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Bids—Unsigned—Waiver

An agency may waive a bidder's failure to sign its bid as a minor informality, thus obviating rejection of the bid as nonresponsive, when the bid is accompanied by other documentation signed by the bidder which clearly evinces the bidder's intent to be bound, such as an acknowledged amendment.

Matter of: Wilton Corporation, February 1, 1985:

Wilton Corporation protests the acceptance of the unsigned bid of Brink and Cotton Manufacturing Company under invitation for bids (IFB) No. FEN-SV-A5204-A-1-7-85, issued by the General Services Administration (GSA). GSA waived the failure to sign the bid as a minor informality because the bid was accompanied by Amendment No. 1 to the IFB, which Brink and Cotton had acknowledged by signing and returning. Wilton asserts that this waiver was improper. We dismiss the protest.

In general, a bid which is not signed must be rejected as nonresponsive because, without an appropriate signature, the bidder would not be bound upon the government's acceptance of the bid. See, e.g., *Inge Ellefson,* B-212785, Sept. 2, 1983, 83-2 CPD ¶ 303. However, we have recognized an exception to this general rule that allows for waiver of the failure to sign the bid as a minor informality when the bid is accompanied by other documentation signed by the bidder (such as a properly executed bid bond) which clearly evinces the bidder's intent to be bound by the bid submitted. *Mountain Cascade, Inc.,* B-211460, July 14, 1983, 83-2 CPD ¶ 93; cf. *Cable Consultants, Inc.,* B-215138, July 30, 1984, 63 Comp. Gen. 521, 84-2 CPD ¶ 127 (in which an accompanying irrevocable letter of credit was held not to negate a bidder's failure to sign its bid because it did not require the bidder's signature as a party to the instrument).

In addition, the Federal Acquisition Regulation (FAR), § 14.405(c)(1), 48 Fed. Reg. 42,102, 42,180 (1983) (to be codified at 48 C.F.R. § 14.405(c)(1)), provides that a bidder's failure to sign its bid may be waived as a minor informality when the bid

> is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself) * * *

Here, GSA waived Brink and Cotton's failure to sign its bid as a minor informality because the bid was accompanied by Amendment No. 1, which the firm had acknowledged by signing and returning. We believe that GSA's action was proper.

Wilton urges that the amendment was not legally sufficient to indicate Brink and Cotton's affirmative intent to be bound by its bid, because the amendment in fact had been issued prior to the IFB itself, and because, allegedly, the amendment was immaterial and GSA did not require its acknowledgment. We find no merit to the firm's position. The amendment bore the bidder's signature, which is the prime consideration for determining the bidder's intent to be bound. See *Cable Consultants, Inc., supra.* Moreover, by its very nature, the amendment referred to and identified the bid, thus fully comporting with the requirements of FAR, § 14.405(c)(1), *supra,* with respect to the legal sufficiency of accompanying documentation.

Hence, it is our view that an amendment bearing the bidder's signature which accompanies an unsigned bid is a clear indication of the bidder's intent to be bound by its bid, and, accordingly, permits acceptance of the bid.

Under section 21.3(f) of our new Bid Protest Regulations effective January 15, 1985, we will summarily dismiss a protest without requiring the submission of an agency report when on its face the protest does not state a valid basis for protest. See 49 Fed. Reg. 49,417, 49,421 (1984) (to be codified at 4 C.F.R. § 21.3(f)). We find no valid basis for protest here, and, accordingly, we have not requested a report from GSA.

The protest is dismissed.

[B-216162]

Travel Expenses—Official Business—Vehicle Breakdown, etc.

When use of a privately owned vehicle for the performance of official duties is determined to be advantageous to the government, a breakdown and resultant delay may be viewed as being incident to the official travel. Travel or transportation expenses caused by the delay may be reimbursed if the period of delay is reasonable and the traveler is acting under administrative approval or the actions of the traveler are subsequently approved.

Matter of : Gunnery Sergeant Michael M. McClure, February 4, 1985:

The issue presented in this case is whether a member of the Marine Corps who is ordered to temporary additional duty and is authorized travel by commercial air, using a government transportation request, may be reimbursed for excess transportation charges when, for reasons beyond his control, he is unable to travel on the scheduled flight for which he has obtained a ticket using a government transportation request and was required to pay excess charges in order to perform his travel in a timely manner.[1] In these circumstances reimbursement is authorized.

Background facts

Gunnery Sergeant Michael M. McClure, USMC, who was stationed at Camp Pendleton, California, was ordered to perform temporary additional duty at Nellis Air Force Base, Nevada, from May

[1] This question was submitted by Lieutenant Colonel M.K. Chetkovich, Disbursing Officer, Marine Corps Base, Camp Pendleton, California. The request was approved by the Department of Defense Per Diem, Travel and Transportation Committee and has been assigned Control Number PDTATAC 84-15.

12, 1983, through May 15, 1983. Travel from San Diego, California, to Las Vegas, Nevada, via commercial air using a government transportation request was directed. Use of his privately owned vehicle from Camp Pendleton to San Diego was also authorized.

Sergeant McClure encountered mechanical difficulties with his vehicle en route to the San Diego Airport and arrived too late to board his scheduled flight. Due to the time constraints involved in his assigment, he purchased a ticket to Las Vegas via Los Angeles. Apparently, since he did not have a government transportation request available there was an excess charge of $45 over the cost of his original flight.

The order issuing authority has issued an amendment to the original orders, authorizing the additional cost of the flight citing Volume 1 Joint Travel Regulations (1 JTR) para. M4416 as authority for the added cost. The Marine Corps asks whether the retroactive amendment to the order was authorized so as to permit payment of the added cost.

It is the general rule that travel orders may not be revoked or modified retroactively so as to increase or decrease the rights which have accrued or become fixed under the law and regulations when the ordered travel has already been performed. *Dr. Sigmund Fritz,* 55 Comp. Gen. 1241 (1976). It also has been consistently held that the travel allowances authorized for members of the uniformed services are for the purpose of reimbursing them for the expense incurred in complying with the travel requirements imposed upon them by the needs of the service over which they have no control. See 51 Comp. Gen. 548 (1972).

In the present case, modification of the travel orders was to permit payment of the excess cost of transportation which occurred because government transportation request was not used. The regulation cited as authority, 1 JTR para. M4416, provides for reimbursement of "other necessary incidental expenses related to travel not specifically enumerated in this Part." Such expenses may be reimbursed if authorized in the travel order or approved after travel has been performed. However, 1 JTR para. M4416 is in Part I of 1 JTR which enumerates miscellaneous reimbursable expenses in connection with travel and temporary duty.

Under 1 JTR para. M4202 the reimbursable expenses covered by Part I do not include transportation expenses but are expenses in addition to per diem allowances and transportation expenses. Thus, the regulation cited in the amending travel order is not an appropriate justification for payment of the cost incurred by Sergeant McClure.

However, the excess charge appears to be reimbursable under the provisions of 1 JTR para. M4203 pursuant to Sergeant McClure's original order. Those orders do require transportation to be procured using government transportation requests, but 1 JTR para. M4203-3e provides that when orders direct the use of transportation requests but transportation requests are not available for the member's travel by common carrier, the provisions of M4203-3b are applicable. Under that provision the full cost of commercial air travel may be reimbursed to the member.

Thus, if it is held that a transportation request was not available for procurement of necessary transportation in the circumstances of this case, that full cost of commercial travel may be paid. The need to purchase another ticket resulted from the delay caused by the breakdown of the traveler's privately owned vehicle. We have held that when use of a privately owned vehicle for the performance of official duties is determined to be advantageous to the government, the delay caused by a breakdown of the vehicle may be viewed as being incident to the official travel. See 42 Comp. Gen. 436.

Since use of a privately owned vehicle to and from San Diego Airport was specifically authorized in Sergeant McClure's orders, the added cost resulting from the breakdown may be borne by the government.

In the present case, the delay in arriving at the airport in San Diego required an immediate change in Sergeant McClure's travel arrangement. Since it is clear that he could not obtain a government transportation request in time to use it to procure transportation aboard the only alternate flight that would permit him to comply with his orders, the full cost of transportation may be borne by the government. Accordingly, the claim may be allowed.

[B-216261]

Travel Expenses—Return to Official Station on Nonworkdays—Reimbursement—Limitation

An employee on temporary duty who used the return portion of a "super saver" airline ticket for his weekend voluntary return travel to his permanent duty station claims that the difference between the regular one-way coach fare and the "super saver" fare should be used in the computation of the maximum allowable reimbursement for his voluntary return travel. He argues that the "super saver" fare applied only to round trips, and if he had not used the return portion, the Government would have had to pay the full coach fare for his travel to the temporary duty point because his other travel was performed by automobile with another employee. The agency properly limited his reimbursement to the per diem which he would have received if he had remained at the temporary duty station. There is no basis to include costs other than those the employee would have incurred had he remained at his temporary duty station.

Matter of: Hugo H. Huslig, February 4, 1985:

An employee traveled to his temporary duty station by commercial air carrier at a "super saver" fare which was only available for round-trip travel. After learning that he could return to his permanent duty station as a passenger in another employee's automobile upon the completion of his assignment, the employee used the return portion of the ticket for voluntary return to his permanent duty station over nonworkdays. The employee's use of the return portion of the round-trip "super saver" ticket for his voluntary return travel allowed the Government to be charged only the "super saver" fare for his travel to his temporary duty station. The question presented is whether the amount thus saved by the Government may be included in the computation of the maximum allowable reimbursement for the employee's voluntary return travel.[1]

The employee apparently contends that his use of the return portion of the ticket enabled the Government to save money for his travel to the temporary duty station because the "super saver" fare applied only to round trips. He indicates that if he had not used the return portion for his personal travel, the Government would have been charged the full one-way coach fare for his travel to the temporary duty point. We find that the difference between regular coach fare and the "super saver" fare for one-way travel, $55.50, may not be included in the determination of the allowable reimbursement for the employee's voluntary return travel on nonworkdays.

Background

Mr. Hugo H. Huslig, an employee of the Wichita, Kansas office of the Internal Revenue Service, Department of the Treasury, was assigned to perform temporary duty at Little Rock, Arkansas, during the period from January 24 to February 17, 1983, for the purpose of teaching a course there from February 2 to 17, 1983. Mr. Huslig traveled to Little Rock on Trans World Airlines on a discount "super saver" fare ticket which he had purchased with a Government Travel Request. Mr. Huslig advises that the "super saver" fare was only available for round-trip travel. He states that subsequent to his purchase of the "super saver" ticket he discovered that another employee from the Wichita office would be attending the training classes and that the employee would be traveling by automobile. Mr. Huslig states that based on this information he arranged to return to his permanent duty station for personal reasons on February 4, 1983, for the weekend. He used the return portion of the "super saver" ticket for his travel to Wichita. He then returned to his temporary duty station on February 6, as a passenger in the automobile driven by the other employee in the Wichita office who was attending the classes at Little Rock. Upon completion of the temporary duty assignment Mr. Huslig returned to Wichita on February 17, as a passenger in the other employee's automobile.

Mr. Huslig claims that the maximum allowable reimbursement for his voluntary return travel should include the $55.50 difference in cost between the regular one-way coach fare between Little Rock

[1] The request for an advance decision is presented by Mr. Larry W. Faulkner, Chief, Accounting Section, Internal Revenue Service, Southwest Region.

and Wichita ($163) and the cost of one-half of the round-trip "super saver" fare ($107.50). The apparent basis for his claim is that his return travel on the return portion of the round-trip "super saver" ticket enabled the Government to receive the benefit of his travel at the "super saver" rate from Wichita to Little Rock. Mr. Huslig's voucher indicates that in addition to his use of the "super saver" ticket, which cost $107.50 (prorated for one-way travel), he incurred $4 in airport limousine costs incident to his return travel.

The agency has allowed Mr. Huslig reimbursement for the cost of his voluntary return to his permanent duty station to the extent of the per diem which he would have been allowed if he had remained at his temporary duty station. The agency apparently had authorized Mr. Huslig per diem at the rate of $49 while at Little Rock. Taking into consideration that he was on leave status for more than half the workday on his date of departure for Wichita, the agency determined that the total per diem which would have been allowable to Mr. Huslig if he had remained at his temporary duty station would have been $61.25.

Discussion

The agency's reimbursement for Mr. Huslig's voluntary return travel is based on section 342.1(2) of Internal Revenue Manual 1763, which provides in part that when a traveler voluntarily returns to his place of residence or post of duty over nonworkdays, reimbursement for transportation expenses and per diem en route is limited to the per diem that would have been allowed had the employee remained at the temporary duty station. This regulation supplements and is not inconsistent with paragraphs 1-7.5c and 1-8.4f of the Federal Travel Regulations (FPMR 101-7) (September 28, 1981) *incorp. by ref.* at 41 C.F.R. § 101-7.003. Under these paragraphs an employee on temporary duty may voluntarily return on nonworkdays to his official duty station or place of residence from which he commutes to his official duty station and be reimbursed for transportation and per diem not to exceed the per diem or actual subsistence expenses and travel expenses which would have been allowed had the employee remained at his temporary duty station. See *Coleman Mishkoff*, B-212029, August 13, 1984, and *Howard E. Johnson*, 59 Comp. Gen. 293 (1980).

Thus, in order to compute the maximum amount properly reimbursable it is necessary to determine the constructive amount which would have been allowable if the employee had remained at his duty station. *Coleman Mishkoff*, B-212029, *supra*. We are not aware of any basis upon which the maximum allowable reimbursement for voluntary return travel under paragraph 1-7.5c of the Federal Travel Regulations may be computed on the basis of expenses other than those the employee would have incurred if he had remained at his temporary duty station. Cf. *Thomas D. Salter*, B-194166, June 4, 1979. Since Mr. Huslig would not have incurred air transportation expenses on his nonworkdays had he remained at his temporary duty station, there is no basis for including the difference between regular coach fare and the "super saver" fare for one-way travel between Wichita and Little Rock in the computation of the maximum allowable reimbursement for his voluntary return to his permanent duty station.

While Mr. Huslig's use of the "super saver" ticket for his voluntary weekend return travel to Wichita and subsequent return from Little Rock to Wichita at the end of the assignment with another employe at no additional cost to the Government did save the Government some money for his return travel, it does not provide a basis for increasing his reimbursement from the Government for his voluntary travel. In addition we note that he also directly benefited from the use of the "super saver" ticket since it reduced by $55.50 his personal cost for such travel, the difference between the regular $163 one-way coach fare and the $107.50 "super saver" fare prorated for the one-way travel.

Accordingly, payment on the reclaim voucher is not authorized.

[B-216495]

Contracts—Federal Supply Schedule—Purchases Elsewhere—Award Combining FSS and Non-FSS Items—Lowest Price *v.* FSS Coverage Basis—Identical Coverage Effect

An agency which is a mandatory user of a multiple-award federal supply schedule (FSS) contract may purchase lower priced non-FSS items which are identical (in terms of make and model) to those included on the FSS contract from the schedule contractor that submitted the low quote under the original request for quotations. There is nothing in the Federal Acquisition Regulation which would compel the agency to recompete the non-FSS items.

Matter of: MII/Lundia, February 4, 1985:

MII/Lundia protests the Department of the Army's issuance of a purchase order for certain items of mobile shelving to Advance Manufacturing Corporation. Quotations were originally solicited under request for quotations (RFQ) No. DADA-15-84-Q-0515. Lundia contends that the Army issued the purchase order without obtaining adequate competition. We deny the protest.

The Army issued the RFQ on April 26, 1984, seeking quotations from four firms—including Lundia and Advance—who hold multiple-award, mandatory federal supply schedule (FSS) contracts [1] for the shelving being acquired. The RFQ was issued on a brand name or equal basis, with the Lundia product specified as the brand. Four quotes were received, but two of them were rejected for noncompliance with the specifications. Both Advance and Lundia offered acceptable products with Advance submitting the low quote

[1] FSC Group 71, Part 3, Section J, FSC Class 7125.

at $36,907.00. Lundia was second low at $38,896.50. Accordingly, the Army issued a delivery order for the shelving to Advance on July 23.

