

January 5, 1994

P.S. Protest No. 93-27

PATRIOT AIRLINES, INC.

Solicitation No. D5K-05-93

DIGEST

Protest alleging various improprieties in emergency solicitation for air taxi service is sustained where contracting officer did not base determination of nonresponsibility reasonably on substantial information.

DECISION

Patriot Airlines, Inc., ("Patriot") timely protests the award of an emergency air transportation contract to Evergreen International Airlines, Inc., ("Evergreen"). The protester alleges that it was improperly found nonresponsible and that award was not based on factors set forth in the solicitation.

On September 3, 1993, the Western Area Distribution Networks Office, Seattle Branch, issued emergency solicitation D5K-05-93 on Form 7435-D, seeking "sealed bids [sic]" for air taxi service between Billings, MT, and Denver, CO, after a determination that "service to customers in the Montana area had fallen to unacceptable levels and potentially could fall even lower."¹ Bids were due September 24; the solicitation stated that bid opening would

¹ Procurement Manual ("PM") 12.4.6 b.1.(b) defines an emergency contract as a "contract entered into for the duration of an emergency under the authority of 39 U.S.C. 5001." PM 12.4.6 b.4. states:

Emergency contracts may be entered into only when an emergency exists, and must terminate when the emergency ceases and the Postal Service is able to obtain service otherwise pursuant to its contracting authority. Emergency contracts are awarded through competition and negotiation, or may be negotiated noncompetitively . . . No emergency contract may remain in effect more than six months without the approval of

not be public.

Under the emergency contract, the contractor was to fly one round trip daily between Denver and Billings in a fixed-wing multi-engine jet aircraft with a minimum cargo capacity of 32,000 pounds and a capacity of seven "containers plus lower cargo compartments." The contractor was to stage seven A-2 containers "or equivalent containers providing 390 cubic feet of load space," at each terminal.

The contractor was to receive mail at each terminal, sort it, load it into containers, and transport it to the other terminal, where it was to unload and tender the mail to highway contractors (in Billings) or to connecting carriers and the Denver Air Mail Center (in Denver). At Billings, the contractor was to "provide a facility large enough to load and unload the containers to protect the mail from weather. . . ." The solicitation also identified specific ground equipment to be provided at each terminal.

The expected duration of the contract was to be from October 16 through February 4. Offers were to be expressed in terms of a rate per great circle mile (GCM), but were to list line haul and terminal handling costs per GCM separately.

The solicitation provided for award as follows:

Bidders are cautioned to bid only on those solicitations that they fully intend to operate if selected. Bidders will be expected to perform on ALL solicitations on which theirs is determined to be the lowest responsive, responsible bid.

The solicitation also included a copy the of Form 7485, Air Taxi Contract Information and Instructions, used with both advertised and negotiated contracts, which provided as follows:

II. Information

* * *

B. Award of Contract

1. All contracts . . . must be awarded to the bidder submitting the lowest responsible, responsive bid or to the offeror whose proposal is most advantageous to the Postal Service.

The solicitation did not request specific information concerning the manner in which offerors intended to provide the requested service, nor did it request any information concerning the background and experience of the offeror. It did include the following paragraph:

the next-higher level of contracting authority.

The use of terms such as "sealed bids," "bids," and "bidders" throughout Form 7435-D was inconsistent with the regulatory scheme for the award of emergency contracts by negotiation.

Representatives of the United States Postal Service may contact an operator who has submitted a bid for the purpose of determining his technical and financial ability to perform the service. The operator may be required to furnish evidence of his ability to assure that the types and/or qualities of aircraft and aircraft equipment to perform in accordance with the proposal will be available and properly maintained. The adequacy of the bidder's arrangement to provide the required service will also be considered in the selection of a bidder.

Seven proposals were received. The contracting officer explains that the seven proposals first were evaluated to determine whether they met the requirements in the solicitation for scheduling, facilities, ground handling equipment and aircraft. The three proposals which were determined to have met those requirements were further evaluated.

