

Protest of) Date: April 13, 1988
COHLMIA AIRLINE, INC.)
Under Solicitation No. ANET-87-03) P.S. Protest No. 87-118

DECISION

Cohlma Airline, Inc. (Cohlma), timely protests the award of a contract for the transportation of mail by aircraft, under Solicitation No. ANET-87-03, to Kitty Hawk Airways, Inc. (Kitty Hawk). Cohlma alleges that its proposal and Kitty Hawk's were improperly evaluated. Cohlma also alleges that Kitty Hawk's proposal failed to meet the technical requirements of the solicitation, and asserts bad faith on the part of contracting officials, who allegedly predetermined that Cohlma would not receive award. Cohlma requests the award be set aside and that it be awarded the contract.

Facts

Solicitation No. ANET-87-03, issued September 3, 1987, by the Transportation and International Services Office, Mail Processing Department, sought proposals for a two-year contract, commencing November 21, 1987, for the air transportation of mail for a network of ten cities in the Western section of the United States.^{32/} Cohlma had performed a similar service under an emergency contract for approximately twenty months prior to the solicitation.

Twenty-two proposals were received by the offer due date of October 5, 1987. A three member technical evaluation board evaluated the offers and established a competitive range which included the offers of both Cohlma and Kitty Hawk. Negotiations were conducted with all offerors within the competitive range. Best and final offers were received by October 23. Kitty Hawk's proposal was rated highest by the evaluation board and the contracting officer awarded it the contract on October 26. This protest followed.

The solicitation sets forth at page (x) the criteria upon which proposals are to be evaluated:

^{32/}Denver, Las Vegas, Los Angeles, Portland, Phoenix, San Francisco, Seattle, Albuquerque, Salt Lake City and San Diego.

The relative superiority of the proposed service and price will be equal factors in selection for award.

Prices will be compared based upon the total cost to the Postal Service of the offered network. The per pound rates of proposals (or portions thereof) offering service on a guaranteed lift (shared expense) basis will be multiplied by the proposed maximum weights to provide a basis for comparison.

The following elements of service, ranked in order of importance, will be considered in the Postal Service's technical evaluation of the relative superiority of the proposed service: (1) the perceived reliability of the proposed network considering the offeror's previous experience in providing comparable service, the feasibility of its proposed hub transfer operations, the sufficiency of time allowed in the proposal for hub transfer operations and the adequacy of the offeror's proposed aircraft, ground equipment and facilities; (2) the length of time between required tender [of mail from the Postal Service to the contractor] and delivery (with tighter time frames preferred); (3) the extent to which the proposal offers to provide service via aircraft dedicated to the transportation of mail under the solicited contract.

The solicitation requires service be provided to and from ten cities, via a central hub^{1/} through which all of the mail would pass en route to destination points. A guide reflecting approximate median averages of mail flow between the hub and origin/destination points was provided as part A of the specifications, an attachment to the solicitation. The solicitation also requires, at page (iii), that offerors propose tender times no earlier than 2130 hours for each origin point, and delivery times no later than 0500 hours at each destination point.

The record in this protest consists of several rounds of lengthy statements from both parties, hundreds of pages of attachments, affidavits of various persons, a transcript of the parties' negotiation session, and numerous allegations of unfair dealings and severe factual disputes. In addition, many of the protester's points were discussed at a lengthy protest conference. We will briefly summarize the parties' positions.

Issues Presented

The protester presents four arguments against the award to Kitty Hawk. First, Cohlmia contends that the technical evaluations were improper and that discussions were not meaningful. Second, Cohlmia asserts that price evaluations were not fairly conducted. Third, it claims that Kitty Hawk's proposal fails to meet the technical requirements of the solicitation because its proposed transit times cannot be achieved. Finally, the protester alleges that contracting officials have conducted the procurement in bad faith due to an alleged vendetta against Cohlmia on the part of postal procurement personnel.

^{33/}Both proposals offered Las Vegas as the hub of operations.

A. Technical Evaluations

The contracting officer's statement reveals that Kitty Hawk was rated higher than Cohlmia in both price and service, elements which were to be accorded equal weight under the solicitation's evaluation scheme. As to the service rating accorded Kitty Hawk's proposal, the statement identifies five main areas of significance.

1) Kitty Hawk proposed to operate the majority of its aircraft itself rather than through subcontractors, allowing it greater control over schedules. The Kitty Hawk proposal specified that it would operate all but one^{1/} of its planes itself, either as owner or by wet lease.^{1/} Cohlmia's proposal failed to specify how many planes it would operate itself, by wet lease, or by dry lease.^{1/} The contracting officer states that Cohlmia offered to operate fewer planes itself as it proposed to lease passenger planes from Braniff, which Braniff would use commercially during the day.

2) Kitty Hawk proposed to perform its own maintenance while Cohlmia did not.

3) Kitty Hawk proposed to use a fleet of all-cargo aircraft. Cohlmia proposed the use of passenger aircraft in which some of the mail could be loaded into the passenger compartment ("seat packing"). Kitty Hawk's aircraft avoided potential mail security problems which Cohlmia allegedly had experienced.^{1/}

4) Kitty Hawk offered superior hub facilities based upon several factors, including its proposal to protect the mail from the elements during hub transfer operations. Kitty Hawk's proposal included plans to construct protective awnings and stated that airport approval had been obtained for temporary protections, although the approval of airport authorities was later withdrawn. Cohlmia's proposal made no reference to mail protection.

5) Kitty Hawk offered a sophisticated communications network which Cohlmia's proposal lacked.

In sum, Kitty Hawk's proposal was rated higher as to evaluation factor one.^{1/} Cohlmia

^{34/}The sole subcontracted plane represented a temporary arrangement, and was to be replaced shortly with an owned/operated plane.

^{35/}A wet lease is a leasing arrangement in which a lessor's aircraft and crew are totally dedicated to the lessee.

^{36/}A dry lease is a subcontracting arrangement in which a lessor provides a transportation service while maintaining full control over its aircraft and crew.

^{37/}Mail thefts occurred during Cohlmia's performance of the emergency contract, while Cohlmia was in possession of the mails, for which costs were levied against Cohlmia.