Shortly thereafter, Lundia protested to the Army that certain items of the shelving offered by Advance were in fact not on that firm's FSS contract. Advance acknowledged that this was the case and, by a modification dated September 19, those items, representing about 30 percent of the total acquisition, were deleted from the delivery order. However, on September 24, the Army issued a purchase order to Advance for the deleted items at a price of $11,316.95, which was lower than Lundia's FSS contract price for the items.

Analysis

Lundia asserts that the Army improperly acquired the non-schedule items from Advance without obtaining competition. In this regard, Lundia refers to the Federal Acquisition Regulation (FAR), § 8.404-1, 48 Fed. Reg. 42,102, 42,135 (1983) (to be codified at 48 C.F.R. § 8.404-1), which sets forth the particular circumstances where the mandatory use of a multiple-award schedule by an executive agency is not required. Subsection (e) of that section provides:

Lower prices for identical items.

(1) When an ordering office finds that an identical product (make and model) included on a multiple-award schedule is available from another source at a price lower than the schedule price, the office may purchase the item subject to the requirements to obtain competition. * * * [2]

Lundia argues that the language used in subsection (e), "subject to the requirements to obtain competition," compelled the Army to recompete the non-schedule shelving items, rather than issue a purchase order for them to Advance. Lundia implies that it would have quoted a lower price for these items under a recompetition than it quoted when responding to the original RFQ, which contemplated a 100 percent FSS buy. We see no merit in the firm's argument.

We have held in a similar situation that an agency may award a combined contract for FSS and non-FSS items to an offeror who submitted the low aggregate quote. *Synergetics International, Inc.*, B-213018, Feb. 23, 1984, 84-1 CPD ¶ 232. In that case, the protester had alleged that the successful offeror had misrepresented that certain products and services were on its FSS contract. The protester claimed that because an award was made for these non-schedule items on the basis of the offeror's low quote, the agency violated the prohibition against awarding contracts on a noncompetitive basis. We did not accept the protester's argument since the agency

[2] Lundia originally urged that the non-schedule items furnished by Advance were not identical to those on Lundia's FSS contract. After a series of meetings with the Army, Lundia conceded that Advance's items were in fact identical to Lundia's shelving in terms of make and model.

showed that it would have acquired the non-FSS items in any event from the successful offeror due to compatibility considerations, even if it had known that the items were not on the firm's schedule, and since the cost of the non-FSS items was small compared with the total cost of the procurement.

We do not think that the present situation is fundamentally different. Here, both Lundia and Advance responded to the original RFQ by quoting prices for the entire requirement, and Advance was the low offeror. When the Army learned as the result of Lundia's protest that 30 percent of the requirement was not on Advance's FSS contract, the Army deleted that portion from the initial delivery order and awarded those items to Advance separately. Lundia has made no affirmative showing that it would have offered a price lower than Advance's for those items if it had had an additional opportunity to do so. We assume that Lundia's original quote, contemplating a 100 percent FSS buy, represented the firm's best offer to the government, since multiple-award schedule contracts such as that held by Lundia are negotiated on the basis of discounts offered by the contractor from its established catalog prices. Although it is true that Lundia could have offered to supply the shelving items listed on its FSS contract, offered by Advance as non-FSS items, at lower prices than the schedule prices, *Synergetics International, Inc., supra,* we point out that, under the standard price reduction clause that is contained in all multiple-award FSS contracts, any such reductions would have been applicable to all future orders of these items by the government during the FSS contract period. See *GSA—Multiple Award Schedule Multiyear Contracting,* B-199079, Dec. 23, 1983, 63 Comp. Gen. 129, 84-1 CPD ¶ 46. In our view, nothing in the record establishes that Lundia would have reduced its FSS prices to become the low offeror for these items if they had been recompeted, and the firm thus was not prejudiced because the Army did not do so.

In any event, we cannot reasonably construe FAR, § 8.404-1(e), *supra,* to require such a recompetition. In other words, Lundia had the opportunity, through open competition, to reduce its FSS prices had it chosen to do so. We do not believe the regulation requires that Lundia be given another opportunity to compete under the circumstances.

We also note that the acquisition of the non-FSS items was, given the dollar amount involved, a small purchase procurement. Because small purchase procedures are designed to minimize the administrative costs of acquiring relatively inexpensive items, thus affording contracting officers a wide degree of discretion, we have held that agencies need only solicit quotations from a reasonable number of potential sources, judge the advantages and disadvantages of each quotation in relation to the prices quoted, and determine in good faith which quotation will best meet the needs of the government. *R.E. White & Associates, Inc.,* 61 Comp. Gen. 320

(1982), 82-1 CPD ¶ 294. Here, the Army clearly fulfilled its obligation to solicit a reasonable number of quotations by originally soliciting the four FSS contractors, since we note that the small purchase procedures contemplate that the solicitation generally should be limited to three suppliers.[3] Hence, we conclude that the Army in turn met its obligation under FAR, § 8.404-1(e), *supra,* "to obtain competition."

Accordingly, we cannot find that the purchase order for the non-FSS shelving items was issued to Advance on a noncompetitive basis so as to make the award legally objectionable.

The protest in denied.

[B-217492]

Contracts—Small Business Concerns—Awards—Prior to Resolution of Size Protest

Agency properly awarded a small business set-aside contract to a firm determined to be small by a Small Business Administration (SBA) Regional Office where the award was made after the Regional Office's decision but prior to the agency's notification that the protester appealed to the SBA's Office of Hearings and Appeals for a final ruling. Whether options under this contract should be exercised is a matter to be resolved by the agency in accordance with applicable regulations.

Matter of: Northwest Maintenance, Inc., February 4, 1985:

Northwest Maintenance, Inc. (Northwest), protests the award of a contract to DESCO, Inc., the low bidder under invitation for bids (IFB) No. N62474-84-B-9003, a small business set-aside issued for maintenance of military family housing at the Naval Air Station, Adak, Alaska (Navy), for 1 year with 3 option years.

We summarily deny the protest.

On August 27, 1984, the Seattle Regional Small Business Administration (SBA) Office rejected a size protest in which Northwest argued that DESCO was affiliated with another business thereby making DESCO a large business. The decision of the SBA Regional Office, that DESCO is a small business, was timely appealed on September 5, 1984, to SBA's Office of Hearings and Appeals. Northwest notified the Navy of its appeal by certified letter received September 7, 1984. On September 6, 1984, however, the Navy awarded the contract to DESCO. Northwest's appeal to SBA resulted in a final decision on November 28, 1984, that DESCO was a large business.

On December 5, 1984, Northwest requested that in view of the SBA's final determination, the Navy terminate DESCO's contract and make award to Northwest, or, in the alternative, resolicit the procurement. The Navy responded to Northwest's request stating:

As this Office has been advised by the Small Business Administration that the contract can remain in force, it is not anticipated that any action will be taken af-

[3] *See* FAR, § 13.106(b)(5), 48 Fed. Reg. 42,102, 42,165 (1983) (to be codified at 48 C.F.R. § 13.106(b)(5)).

fecting this procurement. Information is being gathered at this time as to the effect on the option year(s).

Northwest argues that the Navy, by relying on advice from the SBA, abdicated its responsibility to determine whether DESCO's certification as a small business was made in good faith or not. We disagree.

The Navy made award to DESCO based upon the determination of August 27 by the SBA Regional Office that DESCO was a small business. Such determination was binding on the contracting officer. *See* Federal Acquisition Regulations, § 19.301(c), 48 Fed. Reg. 42,102, 42,246 (1983) (to be codified at 48 C.F.R. § 19.301(c)). The award, made in September 1984, months before the SBA's Office of Hearings and Appeals reversed the determination of the Seattle Regional SBA Office, and before the Navy was notified of Northwest's appeal of the SBA Regional Office decision to SBA's Office of Hearings and Appeals, resulted in a valid contract. *See* FAR, § 19.302(g)(2), 48 Fed. Reg. 42.102, 42,247; *John C. Holland Enterprises,* B-216250, Sept. 24, 1984, 84-2 C.P.D. ¶ 336. Accordingly, the contracting officer was not required to determine, after the SBA final decision that DESCO was large, whether DESCO's certification as a small business was made in good faith or not.

Northwest argues that even if the award was not improper, the Navy should be precluded from exercising the options under the contract with DESCO. Of course, the exercise of this option is a matter to be resolved in accordance with applicable regulations. *See* FAR § 17.207, 48 Fed. Reg. 42,102, 42,237; *Triple A Shipyards,* B-213738, July 2, 1984, 84-2 C.P.D. ¶ 4; *Gallegos Research Corporation—Reconsideration,* B-209992.2, B-209992.3, Nov. 21, 1983, 83-2 C.P.D. ¶ 597. Although this contract should not be continued as a small business contract, the exercise of an option is not precluded if done in accordance with applicable regulations. *Triple A Shipyards,* B-213738, *supra; Gallegos Research Corporation—Reconsideration,* B-209992.2, B-209992.3, *supra.* At this time, the propriety of any option exercise is premature.

The protest is denied.

[B-218101]

Contracts—Grant-Funded Procurements—General Accounting Office Review

Complaint regarding rejection of bid by grantee is dismissed since General Accounting Office no longer reviews complaints concerning contracts under federal grants.

Matter of: The George Sollitt Construction Company, February 6, 1985:

The George Sollitt Construction Company complains of the determination by the Village of Addison, Illinois that its bid is nonresponsive under an invitation for bids issued by an Environmental

Protection Agency grantee for expansion of a waste water treatment plant, Project No. 0174.

On January 29, 1985, we published a notice in the Federal Register, 50 Fed. Reg. 3978 (1985), stating that our review of grantee compliance with federal bidding requirements is no longer necessary. The notice stated that, effective January 29, we would no longer review complaints concerning the award of contracts under grants. The complaints by Sollitt was filed in our Office on January 31. Consequently, we dismiss the complaint.

[B-218113]

Office of Management and Budget—Circulars—No. A-76—Policy Matters—Not for GAO Review

Determination under Office of Management and Budget Circular No. A-76 to contract for services rather than have them performed in-house is a matter of executive branch policy not reviewable pursuant to a bid protest filed by a union local representing federal employees.

Contracts—Protests—Information Evaluation—Sufficiency of Submitted Information

Protest may be dismissed where protester failed to submit most of the specific information required to be included in a submission under General Accounting Office bid protest regulations.

Matter of: Federal Employees Metal Trades Council, Save Our Jobs Committee, February 6, 1985:

The Federal Employees Metal Trades Council, Save Our Jobs Committee, protests the award of a contract to Reliable Trash Services for refuse collection and disposal services at Fort Benning, Georgia. We dismiss the protest.

This protest involves a challenge to an agency's determination under Office of Management and Budget Circular No. A-76 to contract for services rather than perform them in-house. The protester, representing a group of federal wage grade employees, states that a prior contract for refuse services at Fort Benning called for the services to be performed by an outside contractor using government-owned equipment. Under the current contract being challenged by the protester, the services are to be performed by an outside contractor using its own, different equipment. The protester maintains that, because of the change in the type of equipment being used, the agency was required to conduct a new cost study before deciding to contract for the services.

Our Office has repeatedly declined to render decisions concerning the propriety of an agency's determination under Circular A-76 to contract for services instead of performing the work in-house. These determinations are beyond the scope of our bid protest decision function because the provisions of the Circular are matters of executive branch policy which do not create legal rights or responsibilities. See *Local F76, International Association of Firefighters,* B-194084, Mar. 28, 1979, 79-1 CPD ¶ 209.

We do, however, consider it detrimental to the competitive system for the government to decide to award or not award a contract based on a cost comparison analysis that did not conform to the terms of the solicitation under which the bids were submitted. See *Crown Laundry and Dry Cleaners, Inc.,* B-194505, July 18, 1979, 79-2 CPD ¶ 38. For that reason we do entertain protests which allege faulty or misleading cost comparisons of in-house estimates with bids received. See *Serv-Air, Inc.; AVCO,* 60 Comp. Gen. 44 (1980), 80-2 CPD ¶ 317. Even in those cases, however, our review is intended only to protect the parties that competed from the arbitrary rejection of their bids; our review does not extend to protests by non-bidders such as federal employees or union locals that represent federal employees. *Hawaii Federal Lodge No. 1998, International Association of Machinists and Aerospace Workers,* B-214104, Jan. 23, 1984, 84-1 CPD ¶ 109. Similarly, our new bid protest regulations provide that protests may be filed only by an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. *See* GAO Bid Protest Regulations, §§ 21.0(a) and 21.1(a), 49 Fed. Reg. 49,417-49,423 (1984). It appears from the face of the protest that the protester here is not a bidder and thus is not eligible to file a protest.

Moreover, the protester has failed to submit most of the information required to be included in a submission under our regulations. Specifically, the protester does not identify the number of the solicitation or contract being challenged; request a ruling by the Comptroller General; state the form of relief it requests; or indicate its own telephone number, all items required by section 21.1(c) of our regulations to be included in a protest filed with our Office. In addition, the protest does not indicate that a copy has been furnished to the contracting agency, as required by section 21.1(d). Under section 21.1(f) of our regulations, a protester's failure to comply with these requirements constitutes grounds for dismissing its protest.

The protest is dismissed.

[B-214634]

Contracts—Negotiations—Offers or Proposals—Evaluation—Point Rating—Propriety of Evaluation

Protest against assigning four times as many evaluation points to technical factors as to cost factors is denied where protester fails to show that agency's conclusion that the higher cost of a technically superior offer would be more than offset by the increased savings expected from such an offer lacked a reasonable basis.

Contracts—Negotiations—Awards—Initial Proposal Basis—Propriety

Protest that agency conducted discussions with offerors, thus rendering the award on the basis of initial proposals improper, is denied where contracing agency either withdrew request to offerors for additional information before they had an opportunity to respond or protester was not competitively prejudiced by any discussions it may have had with agency.

Contracts—Negotiations—Offers or Proposals—Evaluation—Personnel

Protest that agency improperly considered whether personnel proposed by offerors had experience in breakout reviews when evaluating proposals in procurement for breakout reviews is denied where solicitation listed personnel qualification as an evaluation criterion and requested offerors to submit in this regard information concerning the experience of proposed personnel. Although solicitation did not identify experience with breakout reviews as an evaluation criterion, agencies need not identify the various aspects of stated evaluation criteria which may be taken into account if, as here, such aspects are reasonably related to the stated criteria.

Contracts—Negotiations—Offers or Proposals—Evaluation—Criteria—Experience

Protest that in evaluating proposals agency improperly considered whether proposals indicated experience with certain types of spare parts which the agency expected to ask the contractor to evaluate under any contract is denied where solicitation listed personnel qualifications as an evaluation criterion and requested offerors to submit in this regard information about the experience of the proposed personnel and where the solicitation also set forth the types of spare parts expected to be evaluated under the contract.

Contracts—Negotiations—Offers or Proposals Evaluation—Point Rating—Significance of Difference

Protest that agency misled offerors by stating in the solicitation that cost was an important factor which should not be ignored when undisclosed evaluation scheme assigned only 20 percent of available evaluation points to cost and when 25 percent was assigned to only one of the technical factors is denied. Solicitation need only advise offerors of the broad scheme of scoring to be employed and give reasonably definite information concerning the relative importance of evaluation factors. Here, solicitation listed the technical factors in descending order of relative importance and indicated that cost, while significant, nevertheless was of secondary importance to the technical factors.

Contracts—Negotiations—Offers or Proposals—Evaluation—General Accounting Office Review

In reviewing an agency's technical evaluation General Accounting Office will not evaluate the proposal *de novo,* but will instead examine the evaluation to ensure that it had a reasonable basis. Protest against agency evaluation is denied where the protester failed to carry its burden of showing that the evaluation was unreasonable.

Contracts—Allegations—Bias—Not Prejudicial to Protester

Protester fails to prove bias against it in evaluation of proposals where it advances no more than supposition in support of the allegation and where the evaluations were either reasonable or, if unreasonable, any errors were in the protestor's favor and protester thereby suffered no competitive prejudice as a result.