Patriot had offered the lowest cost per GCM of the three acceptable offers; Evergreen was second lowest. By letters sent by facsimile on October 1, Patriot, Evergreen, and the third offeror were asked to provide additional information and best and final offers (BAFOs) by close of business, October 4.²

An undated "Summary Analysis" discussed the relative standing of the offerors following the receipt of the BAFOs. Patriot's offer was said to have strong points in its offer of a 727 aircraft and eight A-2 containers, and to have as a weak point "some doubt" about Patriot's ability to accomplish the ground transfer of mail at the two termini. Specifically, the analysis noted, in part:

[T]he offeror's admitted lack of Postal experience, with the exception of past experience with Air Train, places doubt as to the offeror's being able to oversee and handle the complex mail transfers required in the contract. The latter transfers are key to the success of this contract. The offeror did not demonstrate any other related mail transfer experience. In a letter dated October 1, 1993, the offeror was requested to provide additional information concerning past Postal experience. The offeror responded by FAX dated October 4, 1993, under Experience: "Patriot Airlines has yet to perform directly for USPS". The Contracting Officer, when faced with uncertainty about an untested offeror's ability to perform the immediately required service, was unable to make an affirmative determination of the offeror's

² Patriot was asked to verify its schedule and provide information about its proposed Billings facility, its ground handling equipment, and its prior postal experience; Evergreen was asked to provide information about its proposed Billings facility, and, in a revised version of the request dated October 5, about its transfer of mail to other airlines at Denver. (The issuance of a second request for a BAFO only to Evergreen was inconsistent with PM 4.1.5 g.4.(c): "If discussions are reopened [after receipt of best and final offers], the contracting officer must issue an additional request for best and final offers to all offerors still within the competitive range.")

With respect to its prior postal experience, Patriot's reply stated: "Patriot [h]as yet to perform directly for USPS. All staff members have in the past been associated with Air Train, Inc. (now known as Emery Air) which presently performs on the A-Net contract."

responsibility.

The analysis further noted that the relative difference in cost of the Evergreen and Patriot proposals was lessened when the excise tax which the Postal Service was required to pay on the line haul portion of the rate was taken into account.³

The contracting officer awarded the contract to Evergreen on October 8. This protest followed. The protester alleges that since it offered the lowest price, it should have been awarded the contract under the terms of the solicitation, which, it complains, did not "call for a formal evaluation procedure." Patriot also questions the ability of Evergreen's DC-9 aircraft to carry the containers required by the solicitation. The protester claims that it submitted the "superior bid" because its B-727 aircraft "well exceed requirements outlined in the statement of work," providing "additional lift to the Post Office without additional costs. . . ." According to Patriot, Evergreen did not offer a facility in Billings and Patriot's facility is the "only qualified ground service company on the airport." Patriot points out that unlike Evergreen, Patriot is a small business, and since it is "government policy to enhance small businesses" award should go to Patriot.⁴ The protester asks that the award to Evergreen be terminated and the contract awarded to Patriot.

Commenting on the protest, the contracting officer asserts that since this was an emergency solicitation, negotiated procedures were used and award was made to the offeror submitting the "most advantageous" proposal conforming to the requirements of the solicitation, citing Form 7485.⁵ The contracting officer contends that price was not the only award factor and that Patriot's price was only slightly lower than Evergreen's when the excise tax is taken into consideration. The contracting officer alleges that the protester's complaint about the lack of formal evaluation criteria in the solicitation is untimely under PM

³ The two offers were as follows:

	Patriot	Evergreen
Line Haul	\$11.15/GCM	\$10.15/GCM
Terminal Handling	<u>2.73/GCM</u>	<u>3.80/GCM</u>
	\$13.88/GCM	\$13.95/GCM

The tax amounts to 1.0625% of the line haul rate. Because a greater portion of Patriot's GCM rate was attributed to line haul than Evergreen's was, the difference in total cost to the Postal Service of the proposals was lessened to three-quarters of one cent per GCM.

⁴ Status as a small business does not afford an offeror a preference for award. See, e.g., *Avanti, Inc.*, P.S. Protest No. 92-38, September 11, 1992 (the policies set out in PM 10.1 are "meant to encourage the participation of small and minority-owned businesses, but they do not set forth enforceable requirements which compel postal procurement employees to take any particular procurement action"), quoting *COR, Inc.*, P.S. Protest No. 90-16, June 22, 1990.

⁵ The contracting officer's assertion that "Patriot seems to be confusing the negotiated procurement conducted here with a procurement based on an invitation for bids" is disingenuous in the extreme given the solicitation's consistent use of terms associated with sealed bid procurements.

