September 29, 1993

P.S. Protest No. 93-15

CENTRAL AIR SOUTHWEST

Solicitation No. HQ-93-11-16-T

DIGEST

Protest against awards of two of three air taxi contracts is dismissed where protester lacks standing; protest against remaining award is denied where protester fails to show that the contracting officer's affirmative determinations of the awardee's responsiveness and responsibility were arbitrary or amounted to abuse of discretion.

DECISION

Central Air Southwest ("Central") timely protests the award to Suburban Air Freight ("Suburban") of three contracts for temporary air transportation of mail under air taxi solicitation HQ-93-11-16-T, issued under sealed bid procedures by Air Transportation Operations at Postal Service Headquarters on July 6, 1993. The solicitation identified six air taxi routes for which prospective contractors were invited to submit bids; an amendment to the solicitation issued July 8 postponed the original bid closing time, 3:00 p.m. on July 15, to 3:00 p.m. on July 16.

The solicitation contained schedules for each of the six routes sought; each schedule identified an "aircraft lift requirement" expressed in terms of a multi-engine aircraft capable of carrying a specified weight of loose sack mail. Each specification also identified an "estimated daily volume" expressed in pounds of mail and the mail's estimated density, or weight per cubic foot. For the routes at issue in this protest, the aircraft lift requirement was for a "[m]ulti-engine aircraft which must be capable of carrying up to 2,000 pounds

loose sack mail," the estimated daily volume was 2,000 pounds, and the estimated density was 7.5 pounds per cubic foot.

Suburban was the low bidder for three of the air taxi routes;[1] it was awarded contracts for these routes on July 23. Suburban indicated that it would use an Aero Commander, Model 680FL, for each route, and it completed an Aircraft Modification and Operational Data form for each route showing weight and balance information. Those forms indicated that each of the offered aircraft could carry "+2,000" pounds of mail and had between 270 and 280 cubic feet available for cargo.

Central timely protested to the contracting officer, who referred the protest to this office pursuant to Procurement Manual (PM) 4.5.6 c.1.[2] Central bases its protest on two related contentions: that the Aero Commander 680FL aircraft proposed for use by Suburban cannot provide 267 cubic feet of cargo space, which Central claims is required by the solicitation,[3] and cannot safely carry the required 2,000 pounds of mail. Central alleges that an Aero Commander 680FL cannot carry 2,000 pounds of mail and also carry the quantity of fuel required by Federal Aviation Regulations for the hours and routes involved. Central has submitted its measurements of the total usable cubic footage of cargo areas of an Aero Commander 680FL, which it calculates as approximately 185 cubic feet.

Replying to the protest, the contracting officer questions Central's standing to protest the awards for routes HQ-93-11-T and HQ-93-12-T. According to the bid abstract on the record, Central would not be next in line to receive these awards should its protest be sustained.[4] The contracting officer asserts that Central is not an "interested party" whose

[1] The routes awarded were as follows:

Contract No.	Route
HQ-93-11-T	OMA-IND-OMA
HQ-93-12-T	DSM-ALO-IND-DSM
HQ-93-13-T	CID-MLI-IND-MLI-CID

Service on each route was to begin July 31, 1993. HQ-93-11 and HQ-93-13 would run through July 28, 1995; HQ-93-12 would run through July 29, 1994.

[2] PM 4.5.6 c. states:

> The contracting officer, if unable to conclude that a protest is obviously meritorious, may, within the time allowed for a decision:
>
> 1. Refer the protest to the General Counsel for resolution . . . .

[3] 267 cubic feet of space is required to carry 2,000 pounds of mail if its density is 7.5 pounds per cubic foot.

[4] The protester was third in line for award of HQ-93-12-T and fourth for HQ-93-11-T. Since the

protest may, under PM 4.5.2 a, be reviewed by this office.