^{38/}Kitty Hawk was highly rated for experience based on, among other reasons, its history of service in the industry and its favorable experience performing a Postal Service 1986 Christmas contract.

offered more advantageous tender times, (factor 2). Both proposals were rated equally as to the provision of dedicated equipment (factor 3).

Regarding the scoring of the service proposals, Cohlmia alleges:

1) that it has more experience than Kitty Hawk and that its time frames and hub transfer operations are known to be workable while Kitty Hawk's are not;

2) that Kitty Hawk does not operate its planes itself but by subcontract;

3) that there is no advantage to Kitty Hawk's proposed use of cargo planes over Cohlmia's passenger planes;

4) that Kitty Hawk does not have required back-up planes available;

5) that the proposed hub facilities are the same and Kitty Hawk's proposal for protecting the mail from the weather should not have accorded it a higher rating because proper investigation should have revealed that airport authorities would not allow construction of such protective awnings;

6) that Kitty Hawk's Convair planes require electric starters which result in an inefficient hub;

7) that past and possible future seat packing of mail on passenger planes should not have adversely affected Cohlmia's evaluation because there is no danger to mail security;

8) that Cohlmia's tender and delivery times are more advantageous than those of Kitty Hawk;

9) that Cohlmia's planes will be fully available for postal use, that the contracting officer's contention to the contrary is unsupported conjecture, that its leased planes never were unavailable in its prior contracts; and

10) that the issues of protecting the mail from the weather and the availability of its planes were not raised in negotiations, resulting in the negotiation not being meaningful.

The parties disagree regarding the success and reliability of Cohlmia's prior experience under the emergency contract. Cohlmia asserts that its demonstrated superior performance on the existing emergency contract is better evidence of reliability than Kitty Hawk's unknown reliability. Further, it believes that Kitty Hawk's infeasible transit times and poor performance since contract award demonstrate Kitty Hawk's unreliability and support Cohlmia's position that Kitty Hawk's performance would be (and, in fact, has been, since contract inception) inferior to its own.

The contracting officer maintains that Cohlmia's service under the emergency contract was marginal, and that it received lower scores in perceived reliability than Kitty Hawk in part because of shortcomings in its performance of the emergency contract. He

maintains that Cohlmia misdirected mail; generated a large number of mail irregularities (receiving numerous Postal Service Form 2759's which note specific performance deficiencies); experienced mail security problems, including theft of mail, largely due to its use of passenger aircraft; provided insufficient lift in June and July, 1987; failed to perform on three segment contracts in 1985; and had inefficient and unsafe hub operations.

Cohlmia counters by stating that its hub operations are nearly identical to those proposed by Kitty Hawk, are efficient and safe, that no concerns were ever expressed over its hub operations or the protection of mail from the weather during its performance of the emergency contract; that it did not misdirect mail and has performed exceptional direction of the mail; that while mail thefts did occur, the thefts occurred on cargo planes for which Cohlmia was not responsible, Cohlmia reported the thefts, cooperated with Postal Service authorities and fired its

workers who were involved, and security is not a problem; that the alleged insufficient lift in June and July was due to a subcontractor having pulled its planes from service on short notice, a circumstance occasioned by the fourteen-day termination provision of the emergency contract which prevented Cohlma from being able to make more secure, long-term commitments for aircraft, a condition which will not arise under the service solicited here; and that the 1985 segment contracts issue has long been resolved and has not affected its having received subsequent awards.

The contracting officer replies that the mail thefts did occur on Cohlma's passenger planes and that even if Cohlma were correct in this regard, seat-packing of mail continues to present potential security problems absent in all-cargo planes and for which Cohlma was properly down-graded; and Cohlma's poor performance ratings,^{39/} which Cohlma disputes, are accurate and, if anything, are conservative.^{40/}

B. Price Evaluation

Concerning the evaluations of the pricing proposals, Cohlma contends that its per pound rates are either less than or only slightly more than those of Kitty Hawk. It bases this assertion on its having bid the maximum weights set forth in Specifications, Part A, while Kitty Hawk did not.^{41/} The protester also claims that post-award performance records which include data on the weights of mail transported by Kitty Hawk indicate that Kitty Hawk actually moved far less mail than the maximum amounts it proposed and failed to meet the required minimum volumes of mail set forth in Specifications Part A of the solicitation. It further claims that Kitty Hawk's price per pound increases dramatically when mail volumes actually transported under the contract are considered.

Cohlma also contends that Kitty Hawk's proposed tender times are too early to receive the bulk of the Express Mail which is the primary purpose of the contract, so that the remainder of the Express Mail must be tendered to other carriers, resulting in additional cost to the Postal Service which must be considered in comparing price. Cohlma's tender times, on the other hand, are claimed to allow for the receipt of Express Mail.

The contracting officer notes that, pursuant to the solicitation, prices were to be compared on the basis of the total cost to the Postal Service of offered network, not upon price per pound. Basing price upon the maximum weights set forth in the solicitation is not proper since the solicitation did not require that offerors propose the maximum weights of Part A. Rather, offerors were permitted to propose their own maximum weights as long as they were within the minimum and maximums set forth therein. The solicitation provision regarding per pound rates of proposals has no

^{39/}Kitty Hawk's substandard performance ratings, achieved during its initial performance of the contract at issue, were, of course, not before the contracting officer at the time proposals were evaluated.

^{40/}The contracting officer also cites alleged service deficiencies occurring during a 1987 Christmas air taxi contract. These allegations are adequately rebutted by Cohlma, and are unpersuasive.

^{41/}The protester maintains that Kitty Hawk's per pound prices were calculated upon 117,000 pounds of mail being transported, while it calculates Kitty Hawk's proposal to include only 111,000 pounds.

bearing because both Kitty Hawk and Cohlma offered service via dedicated aircraft not guaranteed lift. The total cost to the Postal Service, which the solicitation requires to be the basis of comparison where, as here, dedicated aircraft are proposed, is the sum of the daily trip rates as provided at page (iii) of the solicitation. The contracting officer has provided a detailed breakdown of daily trip costs for each route, based upon proposed maximum weights,^{42/} and annualized these costs. As so calculated, the total cost to the Postal Service of the proposed network for Kitty Hawk was substantially lower than of Cohlma's.

