

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

October 3, 1983

Honorable Thomas R. Perkins
15 Main Street
Blue Hill, Maine 04614

Dear Senator Perkins:

This will respond to your letter of September 9, 1983, in which you request this Office to investigate the State's recent purchase of an executive aircraft "to determine if any statutes and/or the bidding procedures have been violated." This Department has now completed the investigation you have requested, and, for the reasons explained below, concludes that there has been no illegality in connection with this matter.

FACTUAL BACKGROUND

By virtue of Part E, subpart 14 of Chapter 477 of the Public Laws of 1983, the Legislature authorized the Department of Transportation "to purchase an executive aircraft at a cost not to exceed \$600,000."^{1/} Chapter 477 was approved by the Governor on June 23, 1983.

On June 30, 1983, the Department of Transportation submitted specifications to the State Purchasing Agent in order to begin the bidding process for the purchase of the aircraft authorized by the Legislature.^{2/} The specifications, as

^{1/} The purchase of the aircraft is to be accomplished by funds advanced by the Motor Transport Service and then repaid, over a period of years, from the General Fund.

^{2/} It is our understanding that the original specifications were prepared by the Division of Aeronautics within the Department of Transportation.

submitted to the State Purchasing Agent, called for the purchase of "[o]ne 1983 Piper Chieftain PA-31-350" aircraft. We have been informed by George Campbell, Commissioner of the Department of Transportation that it was his original intention to purchase a new, i.e., an unused, aircraft. We have also been informed by the Commissioner that it was his desire to purchase the aircraft only from an authorized Piper dealer and, in fact, a list of six such dealers was submitted to Stuart Sabeau, State Purchasing Agent. The Commissioner has explained that his reasons for wishing to purchase the aircraft from an authorized dealer were the superior service capability available from such a vendor and the warranty that could be offered.

The State Purchasing Agent, however, refused to approve the specifications as limited to authorized Piper dealers because, in his view, such a limitation would exclude other aircraft vendors in the State who sell Piper planes, but who are not authorized dealers. Both the Commissioner and the State Purchasing Agent were aware that Central Maine Flying Service of Old Town is the only authorized Piper dealer in the State. The State Purchasing Agent did indicate, however, that the service capability of all vendors and the warranties offered would be more appropriately addressed as factors after the bids were opened and before the final decision had been made, and this was stated in the specifications. Moreover, the State Purchasing Agent, following the customary practice of his agency, altered the specifications to call for "[o]ne 1983/1984 Piper Chieftain PA-31-350 or equivalent aircraft with the following specifications."^{3/}

On July 29, 1983, the State Purchasing Agent sent requests for bids for the executive aircraft to eight vendors on a registry of responsible suppliers. 5 M.R.S.A. § 1816(4). The form sent to each vendor requested bids on the following:

AIRCRAFT: 1983/1984 Piper Chieftain,
PA-31-350 or approved equal. Aircraft
specifications are attached and made a part
of this bid.

The bid request also specified that the bid was to include a trade-in of the State's existing plane, and it also noted that the award would be based on the price plus the warranty period and maintenance service. At the bottom of the bid request

^{3/} The specifications consist of approximately four pages of detailed descriptions.

form, and appearing in boldface type, the vendors were directed to "SEE REVERSE SIDE FOR CONDITIONS AND INSTRUCTIONS TO BIDDERS."

On the reverse side of the bid request is a list of 23 conditions and instructions to bidders, the first of which reads, in pertinent part, as follows:

Whenever, in bid forms and specifications, an article or material is defined by using a trade name and catalog number of a manufacturer or vendor, the term 'or approved equal,' if not inserted therewith, shall be implied. Any reference to a particular manufacturer's product either by trade name or by limited description has been made solely for the purpose of more clearly indicating the minimum standard of quality desired. The term 'or approved equal' is defined as meaning any other make which in the opinion of the State Purchasing Agent is of such character, quality and performance equivalence as to serve the purpose for which it is to be used equally as well as that specified. Consideration will be given to proposals submitted on alternate commodities, to the extent that such action is deemed to serve the best interest of the State.