The contracting officer does not question Central's standing to protest the award of route HQ-93-13-T to Suburban because Central was the second lowest bidder for that contract. Responding to the substance of Central's protest, the contracting officer asserts that Suburban "has unequivocally committed to meet these requirements of the solicitation" by stating, on the appropriate contract forms, that its aircraft would "provide 270 cu. ft. of cargo space and . . . carry 2,000 lbs. of cargo."[5] The contracting officer states that when Central's protest first was received, she requested and received from Suburban weight and balance data supported by "six pages of technical material on the capabilities of the aircraft." Subsequently, the contracting officer contacted the Federal Aviation Administration (FAA) Flight Standards District Office in Lincoln, NE, which she states has "jurisdiction" over Suburban, which is based in Omaha, NE. An FAA aviation inspector there confirmed Suburban's figures in a memorandum dated July 21.[6]

The contracting officer characterizes Central's protest as a challenge to her affirmative determination of Suburban's responsibility, because Central's "basic complaint" is that "it did not believe Suburban." The contracting officer states that her determination was based on Suburban's representations and confirmation from the FAA, and asserts that the protester has failed to meet its burden of proving that her decision was arbitrary, capricious or an abuse of discretion. The contracting officer concludes, "[a]t the most Central Air alleges misrepresentation by Suburban in the preparation of its bid; this is not 'an adequate justification for overturning a contracting officer's affirmative determination of responsibility'," citing *Automated Conversion Technologies, Inc.*, P.S. Protest No. 92-63,

intervening bidders on both routes did not propose to use the Aero Commander 680FL, Central cannot be said to have challenged their eligibility for award.

[5] The contracting officer states:

> It is clear from the solicitation that the 'weight' carrying capacity of the aircraft is more important to the Postal Service than the volume it can handle. Schedule Attachment A for each route states that the aircraft must carry 'up to 2000 pounds loose sack mail.' Schedule A also states that the 'estimated density' of the mail is 7.5 pounds per cubic foot. Central Air argues that one must divide the required 2000 lbs. by the 'estimated' 7.5 cu. ft. density to determine a required cubic capacity. However, if the density of mail rises on any given day, the aircraft will carry the same weight but [it will] take up less space on the aircraft. That is why the Postal Service used an estimated density rather than a firm density number.

[6] The memorandum states: "After reviewing [Suburban's weight and balance data] and checking it against the Aero Commander 680 Flight Manual, all data is correct according to the flight manual."

The contracting officer also includes in the protest record an August 19 memorandum from a Postal Service technical adviser in Indianapolis, who looked into the protest's allegations of the Aero Commander's inadequate cubic footage. That memorandum indicates that figures from an Aircraft Maintenance Manual provided by the FAA in Indianapolis in response to his request caused him to conclude that the interior usable cargo volume of Suburban's aircraft would exceed 267 cubic feet.

September 25, 1992.

Replying to the contracting officer's statement, Central emphasizes that its figures were actual rather than estimated measurements of an Aero Commander 680FL which it contends is identical to the aircraft that Suburban proposed to use. Based on those measurements of the length, height and width of the main cabin and the rear baggage compartment of its own 680FL, the protester asserts that Suburban cannot provide 270 cubic feet of usable cargo space in each aircraft. It states that based on measurements published in the FAA-approved maintenance manual for the airplane, an unaltered 680FL has at most 187 cubic feet of available volume.[7] The protester complains that the contracting officer accepted Suburban's representation at face value, when the "only way to resolve and absolutely verify" that Suburban's aircraft have 267 cubic feet for cargo is to measure Suburban's airplanes.

The protester also contests Suburban's weight and balance calculations, concluding that if the awardee's aircraft were loaded with sufficient fuel as required by FAA regulations, then allowing for practical considerations such as average headwind velocity, the aircraft could carry only 1,765 pounds of mail, not 2,000. The protester claims that the sources of its figures include interviews of one Suburban pilot, other pilots, and weather data. The protester suggests that the Lincoln FAA personnel were biased toward Suburban and asks that we undertake to analyze the load-carrying capabilities of Suburban's aircraft by consulting with the FAA in Washington, other pilots and aviation consultants.[8]

In rebuttal, the contracting officer emphasizes that Suburban has been performing its obligations well, including carrying 2,000 pounds of mail on several occasions. She also states that Suburban's "interior modifications" of its aircraft have resulted in its capability to "more than provide the volume committed to in its bids."