As to the issue of the tender of Express Mail, the contracting officer states that the solicitation was designed primarily for First-Class and Priority Mail, not Express Mail, and supplies as support the solicitation language^{43/} and a memorandum to the file, written two months before award, which is consistent with that view. He further states that Kitty Hawk's tender times were within the parameters of the solicitation, which did not provide for particular consideration of the tender of Express Mail in making price comparisons. He notes, though, that Cohlma was technically evaluated higher than Kitty Hawk for its earlier tender times.

C. Technical Requirements

Cohlma contends that Kitty Hawk's proposed network fails to meet the technical requirements of the solicitation in that several routes cannot be operated according to Kitty Hawk's proffered schedules with the aircraft and ground terminal handling equipment it proposed to use. For example, Cohlma questions the Seattle-Portland-Las Vegas-Portland-Seattle loop segment. Cohlma alleges that Kitty Hawk's tender, departure and arrival times are unworkable and unrealistic based upon its experience working that segment, Kitty Hawk's post-award performance records, and the block times^{44/} and schedules provided by commercial airlines.

The contracting officer counters by stating that Cohlma's experience is inapposite because Kitty Hawk proposes all-cargo and containerized aircraft, so that loading and unloading will be faster than in Cohlma's experience and ground time and handling delays will be minimal. Further, allotted ground times provide a large scheduling cushion to assure timely delivery. The contracting officer states that the offered flight times are sufficient. He bases this conclusion upon the average speed of the planes to be utilized and the mileage to be flown (including time required for takeoff and landing)

^{42/}As noted, offerors were not required to propose the maximum weights set forth in the specifications so long as their proposed weights were at least as much as the minimums of the specifications. However, the contractor is required, by page (iii) of the solicitation, to carry mail at the per trip rate up to the limits of the lift capacity of its aircraft where the aircraft lift capacity exceed the maximum weights proposed.

^{43/}The solicitation provides, at page (ii), that it "is intended to procure for the Postal Service air transportation of mail for Express Mail and other classes of mail." Special Provision 15 defines other classes of mail as First-Class and Priority Mail.

^{44/}Block time means the full amount of time required from takeoff to landing, including taxiing and clearance.

and the minimal air traffic at the proposed flight times which eliminates waiting.

Cohlmiia alleges that the contracting officer based these calculations on the cruise speed of the aircraft, failing to take into account time required for taxiing, clearance for takeoff, lower speeds while climbing, weight restrictions on cruising speed, lower speed while descending, clearance for landing, and taxiing at the destination, all of which must be considered in computing block times. For instance, Cohlmiia notes that the 12 minute time allocated in Kitty Hawk's schedule^{45/} for the flight between Seattle and Portland allegedly is far out of line with actual block times of 40 - 45 minutes. Cohlmiia has provided commercial airline scheduling information, as well as its own experience in support of this position. Cohlmiia further claims that Kitty Hawk's times fail to account adequately for ground handling.

The contracting officer responds by pointing out that Kitty Hawk has been able to perform its schedules on the challenged routes, contrary to Cohlmiia's assertions that conforming to the stated schedules would be a physical impossibility. He submitted operating reports said to demonstrate that Kitty Hawk has met its proffered schedules for the challenged routes a good deal of the time^{46/} and that, after an initial "shakedown" period in which performance was substandard, Kitty Hawk has met its schedules nearly 100% of the time.^{47/} The contracting officer further states that the times provided by the commercial air carriers are not clearly comparable to those for Kitty Hawk's operation; for example, commercial passenger plane times would include longer taxiing and day-time air traffic congestion time allocations. The contracting officer reiterates that Kitty Hawk allocated sufficient extra time to its hub transfer operations to accommodate late arriving or early departing planes.

Cohlmiia asserts that the Convair aircraft which Kitty Hawk proposed to use on the Denver-Las Vegas route is incapable of flying the route in the stated time without violating FAA regulations regarding adequate fuel reserves. The contracting officer replies that Kitty Hawk intends to attach extra fuel tanks to its planes, which would then meet these regulations. He also maintains that the entire subject is a matter of contract administration over which the Postal Service can assert claims against Kitty Hawk should it fail to meet its proposed schedules.

Cohlmiia next alleges that Kitty Hawk did not have the planes or containers which it

^{45/}The contracting officer's statement introduced this flight time frame, determining it to have been allocated by Kitty Hawk's schedule. Our examination fails to disclose the source of this flight time, but we accept the contracting officer's statement.

^{46/}On the Seattle - Portland route, for instance, the contracting officer notes that between January 1 and February 19 the on-time delivery rate was 100%. The on-time rate for that route since inception (November 23 through February 19) was 90%. On-time rates for the return Portland - Seattle route were 94% since the first of the year and 75% overall.

^{47/}Cohlmiia points out the great extent of Kitty Hawk's late deliveries according to operations reports, claims that favored criteria have been used to judge Kitty Hawk's performance, and asserts that the contracting officer's performance figures are badly skewed and should be disregarded.

proposed to utilize and that the design of Kitty Hawk's Convairs requires longer loading and unloading times than were proposed. The contracting officer states that Kitty Hawk did have these items and that being prepared for start-up is a matter of contract administration which does not concern contract award. The contracting officer asserts that the times allocated for loading and unloading are sufficient and that Kitty Hawk's cargo planes are more efficient than Cohlmia's passenger planes for the loading and unloading of cargo.

As to Cohlmia's allegations that Kitty Hawk's tender times do not meet the solicitation's requirements, the contracting officer maintains that Kitty Hawk's tender times meet the tender times listed in the solicitation, that Cohlmia's contention that Kitty Hawk's tender times are too early to move even the minimum amounts of mail required by the solicitation is incorrect, and that the Postal Service is free to solicit whatever service it deems appropriate.

