October 3, 2001

Ms. Donna Christensen, Esq.
Mr. Anh Nguyen, Esq.
Department of Energy
Albuquerque Operations Office
P.O. Box 5400
Albuquerque, NM 87185-5400

Re: Request for Opinion on Air Carrier Operations

Dear Ms. Christensen and Mr. Nguyen:

We are in receipt of your letter dated July 12, 2001, in which you requested the Federal Aviation Administration's (FAA) position on six issues related to a bid protest before the General Accounting Office (GAO) that is based on air carrier operational matters. In our subsequent telephone conversation of October 2, 2001, you amended this request to our opinion on the first question.

We understand that the Department of Energy (DOE) owns a number of large and small aircraft that are used to transport passengers as part of its mission of nuclear weapons transportation, operations, and research and development. Historically, DOE has utilized a company to operate these aircraft under part 135 and 121 of the Federal Aviation Regulations (FAR). More recently, DOE is considering a contract with another company, company B, to assume these duties. However, Company B's proposed corporate structure is unique and has been challenged by the first company as not complying with aviation statutes and the FARs.

Briefly, we understand that Company B's proposal would provide that it be given the DOE contract for aviation-related support. Company B is a Limited Liability Company, which will be made up of three other companies (subcontractors). These subcontractors hold 135, 121, and 145 certificates issued by the FAA. Company B holds no certificates. The subcontractors will "operate and maintain" the aircraft, which will be owned and provided by DOE. Company B will be responsible for "operational control" of all transport operations. Further, all pilots, freight coordinators, flight followers, aviation maintenance, avionics maintenance, mechanics, re-fuelers, and administrative personnel are to be employees of Company B. Only the Director of Maintenance and Aircraft Maintenance Supervisor are to be employees of the subcontractors (B1, B2 and B3). DOE accepts the definition of "operational control" as that provided for under 14 C.F.R. §1.1.

Further, the pilots-in-command and aircraft dispatchers are jointly responsible for preflight planning, delay, and dispatch release for each flight.

Given this understanding, DOE requests guidance on the following issue:

Whether an offeror (prime contractor) lacking a Part 121 and 135 Air Carrier Certificate and a Part 145 Repair Station Certificate can satisfy DOE/AL's requirements for a Part 121, 135, and 145 Certificate by proposing a subcontracting or teaming arrangement where the prime contractor is the lead management company and the subcontractors are the holders of the Parts 121, 135, or 145 Certificates who will operate and maintain government-furnished aircraft and facilities.

Turning first to the Part 145 Certification, there does not appear to be a problem in utilizing the services of a Part 145 certificated company to perform the maintenance on aircraft operated under 121 and 135 of the FARs. This, of course, presumes that the repair station will have the appropriate ratings and otherwise meets all the requirements prescribed by Part 145.

Whether the circumstances described above satisfy Parts 121 or 135 is not so easily evaluated. A teaming arrangement, or subcontracting, is not in itself prohibited under the FARs. However, the teaming arrangement, or contract, as you propose has some provisions that raise concern with FAR compliance. We believe the primary issue raised by the arrangement you propose is the concept of "operational control" over the flights. In order to comply with Part 121 or 135, operational control must be exercised by the certificate holder, in this case, B1, B2, or B3, as applicable (See §135.77 and §121.533(a)). Company B does not hold any air carrier certificates, therefore, can not exercise operational control to have the operation be in compliance with Part 121 or 135. Under 14 C.F.R. §1.1, "operational control" is defined as:
. . .with respect to a flight means the exercise of authority over initiating, conducting or terminating a flight.

The key words in this definition are "exercise of authority". As you can see, operational control status is not determined by the labels or terms of the agreement alone, but on the facts of the operations. Factors indicating who has operational control include who provides the pilots, the aircraft, the related aviation services, and who gets paid, and for what.

The circumstances presented by your query present a clouded

picture of who has operational control. You state the subcontractors will "operate and maintain" the aircraft. "Operate", which is not the same as operation control, is defined in 14 C.F.R. §1.1 as:

. . .with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose (except as provided in §91.13 of this chapter) of air navigation including the piloting of aircraft with or without the right of legal control (as owner, lessee, or otherwise).

A grant under the contract to operate and maintain is not a grant or determination of operational control. Indeed, you clearly state that Company B will be responsible for "operational control" of all air transportation operations in support of DOE/AL. Further, you state that all pilots, freight coordinators, flight followers, aviation maintenance, avionics personnel are to be employees of Company B. You also provided that only the Directors of Maintenance and Aircraft Maintenance Supervisors will be employees of the subcontractors. Your proposal places operational control with Company B. Further indication that Company B has operational control is found in its employment of nearly all personnel involved in the aviation-related aspects of the day-to-day operation of the flights, including the maintenance, ground operations, and flight following.

Based on our understanding of the facts as you present them, the relationship between Company B and the Subcontractors on its face leans strongly towards Company B, not the certificate-holding subcontractors, exercising operational control of the individual flights. Again, it is not the wording of the contract, but upon the actual operation itself that determines who has operational control. Since the entity with control is not clear from the available information, we must assume that its operation will track with the scenario you provided. Accordingly, operational control would appear to rest with Company B, a non-certificated entity. That would not be permissible under FAR Parts 135 and 121. See §135.77 and §121.533(a).

If you have any questions regarding this matter, please contact me at the below-listed telephone number.

Sincerely,

Ernest E. Anderson Attorney

LYNETTE WORD Regional Counsel Southwest Region