

March 30, 1994

P.S. Protest No. 94-05

PATRIOT AIRLINES, INC.

Solicitation No. D5K-05-94

DIGEST

Protest challenging affirmative determination of awardee's responsibility is denied where it was not an abuse of discretion for the contracting officer to conclude that the awardee's aircraft met the performance capability requirements of the solicitation.

DECISION

Patriot Airlines, Inc., (Patriot) timely protests the award of an emergency air transportation contract to Evergreen International Airlines, Inc., (Evergreen). The protester challenges the contracting officer's affirmative determination of Evergreen's responsibility.

On January 24, 1994, the Western Area Distribution Networks Office, Seattle Branch, issued emergency solicitation D5K-05-94 on Form 7435-A, seeking proposals for air taxi service between Billings, MT, and Denver, CO. Offers were due January 26, and, if made by telephone, were to be confirmed in writing within 24 hours of the oral offer.

The expected duration of the contract is from February 5 through July 22. Offerors were to express prices in terms of a rate per great circle mile (GCM), but were to list line haul and terminal handling costs per GCM separately.

Under the emergency contract, the contractor is to fly one round trip daily between Denver and Billings, using a fixed-wing multi-engine jet aircraft with a minimum cargo capacity of 32,000 pounds. The contractor must provide "a sufficient number of A2 containers or equivalent so that the total space is 2,730 cubic feet or more." In addition, the aircraft is required to have additional cargo space "so that the total offered cubic space is 3,200 cubic feet." The contractor is also required to have "readily available sufficient standby

equipment . . . to permit maintenance and prevent delays in emergencies such as mechanical failures and poor weather conditions."

The solicitation provided for award to be made "to the responsible offeror whose proposal is technically acceptable and offers the lowest price" and stated that the Postal Service "will not accept an aircraft that cannot technically meet the minimum requirements under all conditions. Proposals that exceed the minimum requirement will not be technically superior."

Offerors were "cautioned to submit a proposal only on those solicitations that they fully intend to operate if selected. Offerors will be expected to perform on ALL solicitations on which they are awarded a contract." Finally, the solicitation included the following paragraph:

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

Four offers were received. The contracting officer explains that no discussions were conducted and the four proposals first were evaluated to determine whether they met the requirements in the solicitation for scheduling, facilities, ground handling equipment and aircraft. Two offerors were eliminated as technically unacceptable, which left Evergreen and Patriot in the competitive range for further evaluation.

Evergreen, the lower-cost technically acceptable and responsible offeror, was awarded the contract on February 2; this protest followed.¹

Patriot asserts that the DC-9 aircraft which Evergreen proposed to use do not meet the solicitation requirement of a capability to carry 32,000 lbs. of mail. According to Patriot, the contracting officer did not consult aviation experts familiar with aircraft capabilities or with the routes covered by the solicitation. In support of its allegations, the protester submits what it considers a "typical" flight plan for the Denver to Billings route; a performance chart for DC-9 models 32 and 33 for Stapleton International Airport in Denver, which Patriot alleges shows that the temperature "would have to be 10 [degrees] F in order for it to takeoff from Denver"; and a chart showing "general airplane characteristics" for various DC-9 models, suggesting that the "maximum structural payload" which the models 32 and 33 could carry would be under 32,000 pounds. The protester asks that Evergreen's contract be terminated and award made to Patriot.

¹ The two price offers were:

	Patriot	Evergreen
Line Haul	\$14.55/GCM	\$9.53/GCM
Terminal Handling	<u>2.75/GCM</u>	<u>3.80/GCM</u>
	\$17.30/GCM	\$13.33/GCM

Evergreen's proposal evidences ownership and availability of several models of DC-9 aircraft, and specifically discusses using the DC-9-30-F(eight) as a "dedicated" postal freight transport plane. Evergreen later also specified its DC-9-32 Fs for this contract.

In reply, the contracting officer asserts that the issue of Evergreen's aircraft was raised in Patriot's previous protest,² and was found to be without merit. The contracting officer states that as a result, the instant protest should be "summarily denied." The contracting officer states that the protest should also be denied on the merits because the "only basis for overturning the contracting officer's affirmative determination regarding Evergreen's responsibility would be abuse of discretion. This is because the protester does not allege fraud or a failure to apply in definitive responsibility criteria; nor would the record support such allegations," citing *Transnorm System, Inc.*, P.S. Protest No. 90-58, October 26, 1990. The contracting officer asserts that there is "no basis" for a finding that he abused his discretion, because he based his determination that Evergreen's aircraft met the requirements of the solicitation on an opinion by McDonnell Douglas, the DC-9's manufacturer.³ He also asserts that his determination is consistent "with an industry standard published in *Aviation Week and Space Technology*, March 16, 1992."⁴

Evergreen has commented on the protest, submitting a statement written by its Director of Operations. He asserts that Evergreen's DC-9-32 F aircraft "meet the solicitation requirements on a year-round basis," and that its DC-9-30 Fs "meet the requirements during most of the winter months." To support its position, Evergreen also has submitted performance charts representing various circumstances under which its aircraft could be taking off from the two airports and flying enroute. Variables include runway length, runway elevation, obstacles in departure path (if any), temperature, barometric pressure, and wind direction and strength. Calculations indicate expected aircraft performance on a given day, and are done, as Evergreen puts it, "to be confident that the aircraft may be safely operated from the given airport at a particular weight given the other conditions prevalent at the

² This emergency service originally was solicited in September, 1993, after a determination that "service to customers in the Montana area had fallen to unacceptable levels and potentially could fall even lower." Patriot protested the award which was made to Evergreen on October 8. Its protest was sustained on the grounds that Patriot, which offered the lowest price, was improperly found to be nonresponsible and award was not made in accordance with the terms of that solicitation, which had listed price as the only evaluation factor. *Patriot Airlines, Inc.*, P.S. Protest No. 93-27, January 5, 1994. Solicitation D5K-05-94 has been issued as a result of that decision.