D. Bad Faith

Cohlmia alleges that contracting officials have conducted the procurement in bad faith and in an environment that is fundamentally unfair because it was predetermined that Cohlmia would not be awarded the contract. The reasons asserted for the contracting officer's decision are said to constitute merely post-award justifications for its position. Recognizing the high burden which it must overcome in proving bad faith, Cohlmia offers the following as circumstantial proof:

1) a memorandum to the record, written by the contracting officer two months before award stating disbelief as to how Cohlmia could have been awarded the existing emergency contract and allegedly suggesting that it should not be awarded the permanent contract;

2) a pre-award survey was conducted of Cohlmia but not Kitty Hawk;

3) the pre-award survey of Cohlmia was allegedly reported in an unfair and misleading way^{48/};

4) allegedly irrelevant and prejudicial subject matter was inserted by the contracting officer into the record solely to disparage Cohlmia;

5) matters of concern to the contracting officer were not disclosed in negotiations;

6) current allegations of inferior service are inconsistent with Cohlmia having been requested to continue other services for the Postal Service and inconsistent with Cohlmia having been allowed to continue the emergency contract for almost two years despite the Postal Service's option to cancel with fourteen days notice;

^{48/}An affidavit of a Cohlmia official present at the survey is offered in support of this contention.

7) criticisms of various services of Cohlmia which occurred prior to Cohlmia's operations under the emergency contract, but which allegedly were not raised in awarding the emergency contract, were put into the record specifically to prejudice the protester.

8) the existence of Kitty Hawk's post-award operations reports were known or should have been known and the reports were wrongfully withheld until very late in the protest process; and

9) the contracting officer employed a double standard in discussing Kitty Hawk's and Cohlmia's performance, evidenced by differing and prejudicial means of computing on-time performance and of identifying mail irregularities, and that the contracting officer's presentation of the Kitty Hawk performance data is disingenuous and misleading.

Cohlmia alleges that these actions all lead to the conclusion that a plan existed to not award a contract to Cohlmia, and that the justifications for this action were only constructed after award.

The contracting officer rebuts these contentions as follows:

1) The pre-award memorandum to the record accurately reflects the contracting officer's observations and plans for the procurement of permanent service. Those observations were not furnished to the technical evaluation board which was therefore not influenced by the memorandum;

2) a favorable evaluation of Kitty Hawk's operation had been conducted in connection with its 1986 Christmas network so that a pre-award survey was unnecessary, while no similar recent survey of Cohlmia had been conducted;

3) Cohlmia's pre-award survey and its reporting were proper and accurate;

4) the allegedly prejudicial subject matter inserted into the record was relevant as rebutting Cohlmia's claim of having performed superior service in the emergency contract;

5) negotiations were properly conducted as the transcript reflects;

6, 7) Cohlmia's past inferior service was a proper consideration, bearing on its reliability and other evaluation factors;

8) all operating reports known to exist were disclosed to Cohlmia pursuant to its Freedom of Information Act request. The additional reports, provided to the protester and our office late in the proceedings were discovered subsequently to that earlier disclosure; and

9) presentation of data and submissions to our office were fair and evinced no prejudice;

The contracting officer states that no plan existed to disparage Cohlmia and that the procurement was conducted in good faith.

Discussion

A. Procedural Issues

A preliminary matter concerns the contracting officer's decision to withhold certain documents from the protester under a claim of privilege. Cohlmia complains that it has been prejudiced by this nondisclosure and has requested this office to order the disclosure of the disputed documents pursuant to a protective order. We conclude that an order to the contracting officer to disclose these documents is inappropriate. Although the Postal Contracting Manual is silent on the disclosure question, we have in the past not attempted to resolve conflicts between contracting officers and parties to a protest over the release of allegedly confidential or privileged information. See CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 27, 1987, at note 6. It is sufficient that we have reviewed the disputed documents in camera to determine whether the assertedly privileged material impacts upon the protest decision. If it does, such information is taken into account in rendering the decision. Id. See also Actus Corporation/Michael O. Hubbard and L.S.C. Associates, Comp. Gen. Dec. B-225455, February 24, 1987, 87-1 CPD & 209.

We note that the Postal Service has a legitimate and important interest in limiting disclosure of proprietary information between bidders, and of information regarding the deliberative process of the procuring office. Cf. CACI Field Services, Inc. v. United States, 12 Cl. Ct. 440 (1987). If a bidder could get information, otherwise not disclosable in a bid protest procedure, the Postal Service's ability to maintain the integrity and efficiency of the procurement process would ultimately be weakened. Cf. Metric Systems Corporation v. United States, 13 Cl. Ct. 504 (1987).^{49/}

A second preliminary factor involves the subfactors which were used in the technical evaluations but were not set out in the solicitation. Subfactors need not be enumerated in the solicitation where they are reasonably related to stated criteria. See Technical Services Corp., Comp. Gen. Dec. B-214634, February 7, 1985, 85-1 CPD & 152; Thomas G. Gebhard, Jr., Comp. Gen. Dec. B-196454, February 8, 1980, 80-1 CPD &

^{49/}There are two methods, outside the protest process, by which a protester can receive information withheld by the contracting officer: by a Freedom of Information Act request, or through discovery in litigation in a court of competent jurisdiction. Postal Service protest decisions are not suspended during the resolution of Freedom of Information Act appeals, even if the information sought would be helpful to the prosecution of the bid protest. See Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984; Edward B. Friel, Inc., P.S. Protest No. 82-8, May 4, 1982. We note that the Postal Service has greater statutory authority than other government agencies to withhold information of a commercial nature. 39 U.S.C. ' 410 (c)(2). Alternatively, if the subject of a bid protest proceeding before this office is also the subject of litigation, our office may decline to decide the protest unless the court requests, expects or otherwise expresses interest in our decision. PCM 2-407.8 f. (11) see Irwin Grossman, P.S. Protest No. 84-55, July 23, 1984.

115; Buffalo Organization for Social Technological Innovation, Inc., Comp. Gen. Dec. B-196279, February 7, 1980, 80-1 CPD & 107. Cohlma has not objected to the propriety of the subfactors and our review leads us to conclude that the subfactors reasonably related to the stated evaluation criteria.