4.5.4 b. because it was not made by the time set for receipt of proposals.⁶

With respect to the adequacy of Evergreen's proposal, the contracting officer states that Evergreen offered eight A-6 containers, the equivalent of seven A-2 containers.⁷ The contracting officer states that Evergreen proposed the same facility in Billings as did Patriot, concluding that "[c]learly the Evergreen proposal is equivalent or better than . . . Patriot's."⁸

The contracting officer also notes that he was unable to make an affirmative determination of Patriot's responsibility due to its lack of previous postal contract experience.

In reply to the contracting officer's statement, the protester asserts that under the terms of this solicitation, "most advantageous" means the "lowest responsible, responsive bid," which the protester emphasizes that it made. The protester also reiterates its claim that Evergreen's proposed equipment cannot carry the required payload or otherwise perform as required in the solicitation. Patriot asserts that since this solicitation did not require it to "provide full daily operational details" or "a great deal of detailed explanation," Evergreen should not have received credit for providing additional data. The protester states that "the contracting officer should have been well aware of Patriot's performance in providing service with other companies," such as Emery Airlines. The protester questions the fairness of the evaluation procedures and suggests that in the western region, there is "collusion in the awarding of these contracts" to Evergreen.⁹

In rebuttal, the contracting officer asserts that the protester's challenge to the affirmative determination of Evergreen's responsibility constitutes new grounds for protest and therefore is untimely.

A protest teleconference was held December 10 in which Andrew Barnes, president of Patriot, emphasized that if Patriot's responsibility was in question, the contracting officer easily could have obtained information which would have supported an affirmative

⁶ The contracting officer asserts that despite the lack of specified evaluation criteria, the solicitation gave the offerors notice of how their offers would be evaluated (and how they could be the most advantageous) through the requirements listed in the statement of work, such as ground facilities or operational plans.

⁷ According to the contracting officer, an A-6 container has a capacity of 360 cubic feet, while an A-2 container has a capacity of 390 cubic feet, so that the total capacity of eight A-6 containers (2,880 cubic feet) slightly exceeds that of seven A-2 containers (2,730 cubic feet).

⁸ Patriot's and Evergreen's BAFOs each described a Billings ground facility to be provided by Corporate Air.

⁹ The protester offers no evidence of "collusion." It is well settled that it takes "well-nigh irrefragable proof" to overcome the presumption that government employees act in good faith. *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993, citing *A-Transport Northwest Co., Inc.*, 27 Fed.Cl. 206, 220 (November 25, 1992). Suspicion, assumptions and innuendo are not sufficient to justify such inferences; the protester must offer specific proof of allegations of bad faith, bias or unfairness. *Thermico, Inc.*, P.S. Protest No. 90-71, December 21, 1990, and must prove that these officials intended to harm it. See also *JCI Environmental Services*, Comp. Gen. Dec. B-250752.3, 93-1 CPD 299, April 7, 1993.

determination. Mr. Barnes complained that he was asked only one question--whether his company had postal contract experience. He stressed that his company, although only two years old, has an excellent record of reliability which, he claims, the contracting officer could have verified with "one phone call." Mr. Barnes stated that he, as well as other members of Patriot's staff, formerly worked for Air Train and dealt with the postal A-Net contract. Mr. Barnes also stated that Patriot has performed contracts for Emery, DHL and UPS, and alleged that he tried to inform the contracting officer of Patriot's non-postal experience.¹⁰ Mr. Barnes also restated his allegation that Evergreen's DC-9 aircraft cannot meet the minimum lift or cargo capacity requirements of the solicitation.

DISCUSSION

The contracting officer is incorrect in contending that Patriot's questioning of the lack of a formal evaluation procedure in the solicitation is an untimely protest against the terms of the solicitation. Instead, the protester is contending that its offer and those of the other offerors were not evaluated in accordance with the terms of the solicitation. That argument is timely.¹¹

The contracting officer has articulated two bases for the award to Evergreen. One is that award was made to Evergreen because its offer was determined to be more advantageous than Patriot's offer. The other is that award was made to Evergreen after Patriot was found not to be responsible. The two grounds are not fully reconcilable.

As the contracting officer asserts, the procedures used for this emergency transportation procurement were those governing negotiated procurements, PM 12.4.6 b.4., *supra*, see *also* PM 12.2.2 e. (defining a negotiated transportation contract as one "awarded using the procedures in [PM] 4.1 or 4.3, as they may be modified by . . . [PM] chapter [12]").