Attached to the bid request was the four-page list of specifications. On the last page of that list appeared the following note:

"Bids may be submitted with alternate or additional optional equipment. All bids will be evaluated by the Department [of Transportation]. Bids will be awarded only to vendors with the capability of long term warranty and maintenance service."

We have been informed by the Commissioner of Transportation that after the bid requests had been sent to the eight vendors, but prior to the public opening of the bids, he received a telephone call from Mr. Ernest Caliando, owner of Central Maine Flying Service. According to the Commissioner, Mr. Caliando was upset because the specifications for the executive aircraft

were not limited to authorized Piper dealers.^{4/} The Commissioner also recalls that Mr. Caliendo remarked that he might submit a bid for a used plane. The Commissioner responded that the specifications were approved and issued by the State Purchasing Agent and that Mr. Caliendo was free to submit any bid he chose to.

Although bid requests were sent to eight vendors, only five submitted bids. Central Maine Flying Service of Old Town, submitted five bids, while Telford Aviation of Waterville, Northeast Airmotive Co. of Portland, Wiggins Airways of Norwood, Massachusetts and the Airplane Store of North Hampton, Massachusetts each submitted one bid. Central Maine Flying Service was the only vendor to submit more than one bid, and it was the only vendor to submit bids for something other than a 1983-1984 aircraft. In particular, the first two bids submitted by Central Maine Flying Service offered the State a used 1981 Piper Chieftain aircraft; the third and fourth bids were for a 1983 aircraft, and the fifth bid was for a 1984 aircraft.

All of the bids were publicly opened at the Bureau of Purchases at 10:45 a.m. on August 16, 1983. In a memo dated August 18, 1983 to Robert Nason, Director of the Division of Financial Analysis of the Department of Transportation, the State Purchasing Agent indicated that he had reviewed the bids submitted for the executive aircraft and "would suggest the purchase of 'alternate' Bid No. 2 from Central Maine Flying Service of Old Town, Maine for \$315,187."^{5/} He also

^{4/} Mr. Caliendo has confirmed that this conversation occurred. He has also informed us that the basis of his disappointment with the bid specifications was his belief that they placed him in a competitive disadvantage since, as an authorized Piper dealer, he must deal through Piper Sales East as his sole distributor of Piper aircraft. Other vendors who are not authorized Piper dealers are apparently free to purchase Piper aircraft from any available distributor. Mr. Caliendo has also informed us that his disappointment with the bid package was aggravated by the fact that when the Division of Aeronautics was preparing the specifications for the purchase of the executive aircraft, the State's Chief Executive Pilot was assisted by Central Maine Flying Service since it possessed the most current literature on Piper aircraft.

^{5/} Central Maine Flying Service's second alternate bid was for a 1981 Piper Chieftain. The price of this aircraft was quoted as \$416,944. With a trade-in allowance of \$101,757, the net cost to the State was \$315,187. This bid included six-months free labor and a 90-day factory warranty on parts.

stated that it was his view that "saving \$83,603 appears to me to be in the best interest of the State of Maine by accepting this alternate bid." Finally, he stated that if this bid was not acceptable to the Department of Transportation, he would recommend the next low bid of \$398,790 from Telford Aviation since that "would appear to be the best buy in line with our specifications."6/

After receiving a copy of this memo, the Commissioner of Transportation was contacted by Robert Johnson, Acting Director of the Division of Aeronautics who indicated that he was unsure that the 1981 aircraft was the best selection and that he would like an opportunity to present the recommendations of his staff on the matter. The Commissioner agreed and informed the State Purchasing Agent that he would appreciate some additional time to consider the available choices.

In a memo dated August 19, 1983 to the Commissioner of Transportation the Acting Director of Aeronautics and Graydon Sharpe, Chief Executive Pilot for the State, presented their views regarding the purchase of the executive aircraft. Briefly summarized, their choice was "clearly" the 1983 Piper Chieftain offered by Telford Aviation, since it was new and therefore had not been used by others and it had a "most satisfactory" payload. Moreover, they were of the view that the net price for this aircraft was quite reasonable given the plane's current book value.

