

Protest of) Date: October 3, 1989
SOUTHERN AIR TRANSPORT)
Solicitation No. ANET 89-01) P.S. Protest No. 89-56

DECISION

Southern Air Transport (SAT) protests award of a contract for mail transportation pursuant to Solicitation No. ANET 89-01 to Air Train, Inc.^{1/} SAT alleges that Air Train lacks qualifications required by the solicitation and that the evaluation of its proposal was arbitrary, capricious, unsupported by substantial evidence and not based on the evaluation formula stated in the solicitation.

Background

Solicitation No. ANET 89-01 was issued by the Air Contracts Management Division, Office of Transportation and International Services, Headquarters on April 28, 1989, with an offer due date on June 2. The Solicitation's evaluation criteria, as amended, provided in Section VI, paragraph 2.A that:

The Postal Service will award a contract resulting from this solicitation to the responsible offeror who submits the best combination of technical proposal and price proposal. Offerors may propose to provide either (i) service based upon the use of dedicated fleet, or (ii) service based on guaranteed lift. Proposals offering a dedicated fleet will be preferred. A proposal offering service based upon guaranteed lift will be eligible for award only if such proposal offers a combination of technical and price factors significantly more favorable to the Postal Service than that offered by the best proposal based on the use of dedicated aircraft.

Section IV, paragraph 2.C further provided that:

Price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price. Technical proposals not deemed capable of providing the very high quality of service specified in this solicitation will not be considered for award regardless of price. Although price will not necessarily be the deciding factor in the decision to award, price will become relatively more important in discriminating among high quality technical proposals. If an award decision must be made among closely-

^{1/}We are advised that on August 28, Air Train, Inc., changed its name to Emery Worldwide Airlines, Inc. For convenience, we use the name in which the offer was submitted, Air Train, throughout.

ranked, technically-acceptable proposals, award will be made to the lowest price offer unless another proposal would yield a significant technical advantage to the Postal Service.

Section II. 3, Contractor Qualifications, as amended, specified that:

Proposals will not be accepted or considered from offerors, more than 10 percent of whose gross revenues were derived in calendar year 1988 from the carriage of letters outside the mail under the suspension of the Private Express Statutes for extremely urgent letters. (See 39 CFR, Section 320.6)^{1/}

Nine proposals were received from seven offerors, two offerors submitting alternative proposals. After evaluation of the proposals by the technical evaluation team, the competitive range was set on June 16 at six proposals. Of the six proposals, five were based on a dedicated fleets; only SAT's proposal was based on guaranteed lift. The contracting officer notified those offerors that their proposals had been found to be in the competitive range, listed the deficiencies found in their proposals, and stated that discussions would be held during the week of June 18.^{1/} After discussions, the contracting officer requested best and final offers by June 28. The proposals were reevaluated and scored as follows:

<u>NAME</u>	<u>TECHNICAL SCORE</u>	<u>ANNUAL COST(millions)</u>
Air Train #2	92.46	\$98.84
Air Train #1	89.46	\$86.15
Evergreen #1	88.74	\$90.15
SMB	79.22	\$88.80
Express One	78.48	\$92.89
SAT	67.60	\$61.47

Award was made to Air Train on its first proposal, as the contracting officer found the service advantages of its second proposal insufficient to make up the substantial price difference. While SAT's proposal was priced \$25 million less in annual cost than the most advantageous dedicated fleet offer, the contracting officer received input from the Marketing Department which indicated that this savings would be more than offset by the lower level of service provided by SAT's guaranteed lift proposal.^{1/} Further, the tender and delivery times proposed by SAT would limit the ability of the Postal Service

^{2/}This regulation is entitled "Suspension for Extremely Urgent letters." Letters dispatched under the suspension must meet various specified delivery criteria, must have their value or usefulness "lost or greatly diminished" if not timely delivered, and must be endorsed with a legend establishing the availability of the legend.