¹⁰ In a memorandum to the contracting officer dated October 20, the contracting officer's representative stated that he informed Patriot's president that Evergreen had been awarded the contract, and:

We discussed Patriot's experience. I told him the major deficiency with his proposal was that Patriot did not demonstrate that they had any experience. [Patriot's president] then gave me a complete rundown of the experience that Patriot had in performing. I told him that he should have conveyed this information in response to our request in Fax dated October 1, 1993.

¹¹ The protester's allegations against the suitability of Evergreen's aircraft and equipment were also timely made in the initial protest. These allegations challenge the contracting officer's affirmative determination of Evergreen's responsibility since responsibility relates to a firm's ability to perform in accordance with the terms of the solicitation. *Transnorm System Inc.*, P.S. Protest No. 90-58, October 26, 1990; *see also*, *Telex Communications, Inc.*, Comp. Gen. Dec. B-236981, 90-1 CPD 120, January 29, 1990. That is a matter within the discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria. *See Central Air Southwest*, P.S. Protest No. 93-15, September 29, 1993. The protester has not alleged fraud by the contracting officer, there were no definitive responsibility criteria, and we find no abuse of the contracting officer's discretion. Accordingly, this portion of its protest fails.

PM 4.1.4 a. provides, in part, that "[p]roposals [in competitive negotiated procurements] must be evaluated in accordance with . . . the evaluation factors specified in the solicitation" and PM 4.1.5 b.1. provides that a "contract will be awarded to the offeror whose proposal offers the best value to the Postal Service, considering the price, price-related and other evaluation factors identified in the solicitation."¹² Similar procedures are set out in supplemental guidance applicable to mail transportation contracts. Mail Transportation Procurement Handbook (MTPH) 1.4.2 K. states that "[t]echnical and other quality-related benefits must be weighed against price advantages in deciding which offer affords USPS the best overall value. . . ." but instructs contracting officers that in evaluating proposals they may trade off between quality and price using best value criteria "*only if you have stated in the solicitation the Postal Service's intention to use them.*" (Emphasis in original.) The rule is no different for emergency contracts. MTPH 6.6.2 A. states, with regard to such contracts, that "[t]he contracting officer must base the contract award on the evaluation criteria specified in the solicitation."

The solicitation here requested "sealed bids" which were to be evaluated solely on the basis of price. It is axiomatic that a solicitation must fairly inform offerors of the basis on which award is to be made. See, e.g., *Hratch Kouyoumdjian & Associates*, P.S. Protest No. 93-03, April 16, 1993, citing *Dawson Construction Co., Inc.*, P.S. Protest No. 91-47, September 25, 1991. The contracting officer argues that because the solicitation listed

¹² PM 4.2.1 e., a section not directly involved with the subject procurement because it deals with simplified purchasing, nonetheless provides a useful description of awards based on price, price and price-related factors, and price and other evaluation factors:

4.2.1 e., Basis for Award.

* * *

2. Price-based awards. Awards based solely on price are made to the responsible proposer or quoter who submits the lowest price. . . .

3. Awards based on price and price-related factors. Awards based on price and price-related factors are made to the responsible proposer or quoter whose submitted price, after taking into account stated price-related factors such as transportation charges (if appropriate), administrative costs associated with multiple awards, life cycle utility costs, etc., yields the lowest evaluated price. . . .

4. Awards based on price and other evaluation factors.

(a) General. Awards based on price and other evaluation factors are made to the responsible proposer or quoter who submits the most advantageous proposal or quotation taking into account price and other stated evaluation factors which are of value or concern to the requiring organization, such as quality, experience, delivery schedule, maintainability, ease of operation, size, weight, etc. Award is determined by comparing differences in the evaluation of the other factors with differences in price to the Postal Service. . . .

specific requirements in the statement of work, offerors should have known that they would be evaluated based on those requirements. The record shows that offerors not meeting those requirements were rejected because their proposals "did not meet the minimum solicitation requirements," indicating that those factors related to technical acceptability and were not evaluation criteria under this solicitation.¹³

The evaluators found both the Patriot and Evergreen proposals technically acceptable. Since price was the only evaluation factor, and Patriot offered the lower price, award should have been made to Patriot unless the contracting officer properly determined that Patriot was nonresponsible.¹⁴ Accordingly, we turn to that issue.

