or disallowance concerns.

We hope this Government Contracts Update provides useful information on the Fly America Act. If you have any comments of questions please contact the CostTrend at 703.657.0270 or info@costtrend.com.