Contracts—Negotiations—Offers or Proposals—Evaluation—Technical Superiority *v.* Cost—Solicitation Provisions

Where the solicitation, in describing the relative importance of cost vis-a-vis technical factors, in effect notified offerors that the agency had predetermined the tradeoff between technical merit and price, then the evaluation point scores were to be controlling unless selection officials determined that, notwithstanding a difference in the technical scores of the proposals, there were no significant differences in their technical merit, in which event price would become the deciding factor.

Contracts—Small Business Concerns—Awards—Prior to Resolution of Size Protest

Protest that agency made award in a negotiated small business set-aside without allowing offerors at least 5 working days in which to protest size status of apparent successful offeror is denied where contracting officer determined that award must be made without delay in order to protect the public interest and protester does not allege that awardee was other than a small business.

Reports—Administrative—Contract Protest—Timeliness of Report

Agency's failure to submit an administrative report responding to the protest in a timely manner, *i.e.*, within 25 working days, does not render invalid the otherwise proper award.

Matter of: Technical Services Corporation, February 7, 1985:

Technical Services Corporation (TSC) protests the award of cost-reimbursement-plus-fixed-fee contracts to DHD, Inc., and Resource Consultants, Inc. (RCI), under request for proposals (RFP) No. N00393-84-R-1422, issued by the Department of the Navy for in-depth technical reviews (full screen breakout reviews) of the possibility of procuring on a competitive basis certain aeronautical spare parts. TSC alleges that the awards were improperly made on the basis of initial proposals, without affording offerors an opportunity to submit best and final offers, and under evaluation criteria other than those set forth in the solicitation. TSC also challenges the technical evaluation of the proposals and the cost-versus-technical tradeoff made by the Navy. We deny the protest.

The solicitation required the contractor selected by the Navy to provide a full screen breadout review for aeronautical spare parts selected by the Navy's Aviation Supply Office (ASO). Full screen reviews, as described in the solicitation, include a determination as to whether the available technical data on a spare part is sufficient to permit its competitive procurement, a determination as to the economic feasibility of completing an inadequate data package, the completion of the data package where practicable, and the consideration of the cost effectiveness of undertaking a breakout or competitive procurement of the part. In addition, the contractor was required to review the breakout screening procedures being used by ASO and to determine whether categories of items managed by ASO should be removed from competitive procurement.

The amended RFP divided the work to be performed into two lots. Each lot consisted of an anticipated level of effort of 49,244 man-hours of direct labor during a base period from the date of award through September 30, 1984, and a further 49,244 man-hours under an option to extend the contract an additional 12 months. Lot I was to be awarded on an unrestricted basis, Lot II was designated a 100-percent small business set-aside.

The solicitation provided that award would be made to that responsible offeror whose offer was most advantageous to the government, price and other factors considered. The RFP listed in descending order of relative importance Personnel Qualifications, Technical Approach, Management Approach and Corporate Experience as the criteria to be applied in evaluating the technical proposals. The precise numerical weight assigned to each evaluation criterion was not disclosed. As for cost, the solicitation indicated that:

> The evaluation of the contractor's costing/fee proposals shall be of secondary importance to the evaluation of technical proposals in making the award under this solicitation.
>
> Although cost is of secondary importance, it is an important factor and should not be ignored. The degree of its importance will increase with the degree of equality of the proposal in relation to the other factors on which selection is based. * * *

Under the evaluation scheme adopted by the Navy, proposals could receive a maximum of 80 points for technical factors, including 25 for the qualifications of the proposed personnel, 23 for the technical approach, 17 for the management approach, and 15 for corporate experience. An additional 20 points were assigned to cost.

The Navy received five proposals for Lot I and four for Lot II. Although TSC submitted proposals for each lot, as well as an alternate proposal for a combined award of both lots, and submitted resumes for personnel sufficient to perform the work under both, it failed to indicate which personnel would work on Lot I and which would work on Lot II. Accordingly, by letter of September 7, 1983, the contracting officer requested TSC, "[f] or the purpose of clarifying the technical proposal," to specify which personnel would be assigned to which lot. TSC was "required to respond" by February 8.

By letter of February 8, TSC designated the personnel among those for which it had submitted resumes which would be assigned, if TSC received a contract for either lot. TSC did not allocate its personnel between the two lots, but instead assigned the same personnel to Lot I as it assigned to Lot II. Nevertheless, the contracting officer determined that TSC should be allowed to assign the same personnel to both lots because a small business such as TSC might not be awarded Lot I, which was not a small business set-aside.

However, both TSC and DHD, which had likewise furnished the same resumes for Lot II as were furnished for Lot I, submitted alternate proposals based upon a combined award of both lots. Accordingly, on February 14, the contracting officer wrote DHD and TSC to inform them that:

In the event you desire to be considered for an award for both lots, it is required that you allocate your total number of personnel over Lots I and II. If you do not wish to be considered for award of both lots, then your proposals will be evaluated as submitted.

On the same day that the February 14 letter was made available for pickup by TSC and DHD, the Navy telephoned TSC to ask that it not respond to the letter yet. On the following day contracting officials called TSC to withdraw the letter, instructing TSC to ignore it and rebuffing TSC's attempt to explain its proposal. TSC was informed that "in order not to prejudice anyone" the question raised in the letter would be deferred until technical discussions. We understand that the letter to DHD also was withdrawn.

The Navy in fact found that it had insufficient time to conduct subsequent discussions with offerors. A goal of competing 25 percent of purchases made for the fiscal year ending September 30 had been established. As of February 24, ASO had a backlog of 5,850 full screen breakout reviews requiring completion prior to May 1, with an additional 5,500 required to be completed by September 30. Since the contract was expected to account for one-third of the total full screen reviews, the Navy determined that reaching the goals for competitive procurements would be seriously jeopardized if awards were not made by March 1. Accordingly, the Navy made award based upon an evaluation of the initial proposals.

As indicated below, DHD's proposals received the highest point scores for both lots while RCI's proposals received the second highest scores.

Contractor	Technical points (Raw)	Technical points Normalized [1]	Cost points		Total
Lot I:					
DHD	(76.80)	80.00	($3,079,643)	11.59	91.59
RCI	(70.66)	73.60	($2,111,030)	16.91	90.51
VSE, Inc.	(69.40)	72.29	($2,004.026)	17.81	90.10
TSC	(63.65)	66.30	($1,784,416)	20.00	86.30
Booz-Allen & Hamilton	(65.84)	68.58	($3,370,333)	10.59	79.17
Lot II:					
DHD	(76.80)	80.00	($3,079,643)	11.59	91.59
RCI	(70.64)	73.55	($2,111,030)	16.91	90.46
TSC	(63.73)	66.36	($1,784,416)	20.00	86.36
[2]					

[1] Scores are "normalized" by giving the highest ranked proposal in an area the maximum number of points available in that area and the other proposals a fraction of the maximum score for each area in the same proportion as to the offerors' raw scores. See *SETAC, Inc.*, 62 Comp. Gen. 577 (1983), 83-2 C.P.D. ¶ 121.

[2] A fourth proposal for Lot II was found technically unacceptable.

After satisfying himself as to the reasonableness of the prices and costs proposed by DHD and determining that the greater cost of its proposal reflected a technical superiority which would likely result in offsetting cost savings, the contracting officer made award to DHD for Lot I. Since DHD proposed to use the same personnel for Lot II as were proposed for Lot I, and since the urgency of the procurement precluded further negotiations, the contracting officer determined that DHD's proposal for Lot II was no longer acceptable and accordingly made award to RCI for that lot. TSC thereupon filed this protest with our Office.

Failure To Request Best and Final Offers

TSC characterizes the information requested in the Navy's February 7 and 14 letters as essential to any determination of the acceptability of TSC's proposals. It contends that substantive written and oral discussions occurred between the Navy and TSC and that the Navy's subsequent failure to request best and final offers and the making of award on the basis of initial proposals was, given such discussions, therefore improper.

Award may be made on the basis of initial proposals, without discussions, where it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussions would result in a fair and reasonable price, provided that the solicitation advises offerors of the possibility that award might be made without discussions, and provided that award is in fact made without discussions. Discussions occur if an offeror is afforded an opportunity to revise or modify its proposal or when the information requested and provided is essential for determining the acceptability of the proposal. Clarifications are inquiries to eliminate minor uncertainties or irregularities. While an agency may request "clarifications" when award is made on the basis of initial proposals, when it conducts "discussions" it must afford all offerors in the competitive range the opportunity to submit revised proposals. See *Emerson Electric Co.*, B-213382, Feb. 23, 1984, 84-1 C.P.D. ¶ 233; see also *Alchemy, Inc.*, B-207338, June 8, 1983, 83-1 C.P.D. ¶ 621 (discussions versus clarifications); Defense Acquisition Regulation (DAR) § 3-805.1, *reprinted in* 32 C.F.R. pts. 1-39 (1983).

We note that although contracting officials characterized the information they were seeking in the February 7 letter as merely a clarification of TSC's proposals, the Navy admits that the contracting officer now believes that TSC was given an opportunity to revise its proposals and that, therefore, the letter and TSC's response could be viewed as constituting discussions. Nevertheless, whether discussions or clarification then occurred, we fail to see how TSC suffered any competitive prejudice from the Navy's action. Cf. *Lou Ana Foods, Inc.* B-209540, Mar. 21, 1983, 83-1 C.P.D. ¶ 278; *ABA Electromechanical Systems, Inc.* B-188735, Nov. 28, 1977, 77-2 C.P.D ¶ 411. The solicitation required offerors to submit resumes of the personnel with which they intended to perform the contract. Offerors were instructed to detail the experience and availability of the personnel and to identify the solicitation requirement to which they related. By identifying which employees would work on which lot, TSC did no more than address the requirements of the solicitation.

As for the February 14 letters, the Navy withdrew its request for information before TSC and DHD had an opportunity to respond and contracting officials thereafter rebuffed TSC's attempt to supply the information. Further, not only do we question whether discussions occurred in these circumstances, but, even if the Navy had considered the information TSC had attempted to convey, we again see no prejudice to TSC. The urgency of the procurement prevented consideration of TSC's alternate proposal, in regards to which the information had been requested.

Selection of Evaluation Criteria

TSC argues that, given the type of work required, contracting officials abused their discretion in assigning only 20 percent of the available evaluation points to cost.

Selection officials are relatively free to determine the manner in which proposals will be evaluated so long as the method chosen provides a rational basis for any source selection and the actual evaluation comports with the established evaluation criteria stated in the solicitation. *SETAC, Inc., supra,* 62 Comp. Gen. at 586, 83-2 C.P.D. ¶ 121 at 9-10. TSC has failed to show that the Navy lacked a rational basis for considering technical factors to be four times as important as cost indicated above. The Navy has concluded that the higher cost of a technically superior proposal can be more than offset by the increased savings to be realized from award on that proposal since the increased level of production and higher quality of reviews expected from a technically superior offeror would lead to a larger number of cost-saving competitive procurements.

Disclosure of Evaluation Criteria

TSC alleges that contracting officials in their evaluation of proposals considered evaluation criteria other than those set forth in the solicitation.

The RFP listed "Personnel Qualifications" among the evaluation criteria and required in this regard that technical proposals address:

Experience: The degree to which the experience cited in the resumes submitted satisfy the minimum experience identified in Section C for the two levels of Equipment Specialists and Engineers to be made available.

Initial Availability: the contractor should have available sufficient Equipment Specialist and Engineer personnel who are qualified to perform the task at the time of contract award.

The evaluation submitted by the technical evaluation team indicated that:

The major grading differences were in the critical areas of personnel experience and availability * * * Personnel experience was rated based on SOW [statement of work] minimum requirements including direct breakout and Inventory Control Point (ICP) experience. In addition to educational requirements and a general technical background, it is essential that direct breakout and/or ICP experience be documented for a grade of excellent. Due to the size, scope and short duration of the contract, a grade of excellent for personnel availability equates to fully qualified personnel documented to be available at time of contract award. Personnel meeting minimum SOW requirements, but with little breakout/ICP experience were not considered fully "qualified to perform" and could not be rated as excellent.

DHD's technical proposals were rated as excellent in regards to the qualifications of the personnel it proposed and received the maximum of 25 evaluation points for this category. RCI's proposals were considered "good" in this regard and received 19.16 points.

On the other hand, although TSC's proposals were rated as "excellent" in regards to technical approach, management approach and corporate experience, the qualifications of the personnel it proposed were described as only "average" and its proposals given only 11.25 points for this category. The evaluation team explained that its evaluation was based upon two factors:

(a) Personnel Experience—*Average*

TSC personnel are rated as average because 50 percent of the junior equipment specialist lack direct breakout experience. Additionally, none of the onsite management or supervisory personnel have ICP experience and breakout experience is rare. The four commodity managers (excellent organization) lack breakout experience, and although very qualified supervisors and technicians, they will need much training in order to be effective and innovative in the breakout arena. The majority of the senior ES's [equipment specialists] are rated good or excellent.

(b) Personnel Availability—*Average*

It is extremely difficult to tell when the TSC people will be available for work. The management staff and key personnel should be available immediately but full operations may take three weeks. With the lack of direct ICP and or breakout experience this workforce will not be qualified to perform the task at the beginning of the contract as directed in the SOW.

TSC argues that consideration of its breakout experience was improper because that subfactor was not mentioned in the solicitation.

While agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify the various aspects of each which may be taken into account, provided that such aspects are reasonably related to the stated criteria. See *Information Management, Inc.*, B-212358, Jan. 17, 1984, 84-1 C.P.D. ¶ 76. The solicitation listed personnel qualifications as an evaluation criterion and requested offerors to submit in this regard information concerning the experience of the personnel with which they proposed to perform breakout reviews. Whether that experience was in performing breakout reviews, the very object of the procurement, was reasonably related to the experience and qualifications of the personnel proposed and thus properly considered by the Navy. *United Food Services, Inc.*, B-211117, Oct. 24, 1983, 83-2 C.P.D. ¶ 476; *Genasys Corp.*, 56 Comp. Gen. 835 (1977), 77-2 C.P.D. ¶ 60.

TSC likewise argues that consideration of Inventory Control Point (ICP) experience was improper since ICP experience was not listed as an evaluation criterion.

The Navy indicates that the phrase as used by the evaluation team referred to "experience relatable to data review for the type of material ASO buys (as an Inventory Control Point) * * *." The solicitation identifies the type of material for which ASO will request breakout reviews. Whether the experience of the proposed personnel related to data review for such material was reasonably related to the stated evaluation criteria and thus properly considered by the Navy.

TSC further contends that the solicitation failed to inform potential offerors of the true relationship between cost and technical factors, arguing that describing cost as "an important factor * * * [which] should not be ignored" was misleading when the Navy had in fact only assigned 20 percent of the available evaluation points to cost and when 25 percent of the available points were assigned to personnel qualifications, only one of several technical factors.

Although a solicitation must advise offerors of the broad scheme of scoring to be employed and give reasonably definite information concerning the relative importance of the evaluation factors, the precise numerical weight to be used in evaluation need not be disclosed. See *Bendix Corp.*, B-208184, Sept. 16, 1983, 83-2 C.P.D. ¶ 332. Here, the solicitation indicated the relative importance of the evaluation factors by listing the technical factors in descending order of relative importance and by indicating that cost was of secondary importance to the technical factors. As for the warning that cost was an important factor which should not be ignored, 20 percent is a significant percentage, and such a warning cannot reasonably be interpreted as a representation that cost will necessarily be allocated more than 20 percent of the available points where the solicitation also cautioned that cost was of secondary importance. Further, we are aware of no requirement that under these circumstances the solicitation must reveal the relative weight accorded cost vis-a-vis each individual technical factor, as opposed to merely informing offerors of its relative weight vis-a-vis the technical factors as a whole.

Application of Evaluation Criteria

Not only does TSC challenge the Navy's selection and the adequacy of its disclosure of evaluation criteria, it also challenges the application of those criteria.