^{3/}SAT was given a list of 30 specific deficiencies to which it responded in its best and final offer.

^{4/}SAT's proposal was based on providing guaranteed lift to the required locations with the hub located in Fort Wayne, IN. It provided for dedicated containers and Express Mail sections to segregate the mail, indicated that the hub would be transferred during the term of contract performance to Toledo, OH, and generally indicated what steps would be taken to assure that no interruption in service occurred.

to expand the Express Mail system. Award was made to Air Train on July 7, 1989. After a telephone debriefing, Air Train timely protested on July 21.^{4/}

SAT's Protest

SAT's protest raises four issues. First, SAT argues that Air Train does not meet the solicitation's requirement that less than 10% of its 1988 calendar year revenues be derived from carriage of letters outside the mails under the suspension of the private express statutes for extremely urgent letters. SAT argues that as a wholly-owned subsidiary of CF Emery Worldwide, Air Train should be charged with all of the revenues which Emery derives from operations under the exemption, which it contends are 22% of Emery's total revenues.

Second, SAT argues that the contracting officer failed to apply the solicitation's award factors properly, impermissibly favoring dedicated aircraft proposal over guaranteed lift proposals. It alleges that this was in contravention of the solicitation provision which required award to be made to a guaranteed lift proposal which was significantly more favorable than the most advantageous dedicated aircraft proposal. SAT argues that if its proposal had been evaluated correctly, it would have been given a higher technical score, which, combined with its substantial price advantage, would have mandated award of the contract to it.

Third, SAT separately alleges that its proposal was incorrectly evaluated. During its post-award debriefing, SAT was informed of six deficiencies in its proposal.^{5/} SAT disputes the relevance or magnitude of the deficiencies. It asserts that the adequacy of its proposed facility at Fort Wayne was demonstrated by detailed plans prepared by engineers familiar with the Postal Service's requirements. SAT stated in its proposal that, if the Postal Service did not think service to Oakland was adequate, it would serve San Francisco airport with noise compliant aircraft. The delivery deficiencies are explained as follows: no proponent could meet the tender time for Phoenix during the summer months because Arizona does not go on daylight savings time; both SAT and Air Train could meet the Boston delivery time only if they received an exemption from Boston's night-time noise curfew of the sort which the predecessor contractor had received; and JFK's preferred time was only a goal, and SAT met the required delivery

^{5/}Also on July 21, Evergreen International Airlines, Inc., another disappointed offeror, filed suit in the United States District Court for the District of Columbia, alleging that Air Train did not meet the 10 percent contractor qualification and was unable to meet the performance requirements of the contract. Evergreen International Airlines, Inc. v. United States Postal Service, Civ. No. 89-2056, D.D.C. Evergreen's request for a preliminary injunction was denied on August 10, 1989. Pursuant to the terms of the contract, Air Train's contract performance commenced on August 20.

^{6/}The deficiencies were the inadequacy of its Fort Wayne sort center space, its proposal to serve the San Francisco area through the Oakland airport, rather than the San Francisco airport, its failures to meet the required minimum delivery (arrival) time at Boston, the minimum required tender (departure) time at Phoenix, and the preferred delivery time at JFK Airport (although it did meet the required delivery time), failure to indicate how Express Mail and Priority Mail would be separated, as the solicitation required, and its plan to relocate its hub from Fort Wayne to Toledo during contract performance.

time to JFK. The solicitation did not require that Express Mail be kept separate from Priority Mail. Finally, the transfer of the hub was fully described and would be accomplished without any service disruption. Contending that any downgrading of its proposals on the bases stated in its debriefing downgraded are groundless, SAT concludes that the evaluation of its proposal was incorrect, an error explainable only by an impermissible bias of the evaluators in favor of dedicated aircraft.