Finally, our bid protest forum, unlike a judicial one, is ill-suited to resolving factual disputes, as we cannot conduct adversary functions to any significant extent or degree. International Mailing Systems, Inc., P.S. Protest No. 84-13, April 27, 1984; Southern California Copico, Inc., P.S. Protest No. 83-76, March 5, 1984. In a factual dispute we adopt the contracting officer's position absent sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's action. Harper's Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976; Alta Construction Co., P.S. Protest No. 85-2, February 26, 1985; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986.

Technical Requirements

Cohlma has contended that Kitty Hawk's proposal failed to meet the technical requirements of the solicitation. In this regard, we note that award to an offeror which fails to meet essential requirements of a solicitation is improper since award must be based upon the terms on which the competition was conducted. Dwight Foote, Inc., P.S. Protest No. 87-90, September 28, 1987. If the proposal of Kitty Hawk was technically unacceptable, it should have been placed outside the competitive range for failure

to meet essential requirements. Sea-Land Service, Inc., P.S. Protest No. 77-5, April 15, 1977. We understand Cohlma's argument to be that the alleged impossibility of the times proposed by Kitty Hawk adversely impact its ability to meet the 0500 cut-off point for delivery of the mail.

Even if Kitty Hawk's times are not feasible, its proposal is not rendered technically unacceptable unless these or other material requirements of the solicitation are not met, although infeasibility could properly be the basis for a lower technical evaluation for the reliability criterion or for a nonresponsibility determination. We will not undertake to resolve the factual disputes surrounding speeds of aircraft or the like. The dispute is essentially a factual one encompassing the presumptions in favor of the contracting officer's position, outlined above. While we believe that the contracting officer is fairly chargeable with recognizing times which are impossible to achieve by the utilization of proposed equipment, the protester has not met its burden of proving technical deficiency in these areas. While the protester's allegations of impossibility of performance are supported by its own experience and arguably by comparable scheduling of commercial airlines, it is rebutted by various statements of the contracting officer that the times are practical and by the subsequent operating records of Kitty Hawk. These records reveal that Kitty Hawk's proposed schedules have been actually accomplished. The 0500 delivery cut-off point has been achieved by Kitty Hawk pursuant to its proposed plan with its proposed aircraft and hub transfer equipment.^{1/} The proposal was not, therefore, technically deficient in this regard.

The potential for late delivery occasioned by the plane speed distance traveled calculations (and supported to some degree by the late deliveries experienced in Kitty Hawk's early performance of the contract), may have provided a basis for the down grading of Kitty Hawk's proposal, giving Cohlma support in hindsight. However, as set out below it is not our function to resolve disputes on the scoring of proposals, Mid-Atlantic Forestry, infra, this affords no basis for relief.^{1/} We further note that the contracting officer could not have been on notice of Kitty Hawk's post-award performance when he determined that award to Kitty Hawk was proper.

Cohlma has also claimed that Kitty Hawk's tender times are too early to move even the minimum amounts of mail required by the solicitation and that the proposal is therefore technically unacceptable for failing to conform to the minimum requirements of the solicitation. (This allegation is closely related to its contention regarding the scoring of Kitty Hawk's proposal on this point, analyzed below.) We find the tender times in Kitty Hawk's proposal in conformance with the requirements of the solicitation, so this basis of Cohlma's protest is factually unsupported. Cohlma cannot complain that the minimum mail volumes are too low, as Postal Service procuring officers have the

^{50/}The protester has not seriously challenged the contracting officer's reasonable explanation of the acceptability of Kitty Hawk's Denver-Las Vegas route and has failed to meet its burden of proof in that regard.

^{51/}The contracting officer has stated that Kitty Hawk allocated sufficient extra time to its hub transfer operations to provide a large scheduling cushion for meeting delivery deadlines. This does not violate the solicitation and could properly have been considered by the contracting officer.

responsibility for drafting specifications. We will not object to specifications unless there exists no reasonable basis for them. Zinger Construction Co., Inc., P.S. Protest No. 77-32, August 5, 1977. Further, there is considerable flexibility in determining what specifications are reasonably within the minimum needs of the Postal Service. Comprehensive Health Services, Inc., P.S. Protest No. 83-46, October 28, 1983.^{1/}

Scoring of Proposals

Cohlma also challenges the scoring of the proposals.

[T]his office will not substitute our judgment for that of the evaluators or disturb the evaluation unless it is shown to be arbitrary or in violation of procurement regulations. H & B Telephone Systems, P. S. Protest No. 83-61, February 6, 1984; Amdahl Corporation, P.S. Protest No. 81-34, September 29, 1981. The determination of the relative merits of technical proposals is the responsibility of the contracting office, which has considerable discretion in making that determination. It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. See Mid-Atlantic Forestry Services, Inc., Comp. Gen. Dec. B-217334, September 9, 1985, 85-2 CPD & 279. In reviewing a technical evaluation, we will not evaluate the proposal de novo, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. Rice Services, Comp. Gen. Dec. B-218001.2, April 8, 1985, 85-1 CPD & 400. The protester bears the burden of showing that the technical evaluation was unreasonable. Id.

Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986.

[T]he assignment of numerical scores or ratings to a proposal is an attempt to quantify what is essentially a subjective judgment. This is an accepted procedure. Book Fare, Inc., P.S. Protest No. 80-29, July 3, 1980; Didactic Systems, Inc., Comp. Gen. Dec. B-190507, June 7, 1978, 78-1 CPD & 418. "The determination of the desirability of proposals is largely subjective, primarily the responsibility of the procuring [activity], and not subject to objection ... unless shown to be unreasonable, arbitrary, or violative of the law." High Plains Consultants, Comp. Gen. Dec. B-215383, October 18, 1984, 84-2 CPD & 418; Credit Bureau Reports, Inc., Comp. Gen. Dec. B-209780, June 20, 1983, 83-1 CPD & 670.

Management Concepts, Inc., P.S. Protest No. 86-29, July 10, 1986.