The contracting officer states that Suburban's performance shows that Central's argument that Suburban cannot perform is "not borne out by the facts." She contends that even if, despite her affirmative determination of its responsibility, Suburban were to have problems performing the requirements of its contracts, then that would be a matter of contract administration which cannot be resolved in the protest forum. Finally, the contracting officer takes exception to the protester's "innuendo . . . unsupported by any facts" that the FAA Flight Standards District Office in Lincoln is biased in favor of Suburban.

Suburban submitted comments on the protest. It states that its aircraft meet the specifications of the solicitation and asserts that since the solicitation requires only that the

[7] The protester admits that if Suburban's aircraft have extended cargo areas, they could carry up to 245 cubic feet in cargo volume, but asserts that the aircraft still would not meet what it terms the "contract requirement."

[8] Our office does not conduct independent investigations and we are not set up to conduct adversary proceedings; rather, we resolve protests based upon the written record supplied by the contracting officer, the protester and interested parties. See *COR, Inc.*, P.S. Protest No. 90-16, June 22, 1990; *Cohlmia Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988.

aircraft be able to carry up to 2,000 pounds of mail, a protest based on alleged inability to meet an estimated--but not required--cargo volume must fail. The awardee claims that in actuality, due to its reconfiguration of the interiors of its aircraft, the aircraft can utilize approximately 280 cubic feet for cargo. The awardee disputes the protester's weight, balance, and fuel calculations as well, reaffirming its representations to the contracting officer and stating that it already has performed the requirements of these and similar contracts with its 680FLs. Suburban points out that its contracts contain a provision which would allow it to delay or cancel a flight if adverse weather conditions require the loading of fuel "in addition to that carried under the conditions set forth within the contract. . . ." The awardee asserts that such a situation would be rare and that the protester has provided no evidence to support its assertions to the contrary. Finally, the awardee also takes exception to Central's contention that the FAA Flight Standards District Office in Lincoln is biased in Suburban's favor.

OKAir Airlines, Inc., an interested party, has submitted comments expressing agreement with the protester's doubts that an Aero Commander 680FL can carry 2,000 pounds of cargo with the quantity of fuel required by FAA regulations.

DISCUSSION

We first address our jurisdiction over Central's protest. The contracting officer is correct that Central's protest against two of the three awards to Suburban cannot be considered because Central lacks standing to raise it. Under PM 4.5.2, this office has jurisdiction to decide protests where the protester is an "interested party." Generally, an "interested party" is a party which would be eligible for award if its protest were upheld. *See Canteen Corporation*, P.S. Protest No. 92-37, October 20, 1992; *Compu-Copy*, P.S. Protest No. 90-21, July 5, 1990. In this case, if the awards of routes HQ-93-11-T and HQ-93-12-T to Suburban were overturned, Central would not be in line for those awards, since it had, respectively, only the fourth and third most advantageous bids for them and it has not challenged the bids of the intervening bidders for those contracts. Central's protest against those awards, therefore, is dismissed.

Turning to the merits of the protest against the remaining route award, Central's basic contention is that Suburban's aircraft cannot handle the weight and volume of mail that it contends is required by the solicitation. Such a contention challenges the contracting officer's affirmative determination of Suburban'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.

> An affirmative determination of responsibility is a matter within the broad 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.

Gage Constructors, P.S. Protest No. 87-11, July 13, 1987 (citing *Logan Co.*, P.S. Protest No. 83-1, February 9, 1983).

The protester has not alleged fraud by the contracting officer. Further, the requirement that the awardee provide aircraft capable of safely carrying 2,000 pounds of mail is not a definitive responsibility criterion. *See, e.g., Noah Howden, Inc.*, Comp. Gen. Dec. B-227979, 87-2 CPD 386, October 22, 1987 (requirement in solicitation that fan assembly components be obtained from approved sources is not a definitive responsibility criterion); *W.H. Smith Hardware Company*, Comp. Gen. Dec. B-228576, 88-1 CPD 110, February 4, 1988; *accord Transnorm, supra*. The cargo weight requirements of the solicitation are performance rather than definitive responsibility criteria. *Id*.

