

**January 22, 1999**

**P.S. Protest No. 98-25**

**THOMAS J. CAPALBO, JR.**

**Solicitation for Construction and Lease  
Pawcatuck Branch, Stonington CT**

**DIGEST**

Protest of selection of leased post office site is denied. Postal Service's solicitation of municipal opinion through First Selectman was appropriate; successful offeror's representations in process of getting local approvals were not incorrect; protester was given opportunity to negotiate the terms of his offer; and dispute about suitability of contesting sites is not for our review.

**DECISION**

Thomas J. Capalbo, Jr.,<sup>1</sup> protests the award of lease for the Pawcatuck Branch post office, Stonington, CT, to Ron-AI LLC.

The contracting officer's statement recites that Pawcatuck is situated in the southeast corner of Connecticut, and is served by the Westerly, RI, post office. In 1996, proposals were sought for a carrier annex in Pawcatuck. However, before award could be made, the project was put on hold because the district office wished to establish a full service office instead.

The Windsor, CT, Facilities Service Office issued the solicitation for proposals for construction and lease of the Pawcatuck Branch in August, 1997, for a site to be leased for a 20-year initial term with four five-year renewal options. Proposals offering three site

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<sup>1</sup> Mr. Capalbo, an attorney, submitted his offer as "Trustee," but nothing in the protest file identifies the trust, and the offer identifies the offeror only as an individual.

were received. One was the Ron-Al site at 66 Broad Street, which had previously been the preferred site for the carrier annex; the second was Mr. Capalbo's site, a stand-alone building in a shopping center approximately 200 feet north of the Ron-Al site; and the third was the Finlay site, about one mile south of the other two.

An initial review by a site review committee in early October placed the Capalbo site first, the Ron-Al site second, and the Finlay site third. Later that month, however, the project manager met with the Stonington First Selectman, advising him of the three sites. The Selectman favored the Finlay site, but found the Capalbo site least desirable, citing "concerns . . . that included poor site lines, limited ingress and egress from Route 1, and the potential for problems in obtaining Planning and Zoning Commission (PZC) approval due to the site's proximity to adjacent residential property." Subsequently, the review committee reconsidered its rankings of the three sites, reversing the order of the Ron-Al and Capalbo sites.<sup>2</sup>

Because the Ron-Al site included a wetland, it was necessary to perform a review of the environmental consequences of that fact, delaying the process of finalizing the site selection process and the consummation of a lease. While that review was underway, Ron-Al proceeded to obtain local approvals for the use of its site as a post office. Also during this period the Postal Service issued requests for best and final offers, and in response to those requests, Mr. Capalbo revised his offer by letters of November 17, February 3, and May 26. Each revision lowered the annual rental for the initial lease term.

Ron-Al's lease was accepted on July 6, and Mr. Capalbo was so advised by letter of that date. On July 24, he requested a debriefing on the award which was held on August 26. The contracting officer received Mr. Capalbo's protest on September 3.

The protest contends that the Postal Service should have further investigated the town's preference, seeking additional official comment and public reaction after the First Selectman informed the Postal Service that he preferred the Ron-Al site and before the Postal Service changed its preference accordingly. The Stonington Town Planner had "made it known that he did not prefer the Ron-Al site," and thereafter "a

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<sup>2</sup> According to the contracting officer's report:

The Capalbo site was determined to be less desirable [than the Ron-Al site] at this stage of the process due to the following factors:

1. Overall cost, as the offer for the Ron-Al site was superior.
2. Location of the proposed building in [the] middle of a "buffer zone" designed to shield the shopping center from adjacent residential development.
3. Comments from the Town of Stonington through the First Selectman.

ground swell” of townspeople similarly objected to it. Following the groundswell, the First Selectman “was prepared to change his position,” but was stopped from doing so by threats by “an associate of Ron-Al.”

The protester also objects to the facts that the Postal Service did not negotiate with him before final acceptance as he had understood that it would and as he had requested by soliciting a counteroffer, noting that his final offer had been lower than Ron-Al’s offer and that the Postal Service had failed to inquire concerning the insurance and maintenance aspects of his offer.<sup>3</sup>

Finally, the protester asserts that the Ron-Al site is less attractive than his site because it requires significant filling of wetlands (unlike the protester’s site), has inferior entrance sight lines, and will require postal trucks to stop on heavily traveled Route 1 in order to back into the site.