Bearing these standards in mind, we examine each of Cohlma's major factual contentions that its proposal was evaluated improperly. In resolving these contentions, we express no opinion as to how we would decide them de novo.

^{52/}In any event, such a protest would be against the terms of the solicitation, the time for which has long passed. PCM 2-407.8 d.(1).

Cohlmia contends that its proven experience in performing this service, under its emergency contract, requires the contracting officer to rate its experience (factor 1) higher than that of Kitty Hawk, which allegedly had no comparable experience. Incumbency alone cannot justify a higher technical score. An incumbent cannot receive a technical scoring advantage because of incumbency if the record does not indicate that the incumbent's proposal demonstrated any real technical superiority. Frequency Engineering Laboratories Corporation, Comp. Gen. Dec. B-225606, April 9, 1987, 87-1 CPD & 392, citing with approval NUS Corp. et al., Comp. Gen. Dec. B-221863, B-221863.2, June 20, 1986, 86-1 CPD & 574. Here, the contracting officer had adequate evidence before him that Cohlmia's performance on the emergency contract was unsatisfactory.^{53/} We will not second-guess the scoring of an evaluation factor, which is reasonably based. Computer Systems, supra. Cohlmia further argues that its experience justifies award to it despite its significantly higher price. This is incorrect, since "a numerical scoring advantage based primarily on the advantages of incumbency may not necessarily indicate a significant technical advantage that would warrant

^{53/}While we find that some evidence considered by the contracting officer should not have prejudiced Cohlmia, infra at p. 19-20, on the whole, the evidence was sufficient for the contracting officer to have reasonably made this determination.

paying a substantial cost premium for it." Frequency Engineering, supra, citing Bunker Ramo Corp., Comp. Gen. Dec. B-187645, June 15, 1977, 77-1 CPD & 427.¹⁷

Cohlmiia has disputed the contracting officer's conclusions that Kitty Hawk proposed to operate its aircraft itself rather than by subcontract, and that it has sufficient back-up aircraft available. The contracting officer's positions are fully supported by Kitty Hawk's proposal, and we find these aspects of the evaluation to be reasonable.¹⁴

Cohlmiia's contention that Kitty Hawk proposed an inefficient hub has scant support in the record. Cohlmiia's emphasis in this regard is essentially misplaced, as analysis of the technical evaluations reveals that Cohlmiia's hub operations were generally rated comparable to or better than those of Kitty Hawk, and Cohlmiia argues elsewhere that the hub operations of the two are nearly identical.

Further, the contracting officer's preference for completely dedicated planes is reasonable. Although the record does not indicate that Cohlmiia's leased planes, used during the day by a commercial carrier, would be unavailable for Postal Service use any definite percentage of time, there is a risk of unavailability not present with planes dedicated on a twenty-four hour basis. We are unable to say that the potential unavailability of planes is an unreasonable consideration for the contracting officer's evaluation of proposals, and use of this subfactor is within the legitimate exercise of his discretion. Computer Systems, supra.

Regarding the proposal of Kitty Hawk to protect the mail from the elements, at the time of evaluation, Kitty Hawk's proposal included such protections. Although the contracting officer had some obligation to investigate the feasibility of the proposal, the approval for which was subsequently withdrawn by airport authorities, it is not disputed that Kitty Hawk proposed such protection in the belief that it would be accomplished, and that some preliminary approval had been granted as stated in Kitty Hawk's proposal, while Cohlmiia included no such proposal. Technical evaluations are dependent on the information furnished in the proposal as submitted and upon circumstances as they exist at the time of contract award. Computer Systems and Resources, Inc., supra. Further, the general matter of protection of mail from the elements was brought out in the discussion session with Cohlmiia, which failed to offer comparable protection.¹⁵ The contracting officer did not act unreasonably in considering Kitty Hawk's proposal to protect the mail from the weather in technical evaluations.

^{54/}We note that Cohlmiia's contention fails to account for the solicitation's according equal weight to price and technical evaluations.

^{55/}As we stated in Evergreen International Airlines, Inc., P.S. Protest No. 86-7, May 5, 1986, a wet lease is not a subcontract because of the lessee's day-to-day control of the aircraft involved in the contract, and because there is no relinquishment of authority to a third party in the performance of the contract.

^{56/}Cohlmiia contends that its failure was the direct result of its knowledge that the airport authorities would not allow such facilities. However, it has not established that this knowledge was imparted by it to contracting officials or that contracting officials should have been otherwise aware of it.

Concerning the problem of mail security and the seat packing of mail, we similarly conclude that the contracting officer acted reasonably in considering the matter in evaluations. The parties dispute whether the mail theft which admittedly occurred during Cohlma's emergency contract by Cohlma employees, happened on a cargo or a passenger aircraft. Regardless, it is clear that contracting officials were concerned about mail security and informed the protester of this concern, both during the emergency contract and in negotiations. Seat packing was identified as a potential security risk in correspondence during the emergency contract. It was not unreasonable for the contracting officer to be concerned about Cohlma's potential seat packing of mail or about security risks involved in the use of passenger planes, and to have considered them in evaluations.

Cohlma's unsupported contention that Kitty Hawk would not be ready for start-up because it did not possess the equipment it proposed to utilize, including containers, is adequately refuted by the contracting officer. Cohlma's arguments as to the other areas in which Kitty Hawk was evaluated higher are unpersuasive. It was reasonable for the contracting officer to have considered Kitty Hawk's performance of its own maintenance and its superior communications network, for instance, as significant positive considerations.

The evaluation of the reliability of the offerors, which includes experience, was the first criterion of the service rating set forth in the solicitation. First, the evaluation of Kitty Hawk's perceived reliability has not been seriously challenged by the protester, except to the extent that Cohlma argues for an advantage based upon incumbency, discussed above, and the hindsight support of Kitty Hawk's operations records, unavailable to the contracting officer when technical evaluations were conducted and therefore not a factor in his determination and our review. Cohlma has pointed to no objective weaknesses in the experience of Kitty Hawk and we consider the evaluation reasonable.^{1/}

Second, while some of the items for which Cohlma was downgraded appear to be due to factors for which Cohlma was not responsible, the evaluation as a whole cannot be said to have been unreasonable, especially when the myriad of subfactors is inspected.

