

**March 8, 1999**

**P.S. Protest No. 98-33**

## **STEVE KUNTZ**

**Solicitation No. 632-286-98**

### **DIGEST**

Protest of affirmative determination of box delivery route contractor's capability is denied for lack of evidence of fraud or bad faith on the part of the contracting officer or his failure to apply definitive capability criteria.

### **DECISION**

Mr. Steve Kuntz protests the award of a contract for the box delivery of mail to Mr. Dean Papes. Mr. Kuntz had been the previous contractor on the route under a regular contract that was not renewed when agreement on a renewal rate could not be reached, and then on an emergency contract.

Distribution Networks, Midwest Area, issued solicitation 632-286-98 for the delivery of mail to some 300 boxes on HCR route 676A1 between Collyer, KS, and Quinter, KS. Five offers were received in response to the solicitation, of which that of Mr. Papes was the lowest, and that of Mr. Kuntz was second low. The three lowest offerors were evaluated, and award was made to Mr. Papes. Mr. Kuntz's protest was timely submitted to this office.

The protest notes the protester's prior performance on the route, and questions the award to Mr. Papes because of various irregularities asserted in his prior performance as an emergency contractor on the route in 1994. The protest contends that the Collyer postmaster, who had not been present during Mr. Papes' prior performance, did not have the opportunity to obtain and provide relevant information about that performance to the contracting officer prior to award, and that that information, belatedly supplied, should have resulted in a different award decision.

The contracting officer's statement recites the circumstances of the evaluation of Mr. Papes' offer, discussing at length the particulars of the asserted performance prob-

lems and concluding that some are undocumented or lack credibility, and that the others are insufficient to warrant the conclusion that Mr. Papes should not have received the award. The contracting officer notes prior decisions of this office as standing for the proposition that we will not disturb “an affirmative determination of responsibility[] unless the protester can overcome the presumption that the decision is correct.”

Mr. Papes has submitted comments on the protest taking exception to the contentions concerning his performance. The protester submitted comments rebutting the contracting officer’s responses to the protest’s contentions, and complaining about the manner in which the renewal discussions of his previous contract were handled.<sup>1</sup>

## **DISCUSSION**

The protest contests the contracting officer’s affirmative determination of Mr. Papes’ capability to perform the required service.<sup>2</sup> This office’s review of such a determination is even more limited than the contracting officer’s statement suggests. “An affirmative determination of capability is ordinarily not for our review absent evidence of fraud or bad faith on the part of the contracting officer or a failure to apply definitive capability criteria.” *Four Star Aviation, Inc.*, P.S. Protest No. 98-28, March 1, 1998. Because the protest here does not present such evidence, it provides no basis for our review.

Accordingly, the protest is denied.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

---

<sup>1</sup> Such complaints are matters subject to the higher level review provided by the contract, and not the protest process. *Ruben Luis Rivera Garcia*, P.S. Protest No. 91-25, May 20, 1991.

<sup>2</sup> “Capability” is the current term for what was previously referred to as “responsibility.” See *RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999.