Finally, SAT claims that its experience and expertise, based on 42 years of air cargo operations and four years of a hub-and-spoke cargo operating system are much superior to that of neophyte Air Train. SAT argues that it was misevaluated as against Air Train as to the factor of "adequacy of experience and commitment," which constituted 20 percent of the technical score, and that Air Train should not have received the highest technical score or be considered a responsible offeror. It notes that subsequent to the award, the Department of Transportation asked Air Train to submit information to it sufficient to establish its continuing fitness to possess an air carrier certificate, given the substantial change in operations which will occur when contract performance begins. SAT requests that the award to Air Train be set aside and award be made to SAT, or a resolicitation of the contract requirements be made.

Contracting Officer's Position

The contracting officer has responded to the protester's assertions. He states that the issue whether Air Train meets the 10 percent eligibility standards set forth in the solicitation should not be reached pursuant to PM 4.5.7 o. because that issue is presently before the D.C. District Court in Evergreen International Airlines, Inc. v. United States Postal Service, Civ No. 89-2056, (D.D.C. 1989), where it will be fully litigated.

As to the propriety of the relative evaluations of the Air Train and SAT proposals, the contracting officer notes that Amendment 3 softened the solicitation's original statement that award would be made to a guaranteed lift only if no acceptable dedicated fleet proposals had been received, but as modified still clearly indicated the Postal Service's strong preference for dedicated fleet proposals. He asserts that SAT's proposal, as evaluated in accordance with the factors set forth in the solicitation, received a far lower technical score than Air Train's. The contracting officer declares that while price was to be considered in making award, it would become determinative only as between closely-ranked proposals (which did not exist here) and that award would not be made to proposals not of very high quality, regardless of price. Citing Unit Distribution Corporation et al., P.S. Protest No. 88-77, December 29, 1988, the contracting officer contends that when the solicitation states that technical factors are significant, there is no basis for objecting to award merely because the successful offeror did not submit the lowest price. He states that a lower priced offer is not "significantly more favorable" if it has substantial technical deficiencies. Therefore, SAT was not entitled to award under the solicitation.

The contracting officer notes that the standard of our review of the technical evaluations is our office will not substitute its judgment for that of the evaluators or disturb the evaluation unless it is shown to be arbitrary or in violation of procurement

regulations.¹⁴ With regard to the points raised in the debriefing, he notes that the evaluation team did not think that SAT's explanations of the manner in which the Fort Wayne hub had been designed and how the hub would be moved during contract performance adequately addressed the Postal Service's concerns. The Postal Service was not obliged to accept SAT's explanations. SAT failed to have a hub transition plan already developed and made no more than general assurances to the Postal Service that the hub change would not disrupt service. The uncertainty surrounding the hub transition had a significant negative impact on the evaluation of SAT's proposal. The contracting officer explains that the other four issues raised in the debriefing did not contribute significantly to the low technical score SAT received.

Finally, the contracting officer recounts that following a pre-award survey he determined Air Train to be a responsible offeror at the time of contract award pursuant to PM 3.3.1.b. He describes the DOT review of Air Train as routine and required by its regulations, and in no way indicating any doubts about Air Train's fitness to serve as an certificated air carrier at the time of award.

Air Train's Comments

In its comments, Air Train states that it meets the 10% contractor qualification test, whether its subsidiaries and affiliates are included in the total or not. Air Train argues that SAT's protest on this issue is untimely, since it is really against the terms of the solicitation, and invalid, since SAT wishes to interpret the 10% requirement more restrictively and thereby reduce competition.

Air Train further explains that the Postal Service's evaluation of SAT's proposal was accurate and correct, and that its protest really amounts to a mere disagreement with the judgment of the Postal Service's technical evaluators. It notes that, given the Marketing Department's analysis of the limitation of Express Mail growth which would occur under SAT's proposed system, SAT is not even the lowest cost proposal over the contract term. Therefore, there is no basis for SAT's claim that it offered a substantially more favorable proposal which was entitled to award. Air Train also notes that DOT found that, as of August 17, 1989, no information had been brought to its attention to conclude that Air Train is not presently fit to engage in air transportation.