TSC initially objects to the technical evaluation team penalizing TSC's technical proposals for allegedly not indicating that personnel would be immediately available upon award of the contract. TSC denies that the solicitation imposed any requirement that all of TSC's proposed personnel be available on the first day of the contract, pointing to the language in paragraph L-1281, "STAFFING LEVELS," of the solicitation which warns that:

It is understood and agreed that the rate of manhours per month may fluctuate in pursuit of ASO's technical objective provided such fluctuation does not result in the utilization of the total manhours of effort prior to the expiration of the term hereof. All personnel may not be required for actual performance for months after award of contract. The Government will not reimburse the contractor for any personnel until such personnel are actually performing under this contract.

TSC also indicates that it was informed by contracting officials that the government would only reimburse the contractor for personnel effectively and productively employed. TSC interprets the above as recognition that all of the proposed personnel could not be effectively employed on the first day of the contract period.

TSC finds corroboration for that conclusion in paragraph No. 4.0, "Work Site," which, as amended, provides that:

This contract shall be performed within (15) fifteen miles of the Aviation Supply Office Compound. If the contractor is required to lease a facility within this area, rental costs shall be reimbursed in accordance with DAR 15-205.34.

TSC contends that this provision clearly envisions the possibility that an awardee might have to lease new facilities in order to comply and maintains that "it would be completely irrational to employ a total work force prior to establishment of a work site."

In any case, argues TSC, it in fact satisfied any requirement for immediate availability since it submitted resumes indicating that the proposed employees were immediately available.

The Navy, on the other hand, cites the description of initial availability in the solicitation, that the "contractor should have available sufficient * * * personnel * * * to perform the task at the time of contract award," as evidence that the solicitation required the contractor to have his workforce available and ready to work on the first day of the contract. The Navy explains that TSC's proposals were penalized for failing to meet this requirement because TSC proposed a 30-day startup or phase-in plan according to which TSC would only be ready "to accept *initial data packages at the beginning of the third week after contract award*" and the proposed buildup of personnel would continue into the fourth week after contract award.

The solicitation clearly stated that the contractor should have available at the time of contract award the personnel to perform the work required under the solicitation—*i.e.,* to accept data relevant to certain spare parts selected by ASO and to review the possibility of procuring such parts competitively. We agree with the Navy in viewing clause L-1281 as merely a warning that the government would only pay the contractor for personnel productively employed and not as releasing the contractor from the requirement of immediate availability. In effect, the Navy required the contractor to bear the risk of any fluctuations in the Navy's needs, forcing the contractor to have available sufficient personnel to meet peak demand on day one of the contract, but denying the contractor reimbursement if such personnel were in fact not needed.

In reviewing an agency's technical evaluation, we will not evaluate the proposal *de novo,* but will instead only examine the evaluation to ensure that it had a reasonable basis. In addition, the protester bears the burden of showing that the agency's evaluation was unreasonable. *Essex Electro Engineers, Inc.; ACL-Filco Corp.* B-211053.2, B-211053.3, Jan. 17, 1984, 84-1 C.P.D. ¶ 74.

TSC has failed to demonstrate that the Navy was unreasonable in determining that TSC's proposal did not meet the requirement of immediate availability as defined in the solicitation. While the personnel proposed by TSC may have been immediately available to TSC, as indicated on the resumes, nothing in TSC's proposal indicates that they were available at the time of contract award immediately to begin data reviews. On the contrary, under TSC's proposed startup plan, TSC would begin to accept data packages only at the beginning of the third week after award.

TSC further objects to the Navy's evaluation of proposals on the ground that alleged discrepancies between the technical evaluation team's narrative descriptions of the proposals and the resulting point scores for those proposals demonstrate unacceptable prejudice against TSC. In particular, TSC objects to assigning RCI 19.16 points for personnel qualifications even though RCI's proposal was criticized by the evaluation team for proposing too few junior personnel, thus raising the possibility that overtime might be required, and for proposing to fill two engineer positions with nonengineers. TSC contrasts the 19.16 points assigned to RCI in this regard with the 11.25 points received by TSC. TSC also alleges that it was unfair to assign 12.5 points to DHD for corporate experience when the evaluation team found at DHD lacked direct corporate experience in breakout analysis and when TSC, which the team considered to have excellent corporate experience and which claims to have extensive corporate breakout experience, only received 15 points.

The protester has the burden of proving bias, and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. See *Martin-Miser Associates,* B-208147, Apr. 8, 1983, 83-1 C.P.D. ¶ 373.

TSC has failed to demonstrate that the point scores given for the qualifications of the proposed personnel were biased or even without a reasonable basis. It would appear that in assigning a score to RCI's proposal for personnel qualifications, the technical evaluation team in fact took into account the deficiencies which were identified in the narrative portion of the evaluation and cited by TSC. RCI received only 19.16 of 25 points available in this regard even though the evaluation team otherwise found 70 percent of RCI's proposed personnel to be excellent and found the initial availability proposed by RCI to be excellent. That TSC received only 11.25 points appears to reflect the evaluation team's reasonable conclusion that the lack of direct breakout experience in the personnel proposed by TSC and TSC's unwillingness or inability to begin breakout reviews until the third week after the contract were serious deficiencies in a procurement to meet an urgent requirement.

As for the points assigned for corporate experience, TSC received the maximum number of points available while DHD received 16.7 percent less because of its perceived lack of direct breakout experience. The technical evaluation team explained the amount of the penalty as resulting from the team's conclusion that although DHD lacked direct breakout experience, this deficiency would be offset by the value of DHD's excellent automatic data processing (ADP) experience in performing the data evaluation required under the contract. Moreover, the evaluation report also indicated in regards to DHD's "Corporation Qualification," a subcriterion under management approach, that the personnel proposed by DHD, which were rated as "excellent in direct experience," would compensate for some of DHD's corporate inexperience.

Although TSC contests the relevance of this experience, we need not resolve the dispute since the Navy now indicates that the statement in the evaluation report that DHD lacked direct breakout experience was erroneous. DHD in fact stated in its proposals that under a contract with the Naval Air Systems Command:

> Life Cycle cost analysis, cost comparative analysis, source qualification, reverse engineering and specification development were performed [by DHD] as part of the Breakout function that was required in this contract.

Accordingly, any mistakes in the Navy's evaluation of corporate experience cannot be said to have resulted, on balance, in net competitive prejudice to TSC. See *Martin-Miser Associates,* B-208147, *supra,* 83-1 C.P.D. ¶ 373 at 11; See also *Lou Ana Foods, Inc.,* B-209540, *supra,* 83-1 C.P.D. ¶ 278 at 3.

Cost-Technical Tradeoff

TSC objects to the tradeoff made by the Navy between cost and technical factors. It alleges that TSC's technical proposals were essentially equal to those submitted by DHD and that DHD proposed an unreasonably high price. Accordingly, concludes TSC, award on Lot I should have been made on the basis of TSC's lower priced proposal.

The solicitation, in describing the relative importance of cost vis-a-vis the technical factors, in effect notified offerors that the agency had predetermined the tradeoff between technical merit and price. Therefore, under these circumstances, the point scores were to be controlling unless source selection officials determined that, notwithstanding a difference in the technical scores of the proposals, there was no significant difference in their technical merit, in which event price would have become the deciding factor. Cf. *Eaton-Kenway*, B-212575.2, June 20, 1984, 84-1 C.P.D. ¶ 649 (solicitation listed evaluation criteria in relative order of importance and advised that award would be made on a numerical formula). Here, contracting officials found that DHD's higher technical scores, approximately 13 points, or over 20 percent, higher than TSC's raw technical scores, reflected a significant technical superiority. Given the previously discussed deficiencies in TSC's proposals, we do not believe that TSC has demonstrated that contracting officials abused their discretion in finding a significant technical difference between TSC's and DHD's proposals. See *Sperry Flight Systems*, B-212229, Jan. 19, 1984, 84-1 C.P.D. ¶ 82.

Other Allegations

TSC maintains that the Navy's disregard for proper procedures is further evidenced by the Navy's failure to give unsuccessful offerors 5 working days prior to award in which to challenge the size status of the apparent successful offeror for Lot II, the small business set-aside, and by the Navy's failure to submit the administrative report responding to this protest in a timely manner.

While a contracting officer generally should not make award prior to the deadline for submitting a size status protest set forth in the notice to unsuccessful offerors, a deadline which usually should be 5 working days plus a reasonable time for the notice to reach the unsuccessful offerors, nevertheless, award may be made before such time where the contracting officer determines in writing that award must be made without delay in order to protect the public interest. DAR, §§ 1-703(b)(1) and 1-703(b). The contracting officer here made such a determination. In any case, TSC has not alleged that RCI was other than a small business and thus that TSC suffered identifiable competitive prejudice from the agency's actions.

As for the agency's failure to submit an administrative report in a timely manner, we note that although we request agencies to submit a complete report to our Office as expeditiously as possible, generally within 25 working days, 4 C.F.R. § 21.2(c) (1984), failure to do so has no bearing on the validity of an otherwise proper award. See *Creative Electric Inc.,* B-206684, July 15, 1983, 83-2 C.P.D. ¶ 95.

The protest is denied.

[B-218085]

Bids—Collusive Bidding—Referral to Justice Department

Protest that a former employee of the protester participated in a procurement on behalf of both the protester and a competitor at the same time is dismissed since the allegation involves either a dispute between private parties, an issue to be considered by the contracting officer in determining the awardee's responsibility, or a matter for the Department of Justice.

Matter of: Isratex, Inc., February 8, 1985:

Isratex, Inc. protests the award of a contract to Lakewin, Inc. under solicitation No. DLA100-85-B-0029, issued by the Defense Personnel Support Center, Defense Logistics Agency, Philadelphia, Pennsylvania. Isratex complains that one of its former employees who was involved in preparing the firm's bid was at the same time competing in this procurement on behalf of Lakewin. Isratex says this violates the competitive bidding system, but does not specify further the basis for its complaint.

To the extent that this protest involves an allegation that the former employee improperly used information obtained from Isratex in preparing the Lakewin bid, this is essentially a dispute between private parties which this Office will not decide. See *Genasys Corporation,* B-213830, Jan. 23, 1984, 84-1 CPD ¶ 102. Further, to the extent that Isratex is alleging a possible violation of the solicitation's Certificate of Independent Price Determination, *see* the Federal Acquisition Regulation, 48 C.F.R. § 52.203-2 (1984)—a provision designed to prevent collusive bidding that would restrict competition—this allegation raises an issue that is in the first instance a matter to be considered by the contracting officer in the context of a responsibility determination, *Keystone Elevator Company, Inc.,* B-215540, July 20, 1984, 84-2 CPD ¶ 72, and could be a matter also for the Department of Justice. *Portland Mailing Services, Inc.,* B-213321, Nov. 7, 1983, 83-2 CPD ¶ 535. It is not a question for this Office to decide.

Under section 21.3(f) of our Bid Protest Regulations, 49 Fed. Reg. 49417 (1984) (to be codified at 4 C.F.R. Part 21), we will dismiss a protest without requiring the submission of a report from the contracting agency when the issues raised are not for consideration by this Office. We dismiss this protest.

[B-218048.2]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Comments on Agency's Report

General Accounting Office (GAO) will not reopen a case which was closed because the protester did not send an indication of its continued interest in the protest within 10 working days after receiving the agency report where the protester's alleged lack of proper notification of requirement for a statement of continued interest resulted from the protester's failure to advise GAO of change of corporate official representing the protester in the proceedings.

Matter of: International Development Institute, February 11, 1985:

International Development Institute requests that we reopen the file on its protest concerning the award of a contract by the Agency for International Development under solicitation No. AN-84-002. We closed our file because the protester did not send a timely reply to our request for a statement of its continued interest in the protest after receipt of the agency report on the matter. We decline to reopen the case.

International states that our letter was "mis-sent" because it was addressed to an employee who was no longer employed by International at the time our request for comments was mailed. (Apparently our letter was treated as personal mail of the former employee and was not opened by representatives of International.) Our records indicate, however, that our letter was correctly addressed to the employee of International who filed the initial protest to our Office. Further, we were never thereafter advised of any change of the corporate official responsible for representing the protester in this proceeding. We therefore believe that the responsibility for the failure of appropriate corporate officials to be informed of our notice solely rests with the protester.

In any event, our Bid Protest Procedures clearly indicate that a protester must file comments on the agency report with our Office within 10 working days after receipt of the report or face dismissal of its protest. See 4 C.F.R. § 21.3(d) (1984). Since our procedures are published in the Federal Register, protesters are charged with constructive notice of their contents. *Custom Caterers*, B-212635, Sept. 6, 1983, 83-2 CPD ¶ 306. Therefore, even if International did not receive our letter at all, it was on notice of its obligation to file comments with our Office, or otherwise express continued interest in the protest, and it failed to comply with this obligation.

Although our decision may seem harsh to International, we regard bid protests as serious matters which require effective and equitable procedural standards both so that parties have a fair opportunity to present their cases and so that protests can be resolved in a reasonably speedy manner. See *Edron, Inc.—Reconsid-*

eration, B-207353.2, Sept. 8, 1982, 82-2 CPD ¶ 207. Our procedures are intended to provide for expeditious consideration of objections to procurement actions without unduly disrupting the government's procurement process. Reopening the file in International's protest at this time would be inconsistent with this purpose. Therefore, the file will remain closed.

[B-216417]

General Accounting Office—Jurisdiction—Contracts—National Defense Needs

General Accounting Office (GAO) will not disturb determination and findings justifying negotiation for purchase of mobilization base item, since under 10 U.S.C. 2304(a)(16), determination is final. However, GAO will consider whether findings support the determination. In addition, determination of itself does not justify sole source award when defense agency's immediate requirements apparently can be met by other suppliers.

Contracts—Negotiation—Sole-Source Basis—Authority—Awards In Interest of National Defense

GAO will deny protest against sole source award for mobilization base item when it is based on assessment of defense agency's requirements, amount needed to support producer's capability, and other factors particularly within the agency's expertise.

Matter of: Wayne H. Coloney Co. Inc., February 12, 1985:

Wayne H. Coloney Company, Inc., protests the proposed sole source award of 10,073 30-millimeter ammunition shipping and storage containers designated CNU-332A/E to Lanson Industries, Inc. The United States Army Armament, Munitions and Chemical Command, Rock Island, Illinois, issued the solicitation, No. DAAA09-84-R-0483, on July 27, 1984. Coloney also protests the proposed sole source award of an additional 11,953 units (for a total of 22,026) to Lanson under a September 18, 1984, amendment to the solicitation.

We deny the protest.

The sole-source solicitation was issued to Lanson pursuant to 10 U.S.C. 2304(a)(16) (1982), which permits negotiations where the cognizant Secretary:

Determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved.

In this case, an Assistant Secretary of the Army executed a class determination and findings (D&F) authorizing negotiation for a number of ammunition items and associated items "to maintain, establish or expand production capacity for ammunition." The D&F stated that because of the complexity of these items, sources of supply are limited. The Army believes that in the interest of national defense, these sources should be kept available. In addition, according to the D&F, in the event of a national emergency, requirements for these supplies will substantially exceed the production capacity of all companies. Therefore, the Army concludes, in addition to maintaining the manufacturing facilities of all companies, it is essential that their engineering and production skills be maintained in order to be available for training other companies in the manufacture of the supplies in question.

In the appendices to the D&F, Lanson is identified as the sole authorized mobilization base producer of the ammunition containers for a quantity in excess of the 22,026 being procured here. In the report on the protest, the contracting officer indicates that there are insufficient requirements to justify expansion of the mobilization base to more than one producer.