Examination of the scoring of the subfactors reveals that higher ratings for Kitty Hawk in the following significant areas led to its overall higher evaluation for reliability: overall reliability, containers, terminal handling equipment, subcontractors' line-haul experience, aircraft type/reliability, communications, maintenance and hub facility safety. The thrust of the parties' arguments has been on the issue of overall reliability, a small portion of the scoring of this criterion and a subfactor which was closely scored.

We decline to second-guess the contracting officer, as it is not our function to resolve disputes on the scoring of technical proposals, Mid-Atlantic Forestry, supra, deeming them reasonably within the scope of the contracting officer's discretion. Computer Systems, supra.

We do question however, certain of the specific reasons for which Cohlma was

^{57/}Cohlma was rated higher in postal experience, a subfactor of the first evaluation criterion.

evaluated lower. For instance, many of the mail irregularities for which Cohlmlia was cited appear to be excusable and we have not considered that evidence.⁴⁷ Further, the insufficient lift experienced by Cohlmlia in June and July, 1987 cannot reasonably be held against Cohlmlia given the emergency nature of the contract under which it was performing and the reasonableness of the contractor's unwillingness to incur long term commitments under it. The failures on 1985 segment contracts are unpersuasive as the matter has long been resolved to the mutual satisfaction of the Postal Service and Cohlmlia, and since three year old failures have questionable impact upon Cohlmlia's current ability to perform. Nevertheless, the mail thefts, the contention of inefficient and unsafe hub operations and Cohlmlia's performance data suggest acceptable reasons for downgrading Cohlmlia's offer. We will not attempt to determine a precise performance percentage for Cohlmlia, but we are convinced that the contracting officer possessed sufficient information regarding service to have had a reasonable basis for his necessarily subjective evaluation of the overall reliability subfactor, especially in view of the relatively small disparity in the scoring of the proposals for the reliability factors.

Scoring of Proposals - Price

Cohlmlia's allegations concerning the relative cost of the pricing proposals are unconvincing. According to the specifications, price was to be evaluated by comparing overall cost, not by comparing price per pound. Cohlmlia should have received no credit for lift capacity beyond that called for in the the specifications, and the proper pricing comparisons were made. Kitty Hawk's lower maximum volumes were within the parameters set forth in the solicitation. The contracting officer's utilization of the sum of Kitty Hawk's per trip rates was proper.⁴⁸ The daily performance records of Kitty Hawk are no help to the protester in this regard. The volume of mail which has been carried by Kitty Hawk since service on this contract has begun is above the minimum volumes required to be transported in Specifications, Part A. The average volumes are below the maximum weights which Kitty Hawk proposed to transport, but provide no basis for overturning award since: (1) the volumes did not violate the solicitation requirements as they meet the solicitation's minimum requirements, (2) the technical evaluations were properly based upon maximum weights contained in Kitty Hawk's proposal, not on the weight actually transported, and (3) price was not to be compared based upon per pound costs as Cohlmlia contends but upon total cost to the Postal Service, which is

^{58/}This conclusion obviates the need to resolve Cohlmlia's contention that Kitty Hawk's performance, since service on this contract has begun, would have received a large amount of mail irregularities if judged on a comparable basis as Cohlmlia's performance had been. The inappropriateness of considering post-award data in the contracting officer's contract award decision further obviates the need to resolve this contention.

^{59/}Cohlmlia's contention that Kitty Hawk proposed to carry only 111,000 pounds of mail is unsupported. Our calculations of the maximum weights offered in Kitty Hawk's proposal equate with that arrived at by the contracting officer, that is, Kitty Hawk proposed a total maximum weight of 117,000 pounds of mail. Moreover, the contracting officer's consideration of Kitty Hawk's per trip rates and the sum thereof were consistent with what was offered in Kitty Hawk's proposal.

unchanged by these transported volumes which are less than Kitty Hawk's proposed maximums.¹⁷

Cohlmiia has also contended that Kitty Hawk's time frames are too early to receive some Express Mail, which Cohlmiia believes to be the primary purpose of the procurement, so that the remaining Express Mail must be delivered to other carriers at additional cost which must be considered in comparing price. Even if Cohlmiia is correct as to the significance of Express Mail to the contract, a matter which we need not resolve, the times which Kitty Hawk offered were within the parameters set by the solicitation. Since the proposal was consistent with the solicitation's requirements, prices were properly compared without regard to any perceived additional cost of tendering Express Mail to other carriers. Cohlmiia's favorable times, which may have allowed the tender of more Express Mail, were an advantage in its service evaluation, and Cohlmiia earned higher scores for that factor, but they properly had no effect upon the pricing comparisons.

Weight of Evaluation Factors

Offers must be evaluated in accordance with the criteria and formulas set out in the solicitation. This office reviews the calculation of evaluation scores to determine whether the formula set out in the solicitation has been properly applied. See Garden State Copy Company and Sable Corp., P.S. Protest No. 82-64, May 13, 1983; Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980. We have closely examined the evaluation method and the scores given Kitty Hawk and Cohlmiia for each factor, and we conclude that although the proper factors were employed, the factors listed in the solicitation were inappropriately weighted.¹⁸ However, the errors in weighing which occurred did not affect the outcome.

The evaluators appear to have disregarded the relative importance of three evaluation factors as set out in the solicitation. The solicitation requires factor 1 to be considered more important than factor 2, but fails to establish relative weights. Kitty Hawk received a higher overall score for enumerated factor 1 (the perceived reliability of the proposed network), while Cohlmiia received a higher score for factor 2 (the length of time between tender and delivery). However, in scoring Cohlmiia's proposal against Kitty Hawk's, the contracting officer apparently afforded factor 2 no more weight than was given to subfactors of factor 1, in effect according factor 2 a weight of only 10% of the overall service rating. Where, as here, evaluation factors are listed by relative importance but

^{60/}The record indicates that evaluators initially appeared to evaluate per pound costs, which was improper. However, award was made based upon total cost, easily determined by adding the sum of the per trip rates contained in the proposals. Therefore, no harm resulted which would make the award improper.