All parties have submitted further comments on various aspects raised in this protest. SAT claims that we are not foreclosed from reaching the issue concerning Air Train's qualifications because the District Court in Evergreen has not addressed whether the revenues of Air Train and its parent exceeded the permissible level. SAT realleges that its proposal had technical and price features which, when viewed in combination, was more favorable than that of Air Train. It asserts that the Marketing Department analysis is flawed because it mentions the evaluation factors prior to the amendment which softened the preference for dedicated lift proposals.

¹⁴The contracting officer cites The Mack Company, P.S. Protest No. 81-41, September 23, 1981, Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986, and Management Concepts, Inc., P.S. Protest No. 86-29, July 10, 1986 for this standard.

SAT further notes that several of the areas which the contracting officer stated in its debriefing were reasons why its proposal was marked down do not appear to have been material in the evaluation of its offer. SAT states that the contracting officer's analysis of the items which SAT acknowledges as material is mistaken and that Air Train's proposal contained substantially more uncertainties. SAT also strongly reargues Air Train's unfitness to undertake the required contract performance. Finally, SAT acknowledges the solicitation's preference for dedicated fleet proposals, but reiterates its belief that the technical scoring reflected an impermissible bias against its proposal.¹⁷

The contracting officer claims that the District Court has decided that Air Train met the 10% qualification, and that the Marketing Department's input on that matter was received by telephone prior to the award date and is not affected by the reference to the unamended evaluation provision. He notes that SAT's proposal was evaluated in accordance with the solicitation provisions, and was marked down as to eight subcriteria which explains its low technical score.¹⁷ The contracting officer describes SAT's allegation of bias as merely a dispute over the application of the solicitation's evaluation factors, and claims that it has failed entirely to adduce any persuasive evidence of bias in this procurement.

Air Train's comments restate its previous positions and oppose those of SAT. It claims that SAT lacks standing as to all issues except the evaluation of its offer, because it would not be in line for award even if the award to Air Train was erroneous. Air Train further notes that technical evaluations are based on the information contained in the

^{8/}SAT and the contracting officer have also engaged in substantial discussion concerning the disclosure of evaluation documents to the protester. Citing the deliberative process privilege and prior practice of our office (see Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988; CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 27, 1987), the contracting officer contends that the scoring and internal deliberations of the evaluation team are to be reviewed by our office in camera. SAT disputes this view, stating that it requires access to these documents in order to assert a meaningful protest.

While the contracting officer is correct that the substance of specific technical scores or internal deliberations are not generally revealed, there is a general requirement that unsuccessful offerors be adequately informed, through debriefing, of "the basis for award in a way that leaves no doubt that the award decision was made fairly, impartially, and objectively." PM 4.2.7 a. Where, as here, an offeror is advised of deficiencies in its debriefing which are subsequently asserted as being immaterial when the offeror challenges them in the protest process, that standard has not been met.

In an effort to shed further light on the award process, we provided SAT with the scoring, by subfactor, of its best and final offer. Despite being given this information and an opportunity to comment on it, SAT has not set forth any analysis of its objections to its scoring.

^{9/}The evaluation team deducted points for the proposal's failure to meet tender and delivery time goals; questions about the ability of the aircraft to meet the required departure times; the inadequate size, flow space, and operating space of the hub; the proposed acquisition and availability of ground equipment; concern over the ability of the aircraft to carry the required containers and apportion the load on a nightly basis; an inadequate training program for its employees; and the movement of the hub during the term of the contract.

proposal and that it is the offeror's responsibility to submit an adequately written proposal. It concludes that SAT's claims are totally without foundation in fact or law and that it has failed entirely to establish that the evaluation of SAT's offer was in any way improper or incorrect.