Since the protester has not alleged fraud and there are no definitive responsibility criteria, the burden is on the protester to show that the contracting officer abused her discretion. It has failed to meet that burden. We will not disturb a contracting officer's determination that a bid or offer is responsive to the solicitation or technically acceptable unless it is shown to be arbitrary, unreasonable or in violation of procurement regulations. *See, e.g., Federal Properties of R.I., Inc.*, P.S. Protest No. 93-02, May 20, 1993. The capacity to carry 2,000 pounds of cargo was a requirement specifically set out in the solicitation. A specific cubic capacity was not.[9] On its face, Suburban's bids were responsive to the solicitation, and it was not unreasonable or an abuse of discretion for the contracting officer to rely on Suburban's representations, especially in light of the FAA's subsequent verification of Suburban's weight and balance data.

There are many reasons why Suburban's weight, balance and volume calculations could be different from the protester's yet its aircraft could still be loaded safely and in conformance with contract requirements. For example, an aircraft can provide more space for cargo if passenger seats are removed (as Suburban claims to have done). Central has not provided evidence of error other than its own calculations, speculations and alleged statements of various pilots which would be inconclusive as evidence with respect to Suburban's procedures.[10] The protester thus has not met its heavy burden to overcome the presumption of correctness which attaches to the contracting officer's actions and statements. *See Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78,

[9] We agree with the contracting officer (see footnote 5) that the solicitation was more concerned with weight-carrying capacity than with cubic capacity. The solicitation reflects this by making the 2,000 pounds a contractual requirement while volume is only estimated. Based on the official data for Suburban's aircraft as interpreted by the contracting officer, Suburban, and the FAA, Suburban can carry the required 2,000 pounds of mail matter safely. Even if Suburban's estimate that it has 270-280 cubic feet of space available for cargo were erroneous, it would afford no basis to overturn Suburban's awards because no specific cubic capacity was a requirement of the solicitation.

[10] Central's reply comments appear to concede that the only relevant measurements are those of the aircraft which Suburban proposed to use on the individual contract. The protester's calculations based on its analysis of a different aircraft, therefore, provide an inadequate basis to overturn the award.

February 10, 1992.[11]

The purpose of making weight and balance calculations is to ensure that the aircraft's center of gravity is located within safe limits--the airplane will not stall. Since, in this case, the contracting officer and the FAA[12] agree that Suburban can fly the mail safely in conformance with its contractual obligations, we have no basis to overturn its awards.[13]

The protest is dismissed in part and denied in part.

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Contract Protests and Policies

[11] The burden is especially stringent when the protester alleges bias, as Central does with respect to the FAA in Lincoln. A protester must offer specific proof of allegations of bad faith, bias or unfairness. *Thermico, Inc.*, P.S. Protest No. 90-71, December 21, 1990. Suspicion, assumptions and innuendo are not sufficient, and prejudicial motives will not be attributed to individuals on the basis of inference or supposition. *Id.*; *see also, Rickenbacker, supra; COR, Inc., supra*.

[12] The weight and balance data which the FAA inspector in Lincoln reviewed included Suburban's figures for amount of fuel to be carried on a typical instrument (poor weather) flight along each route. Although the inspector did not specifically refer to FAA regulatory fuel requirements for instrument flight plans, he seemed to approve Suburban's fuel calculations since he wrote that "all data is correct according to the flight manual." In any case, the FAA is the appropriate party to determine whether its regulations are being violated and to take any necessary action. *Flamenco Airways, Inc.*, P.S. Protest No. 91-21, May 21, 1991.

[13] If Suburban's representations about the performance criteria were discovered to be erroneous--if, in fact, Suburban failed to perform the requirements of the contract--then the Postal Service's remedy would be a default termination under the Termination Clause of the contract. Any matter of contract administration, such as termination, is subject to review under Contract Disputes Act procedures, not the protest process. *Transnorm, supra*.