^{61/}This is where the present protest differs from Cohlmiia's prior protest, under ANET-87-02, P.S. Protest No. 87-41, October 30, 1987, where Cohlmiia's protest was sustained because its proposal was not evaluated in conformance with the solicitation's evaluation factors. Here, by contrast, the proper evaluation factors were employed, along with rationally related subfactors, although inappropriate weights were utilized.

without having specific weights assigned, the difference in weight accorded one factor and that accorded the factor either immediately preceding or immediately following it, must be small. If one factor is to have predominant (i.e. 90% - 10%) consideration over the other factors, it should be disclosed to the offerors. See Sperry Rand Corp., Comp. Gen. Dec. B-179875, September 12, 1974, 74-2 CPD & 158. Here, therefore, factor 1 should have been accorded no more than a slightly greater weight than factor 2. However, since giving any preference to service factor 1, in which Kitty Hawk outscored Cohlma, retains the priority given Kitty Hawk overall, including price, we need not determine what weight would be appropriate. No prejudice has resulted from the error in evaluation because even if Cohlma is evaluated slightly higher technically than Kitty Hawk,^{62/} relative standing of the offerors would not be changed. Therefore, overturning the award is not justified. See B & W Service Industries, Inc., Comp. Gen. Dec. B-224392.2, October 2, 1986, 86-2 CPD & 384 (no reversible error where agency determined technical scores inconsistently with the solicitation's weighing but the protester was not competitively prejudiced because relative positions did not change when scores were properly weighted); Tracor, Inc., Comp. Gen. Dec. B-186315, November 8, 1976, 76-2 CPD & 386 (no reversible error where no prejudice resulted from agency erroneously computing scoring of technical evaluation factors by failing to weigh factors as intended by the solicitation); Custom Janitorial Service, Comp. Gen. Dec. B-205023, August 23, 1982, 82-2 CPD & 163 (no reversible error where no prejudice resulted from agency's use of improper scoring method).

Method of Comparing Pricing Proposals

The contracting officer's evaluation of pricing proposals was also flawed, but, again, we find no prejudice to Cohlma. The contracting officer accorded a score of "10" to the lowest priced proposal within the competitive range, that of Kitty Hawk, and a "9" to Cohlma, the second lowest priced proposal. Scores of 8 through 1 were given to the next eight low offers. This method of comparison, which failed to take into account the magnitude of the differences in price, was not stated in the solicitation. In this case, however, Cohlma's score of "9" was 10% lower than Kitty Hawk's score of "10", which closely approximated the actual differentials in their pricing proposals. In sum, although improper weights were given to the factors enumerated within the service rankings, and although a questionable method was utilized to rank pricing proposals, no prejudice to Cohlma has resulted. See Lingtec, Inc., Comp. Gen. Dec. B-208777, August 30, 1983, 83-2 CPD & 279 (no prejudice where prices were improperly weighted because relative standing remained unchanged if prices properly weighted); A.T. Kearney, Inc., Comp. Gen. Dec. B-205527, July 1, 1983, 83-2 CPD & 49 (no prejudice where price scoring between protester's price and awardee's price did not match percentage differences between their prices because their standing remains the same if they are properly weighted), Custom Janitorial Service, Comp. Gen. Dec. B-205023, August 23, 1982, 82-2 CPD & 163 (no reversible error where price scoring was distorted because if proper price scoring were used, the protester would not receive award).

^{62/}This does not imply that proper weighting of the factors results in Cohlma achieving a higher technical evaluation score but only that, even if this occurred, Cohlma would not receive award.

Adequacy of Negotiations

Cohlmia contends that negotiations conducted with it were not meaningful because major areas of concern to the contracting officer were either insufficiently discussed or were totally absent from the negotiations.

Although discussions, if held, must be "meaningful," which includes discussion of proposal deficiencies ... the Postal Contracting Manual, ... does not require notification of deficiencies or an opportunity to resolve or correct the deficiencies. See Inforex Corporation et al., P.S. Protest No. 78-12, June 25, 1978, at page 34.

Management Concepts, Inc., supra.

The degree of specificity required to render discussions meaningful is primarily a matter for the procuring activity to determine. The contracting officer must only proceed in a manner which alerts the offeror to perceived weaknesses in its proposal. See Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83, February 14, 1986, and cases cited therein. We have reviewed a transcript of the discussions session and conclude that, although thin in some areas, as a whole the discussions were meaningful. Specific areas of concern to the contracting officer were identified in the discussion,^{63/} and were sufficient to alert Cohlmia to the contracting officer's perceived weaknesses in its proposal.

^{63/}These areas include the contracting officer's preference for cargo aircraft rather than passenger aircraft; preference for the contractor's operating its aircraft itself; preference for the contractor to have aircraft fully dedicated to the Postal Service rather than aircraft used for other purposes during the day; concerns about mail security; preference for greater use of containers; concern about a sufficient communications network; and concern about protecting the mail from the elements.

Bad Faith

Allegations of bad faith must be proven by virtually irrefutable proof of malicious and specific intent to harm the protester, not merely by inference or supposition. In the absence of such evidence, contracting officers are presumed to act in good faith. Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985. We have examined the evidence presented by Cohlma in support of its contention and conclude that it does not meet the "extremely high standard of proof" required. Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984. Cohlma analogizes, in its submissions to this office, to the proof required in the area of defamation of a public official, for the proposition that the high standard of proof can be met by circumstantial evidence. While we agree that proof of bad faith must often be made by circumstantial evidence of the state of mind of the relevant person, because direct proof is typically absent,^{64/} the circumstantial material offered by Cohlma, considered as a whole, falls short of its burden of proof. Because of this failure, we need not address each specific instance in which the protester has alleged bad faith, although we have considered all the points raised by Cohlma, finding them insufficient to meet its burden of proof.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 3/22/93]

^{64/}See Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2nd Cir. 1980); cert. denied, 449 U.S. 839 (1980). We do not adopt the standards involved in this defamation case for our determinations of bad faith but follow the analogy suggested by the protester.