The mobilization base producer program encompasses planning with possible industrial producers of critical items that the Department of Defense (DOD) will need for mobilization in preparing for war or other national emergencies so as to assure a capability for sustained production of such essential military items. See *American Air Filter Company, Inc.,* 55 Comp. Gen. 703, 705-706 (1976), 76-1 CPD ¶ 73. The results of this planning are ordinarily reflected on an approved DD Form 1519, "DOD Industrial Preparedness Program Production Planning Schedule," which is essentially an agreement between the government and the mobilization base producer regarding what is needed to sustain the producer's production capability. See *American Air Filter Company, Inc.,* 55 Comp. Gen. *supra,* at 706; *True Machine Co.,* B-215885, Jan. 4, 1985, 85-1 CPD ¶ *18.* Before a DD Form 1519 is executed, government production planning officials survey the facilities in question and negotiate with plant management the production planning schedule set forth on the DD Form 1519. See *True Machine Co.,* B-215885, *supra* at 3. After agreement is reached on a DD Form 1519, a firm then becomes a mobilization base producer. *American Air Filter Company, Inc.,* 55 Comp. Gen. *supra; True Machine Co.,* B-215885, *supra.*

Coloney protests that the designation of Lanson as the sole mobilization base producer of this item is arbitrary and capricious because Coloney also can and has produced this item and because the quantity being procured from Lanson allegedly is for more than that needed to keep a mobilization base producer viable. In this regard, Coloney asserts that only 2,000 units could maintain its own production capability, and that, based upon Coloney's intimate knowledge of the facilities and capabilities of Lanson (a previous subcontractor to Coloney, this same quantity is all that would be necessary to support Lanson's production capability.

We have previously found that sole source awards may properly be made under the authority of 10 U.S.C. § 2304(a)(16). See, e.g., *Norton Company, Safety Products Division,* 60 Comp. Gen. 341, 351 (1981), 81-1 CPD ¶ 250 and cases cited therein. As we stated in *National Presto Industries Inc.,* B-195679, Dec. 19, 1979, 79-2 CPD

¶ 418 at 4, in a procurement negotiated under this section, the normal concern with ensuring maximum competition is secondary to the needs of industrial mobilization. The award of a contract for current needs becomes not only an end in itself, but a means to another goal—the creation and/or maintenance of mobilization capacity. For this reason, contracts are awarded to particular plants or producers to create or maintain their readiness to produce essential military supplies in the future.

Further, in reviewing the propriety of a sole source award under this section, our Office will not disturb the findings justifying the determination to negotiate, since they are made final by statute. 10 U.S.C. § 2310(b) (1982); *Norton Co.,* 60 Comp. Gen. *supra,* at 351-352, 81-1 CPD ¶ 250 at 18. However, we will consider whether the findings of fact legally support both the determination to negotiate and the determination to sole source the requirement. *Id.*

We have held that 10 U.S.C. § 2304(a)(16) does not, as a matter of course, justify a procurement restricted to a single source when it appears that immediate mobilization base requirements can be met by other suppliers. *Saft America, Inc.,* B-193759, July 12, 1979, 79-2 CPD ¶ 28. Moreover, in the case of a sole source, the D&F should state all findings necessary to support the designated source.

Here, we find that although the D&F clearly justifies negotiation, it does not, in and of itself, make sufficient factual findings to support a sole source award. In this regard, the D&F designates only Lanson as a mobilization base producer for this item and designates the number of items which can be procured under authority of 10 U.S.C. § 2304(a)(16). There is no specific finding in the D&F which indicates that only Lanson has the requisite exclusive capability or any other specific findings why there is only one mobilization base producer for this item. Further, the D&F provides no information or findings as to the derivation of the number of items to be procured under this authority. Finally, the D&F does not indicate that it is based on any particular review of Lanson's production capability or a DD Form 1519.

Although we think the D&F should have been more precise so as to specifically justify the sole source award to Lanson, we note that neither Lanson nor the Army contracting officer believes that Army requirements do justify having more than one mobilization base producer. Lanson states that the authorized amount needed to support its production capabilities was the subject of a DD Form 1519 and various reviews by cognizant DOD activities, all of which determined that a quantity of 2,000 units is far less than necessary to support Lanson's mobilization capabilities. Further, the D&F, justifying Lanson as the sole mobilization base producer for a quantity in excess of the 22,026 ammunition containers being procured here, is presumably based on the Lanson DD 1519 assessment of capability and production capacity as well as overall military and industry factors, particularly within the Army's expertise. The protester's assertions, on the other hand, are based on its own more limited experience with Lanson as a subcontractor for the same item.

Under these circumstances, we find that neither the capabilities of Coloney nor the requirement for maximizing competition require the Army to procure the ammunition containers competitively. As we stated in *national Presto,* B-195679, *supra,* the DOD is responsible for developing an industrial preparedness program that will ensure the nation's ability to respond to a military emergency. In implementing this goal, the department must continually reassess current and future weaponry needs and decide which producers are in the best position to rapidly expand production if necessary. The decision as to which and how many producers of a particular item must be kept in active production is a complex judgment which must be left to the discretion of the military agencies. We would only overturn such a decision if the evidence convincingly demonstrated that the agency had abused its discretion. We cannot find that the Army abuse its discretion in this case.

Coloney's protest is denied.

[B-217626]

Appropriations—Restrictions—Prohibition Clause

Fiscal Year 1985 appropriation to Board of International Broadcasting provided that not to exceed $15,000 was available for consulting fees and no such fees could be paid after January 1, 1985, if Director's position was vacant. The phrase "not to exceed" sets maximum amount that can be expended in fiscal year 1985 whether or not Director's position is filled.

To the Chairman, Subcommittee on Commerce, Justice, State, and the Judiciary, Committee on Appropriations, United States Senate, February 14, 1985:

This is in response to your joint letter with Senator Ernest F. Hollings dated January 18, 1985, asking us to review a letter to you dated December 18, 1984, from Mr. Frank Shakespeare, Chairman, Board of International Broadcasting. Mr. Shakespeare concludes that the Board's appropriation for fiscal year 1985 does not necessarily restrict the Board to a maximum expenditure of $15,000 for engineering consulting fees. We disagree and conclude that the appropriation language does restrict expenditures to a maximum of $15,000 during fiscal year 1985.

Under the Department of State and Related Agencies Appropriation Act, 1985, Pub. L. No. 98-411, 98 Stat. 1564 (1984), the Board received its annual appropriation. The Act states:

> For expenses of the Board for International Broadcasting, including grants to RFE/RL, Inc., $97,498,000, * * * *Provided* That not to exceed $15,000 shall be available for engineering consultant fees, and no such fees shall be paid after January 1, 1985 at any time the Board's Director of Engineering position is vacant. 98 Stat. 1568.

As you indicate, it is the Committee's position that under no conditions may the Board expend more than $15,000 for engineering consultants in fiscal year 1985.

The Board interprets the provision as limiting it to a maximum expenditure of $15,000 only until the Director has been appointed. Specifically, the Board states:

> We understand that the $15,000 maximum for "engineering consultant fees" specified in the 1985 Appropriations measure restricts our ability to make expenditures in excess of that amount only for as long as the Director of Engineering position remains vacant. We further understand that when the position has been duly filled by either a regular or acting appointee, the BIB [Board] and the Radios [RFE/RL, Inc.] will then be legally able to spend in excess of that amount.

The Senate Report prepared by the Committee on Appropriations reflects that the language regarding consulting fees for engineering services was added because the Committee was concerned about the expenditures made by the Board for consulting fees since August 1980, the date the position of Director of Engineering became vacant. S. Rept. No. 514, 98th Cong. 2d Sess. 73 (1984). The Committee, therfore, "include(d) bill language to limit expenditures by BIB for engineering consultant fees contingent upon filling the position of Director of Engineering by January 1, 1985," *Id.* The Committee recognized that the Board might desire to abolish the position of Director of Engineering and so stated. The Committee, however, stressed that it "[would] not allow more than $15,000 to be spent in 1985 for engineering consultant fees," *Id.*

We consider the language of the appropriation as clearly and concisely accomplishing what the Committee intended. Specifically, the limiting language, "not to exceed $15,000," is susceptible of but one meaning which is that the Board may not expend more than $15,000 for engineering consultant fees during fiscal year 1985 and any expenditures in excess of that amount would be unlawful. *See* A-79741, August 17, 1936; *Cf.* 36 Comp. Gen. 526, 528 (1957) (an earmark of $18 million for the construction of a ship sets the maximum amount which is available for the ship).

The language in the appropriation for the Board providing that no engineering consulting fees should be paid after January 1, 1985, if the Director's position is vacant is merely a condition which must be met if the $15,000 is to be spent after January 1, 1985. That is, from October 1, 1984 to December 31, 1984, The Board could expend funds for engineering consultant services whether or not the Director's position was filled; but, after January 1, 1985, the Board may not expend any funds for engineering consultant services unless the Director's position is filled. It is to be emphasized, however, that the total expenditure for the entire fiscal year, whether or not the Director's position is filled, is limited to $15,000.

Unless requested otherwise by your office, we will make this letter available to the public 30 days from today.

[B-218122]

Bids—All or None—Award Propriety

Agency may properly award to "all or none" bidder notwithstanding invitation for bids provision that award will be by individual items.

Bids—Mistakes—Allegation by Other Than Bidder Involved—Protester

Protest that competitor's bid may be mistaken because it seems too low is dismissed since only the contracting parties may assert rights and bring forth all necessary evidence to resolve mistake in bid questions. Moreover, submission of bid considered by another firm as too low does not constitute a legal basis for precluding award.

Matter of: Riverport Industries, Inc., February 14, 1985:

Riverport Industries, Inc. (Riverport), protests the Navy's award of a contract to T.M. Systems, Inc. (TMS), under invitation for bids (IFB) No. NOO197-85-B-0008 issued by the Naval Ordnance Station, Louisville, Kentucky. Riverport contends that TMS is nonresponsive because of Riverport's belief that the IFB precluded the submission of "all or none" bids. Riverport also believes that TMS may have made a mistake in its bid because TMS's overall bid seems much too low.

We summarily dismiss the protest for failure to state a valid basis for protest under section 21.3(f) of our Bid Protest Regulations. 49 Fed. Reg. 49,417, 49,421 (1984) (to be codified at 4 C.F.R. § 21.3(f)).

Riverport reports that the IFB contains a provision which reads: "Note: Award will be by individual items." Riverport argues that the above provision requires the Navy to award to the lowest bidder on each item. We have held, however, that similar phrases, "award will be made on lot basis only" and "award will be made on an item-by-item * * * basis," did not preclude the award to bidders who bid on an "all or none" or combination basis. *The Interior Steel Equipment Co.*, B-209016, Feb. 8, 1983, 83-1 C.P.D. ¶ 139; 42 Comp. Gen. 415 at 417 (1963). For this reason, there is no basis for concluding that TMS's "all or none" bid was nonresponsible to the IFB.

Regarding Riverport's contention that TMS may have made a mistake in its bid, we have held that only the contracting parties—the government and the firm in line for award—are in a position to assert rights and bring forth all necessary evidence to resolve mistake in bid questions. *Bill Conklin Associates, Inc.*, B-210927, Aug. 8, 1983, 83-2 C.P.D. ¶ 177. Moreover, consideration of a protest such as this in effect would necessitate that we judge whether the low bid appears unreasonably low and, if it does, whether the government must reject it. We have held, however, that the submission of a bid considered by a competitor as too low does not constitute a legal basis for precluding award. *Bill Conklin Associates, Inc.*, B-210927, *supra.*

[B-216121]

Officers and Employees—Transfers—Nonreimbursable Expenses—Mortgage Expenses—Mortgage Discounts, "Points," Etc.

An employee who upon transfer sold his residence at his former duty station claims reimbursement for the loan discount or mortgage placement fee, also known as seller's points, which he paid as a part of the cost of selling his former residence. The claim may not be paid even though under Regulation Z, which implements the Federal Truth in Lending Act, seller's points are no longer included among finance charges, because reimbursement for points or mortgage discounts as a miscellaneous expense of a real estate transaction is specifically prohibited by the Federal Travel Regulations and Volume 2 of the Joint Travel Regulations.

Matter of: Stevan C. Little, Sr., February 19, 1985:

This action is in response to a request for an advance decision as to whether an employee who sold his residence at his old duty station in connection with a transfer is entitled to reimbursement of a loan discount or mortgage placement fee, also known as seller's points, which he paid as a part of the cost of selling his residence.[1] As is specifically provided in current regulations, the employee is not entitled to reimbursement for a mortgage placement fee, loan discount, or seller's points.

BACKGROUND

Mr. Stevan C. Little, Sr., an employee of the Defense Criminal Investigative Service, Defense Logistics Agency, was transferred from Philadelphia, Pennsylvania, to Hartford, Connecticut, under travel orders issued May 10, 1983. In connection with the transfer Mr. Little sold his former residence in Runnemede, New Jersey. In the sales contract Mr. Little agreed to pay a mortgage placement fee not to exceed $1,230. The settlement statement lists the fee as a loan discount. Such a fee or discount is commonly called seller's points.

We have been asked to determine whether such a cost is reimbursable in light of recent changes to both the travel regulations and the Federal Reserve System's Regulation Z.

DISCUSSION

A Federal employee who relocates in connection with a permanent change of station may, under the provisions of 5 U.S.C. § 5724a, be reimbursed for certain real estate expenses incurred in selling his former residence or purchasing a new residence. This statute is implemented by the Federal Travel Regulations, Part 2,

[1] This request for an advance decision was submitted by R. G. Bordley, Chief, Accounting and Finance Division, Office of the Comptroller, Headquarters, Defense Logistics Agency, Cameron Station, Alexandria, Virginia. The request was forwarded by the Per Diem, Travel and Transportation Allowance Committee and assigned Control No. 84-14.

Chapter 6, *incorp. by ref.*, 41 C.F.R. 101-7.003 (1983) (FTR). For civilian employees of the Department of Defense these regulations are reflected in Volume 2 of the Joint Travel Regulations (2 JTR) which are substantially identical with the FTR.

Various miscellaneous expenses related to the real estate transactions for which a transferred employee may be reimbursed are listed in FTR para. 2-6.2d(1), as amended by General Services Administration Bulletin FPMR A-40, General Supplement 4 (August 23, 1982), and in 2 JTR para. C14002-1d(1) (Change 208, February 1, 1983), both of which became effective on October 1, 1982. Nonreimbursable miscellaneous items of residence transactions are listed in 2 JTR para. C14002-1d(2), and FTR para. 2-6.2d(2), the latter of which provides in relevant part:

> (2) *Nonreimbursable items.* Except as otherwise provided in (1) above, the following items of expense are not reimbursable.
>
> * * * * * * *
>
> (b) Interest on loans, points, and mortgage discounts;
>
> * * * * * * *
>
> (e) No fee, cost, charge or expense determined to be part of the finance charge under the Truth in Lending Act, Title I, Pub. L. 90-321, and Regulation Z issued in accordance with Pub. L. 90-321 by the Board of Governors of the Federal Reserve System, unless specifically authorized in (1), above * * *

Under Regulation Z, 12 C.F.R. 226.4(b)(3), points (loan discount fees) were designated as finance charges and, therefore, have previously been considered nonreimbursable items of real estate transaction expenses under FTR para. 2-6.2d(2)(e) (2 JTR para. C14002-1d(2)5), as well as FTR para. 2-6.2d(b) (2 JTR para. C14002-1d(2)2). *Robin J. Zeldin,* B-211262, August 12, 1983. However, as Mr. Little points out, Regulation Z was amended, effective April 1, 1981, to exclude seller's points from finance changes. 12 C.F.R. 226.4(c)(5) (1983). He, therefore, asks if the travel regulations have "mischaracterized" a mortgage discount as a finance charge since Regulation Z was revised.

We recently considered the question of whether seller's points are reimbursable under the travel regulations since they are no longer included within the definition of a finance charge under Regulation Z. We found that the fact that seller's points are no longer considered a finance charge and are not excluded from reimbursement under FTR para. 2-6.2d(2)(e) has no bearing on the fact that they may not be considered reimbursable expenses because they are mortgage discounts which are specifically excluded from reimbursement by FTR para. 2-6.2d(2)(b). Thus, they are not reimbursable expenses regardless of the change in Regulation Z. *Harvey B. Anderson,* B-214277, June 25, 1984.

Accordingly, Mr. Little may not be reimbursed for this cost.