These individuals also expressed their views regarding alternate bid No. 2 submitted by Central Maine Flying Service. While they acknowledged that the 1981 Piper Chieftain should "certainly be a significant improvement over our existing aircraft," they were concerned that it had already accumulated 731 hours of use, and might require replacement of the engines in approximately two years. They estimated the cost of these and other necessary repairs and replacements to be over \$80,000. Finally, they considered the price of the 1981 aircraft to be "excessive when compared to [its] current blue book value. . . ," and referred the Commissioner to a recent publication in which similar planes were being offered for sale

6/ The bid submitted by Telford Aviation was for a 1983 Piper Chieftain. The price of this aircraft was quoted as \$489,750. With a trade-in allowance of \$90,960, the net cost to the State was \$398,790. This bid included a six-month warranty on the airframe, a six-month warranty on the engines to be pro-rated up to 1600 hours and a one-year warranty on radios.

for prices ranging from \$220,000 to \$286,000.^{7/}

Both the Commissioner of Transportation and the State Purchasing Agent have informed us that after the public opening of the bids, they received telephone calls from representatives of Northeast Airmotive and Telford Aviation. Both companies apparently complained to both state officials that they considered the bid for a used 1981 aircraft to be improper under the specifications. The Commissioner responded that this was an issue to be decided by the State Purchasing Agent and the latter official informed both companies that the specifications and State law provide that all vendors may submit, and the State may consider, alternate bids. Northeast Airmotive and Telford Aviation also complained that the price of the 1981 Piper aircraft offered by their competitor was well over book value and that the engines would need replacement in the foreseeable future. The Commissioner responded that he had received similar information from members of his staff. The Commissioner has also advised us that he received a telephone call from Mr. Caliendo of Central Maine Flying Service who insisted that the bid for a 1981 aircraft was proper and that his competitors' statements regarding the book value of the plane and any engine replacement costs were not accurate.

On August 24, 1983, the Commissioner of Transportation sent a memo to the State Purchasing Agent accepting his recommendation by informing him that "I have decided to recommend that the Bureau of Purchases sign an agreement for the plane under alternate bid No. 2 from Central Maine Flying Service of Old Town for \$315,187." In his memo, the Commissioner explained the reasons for his recommendation and specifically addressed some of the concerns raised by the Acting Director of the Division of Aeronautics as follows:

I realize there is some concern about book value; however, that book value is irrelevant since we intend to own the plane for its entire useful life. The concern about replacing engines in its worst case would be equal to the extra cost today and, frankly, the State of Maine needs the money.

^{7/} The publication referred to above did not describe what, if any, optional equipment was included on the planes being advertised for sale. It is our understanding that the 1981 Piper Chieftain offered by Central Maine Flying Service as its second alternate bid included approximately \$20,000 worth of optional equipment.

now (especially in Motor Transport Service from which the money has been appropriated). It has been suggested by the vendor that the engines may simply need to be overhauled in any event in 1600 hours, which would cost significantly less than that price suggested in Mr. Johnson's memo of August 19.

My final point of consideration was the warranty period which is the same on either the new or used aircraft.

On balance, the State is upgrading its executive aircraft for at least the next decade at the lowest cost currently offered by any of the bids.

On August 24, 1983, the State Purchasing Agent signed a purchase order for the 1981 Piper Chieftain aircraft from Central Maine Flying Service for \$315,187.

On August 26, 1983, Mr. Telford Allen, owner of Telford Aviation, and his attorney met with the State Purchasing Agent, the Commissioner of the Department of Transportation, the Chief Legal Advisor to the Department of Transportation, and an Assistant Attorney General, regarding the purchase of the executive aircraft. Mr. Allen, and his attorney, complained that the specifications for the purchase of the plane were misleading because it was unclear that bids for a used aircraft could be submitted. After reviewing the specifications and the applicable law, the Assistant Attorney General concluded that the State Purchasing Agent acted within his legal authority in accepting an alternate bid.

As noted earlier, the Commissioner of the Department of Transportation expected to purchase an unused aircraft. The Commissioner has informed us that throughout the bidding process he continued to have this expectation until he determined that the State's interests could be equally well served by the purchase of a used plane at a substantially lower price. Moreover, both the Commissioner and the State Purchasing Agent have advised us that it was their understanding that the final decision regarding the purchase of the executive aircraft authorized by the Legislature would be made by the State Purchasing Agent. Finally, it should be noted that the aircraft selected by the State Purchasing Agent, with the concurrence of the Commissioner of Transportation, meets all of the specifications called for in the four-page bid request package.