The protester asserts that Ron-Al obtained its permits by misrepresenting the status of its negotiations with the Postal Service, asserting, for example, that the other sites were unacceptable, and that the Postal Service would not give it a signed agreement until the approvals had been given, leading the Town “to believe that if the Ron-Al site were not approved, there would be no Post Office in Pawcatuck.”<sup>4</sup>

The contracting officer’s statement responds to the protester’s contentions as follows:

— The First Selectman did not prefer the Ron-Al site; he preferred the Finlay site. The contracting officer was not aware of any threat to the First Selectman, and the First Selectman has since denied such a threat to the contracting officer. No groundswell of support for the Capalbo site was evident. No correspondence in favor of the site was received; when the project manager attended a hearing at the request of the Town Planner, several residents objected to the Capalbo site as violating the previously established buffer zone.

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<sup>3</sup> The cost relationship of the Capalbo and Ron-Al offers is not entirely clear. While Mr. Capalbo’s final offer had a lower annual rental for the 20-year term than Ron-Al’s offer, that offer (like his previous offers) included an additional reference to the Postal Service’s “proportionate share of real estate taxes, fire taxes, insurance and maintenance.” Insurance and maintenance are not usually stated separately in postal leases, and were not so stated in the Ron-Al lease. While the Postal Service and the protester clearly disagree on the impact of this cost element, the record sheds no light on either party’s understanding of the magnitude of that impact.

<sup>4</sup> Accompanying the protest are various newspaper articles from the *Westerly Sun* and the *New London Day* which discuss Ron-Al’s appearances in May and June before the PZC with respect to these issues, as well as an editorial from that paper which recites the disagreement and expresses a preference for the Capalbo site. The articles reflect representations from Ron-Al’s representative that it had the preferred site and statements by various Postal Service representatives to the effect that no final decision on a site had been made.

- The solicitation reserved the Postal Service’s right to negotiate with all offerors, and the Postal Service did negotiate with the offeror and his real estate broker, who was advised of the Postal Service’s concerns. The protester was afforded an opportunity to submit a best and final offer by letter of May 18, and did so, lowering his price. The Postal Service was not asked to make a counteroffer. The Postal Service obtained an acceptable price for the Ron-Al site.
- Ron-Al sought local planning and wetlands approval on its own initiative. Those actions did not affect the award decision. The project manager attended the May 19 PZC hearing, and informed the commission that “the project was not finalized . . . and that all sites were still under consideration.”
- The Postal Service advised the protester’s broker that the insurance and maintenance aspects of his offer, which were inconsistent with the solicitation’s requirements, needed clarification, but no clarifications were offered. In the absence of those clarifications, the project manager made assumptions about the costs of those items.
- Both the protester’s site and the Ron-Al site contained wetlands; the sight lines for the Ron-Al site were fully evaluated and were acceptable; the site does not require trucks to stop and back from Route 1. The protester’s site suffers from various disadvantages relating to sharing the premises with a shopping center parking lot.

Counsel for Ron-Al submitted initial comments on the protest to the contracting officer. Those comments denied any groundswell of opposition to the Ron-Al site, or any threats to the First Selectman. Counsel characterizes some of the information published about the PZC permit application process as “inaccurate,” and notes that a postal environmental expert was at one such meeting, the Postal Service project manager was at a subsequent meeting, “and explained . . . the procedures that would be followed by the United States Postal Service in selecting a site . . . .” and that the PZC approval occurred at a meeting subsequent to the project manager’s appearance. Further, he asserts that all the concerns about filling wetlands and about traffic were addressed during the approval process to the satisfaction of the local boards and commissions.

The protester submitted comments on the contracting officer’s statement which included the following:

- The First Selectman’s categorization of the Capalbo site as least desirable was not soundly based; it differed from the opinion of the Town Planner, and of a survey of town residents.
- Ron-Al’s representative advised the PZC that Ron-Al had a signed agreement with the Postal Service on June 16. On June 18, a postal representative

told the PZC that no such agreement existed. On June 20, Ron-Al's representative left a message on the First Selectman's answering machine which the First Selectman reported to the local police as a "harassing call."