[B-216197]

Officers and Employees—Training—Expenses—Travel and Transportation

An employee was sent to a location away from his old duty station for long-term training to be followed by a permanent change of station (PCS) to a then undetermined location. Employee claims reimbursement for his move to the training site as a PCS move since he was promoted for purpose of that travel under agency merit promotion program. Since travel to a location for training contemplates either a return to the old duty station or another permanent duty station upon its completion, a training site is but an intermediate duty station. Until the employee is actually transferred to a new permanent duty station, the duty station from which he traveled to the training site remains his permanent duty station.

Officers and Employees—Training—Expenses—Travel and Transportation

An employee received a PCS, with long-term training at an intermediate location en route. Employee claims travel and relocation expenses to the training location under 5 U.S.C. 5724 and 5724a. Although PCS expense reimbursements are governed by secs. 5724 and 5724a, travel and transportation rights for long-term training are specifically governed by 5 U.S.C. 4109. Hence, an employee's entitlements for travel to a training location are limited by those provisions. Since an agency is authorized to limit reimbursement under sec. 4109, where employee was informed before being accepted into the training program that all travel and transportation expenses to the training site would have to be borne by him as a condition of acceptance and all trainees were treated equally, his travel and transportation expenses to the training location may be certified for payment.

Officers and Employees—Training—Expenses—Travel and Transportation

An employee received a PCS, with long-term training at an intermediate location en route. Employee was reimbursed for travel and relocation expenses under 5 U.S.C. 5724 and 5724a from the training site to new PCS location, but at old duty station. His claim for the sales expenses is allowed. An employee away from his duty station for training has not effected a change of station during pendency of that assignment. Therefore, where an employee and family are not actually residing at the old duty station because of long-term training elsewhere, such residence nonoccupancy does not preclude reimbursement for expenses of the residence sale upon his move to his new permanent duty station, so long as all other conditions of entitlement are met.

Matter of: John E. Wright—Travel and Relocation Expenses—Long-Term Training, February 19, 1985:

This decision is in response to a request from the Director, Office of Budget and Finance, Veterans Administration. It involves the entitlement of one of its employees to be reimbursed for travel and relocation expenses incurred incident to training under 5 U.S.C. § 4109 and to a subsequent permanent change of station. The employee's claim may be allowed, in part, for the following reasons.

BACKGROUND

Mr. John E. Wright, an employee of the Veterans Administration (VA) Medical Center, Martinez, California, applied for and was accepted into an agency sponsored training program. This program, which was part of the agency's merit promotion program, was designed to develop technical, supervisory, and managerial skills in the trainees in order that they could ultimately administer a prosthetics assistance program in the various VA Medical Centers. The particular training program in which Mr. Wright participated was to be conducted at any one of six selected locations; it would be for a 12-month period; and, upon successful completion of the training, each participant would be transferred to one of the medical centers within the VA system, the location of which was to be determined at or near the completion of training.

The training site selected for Mr. Wright was the VA Medical Center, Kansas City, Missouri. By Intra-Agency Transfer Request, dated August 4, 1982, he was sent there, effective August 22, 1982. Following completion of his training, he was tranferred to the VA Outpatient Clinic, El Paso, Texas, and reported for duty there on or about September 22, 1983.

Subsequent to his transfer to El Paso, Mr. Wright claimed and was reimbursed expenses incurred incident to his move from Kansas City, Missouri, to El Paso, Texas, including expenses associated with the purchase of a residence in the El Paso area. In addition, he sought reimbursement for the expenses attendant to his and his family's August 1982 travel from Martinez, California, to Kansas City, Missouri, temporary quarters subsistence expense in Kansas City, and movement of his household goods to that location. He also included in that claim the expenses incurred in selling his home in Martinez, California, in August 1983.

The additional claim was disallowed by the VA in its entirety because Mr. Wright had been informed before he was accepted into the training program that, as a condition of acceptance, none of the expenses he might incur incident to moving to Kansas City for training or while there would be reimbursed by the Government. He also had been informed that the time spent traveling from Martinez, California, to Kansas City, Missouri, would be charged to annual leave, or he would be placed in a leave without pay status, at his option, but in no event would he be granted administrative leave. The disallowance was concurred in by the Director, Finance Service, Department of Medicine and Surgery, Veterans Administration, citing to our decision *Stephen T. Croall,* 60 Comp. Gen. 478 (1981), as authority.

Mr. Wright has appealed that determination. Although he admits he was told that he was not entitled to moving expenses or administrative leave for his move to Kansas City, he contends that none of the documents which he was required to sign made specific reference to the fact that the expenses of the move would not be reimbursed. Further, he contends that his move to Kansas City was a permanent change of station in the interest of the Government under the VA merit promotion program, since he was promoted at the time of his transfer to Kansas City. As such, he claims that his expenses incident to that transfer are reimbursable, citing to our decision *Eugene R. Platt,* 59 Comp. Gen. 699 (1980).

DECISION

The agency submission seems to characterize Mr. Wright's transfer from Martinez, California, to Kansas City, Missouri, and then to El Paso, Texas, for permanent duty, as constituting two separate and distinct transfers with only the latter being as a merit promotion transfer. We do not agree.

An employee's entitlement to be reimbursed the expenses of travel and relocation upon a permanent change of station arises under 5 U.S.C. §§ 5724 and 5724a (1982), and is conditioned upon the determination by the head of the agency concerned that the transfer is in the interest of the Government and is not primarily for the convenience or benefit of the employee, or at his request. See paragraph 2–1.3 of the Federal Travel Regulations, FPMR 101–7 (September 1981) (FTR). See also *Michael J. DeAngelis,* B–192105, May 16, 1979, and *Paul J. Walski,* B-190487, February 23, 1979.

In situations involving merit promotion transfers where an agency's own regulations provide that such tranfers are in the Government's interest, we have allowed relocation expenses, even where the agency informed the employee that he would have to pay his own expenses. *Stephen P. Szarka,* B–188048, November 30, 1977.

In decision *Eugene R. Platt,* 59 Comp. Gen. 699 (1980), and *Reconsideration of Platt,* 61 Comp. Gen. 156 (1981), we addressed the issue of merit promotion transfers in the absence of agency regulations. In those decisions, we ruled that, while an agency is not precluded from limiting relocation benefits by regulation for merit promotion transfers, where there are no limiting agency regulations, vacancy announcements under a merit promotion program are considered to be recruitment actions in the interest of the Government and relocation allowances are payable.

In the present case, the initial announcement concerning the training program was contained in a TWIX, dated May 5, 1982, from the VA Central Office. Item 5 of the announcement provided, in part, that "[a]ggressive action will be taken * * * to recruit high quality candidates for the * * * program."

The vacancy announcement, which was actually issued May 18, 1982, provided that the entry grade for a prosthetics representative trainee was a grade GS–5/6/7 and that the placement position following training was in grade GS–7 or 9.

Mr. Wright was already serving in one of the entry level grades before he was accepted into the program and could have simply been given a lateral transfer into the prosthetics representative career ladder. Notwithstanding that, the record shows that Mr. Wright was promoted to grade GS–7, step 1, effective August 22, 1982, the date he was transferred to Kansas City, Missouri, for training. Therefore, it is our position that the announcement for training was a merit promotion announcement contemplating a permanent change of station to a then undetermined location for qualified applicants, with long-term training at an intermediate location en route. Notwithstanding that position, it is our view that the benefits under 5 U.S.C. §§ 5724 and 5724a are not available to Mr. Wright for all parts of his permanent change of station.

Under the facts, Mr. Wright's permanent change-of-station travel was in two distinct parts. The first part was his journey from Martinez, California, to Kansas City, Missouri, an intermediate duty station for training, and the second part was his journey from Kansas City, Missouri, to El Paso, Texas, his new permanent duty station. Since travel expense reimbursement rights for long-term training are governed by a specific statutory provision (5 U.S.C. § 4109), our decisions, *Eugene R. Platt* and *Reconsideration of Platt,* cited above, which construe merit promotion travel and transportation benefits under 5 U.S.C. §§ 5724 and 5724a, would not apply to Mr. Wright's possible travel and transportation benefits for his journey from Martinez, California, to Kansas City, Missouri.

Section 4109 of Title 5, United States Code, provides, in part in subsection (a)(2) that an agency may pay or reimburse an employee for all or part of the necessary expenses of training, including the costs of—

> (A) travel and per diem instead of subsistence * * *;
>
> (B) transportation of immediate family, household goods and personal effects packing, crating, temporarily storing, draying, and unpacking * * * when the estimated costs of transportation and related services are less than the estimated aggregate per diem payments for the period of training * * *;

In decision *Michael G. Pond,* 58 Comp. Gen. 253 (1979), and *Reconsideration of Pond,* B-193197, January 10, 1980, we analyzed the type of duty assignment contemplated by the above provision and the benefits available to the individuals incident to such assignments. We stated therein that "[i]t must be recognized that travel for training is not ordinary TDY or PCS travel but is in a class by itself." *Michael G. Pond,* at 257. We ruled, therefore, that the travel expenses payable in connection with long-term training assignments are limited to those expense items specifically authorized in 5 U.S.C. § 4109, and not otherwise limited by agency proscription. See also *Stephen T. Croall,* above.

As we understand it, other than the expenses immediately associated with the administrative cost of training given at each location, none of the VA trainees were reimbursed for travel to their training sites. In this regard, Mr. Wright acknowledges that he was specifically informed before he was accepted into the training program that all expenses attendant to his move to Kansas City would have to be borne by him as a condition to his acceptance into the program. We also note that the VA Form 5-3918, Intra-Agency Transfer Request, initiated by the personnel office of the VA Medical

Center, Kansas City, on August 2, 1982, relating to that training, and signed by Mr. Wright on August 4, 1982, provides in item 15 thereof, that travel and transportation was not authorized. In view thereof, the expenses claimed by Mr. Wright as having been incurred incident to his move from Martinez, California, to Kansas City, Missouri, may not be certified for payment.

Notwithstanding the foregoing, it is our view that the real estate sales expenses incurred by Mr. Wright and not previously allowed may be reimbursed.

Paragraphs 2–1.4i and 2–6.1d of the FTR, when read in combination, generally establish the requirement that in order for an employee to be reimbursed the expenses of the sale of the residence at his old station, he must live there at the time of transfer notice and that it is the place where he regularly commutes to and from work. Notwithstanding that general requirement, since an employee away from his duty station on Government business does not effect a change of station during the pendency of such assignment (52 Comp. Gen. 834 (1973)), we have recognized exceptions to the "actual residence" rule when a permanent change of station occurs while an employee is on extended temporary duty (*Frank M. Lindeen,* B–188657, December 30, 1977); is constantly in a travel status with no single, true official duty station (*Bill L. Kenney,* B–188706, December 14, 1978); or is performing a long-term training assignment contemplating a return to his then permanent duty station upon completion of training (B–164043, May 28, 1968). It is our view that the principle embodied in those decisions is equally applicable here. That is, where the employee and his family are not residing in their residence at the old duty station because of Government training or travel requirements at the time a permanent change-of-station move occurs, such residence nonoccupancy does not preclude reimbursement for the expenses of selling their residence at the old permanent station upon that subsequent move, so long as all other conditions of entitlement are met. See also *Hughie L. Ratliff,* B–192614, March 7, 1979.

In this regard, we have held that real estate expenses incurred prior to and in anticipation of a transfer of an employee's official duty station may be allowed, but only if a travel order is subsequently issued on the basis of a previously existing administrative intent to transfer the employee at the time the expenses were incurred. 48 Comp. Gen. 395 (1968); *Joan E. Marci,* B–188301, August 16, 1977; and *Bernard J. Silbert,* B–202386, September 8, 1981. Compare *Edwin C. Hoffman, Jr.,* B–213085, January 16, 1984.

In the present case, Mr. Wright sold his residence in the Martinez, California, area on August 4, 1983. Although his transfer to El Paso had a reporting date of September 22, 1983, we were informed that Mr. Wright was definitely advised of this transfer on or about June 15, 1983. In view of these facts, his expenses for selling his old residence are properly reimbursable as part of his transfer to El

Paso, subject, of course, to administrative analysis as to the propriety of the items claimed and the amounts involved.

[B-216461]

Contracts—Negotiation—Request for Proposals—Deficient—Minimum Standards

As a general rule, offerors must be given sufficient detail in a request for proposals to enable them to compete intelligently and on a relatively equal basis.

Contracts—Negotiation—Competition—Indefinite, etc. Specifications

When a protester alleges that specifications are excessively general and vague so as to prevent the submission of an intelligent proposal, General Accounting Office will not only analyze the specifications to see if they adequately detail the agency's requirements, but will also consider whether other proposals were received in order to determine whether the level of uncertainty and risk in the solicitation was acceptable.

Contracts—Negotiation—Requests for Proposals—Specifications—Minimum Needs—Administrative Determination

A contracting agency may impose a restriction on the competition only if it can be shown that the restriction is deemed necessary to meet its actual minimum needs.

Contracts—Negotiation—Requests for Proposals—Amendment—Equal Competitive Basis for All Offerors

In a negotiated procurement, any information that is given to a prospective offeror must be promptly furnished to all other prospective offerors as a solicitation amendment if the information is necessary in submitting proposals, or if the lack of such information would be prejudicial.

Matter of: University Research Corporation, February 19, 1985:

University Research Corporation (URC) protests the award of a contract to Meridian House International, the incumbent contractor, under request for proposals (RFP) No. ROD-NEB-84-10, issued by the Agency for International Development (AID). The procurement was for the acquisition of a contractor-operated program providing reception, orientation, and hospitality services to foreign nationals participating in various programs in the United States under AID auspices. We sustain the protest.

URC, which did not submit a proposal, believes that the agency favored retaining Meridian House as the contractor from the outset of the procurement. In this regard, URC contends that the RFP's specifications were drafted in such a general and vague manner that only Meridian House, with its background knowledge as the incumbent, could effectively compete. Additionally, URC complains that certain specifications unduly restricted competition by requiring offerors to have the necessary physical facilities and qualified volunteer staff in place at the time of award. URC further asserts that the competition was defective because AID provided particular detailed information to the firm prior to the proposal closing date, which information was not furnished to the other prospective offerors by amendment.

Background

In January of 1984, AID published a notice in the Commerce Business Daily (CBD) of its intent to issue a solicitation for the services in question at some future point. Interested firms were requested to furnish detailed statements to AID regarding their ability to meet the agency's needs, and were advised that copies of the solicitation would only be sent to those firms submitting such information.

Seven firms including URC furnished capability statements and accordingly were sent copies of the RFP when it was issued on August 23, 1984. The RFP contemplated that the successful offeror would develop and provide a wide range of services for foreign participants in the AID-sponsored programs, such as: arranging hotel reservations or other suitable accommodations in the Washington, D.C. area and negotiating discounts when possible; maintaining a staffed reception office 7 days a week to meet the participants upon arrival and arrange transportation to their accommodations; conducting various orientation programs; arranging hospitality in American homes in the area; facilitating attendance at and participation in various social, cultural, and educational activities; conducting tours; and providing financial information and assistance. Also, the contractor was required to develop and publish participant-oriented publications regarding such matters as "volunteer activity, significant developmental achievements, and follow-up."

The RFP also required offerors to demonstrate in their proposals that they would have suitable physical facilities and a qualified and trained volunteer staff in place at the time of award. (It is apparent that AID anticipated from prior experience with the incumbent that contractor-furnished volunteers would be used as staffing for many of the services.) The RFP indicated that AID desired a great degree of flexibility on the contractor's part, as the specifications stated that the number of foreign participants per week could vary from 1 or 2 individuals to groups of 50 to 100 or more, with an estimated annual total of 1200, and that as little time as a same-day notice might be given before arrivals in certain instances.

Prior to the September 24 closing date, URC complained to AID by letter that the specifications heavily favored Meridian House in view of its background knowledge as the incumbent, and requested AID to provide more detailed information in numerous specification areas. URC also pointed out that only Meridian House could have the required facilities and trained volunteer staff in place at the time of proposal submission, thereby gaining an undue competitive advantage over the other prospective offerors. URC felt that it would be economically infeasible for other firms to meet these requirements prior to receiving the contract award. URC complained that the 30-day response time was insufficient, and accordingly asked AID to extend the closing date.