Discussion

The first and fourth issues raised by SAT, Air Train's alleged failure to meet the 10% contractor qualification requirement and its alleged inexperience, incapacity and incompetence are matters which we dismiss pursuant to Procurement Manual 4.5.7 o., which provides that:

The General Counsel may decline to decide any protest when the matter involved is the subject of litigation in any court of competent jurisdiction or has been decided on the merits in such a court.

Our practice is to dismiss matters which are also before a court of competent jurisdiction when the issues raised before the court are intertwined with these raised before our office and the relief requested is the same. Irwin I. Grossman, P.S. Protest No. 84-55, July 23, 1984;¹⁰ cf. Opal Manufacturing Co., Ltd., P.S. Protest No. 82-77, April 4, 1983 (suspension of action on a protest until protester withdrew a concurrent lawsuit which raised substantially the same issues). As was stated in Irwin I. Grossman, supra:

Because the court would not be bound by our findings, contemporaneous consideration of the same issues and the same plea for relief would be duplicative and would serve no purpose. Therefore, unless a court expresses some interest in our deciding the protest, we will not consider protests where the material issues are pending before a court of competent jurisdiction.

Here, it is clear from a perusal of Evergreen's complaint that the matters concerning Air Train's eligibility and capability have been brought before the D.C. District Court.¹¹ The concerns stated in Grossman remain valid here. If anything, they are even more compelling when the court has already ruled, as it has, on a motion for a preliminary injunction. Comity and a natural respect for the binding decision of the district court indicate that, as to matters before the district court, we should not tread.

SAT's second ground of protest, that award was not made in accordance with the solicitation's evaluation and award factors, is not logically independent of its third ground of protest, for only if its proposal was incorrectly evaluated can it reasonably argue that it was entitled to award. It is not outside the contracting officer's scope of

¹⁰This is also the practice followed by the Comptroller General. See 55 Comp.Gen 1362 (1976); 53 Comp. Gen. 730 (1974); 53 Comp. Gen. 522 (1979).

¹¹SAT's argument that the issues it raises are different from the issues raised by Evergreen misreads the regulation, which speaks in terms of "matters," not issues. Even if SAT's arguments differ from Evergreen's, the matters concerning Air Train's eligibility are clearly before the court.

discretion to determine that a 25% difference in technical score, combined with a 28% cost savings, does not amount to a significantly more favorable proposal if the technical disadvantages are perceived as outweighing the price advantage, since the solicitation admonished that award would be made only to proposals offering "high quality of service" and that low price would not be determinative. SAT can prevail only if it can show that its proposal was incorrectly evaluated technically.

Accordingly, central to SAT's protest is its view that it was evaluated in an arbitrary and capricious fashion. As to this contention, our office plays a limited role. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985; American Airlines, Inc., P.S. Protest No. 84-72, December 14, 1984. When such determinations rest upon the judgment of technical personnel, we will not substitute our views for their considered judgment in the absence of fraud, prejudice, or arbitrary and capricious action. POVECO, Inc. et al., supra; Hi-Line Machine, Inc. et al., P.S. Protest No. 85-6, March 7, 1985. The protester bears the burden of proving its case affirmatively. Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, Data Flow Corporation, P.S. Protest No. 83-54, October 28, 1983. If the protester's evidence does not overcome this presumption, we will not overturn the contracting officer's position. Michaletz Trucking, Inc., P.S. Protest No. 85-28, June 14, 1985.

Within these guidelines, we have reviewed the technical evaluations of SAT and Air Train and are unable to find evidence that they were arbitrary or capricious. SAT's best and final offer was graded at a point or less lower than Air Train's proposal in most areas.^{12/} SAT's proposal scored substantially lower than Air Train's proposal where the Postal Service's evaluators were skeptical concerning its viability, as with regard to the adequacy of the Fort Worth hub^{12/} and the switch of its hub in the middle of contract performance without disruption of service.