³ The contracting officer attached to his statement an undated memorandum entitled "Summary Award Analysis," which discusses the affirmative determination of Evergreen's responsibility. It points out that Evergreen was not required to provide an aircraft before award; it must only demonstrate "the ability to procure aircraft that are capable of complying with the minimum requirements." The contracting officer contacted the Flight Standards District Office of the Federal Aviation Administration in Portland, which "would not commit to acceptability of the aircraft but did refer the matter to [the manufacturer, McDonnell Douglas]" in California. The memorandum states:

The Unit Manager, Aircraft Analysis Market Development was contacted and he [said] that based on preliminary analysis, that at least one of the aircraft proposed would be able to meet the minimum aircraft requirements. He did state that further information would take additional time. We asked him to continue his evaluation, but base[d] on his preliminary analysis we determined that the offeror responded to the minimum requirements.

⁴ That magazine published a chart showing performance characteristics, including the "typical gross weight," without passengers, for various types of cargo aircraft, including the DC-9-30 F. The data in that chart do not support Patriot's position that this aircraft cannot carry the cargo required by the contract.

time."⁵ Evergreen states:

The DC-9-30F can operate in both directions non-stop with temperatures up to 88 f. from BIL-DEN and 84 f. DEN-BIL. The probability of the temperature exceeding these temperatures is extremely low particularly at the scheduled times of operation In the event that we were not able to operate non-stop due to the temperature or a deferred maintenance item that may impact performance, we would plan to do a very quick fuel stop at Cheyenne, WY[,] which would allow us to carry the full 32,000 pounds in all cases. With the current one hour and thirty minutes of scheduled enroute time, the fuel stop could be accomplished with little or no delay. As you know we could absorb up to fifteen minutes of delay and still deliver the mail on time.

In addition, Evergreen states that its DC-9-30s are equipped with standby rockets to be used in the event of engine failure after takeoff. The added thrust from these rockets "allows the climb performance limit to be significantly increased." As an example, Evergreen states that "[i]f we look at both of the BIL charts at 84 [degrees Fahrenheit] we can see that we have achieved an 8,200 pound increase in performance for the climb limitation column." Evergreen refers to two flight plans attached to its statement and concludes that "[we] can see from the flight plans that we can fact carry the required 32,000 pounds" between Billings and Denver.

DISCUSSION

The contracting officer states the correct standard of review.⁶ Patriot's 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., supra; 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, and there were no definitive responsibility criteria.⁷ Patriot's protest can succeed only if it was an abuse of

⁵ Pilots must be able to predict "performance" in critical situations such as takeoff to ensure that a safe takeoff airspeed will be achieved while there still is enough distance remaining on the runway to abort the takeoff if necessary, and to ensure speed and angle of climb sufficient to allow the clearance of any obstacles. Takeoff roll distance and climb performance are influenced by temperature, humidity, airport elevation and wind direction and velocity, among other factors.

⁶ The contracting officer's position that this protest should be summarily denied, however, is incorrect. The previous Patriot decision, 93-27, stated that based on the record in that case, there was insufficient evidence to overturn the contracting officer's determination of Evergreen's responsibility. Since the earlier protest was sustained on other grounds, there was no need at that time to develop the record further to reach the merits of Patriot's complaint about Evergreen's aircraft, and, consequently, that decision does not control the present case.

⁷ The requirement for an aircraft of a specified capability is not a definitive responsibility criterion. *Id.*

discretion on the part of the contracting officer to conclude that Evergreen's aircraft met the requirements of the solicitation. The record shows that it was not.

This protest centers on a dispute of fact. It is well settled that "[i]n resolving factual conflicts between the protester and the contracting officer, the statements of the contracting officer are given a 'presumption of correctness' which the protester bears the burden of overcoming." *Federal Properties of R.I., Inc.*, P.S. Protest No. 93-02, May 20, 1993, quoting *T&S Products*, P.S. Protest No. 90-06, March 9, 1990. Unlike a court, our protest forum does not provide a mechanism for formal discovery or other adversarial methods of resolving factual disputes. We depend instead on the submissions of the various parties and relevant documentation submitted for review. See, e.g., *International Business Machines Corporation, On Reconsideration*, P.S. Protest No. 90-66, February 22, 1991; *Bingo Motors, Inc.*, P.S. Protest Nos. 84-40, 84-41, July 25, 1984.

Here, the record shows that the contracting officer made a reasonable effort to obtain documentation about the capabilities of Evergreen's aircraft. From the data submitted by the contracting officer and Evergreen, there is no reason to doubt that the proposed aircraft can meet the requirements of the solicitation.⁸ In contrast, the evidence does not come close to supporting Patriot's allegations. It is not certain that the protester's allegations and data concern the models of DC-9 freight aircraft which Evergreen proposed to use; Patriot relies on a chart that by its own terms describes "general characteristics" rather than specifics, and also seems to concern DC-9 models configured for passenger seating. As previously noted, there are many variables that determine aircraft performance for a given flight. Patriot has not met its burden of proof in this case.

The protest is denied.

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⁸ For the rare days in which severe weather or other conditions might reduce the load-carrying capability of its aircraft below contract minimums, Evergreen has alternate plans which would allow it to carry less fuel on takeoff and refuel along the flight route while still meeting the payload and scheduling requirements of the contract.