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible is well settled:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

A-1 Transmission, supra; T/F Trucking, P.S. Protest No. 92-65, October 22, 1992; see also Fabricating Businesses, P.S. Protest No. 92-77, December 16, 1992; Lock Corporation of America, P.S. Protest No. 89-14, March 10, 1989.

PM 3.3.1 a. sets forth the following general standards for determining whether a prospective contractor is responsible:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its

¹³ In the (incorrect) wording of the solicitation, the technically unacceptable offers were not "responsive," and thus ineligible for award. See, e.g., *TLT Construction Corp., Inc.*, P.S. Protest No. 89-75, January 18, 1990.

¹⁴ Because the solicitation provided for consideration of no factors other than price, the general guidance of Form 7485 on which the contracting officer relies is unavailing. In this case, the "most advantageous" offer was the lowest priced one.

The contracting officer further suggests that the award to Evergreen may be justified by taking the applicable excise tax on the line haul portion into account in comparing the price offers. That argument is incorrect. While the applicable excise tax might have been an appropriate price-related factor for use in the evaluation, the solicitation did not provide for such a factor, and it cannot be added now. In any event, Patriot offered the lower price even as so evaluated.

responsibility. . . .

PM 3.3.1 b.3. states that to be determined responsible, a contractor must have a good performance record. PM 3.3.1 e.3. requires that the contracting officer "possess or obtain information sufficient to be satisfied that a prospective contractor meets applicable standards of responsibility," and describes the sources from which that information may be obtained, including records and experience data; the prospective contractor itself; and other customers of the prospective contractor.

The record shows that the contracting officer found Patriot nonresponsible due to lack of Postal Service experience. He gave little consideration to the protester's staff's experience with Air Train's A-Net contract,¹⁵ and did not solicit information about other companies for whom Patriot had worked. The record indicates that Patriot was told (after award) that it should have submitted such information in response to the contracting officer's October 1 inquiry. That inquiry, however, sought prior Postal Service experience and only Postal Service experience.

Further, the analysis of Patriot's offer indicates that the contracting officer's concern was with Patriot's ability to perform the ground handling portion of the contract, a portion which it proposed to subcontract, as the solicitation allowed. Nothing in the contracting officer's statement explains how Patriot's prior postal experience would relate to the subcontractors' ability to perform the required ground handling, nor is there any separate analysis of the prior postal experience of the proposed subcontractors.¹⁶

The responsibility determination thus failed to satisfy the minimum requirements of PM 3.3.1 e.3., and was not "reasonably based on substantial information." *A-1 Transmission, supra*.

Accordingly, this portion of the protest is sustained. The question of remedy remains. As noted above, this contract is to expire February 4. However, inquiry reveals that no replacement contract has yet been solicited, and the emergency contract is likely to be extended.

If Evergreen's emergency contract is to be extended while replacement service is procured, the contracting officer is hereby directed to do so only on terms allowing the termination of the contract on notice, without indemnity, in the event that Patriot wishes to assume the remaining portion of it and a proper determination establishes Patriot's responsibility.¹⁷ In

¹⁵ See, e.g., *DJ Enterprises, Inc.*, Comp. Gen. Dec. B-233410, 89-1 CPD 59, January 23, 1989 (although new company did not have the number of years of experience specified as a definitive responsibility criterion, contracting officer's affirmative determination of the company's responsibility was upheld where the past experience of the company's vice president met the criterion).

¹⁶ For Billings, both Patriot and Evergreen proposed the same subcontractor, Corporate Air, for ground services.

¹⁷ Should Evergreen not accept an extension of its contract on the terms stated above, the route shall be the subject of a new emergency solicitation on which Patriot may freely propose. If Evergreen accepts extension on these terms, should Patriot wish to assume the service on the basis of its initial offer and is

making the further determination of Patriot's responsibility, the contracting officer may rely on all information available to him, including such information as Patriot may submit and as the contracting officer's inquiries to the sources identified at PM 3.3.2 e.3. and concerning Patriot's proposed subcontractors (PM 3.3.1 d.2.) may disclose.

The protest is sustained to the extent indicated.

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found responsible to do so, Evergreen is to be terminated without indemnity and replaced by Patriot for the remainder of the extended term.