— The Postal Service never responded to Mr. Capalbo's requests to negotiate as the contracting officer "had verbally promised" and as the solicitation provided.<sup>5</sup> The protester's revised offer of February 6 included the statement that "[w]e would seriously consider *any* counter offer by the U.S. Postal Service" which was a request for a counteroffer. Although the protester was advised that he "would be afforded an opportunity to negotiate the lease amount," no such opportunity was presented.

— The approvals which Ron-Al improperly obtained by its representations of a signed agreement, did affect the selection process because the wetlands approval was said to limit potential for liability concerning its site, and not to require further environmental review.

— The Capalbo site is a practical alternative; it is part of an existing developed site; it does not require the filing or disturbance of any wetland, any new highway curb cuts, and it presents no site line problems.

In a final submission, the protester notes the recent approval of a traffic light at the intersection to the shopping center which alleviates the First Selectman's concerns about ingress and exit.

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<sup>5</sup> The protester refers to paragraph 6 of the solicitation, which states, in part, that "the Postal Service reserves the right to negotiate with any or all offerors as to any or all rental rates, or other terms and conditions of the proposal."

## DISCUSSION

The protester's initial objections involve the expression of the municipal preference for the Ron-Al site through the Stonington First Selectman. Contrary to the protester's assertions, the record provides no support for the contention that there was any irregularity in the Postal Service's discussions with the First Selectman instead of the Town Planner, that the First Selectman's views did not reflect the Town's position,<sup>6</sup> or that the First Selectman was improperly dissuaded by Ron-Al's representative from changing that position.<sup>7</sup>

Similarly, the record does not reflect that the PZC was misinformed about the status of the selection process when it considered Ron-Al's application. Ron-Al's representation that it the Postal Service considered its site to be the preferred site was accurate, even though it had yet to receive contract award. That the award had not yet occurred was clear from PZC approval, which was contingent upon the submission, *inter alia*, of "[a] copy of the final approval of this site by the [P]ostal [S]ervice . . . ."

The contention that the Postal Service improperly failed to negotiate with the protester is incorrect. The solicitation did not require that the Postal Service negotiate with any offeror, it merely allowed the Postal Service to do so; any oral undertaking to negotiate in contradiction to the solicitation would not be binding, and, in any event, the solicitation of best and final offers from the protester did afford Mr. Capalbo that opportunity. See, e.g., *Gustafson Enterprises, Inc.*, P.S. Protest No. 96-10, July 24, 1996.<sup>8</sup>

The protester's remaining contention is that the Postal Service made the wrong decision in selected Ron-Al's site over the Capalbo site.

The choice as to what is in the best interest of the Postal Service is a business decision within the discretion of the contracting officer and will not be overturned unless the contracting officer has clearly abused his discretion.

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<sup>6</sup> The protester's objections to the process employed by First Selectman clearly must be directed elsewhere.

<sup>7</sup> The contracting officer advises that the First Selectman denies any such influence, and the evidence offered by the protester, the police record concerning the harassing telephone call to the First Selectman, is to the contrary. Rather than reflecting any threat, it indicates the representative's unhappiness with a newspaper account of the PZC meeting. The First Selectman's association with that account is not explained.

<sup>8</sup> Assuming, without concluding, that the protester's February 3 offer to consider a counteroffer was a request that the Postal Service make a counteroffer, no similar request was contained in the protester's subsequent revision of its offer of May 26, which superseded the February 3 offer.

In a protest involving a site acquisition, this office will not review each decision anew to conclude which opinions have merit; we will not substitute our judgment for that of the contracting officer by making an independent determination of the relative merits of the sites offered.

*Federal Properties of R.I., Inc.*, P.S. Protest No. 95-37, January 22, 1996 (citations and internal quotations omitted). Consistent with this principle, we will not re-evaluate the determination of the preferred site.

The protest is denied.

William J. Jones  
Senior Counsel  
Contract Protests and Policies