Federal Aviation Administration

Memorandum

Date: AUG 1 1 2011

To: Michael Mills, Aviation Safety Inspector, DFW FSDO

Cc: David Donnell, Acting Regional Counsel, ASW-7
Gregory Lander, Esq., Staff Attorney, ASW-7

From: Rebecca B. MacPherson, Assistant Chief Counsel, AGC-200

Prepared by: Robert H. Frenzel, Manager, Operations Law Branch, AGC-220

Subject: Request for Legal Interpretation Regarding Part 125 Operations

You forwarded a request through the Southwest Region regarding an inquiry from Paramount Jet, LLC ("Paramount"), holder of an air operator certificate authorizing operations under 14 C.F.R. part 125. Paramount is asking whether part 125 operators may enter into contracts for the transportation of cargo and other goods with the United States government or with other foreign governments and secondly, whether a lease of a Lockheed C-130 aircraft from an agency of the U.S. government to perform all or a part of that service is permissible under the regulations. You also included a question about "public aircraft" in relation to the proposed operations with the C-130.

As provided in its Operations Specification ("OpSpec") A001, effective 11/10/2010, Paramount:

> is authorized to conduct flight operations in non-common carriage and private carriage pursuant to Title 14 Code of Federal Regulations (CFR) Section 119.23(a) – Part 125, and provided the certificate holder does not engage in common carriage. In addition, the certificate holder may not conduct operations carrying people or property for compensation or hire, where such operations result directly or indirectly from any person's holding out to the public to furnish transportation (i.e., common carriage).

The limitations in OpSpec A001 prevent a part 125 certificate holder from operating as a common carrier. Non-common carriage and private carriage for hire involve the carriage of persons or property that does not involve a holding out. An operator involved in private carriage is often called a "contract carrier." However, that term is not defined under the regulations. Private carriage for hire is carriage for one or several selected customers, normally on a long-term basis. Typically, the customer seeks out an operator to perform a desired service and enters into an exclusive, mutual agreement rather than the operator seeking customers. The key fact is whether there are so many contracts that a willingness to contract with anyone is implied.

While the specific number of contracts that would constitute common carriage is not exact, the DOT has stated that: "The Enforcement Office would likely investigate for unlawful common carriage any situation where the number of different customers whose trips the Part 125 carrier bid on, or with whom the Part 125 carrier contracted through the charter manager, exceeded three." *See,* 2004 Department of Transportation Order, *The Role of Air Charter Brokers in Arranging Air Transportation. See also, generally*, Legal Interpretation 1990-15, Letter to William A. Dempsay from Donald P. Byrne, Acting Assistant Chief Counsel for Regulations (Jun. 5, 1990), where the FAA stated, "Private carriage ordinarily entails a highly specialized type of carriage. In regard to your proposed operations, transporting fish cargo in the State of Alaska for one company or a particular few companies appears to be a specialized type of carriage. The same is true for shipment of automobile parts for one company or a particular few companies. However, you propose to do *both*. As has been already noted above, a carrier's operation under contracts for customers entirely unrelated to each other indicates a holding out to the general public."

Advisory Circular 120-12A provides guidelines for determining when activities rise to the level of common carriage. An operator may be deemed to be a common carrier when it:

> holds itself out to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it. Absence of tariff or rate schedules, transportation only pursuant to separately negotiated contracts, or occasional refusals to transport, are not conclusive proof that the carrier is not a common carrier. There are four elements in defining a common carrier: (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation. This "holding out" which makes a person a common carrier can be done in many ways and it does not matter how it is done. (AC-120-12A)

Advertising is often the most direct means of holding out, but not the only means. A holding out can be accomplished through an agent or salespersons. A carrier may also have a reputation of serving whoever makes contact with them. The nature and the character of the operation is the determining factor. *See*, Letter to Michael Goldman from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, (Jun. 14, 2006), for an in-depth analysis and comparison of "commercial operations" and "operations not involving common carriage."

Consequently, so long as Paramount is not holding itself out to the public generally, the contracts with governmental entities are not as the result of a direct or indirect holding out to provide services and the total number of contracts is limited, such services may be viewed to be non-common carriage or private carriage. However, as noted above, the final determination would be based on the nature and character of the operations involved, which would depend on the particular facts in each case. *See,* Legal Interpretation Re: LODA memo from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Dec. 2, 2010). *See also*, Legal Interpretation to Howard Turner from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (2005). I am attaching a copy of a 2004 Department of Transportation Order, *The Role of Air Charter Brokers in Arranging Air Transportation* cited above. The concluding portion of the Order discusses in detail the limitations placed on part 125 certificate holders in any relationships with brokers as well as limitations in dealing directly with potential customers.

With regards to your second question, since a Lockheed C-130 aircraft would meet the maximum payload capacity of 6000 pounds or more, as required for operations under a part 125 operating certificate, we agree with the DFW FSDO that Paramount may be able to add the leased aircraft to its certificate and operate it in accordance with its certificate authority under the terms of the lease. However, under § 125.1(b)(2), Paramount would not be able to operate a C-130 that has a restricted, limited, or provisional airworthiness certificate, special flight permit, or experimental certificate. We understand that most C-130s are restricted category aircraft so this determination will be important. The above discussion further assumes that Paramount otherwise meets all other requirements of the regulations, including, for example, the limitations found in § 125.11(c) (prohibiting the listing of an aircraft on a part 125 certificate that is also listed on a part 121, 129 or 135 certificate).

Paramount also described a plan to provide services for foreign governments in addition to the U.S. government. In that case, Paramount must also take into consideration the fact that "part 125 requirements do not meet (or exceed) the Chicago Convention's Standards for international commercial air transport. As a result, several foreign civil aviation authorities have refused to recognize part 125 operating certificates, and some countries have prohibited or limited operations by part 125 carriers within their territorial airspace.[1]" *See*, Letter to Ms. Elizabeth Wadsworth from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, (Jan. 27, 2006).

Finally, there is not enough information to determine whether any of the proposed flights might qualify as a public aircraft operation. Public aircraft operation status is determined on a flight by flight basis and is not automatic upon entering into a contract with a government entity. Not only must all of the applicable statutory requirements of 49 USC 40102 (a)(41) and 40125 be fulfilled, but the FAA has operational policy regarding declarations by governments entities of public aircraft operations status for contracted operators. *See*, Notice of Policy Regarding Civil Aircraft Operators Providing Contract Support to Government Entities (Public Aircraft operations), 76 FR 16349 (March 23, 2011). In addition, once an aircraft leaves U.S. airspace, it would lose public aircraft status.

---

[1] *See Chicago Convention*, part I, chap.5, art.33 (certificates and licenses will only be recognized by other States when the certification requirements are equal to or above the minimum standards established under this Convention).