SAT asserts that, based on its technical experts' analysis of the sort center operations, Fort Wayne had sufficient capacity to meet the Postal Service requirements. The evaluators disagreed. SAT addressed these issues but failed to convince the Postal Service's technical personnel that it was correct. This is a matter on which reasonable minds could differ, and SAT has failed to show the technical evaluators' position to be arbitrary or unsupported by substantial evidence. Given the conflicting technical

^{12/}Over one-fourth of the difference between the technical scores was due to Air Train's greater ability to meet the tender and delivery time goals, resulting in its receipt of points over and above those SAT received for meeting the required times. The solicitation provided, at Section VI. 2. B. 1 (a), that "[p]roposals will be more favorably evaluated to the extent that they approach the goals set forth in SPECIFICATION PART C." Therefore, SAT was on notice that other proposals could gain points on it insofar as they proposed to meet the tender and delivery time goals better than its proposal.

^{13/}That this was a central concern is reflected in the fact that, of the 30 deficiencies noted in SAT's proposal during negotiations, seven deficiencies deal with the perceived inadequacies of the Fort Wayne hub. While SAT addressed these concerns in its best and final offer the technical evaluators were not convinced of the validity of SAT's position, and SAT had its technical score reduced accordingly.

assessments made by the two sides, we uphold the contracting officer's position.

The same analysis also applies to the proposal reduction due to the hub change during the contract performance period. This issue is even clearer than the adequacy of the Fort Wayne hub. SAT's best and final offer did not include a complete transition plan, addressing many aspects of the transition to Toledo in general terms. Given the impact of any substantial disruption in service, these uncertainties were reasonable grounds for a reduction in SAT's technical score. The offeror is responsible for any omissions or errors in its proposal. Five Star Catering, P.S. Protest No. 88-68, January 31, 1989. The technical evaluators did not find the analysis provided by SAT persuasive. On the record before us, we cannot find that conclusion arbitrary or capricious.

SAT also argues that the points taken away from it on various subfactors indicates an impermissible bias on the part of the evaluators against guaranteed lift proposals. This contention is incorrect for two reasons. First, even as amended, the solicitation indicated a distinct preference for dedicated aircraft proposals. Given that preference, it was reasonable for the evaluators to reflect it in their scoring. Sea-Land Service, Inc., P.S. Protest No. 80-18, June 30, 1980. Second, SAT has failed to prove, by sufficient evidence, that it was treated in a biased and prejudicial manner. See Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988; Book Fare Inc., P.S. Protest No. 80-29, July 3, 1980; Penny Clusker, P.S. Protest No. 80-37, August 27, 1980. The protest file indicates that SAT was evaluated in accordance with the solicitation's terms and provisions, and that the parties' disagreements amount to differing perceptions of the technical merits of the proposed approach to meeting the solicitation's requirements. We cannot find that the award in this case has been impermissibly tainted by bias.

SAT contends that it is impossible that a neophyte offeror such as Air Train could have received a technical score higher than an experienced air carrier such as itself. SAT's argument confuses technical score with responsibility. An offeror's technical score is based upon an evaluation of the technical proposal submitted. See Five Star Catering, supra. An offeror's responsibility is a judgment as to its capacity and capability of performing in accordance with the technical proposal it has submitted. L.P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983. While, in practice, these concepts may blend together, they are analytically distinct. SAT's arguments concerning Air Train's capabilities are more directly arguments that Air Train is nonresponsible. We can overturn affirmative findings of responsibility only in the presence of fraud, bad faith, or failure to adhere to definitive responsibility criteria, EDI Corporation, P.S. Protest No. 83-51, January 26, 1984, none of which are here alleged. SAT's general dissatisfaction with Air Train's ability as an air carrier does not carry its burden of proof.

We have considered all the arguments put forward by SAT and found them to be without merit. The protest is dismissed in part and denied in part.

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[checked against original JLS 5/25/93]