AID did in fact provide URC with additional information in writing, which it did not furnish to the other firms, but refused to extend the closing date. URC did not submit a proposal because the firm felt that AID's responses to its concerns were inadequate. URC then timely protested to this Office prior to the closing date, challenging the RFP's specifications. Meridian House was the only firm to submit a proposal, and AID awarded it the contract in the face of the protest. The contract was awarded for a 5-year period (November 16, 1984 through November 15, 1989) on cost-plus-fixed-fee basis, with the total price estimated to be approximately $4.3 million.

Analysis

(1) Specification Inadequacy

As a general rule, offerors must be given sufficient detail in an RFP to enable them to compete intelligently and on a relatively equal basis. Specifications must be free from ambiguity, and must describe the agency's minimum needs accurately. *Worldwide Marine, Inc.*, B-212640, Feb. 7, 1984, 84-1 CPD ¶ 152. When a protester alleges that specifications are excessively general and vague so as to prevent the submission of an intelligent proposal, we will not only analyze the specifications to see if they adequately detail the agency's requirements, but will also consider whether other proposals were received in response to the RFP in order to determine whether the level of uncertainty and risk in the solicitation was acceptable. See *Memorex Corporation,* B-212660, Feb. 7, 1984, 84-1 CPD ¶ 153.

In this matter, we have no doubt that AID was justified in seeking a great degree of flexibility from the contractor in terms of planning and operation, given the types of services being provided. For example, although URC complained that the RFP did not contain an estimate of the number of volunteer staff that would be required, AID responded that there was no required number, but that the contractor should be able to field enough volunteers to handle groups in the sizes expected. Because the expected group sizes themselves varied so greatly in range, we do not think that AID realistically could have provided an estimated number of the volunteers that would be needed. Essentially, it was left to the offerors to propose a suitable number of volunteers to perform adequately the required services, and we do not think that the specifications can be regarded as overly vague on this point. Similarly, since the RFP specified that the group sizes could range from 1 to 100 individuals or more, and that the total number of participants was estimated to be 1200 per year, we do not believe that URC can successfully argue that not enough information was provided to offerors in this area so as to prohibit intelligent proposal preparation.

However, we believe that certain other specifications were so indefinite as to lead to the conclusion that AID's requirements could have been set forth in a more appropriate manner. We note that the specifications did not indicate the number and content of the orientation programs that the contractor was required to conduct, other than to state in vague terms that the orientation programs would range in length from 1 to 5 days. As we believe URC rightly points out, it would be impossible for offerors to determine from this whether they were to conduct many short programs, or to conduct a lesser number of more extensive ones. Also, the RFP required the contractor to conduct seminars or other specific programs for special groups, several hours or days in length, but never established what would be a "specific" program or what would constitute a "special" group. We believe this requirement was too general since it stated only that the length of such programs might vary from several hours to several days in length, without giving offerors more detailed information as to what was expected in terms of both time and content. With respect to the participant-oriented publications required from the contractor, there was no clear indication in the solicitation as to the nature, quality, or quantity of such publications. Therefore, offerors could only guess as to what kinds of publications would meet the agency's requirements.

Most importantly, we note that there were no offerors under this solicitation other than the incumbent, even though seven firms submitted capability statements in response to the CBD notice. Because of this circumstance, we believe that other prospective offerors may have viewed the procurement in the same way as URC; that is, that there was an unacceptable amount of uncertainty and risk in the solicitation which precluded them from submitting proposals. *Memorex Corporation, supra.*[1]

(2) Unduly Restrictive Requirements

We agree with URC that the RFP's requirements that offerors have dedicated facilities and a qualified and trained volunteer staff in place at the time of award, and demonstrate compliance with these requirements in their proposals, unduly restricted competition. A contracting agency may impose a restriction on the competition only if it can be shown that the restriction is deemed necessary to meet its actual minimum needs, since the benefit of competition both to the government and to the public in terms of price and other factors is directly proportional to the extent of the com-

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[1] The only contrary evidence on this point is a statement from AID that another prospective offeror informed the agency that it did not compete because it had shifted most of its operations to New York City and had drastically reduced its Washington, D.C. staff, not because it objected to the specifications. We do not find this to be persuasive.

petition. *Tennant Co.*, B-205914.2, Dec. 20, 1982, 82-2 CPD ¶ 546. When a protester challenges particular specifications as being unduly restrictive of competition, the burden is upon the agency to establish *prima facie* support for the restrictions. *Lista International Corp.*, 63 Comp. Gen. 447 (1984), 84-1 CPD ¶ 665. We do not believe that AID has met that burden here.

It is apparent from the record that only Meridian House, because of its incumbent status, had the requisite facilities and volunteer staff in place at the time of proposal submission. We agree with URC that it would have been economically prohibitive for offerors other than Meridian House to negotiate the necessary facility leases and to recruit and train a qualified volunteer staff before being selected to receive the contract award. (For that matter, the RFP never stated what kind of qualifications were required in the volunteers, nor how and to what extent they were to be trained). In addition, the other offerors were given only 30 days to meet these requirements, which we believe would have been particularly onerous. AID urges that the other offerors could have satisfied the requirements by negotiating leases which were contingent upon receiving the contract award. Although this may have been feasible in certain instances, we do not think that contingent leases would have been possible or practical on a large-scale basis for every offeror, nor does this approach address the problem of recruiting and training the volunteer staff prior to contractor selection.

In our view, although we fully recognize AID's need for uninterrupted contract services, these requirements could have been set forth in a less restrictive manner. The RFP indicated that performance was to commence immediately upon award, so that only Meridian House, with its facilities and volunteer staff already established and functioning, could meet the requirements as of that date. We think it would have been more appropriate for the RFP to have provided that a specific period of time, such as 30 or 60 days, would be available between the date of selection for award and the effective date of the contract in order to enable a successful offeror to obtain the requisite facilities and recruit and train a qualified volunteer staff.[2]

Our conclusion is based on the long-standing statutory requirement with respect to negotiated procurements that proposals shall be solicited from the maximum number of qualified sources consistent with the nature of the supplies or services being procured. *See* 10 U.S.C. § 2304(g) (1982). This requirement is fully embodied in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.105 (1984), which specifically provides as well that negotiated contracts shall

[2] Under this procurement approach, Meridian House, if unsuccessful, could continue performance until the successor firm was fully operational, and the government would not have to pay for any start-up costs incurred by the successor firm because the preparation period in question would still be prior to the effective date of the contract.

be awarded competitively "to the maximum practical extent." In our view, AID's specifications regarding facilities and volunteer staff were set forth in the RFP in such a manner that a more extensive competition, which could have been achieved through better solicitation draftsmanship, was effectively precluded to the benefit of Meridian House. See *Aero Corporation,* 59 Comp. Gen. 146 (1979), 79-2 CPD ¶ 430. It is our opinion that the challenged specification requirements unduly restricted the competition, and we find nothing in AID's administrative report which sets forth sufficient *prima facie* support for their necessity. *Lista International Corporation, supra.*

We thus conclude that the procurement did not promote competition "to the maximum practical extent," 48 C.F.R. § 15.105, because of the manner in which the specifications were drafted, thereby resulting in a *de facto* sole-source award to Meridian House. See *Worldwide Marine, Inc., supra.*

(3) Failure to Provide Additional Information

We also think that competition may have been precluded because of AID's failure to furnish the additional information it had provided to URC to the other prospective offerors, irrespective of the fact that URC itself did not submit a proposal. In this regard, any information that is given to a prospective offeror under a negotiated procurement must be promptly furnished to all other prospective offerors as a solicitation amendment if the information is necessary in submitting proposals, or if the lack of such information would be prejudicial. 48 C.F.R. § 15.410(c). We believe that AID should have been cognizant of this regulatory provision and have furnished by amendment the information it had given to URC to the other firms to which it had sent copies of the RFP, on the reasonable assumption that the information might be material for the preparation of competitive proposals.

URC's requested relief in this matter is that AID terminate Meridian House's contract for the convenience of the government at the end of the first year, thereby enabling the collection of substantial contract performance data in the meantime, and to recompete the remaining requirements under a new solicitation which will contain more properly drafted specifications to allow for effective competition. We believe that this is an appropriate and reasonable remedy, given the on-going nature of the requirements, and the agency's undoubted need to avoid any disruption in services. Therefore, by separate letter of today, we are recommending to the Administrator of AID that the present contract be terminated for convenience as of November 15, 1985, and that a new RFP be issued sufficiently in advance to that date so that the competition will be concluded and the successful offeror ready to continue performance immediately upon the termination.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committee on Government Operations and Appropriations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

The protest is sustained.

[B-216676]

Bids—Prices—Item Omission

Failure to provide a price for a bid item as requested by an amendment may be waived as a minor informality where bidder acknowledged receipt of the amendment, the change effected by the amendment was immaterial, and waiver would not be prejudicial to other bidders. *E.H. Morrill Company*, 63 Comp. Gen. 348 (1984), 84-1 C.P.D. 508; *Goodway Graphics of Virginia, Inc.*, B-193193, Apr. 3, 1979, 79-1 C.P.D. 230. This decision modifies 63 Comp. Gen. 348 and B-193193, Apr. 3, 1979.

Matter of: Leslie & Elliott Company, February 19, 1985:

Leslie & Elliott Company protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N62472-84-B-3314, issued by the Department of the Navy to replace street lighting at the Naval Submarine Base New London, Groton, Connecticut.

Although Leslie & Elliott acknowledged receipt of amendment 3 to the IFB, its low bid was rejected because it did not contain a price for the bid item 2. After bid opening, Leslie & Elliott notified the contracting officer that it included the cost of bid item 2 in bid item 1. Leslie & Eliott maintains that its failure to provide a price for bid item 2 is a minor informality which should be waived by the Navy. The Navy is withholding award pending our resolution of the protest. We sustain the protest.

The IFB, as issued, called for bids on two items. Bid item 1 was for all construction work except for that covered in bid item 2. Bid item 2 was for removing an estimated 20 cubic yards of hard material and replacing it with clean backfill. The bid instructions called for a combined "fixed-price lump-sum" and "requirements" type contract, with the requirements portion covering the work under bid item 2. The government did not guarantee that any work under bid item 2 would be required. Award would be made to the conforming responsible bidder offering the low aggregate sum of the bid item prices.

The bid form in the IFB package only contained a space for bid item 1. Amendment 3 noted that the bid form inadvertently omitted bid item 2 and furnished a new bid form with both bid items. Leslie & Elliott acknowledged amendment 3, but submitted its bid on the original bid form which did not show a price for item 2. After bid opening, Leslie & Elliott notified the contracting officer that it had included the estimated 20 cubic yards of rock removal requested by the bid item 2 at $50 per cubic yard ($1,000) in its $466,666 price for bid item 1. Leslie & Elliott also contended that if there was any problem with its bid, it was a minor informality which should be waived by the Navy.

In its report to our Office, the Navy concludes that the imperfection in the bid does not justify its rejection. The government estimate was $420,000 for bid item 1 and $1,000 for bid item 2. The second low bidder's total price was $560,000, of which $2,000 was for item 2. The government estimate for bid item 2 was 0.238 percent of the total government estimate, 0.214 percent of the protester's bid, and 1.071 percent of the $93,334 difference between the protester's bid and that of the second low bidder. From these figures, the Navy concludes that the bid item 2 work is *de minimis* and that it would be in the government's best interest to find the protester's bid responsive. We agree.

A contracting officer can waive a defect in a bid as a minor informality if the defect is immaterial and if waiver will not be prejudicial to other bidders. The defect is immaterial if the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the services being acquired. Federal Acquisition Regulation (FAR), § 14.405, 48 Fed. Reg. 42,102, 42,180 (1983) (to be codified at 48 C.F.R. § 14.405). No precise standard can be employed in determining whether a change effected by an amendment is negligible in terms of price and, consequently, a determination must be based on the particular facts of each case. However, in determining whether the value of an amendment is negligible, we look at the amendment's estimated impact on bid prices and the relationship of that impact to the difference between the two low bids. 52 Comp. Gen. 544 (1973). We use the government's estimate of cost significance, not the protester's, when determining materiality. See *Marino Construction Company,* 61 Comp. Gen. 269 (1982), 82-1 C.P.D. ¶ 167.

In this case, amendment 3 changed the bid form by asking for a price on both bid items 1 and 2, instead of just bid item 1. The government estimate for bid item 2 was 0.238 percent of the total government estimate, 0.214 percent of the protester's bid, and 1.071 percent of the difference between the protester's bid and that of the second low bidder. The value of the change effected by amendment 3 was negligible in terms of price.

The effect of Leslie & Elliott's omission of a price for bid item 2 on quality, quantity or delivery also appears negligible, when contrasted with the total cost of the services being acquired. The agency estimated that under bid item 2, only 20 cubic yards of hard material would be required to be removed and replaced with clean backfill. Given the great disparity in bid prices offered by Leslie & Elliott and the second low bidder, Leslie & Elliott's failure to include a price for bid item 2 also had no effect on the competitive standing of the bidders.

The second low bidder in this case argues that Leslie & Elliott's omission of a price for item 2 should not be waived as a minor informality, based on our decision in *E.H. Morrill Company,* 63 Comp. Gen. 348 (1984), 84-1 C.P.D. ¶ 508. In that case, we found nonresponsive a bid that did not provide prices for option work added by an amendment whose receipt was acknowledged. The circumstances in that case differ from those here. In *Morrill,* and also in *Goodway Graphics of Virginia, Inc.,* B-193193, Apr. 3, 1979, 79-1 C.P.D. ¶ 230, the facts show that the omitted item was an essential and integral part of the overall contract performance, material and indivisible from the other aspects of performance. Here, there is no need for the same contractor, who is installing lights, to remove the hard material, if encountered. We believe that where an omitted item is divisible from the contract requirements, is *de minimis* as to total cost, and would clearly not affect the competitive standing of the bidders, it may be waived. We find the facts here support waiver of the omission. Therefore, the Navy should waive Leslie & Elliott's defect in bid as a minor informality, since the defect is immaterial and waiver will not be prejudicial to other bidders. To the extent that *Morrill, Goodway,* and similar cases imply that the failure to price a line item automatically requires rejection of the bid, they are modified in accordance with the above.

The protest is sustained and we recommend that, if Leslie & Elliott is determined to be responsible, award be made to it.

[B-217678]

Lobbying—Appropriation Prohibition

Possibly with the exception of 18 U.S.C. 1913, a penal antilobbying statute administered by the Dept. of Justice, there is no antilobbying restriction against the use of TVA fiscal year 1985 appropriations for grass roots lobbying activities.

To The Honorable Don Sundquist, House of Representatives, February 19, 1985:

Your January 25, 1985 letter enclosed a copy of your request to the Department of Justice for an opinion on a lobbying question. The question concerns a letter from a Tennessee Valley Authority (TVA) District Administrator to members of the public urging them to contact members of Congress in opposition to budget cuts being proposed for TVA.

On February 11, 1985, an attorney from this Office contacted Mr. Thomas J. McNamara of your staff and advised him that with the possible exception of 18 U.S.C. § 1913, a penal statute which is the subject of your letter to the Department of Justice, there is no antilobbying appropriation restriction applicable to fiscal year 1985 TVA appropriations. Mr. McNamara requested us to provide you with a written response on this point.

TVA's fiscal year 1985 appropriations are contained in Public Law 98-360, July 16, 1984, 98 Stat. 403, an act making appropriations for energy and water development for the fiscal year ending September 30, 1985, and for other purposes. That act does not contain a restriction prohibiting the use of TVA appropriations for lobbying activities.

In the years prior to fiscal year 1984, the annual Treasury, Postal Services and General Government appropriation act contained an antilobbying appropriations restriction which was applicable to appropriations contained in that act for a given fiscal year as well as all other appropriation acts for the particular fiscal year. As such, all appropriations, including those of TVA, were covered by that antilobbying restriction. This generally was the case even when the annual Treasury, Postal Services and General Government appropriation bill failed to pass and was incorporated by reference in a law continuing appropriations for a particular year.