CONCLUSIONS

You have asked this Department to determine whether "any statutes and/or the bidding procedures have been violated" in connection with the purchase of the State's executive aircraft. After reviewing both the facts as outlined above and the applicable law, we can find no basis to conclude that any statute or procedure governing the competitive bidding of State purchases has been violated.

5 M.R.S.A. § 1816(1) mandates that, except as otherwise provided by law, "the State Purchasing Agent shall make purchases of services, supplies, materials and equipment needed by the State or any department or agency thereof by competitive bidding." The term "competitive bidding" is defined by law to mean "the transmission of a written or oral proposal or invitation to bid to at least 3 responsible suppliers to be replied to at a stated time." 5 M.R.S.A. § 1816(3).. 5 M.R.S.A. § 1819 makes it unlawful for any department or agency of State Government to make purchases, which are governed by the competitive bidding law, without acting through the State Purchasing Agent. There can be no question that these requirements of the law were faithfully complied with in connection with the purchase of the aircraft in question.

In view of the foregoing, the only issue which merits analysis as to the legality of this purchase is whether the selection of a used 1981 aircraft was permissible notwithstanding the fact that the specifications called for a "1983/1984 Piper Chieftain. . . or approved equal." This Department concludes that the selection of this aircraft was legally permissible.

As previously mentioned, all of the vendors who submitted bids for the purchase of the executive aircraft received the same bid request forms and specifications. All were directed to read the instructions and conditions on the reverse side of the bid request form. All were clearly informed that consideration would be given to bids on alternate commodities "to the extent that such action is deemed to serve the best interest of the State." This language is a direct quotation from 5 M.R.S.A. § 1816(5) which provides, in pertinent part:

Whenever, in bid forms and specifications, an article or material is defined by using a trade name and catalog number of a manufacturer or vendor, the term 'or approved equal,' if not inserted

therewith, shall be implied. It is to be understood that any reference to a particular manufacturer's product either by trade name or by limited description has been made solely for the purpose of more clearly indicating the minimum standard of quality desired. The term 'or approved equal' is defined as meaning any other make which in the opinion of the State Purchasing Agent is of such character, quality and performance equivalence as to serve the purpose for which it is to be used equally as well as that specified. Consideration will be given to proposals submitted on alternate commodities to the extent that such action is deemed to serve the best interest of the State.

(emphasis supplied).

The rationale for this statutory authority to consider alternate bids is, in our view, self-evident: the State is not bound to accept a bid merely because it meets the specifications when another proposal, in the judgment of the State Purchasing Agent, better serves the State's interests.

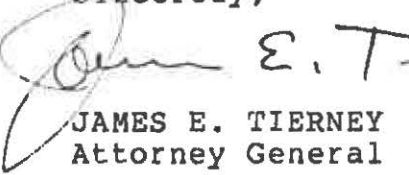

It is apparent, then, that all of the vendors who received invitations to bid on the executive aircraft were instructed that alternate bids could be submitted and that such bids would receive consideration. Obviously, only one vendor chose to take advantage of that prerogative. The other vendors each submitted a single bid, either as the result of choice or ignorance. In fact, we have been informed by Mr. Allen of Telford Aviation that he has bid on numerous State purchases and has, on occasion, submitted alternate proposals. In any event, based upon the available evidence, it is the conclusion of this Department that the selection of the alternate bid submitted by Central Maine Flying Service did not constitute a violation of any statute or bidding procedure, but, on the contrary, was entirely consistent with State law.^{8/}

^{8/} It should be emphasized that this Department intimates no opinion as to whether the selection of alternate bid No. 2 from Central Maine Flying Service does, in fact, "serve the best interest of the State." The Legislature has committed that determination to the State Purchasing Agent.

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I hope this information is helpful to you, and please feel free to call upon me if I can be of further assistance.

Sincerely,

 E.T. 

JAMES E. TIERNEY
Attorney General

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