During floor debate in the House on the fiscal year 1984 Treasury, Postal Services and General Government appropriation act, a point of order was raised against the antilobbying restriction which caused it to be stricken from the bill. See 129 Cong. Rec. H8735, October 27, 1983. The stricken provision was not included in the fiscal year 1985 Treasury, Postal Services and General Government appropriation act.

Accordingly, we are unaware of any non-penal antilobbying appropriation restriction which would be applicable to TVA's appropriations.

[B-214172]

Small Business Administration—Loans—Appropriations Obligation

Spending levels established in authorizing legislation for three Small Business Administration (SBA) loan programs in 1984 fiscal year were not superseded or repealed by higher levels indicated in conference report on 1984 SBA appropriation which appropriated two lump-sums to fund these and other SBA programs. The authorizing legislation and the appropriation provision were entirely consistent with one another on their face. In these circumstances, an express statutory limitation cannot be superseded or repealed by contrary indications contained only in committee reports or other legislative history. 36 Comp. Gen. 240 (1956) and B-148736, September 15, 1977, distinguished. B-214172, July 10, 1984, affirmed.

Small Business Administration—Loans—Appropriation Obligation

Expenditures by SBA in 1984 fiscal year that exceeded statutory ceilings in the authorizing legislation on the amount of direct loans that SBA could make in two of its direct loan programs would violate the Antideficiency Act since such expenditures would exceed available appropriations as that term is used in the Antideficiency Act. However, since a loan guarantee is only a contingent liability that does not require an actual obligation or expenditure of funds, SBA would not violate the Antideficiency Act if it exceeded the statutory ceiling on the amount of loans it could guarantee in a particular program in the 1984 fiscal year. B-214172, July 10, 1984, affirmed as modified.

Matter of: Reconsideration of B-214172, July 10, 1984, February 20, 1985:

This decision is in response to a letter dated September 5, 1984, from the Administrator of the Small Business Administration (SBA), asking our Office to reconsider our opinion B-214172, July 10, 1984, concerning the legal operating level for certain loan programs administered by SBA. Our opinion in that case was written in response to a request from the Chairman of the House Committee on Small Business for us to resolve what SBA believed was a conflict between the spending levels established for these programs in SBA's authorizing legislation and the levels provided for the same programs in SBA's appropriation for the 1984 fiscal year, as explained by the report of the conference committee on the 1984 appropriation act.

Our opinion of July 10, 1984, concluded that the lower spending levels established in the authorizing legislation for the three loan programs in the fiscal year "have not been superseded or repealed and remain in effect." Furthermore, we said that SBA should take whatever actions were necessary "to avoid overobligating or overspending the amounts legally available for each program." In the event the authorized spending level for any of the three programs involved had already been exceeded, we said that SBA "should make the reports and take the actions required by the Antideficiency Act, 31 U.S.C. § 1341." SBA is now asking us to reconsider our conclusions as to the legal spending levels for these three programs in the 1984 fiscal year and the possible violation of the Antideficiency Act if any of those levels were exceeded. Having done so, it is our view for the reasons set forth hereafter, that with one minor modification explained below, the position we reached in our opinion of July 10, 1984, was correct.

SBA's authorization for the 1984 fiscal year, set forth in subsection 20(q) of the Small Business Act as amended, 15 U.S.C. § 631 (note), established 1984 program levels of $15 million for direct loans to the handicapped, $35 million for direct purchases of debentures and preferred securities issued by Minority Enterprise Small Business Investment Companies (MESBICs), and $160 million for guaranteed loans issued by Small Business Investment Companies (SBICs). In addition, subsection 20(r) of the Act, 15 U.S.C. § 631 (note), authorized a total appropriation to SBA in the 1984 fiscal year of $804 million, of which $531 million was to be made available to carry out various programs, including the three programs involved here, and numerous others also authorized by subsections 20(q)(1) (2) and (3) of the Act. All of the loan programs authorized by subsection 20(q) (1-3) of the Act, including the three involved here, are funded out of the business loan and investment fund, established pursuant to section 4(c)(1)(B) of the Act, 15 U.S.C. § 633(c)(1)(B).

SBA's appropriation for the 1984 fiscal year appropriated two lump-sums for the programs funded out of the business loan and investment fund, as follows:

For additional capital for the "Business loan and investment fund", authorized by the Small Business Act, as amended, $230,000,000, to remain available without fiscal year limitation; and for additional capital for new direct loan obligations to be incurred by the "Business loan and investment fund," authorized by the Small Business Act, as amended, $133,400,000, to remain available without fiscal year limitation. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1984, Pub. L. No. 98-166, 97 Stat. 1071, 1080, November 28, 1983.

The conference report on the appropriation act contains a table which breaks down the amounts appropriated for SBA's business loan and investment fund in the 1984 fiscal year on a program-by-program basis. H.R. (Conf.) Rep. No. 478, 98th Cong., 1st Sess. 19 (1983). The table lists the amount appropriated for handicapped direct loans, MESBIC debentures and guaranteed SBIC loans at $20 million, $41 million, and $250 million, respectively (as opposed to limits in the authorizing legislation for these programs of $15, $35, and $160 million, respectively).

Conflict Between Program Level in Authorizing and Appropriation Acts

It is SBA's position that the appropriation act provision, as explained by the information in the conference report, necessarily conflicts with the program levels established in the authorizing legislation. Therefore, since the appropriation act was the more recently enacted legislation, SBA maintains that Congress must have intended to supersede the program levels specified in the authorizing legislation for these three programs with the higher levels indicated in the conference report.

The primary basis for the conclusion we reached in our July 10 opinion that the spending levels specified in the authorizing legislation had not been superseded by the appropriation act was our determination that the two statutes did not, in fact, conflict with one another. Therefore, the so-called "later-in-time" rule, relied upon by SBA, did not apply, in our view. Our determination that the two statutes were not in conflict, and actually tended to complement each other, was based on three factors. First, the two specific lump-sum amounts in the 1984 SBA appropriation for the loan program funded out of the business loan and investment funds were well within the total authorized spending levels established by section 20(q) of the Small Business Act. Second, the total amount appropriated for these loan programs in fiscal year 1984 was only $363.4 million whereas subsection 20(r) of the Small Business Act authorized an appropriation of $531,000,000 for these programs. In this respect, we recognized that if the lump-sum amounts had been greater than the total authorized appropriation for these programs "there might be good reason to consult the conference report or other legislative history materials for an explanation." Third, the appropriation act provision specifically referred to the authorizing legislation in a manner that indicated an intent to incorporate by reference the authorized program levels provided for in the Small Business Act.

We do not quarrel with the basic proposition, that "Congress may appropriate funds in excess of a cost limitation contained in the original authorization act and that the agency is thereby authorized to continue the program at the higher level." 55 Comp. Gen. 289, 292 (1975). However, it must be clear that Congress intended to amend or supersede the prior limitation. It is especially difficult to find clear evidence of such intent where, as here, the only indication that the statutory ceilings established in the authorizing legislation have been superseded is a table in the appropriation conference report which lists higher amounts for several programs than is set forth in the authorization.

As stated above, the appropriation act in this case merely appropriated two lump-sums for SBA loan programs funded out of the business loan and investment fund. Our Office has consistently held that "when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with these funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies." 55 Comp. Gen. 303, 319 (1975). Implicit within this holding is the more basic proposition, as stated in our July 10 opinion, that "an existing statutory limitation cannot be superseded or repealed by statements, explanations, recommendations, or tables contained only in committee reports or in other legislative history." In other words, if explanations or other comments in committee reports do not create any legally binding restrictions on an agency's discretionary authority to spend a lump-sum appropriation as it chooses, how can such comments supersede an existing statutory limitation that does impose a binding legal restriction on the agency's authority to dispose of a lump-sum appropriation.

SBA cites two of our prior decisions in support of its position in this case. While these decisions might at first glance appear to support SBA's position, we believe that both decisions were limited in scope and dealt with unusual factual situations that are distinguishable from the one involved here. In 36 Comp. Gen. 240 (1956) we considered a situation in which Congress authorized $7 million in 1946 for the construction of two new four-lane bridges across the Potomac River to replace the existing bridge. After 10 years of construction, one of the bridges was completed at a final cost of approximately $6.8 million. The question presented to us was whether an additional $1,750,000 appropriation for the second bridge, included within a lump-sum amount contained in the District of Columbia Appropriation Act, 1957, was available to begin construction of the second bridge. We concluded that since there was "no question * * * that the * * * Appropriation Act, 1957, made an appropriation of $1,750,000 for construction of the replacement bridge * * *," the lack of specific legislation "increasing the ceiling on the cost of construction of the two bridges as fixed in the original authorization does not affect the validity or availability of the appropriation in question for the purpose for which provided."

The holding in 36 Comp. Gen. 240 was premised on our determination that there was no question that the District of Columbia Appropriation Act included $1,750,000 for the second bridge. This determination that Congress clearly intended to include these additional moneys for the second bridge in the lump-sum appropriation for "Capital Outlay, Department of Highways" and thereby supersede the $7,000,000 limit contained in the authorizing legislation was based on several factors that are not present in the instant case. At the time the appropriation involved was enacted; approximately 10 years after the authorizing legislation, the first bridge had been completed and the $7,000,000 authorized ceiling had essentially been reached. The legislative history of the appropriation act demonstrates Congress was well aware of this fact when the 1957 fiscal year appropriation for the District of Columbia was enacted. Moreover, the legislative history of the appropriation act clearly establishes that Congress intended to appropriate $1,750,000 to begin construction of the second bridge and knew that the $7,000,000 ceiling would be exceeded as a result.

The factors that allowed us to ascertain in 36 Comp. Gen. 240 that it was the intent of Congress to supersede the prior authorization limitation are not present here. The only evidence supporting SBA's position is a table in the conference report. There is absolutely nothing to indicate that Congress knew or intended that distribution of the SBA lump-sum appropriation along the lines indicated in the conference report table would exceed or was otherwise inconsistent with the statutory ceilings in the authorizing legislation. In fact, as stated above, based on the actual language of the SBA appropriation provision, Congress would have had every reason to believe that the statutes were entirely consistent with one another (as we believe they were). As noted in our July 10, 1984 opinion, the appropriation provision specifically referred to the authorizing legislation in a manner indicating an intent to incorporate by reference the program ceilings "authorized by the Small Business Act, as amended." SBA argues that the quoted phrase "authorized by the Small Business Act, as amended" in the appropriation act simply refers to the business loan and investment fund authorized by section 4(c)(1) of the Small Business Act. While SBA's contention may be an arguable one, we believe the quoted phrase is essentially the same as the phrase "as authorized by * * * which we have interpreted as requiring the funds involved to "be obligated only in accord with the applicable authorization act," 61 Comp. Gen. 532, 536 (1982). Accordingly we do not believe that our holding in 36 Comp. Gen. 240 establishes a precedent that supports SBA's position in this case.

The second case cited by SBA is B-148736, September 15, 1977. In that case, we concluded that the National Park Service could expend a lump-sum appropriation provided for park planning and construction in the manner indicated in the legislative history of the appropriation act even though expenditures for several specific parks would exceed amounts authorized to be appropriated for those parks. In our view, this decision is distinguishable from the present case for many of the same reasons set forth in the preceding discussion of the applicability of 36 Comp. Gen. 240. Of particular importance is the absence of any language in the Park Service appropriation that is similar to the phrase "authorized by the Small Business Act, as amended" appearing in SBA's 1984 fiscal year appropriation, the significance of which is explained above. Moreover, based on the Park Service's statement that the ceilings on individual parks were being exceeded because of the "unprecedented increase" in the level of funding provided for park development and construction, we assumed that Congress was aware of the existing statutory limitations in the authorizing legislation when it approved the appropriation in question. Accordingly, it was reasonable for us to conclude that Congress had intended to supersede the ceilings in the authorizing legislation. As explained previously, there is no justification in the present case for us to make a similar assumption. Thus, the circumstances that were present in each of the precedent cases cited by SBA which led to our conclusion in those cases that the later action of the Congress in appropriating funds superseded the pre-existing authorization limits do not exist here.

Finally, SBA also contends that our opinion of July 10, 1984, mistakenly relied on the Supreme Court's decision in *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153 (1978). That case involved a situation in which the appropriation committee report indicated that included within a lump-sum appropriation for the TVA was an amount for a particular project which was otherwise prohibited by a substantive statutory provision. In holding that the substantive provision had not been amended or repealed the Supreme Court said that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress * * *." SBA contends that the Supreme Court's holding in *Hill* is not applicable here primarily because in *Hill* the statutory provision that TVA maintained should have been amended or repealed by the appropriation report language was a substantive provision of law that was part of an unrelated statute.

We disagree with SBA's contention. Our reading of *Hill* convinces us that the factors SBA argues should distinguish that case from the present one were not the basis for the Supreme Court's holding. To the contrary, several factors relied upon by the Supreme Court in reaching its conclusion, such as the lack of jurisdiction of the Appropriations Committees over non-appropriations legislation, and the absence of any indication that "Congress as a whole, was aware" of the alleged conflict between the two statutes, are present in the instant case as well. Accordingly, we remain convinced that our position in this case is supported by *Hill.*

For the foregoing reasons, we reaffirm the conclusion reached in our opinion of July 10, 1984, that the applicable spending levels for these three loan programs in the 1984 fiscal year are these contained in section 20(q) of the Small Business Act.

Possible Violation of the Antideficiency Act

Our July 10, 1984 opinion also concluded that if SBA exceeded the authorized spending level for any of the three loan programs in the 1984 fiscal year, it should treat the over-expenditures as violations of the Antideficiency Act, 31 U.S.C. § 1341. SBA maintains that even if our opinion was correct as to the applicable spending levels for these programs the expenditure of funds "in excess of the authorized levels does not violate the Antideficiency Act, 31 U.S.C. § 1341, when the expenditures are within the level of funds provided in the appropriation act." SBA argues that "Congress created the Antideficiency Act to prevent Government agencies from subjecting the Government to obligations of payments beyond available appropriations." Therefore, SBA concludes that obligations that do not exceed the amount appropriated do not violate the Act. We disagree with SBA's position. However, having reconsidered the matter, it is now our view, as explained hereafter, that some modification of what we said in our opinion is required.

The applicable provision in the Antideficiency Act is contained in 31 U.S.C. § 1341(a)(1), which reads as follows:

> (a)(1) An officer or employee of the United States Government * * * may not—(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation * * *.

It is our view that expenditures by SBA in fiscal year 1984 that were greater than the authorized spending levels for the programs, as set forth in section 20(q) of the Small Business Act, would have exceeded "available" appropriations as that term is used in the Antideficiency Act. It would make little sense for us to conclude that the information in the appropriation act's legislative history, while insufficient to justify a determination that the authorized spending levels for these programs had been increased, would support the conclusion that expenditures by SBA that exceeded those levels did not violate the Antideficiency Act's prohibition against exceeding available appropriations.

Several recent decisions support the conclusion that the Antideficiency Act is applicable in this situation. In 60 Comp. Gen. 440,

(1981) we considered whether the Customs Service's violation of a provision in its 1980 fiscal year appropriation prohibiting it from paying more than $80,000 in overtime pay to any employee violated the Antideficiency Act. The Customs Service maintained that the Antideficiency Act did not deal "with the circumstance of the obligation of available funds contrary to a statutory limitation." We held that the "Antideficiency Act prohibits not only expenditures which exceed the amount appropriated, but also expenditures which violate statutory restrictions or limitations on obligations or spending." *See*, also B-204230, October 13, 1981. While both of these cases involved limitations that were contained in an appropriation act, we believe that the rationale behind those decisions would apply equally to a limitation contained in authorizing legislation. The broadly worded holding of 60 Comp. Gen. 440, quoted above, supports this view.

If SBA exceeded authorized spending levels for those programs, we do not doubt that it did so in good faith believing that the spending levels established for these programs in the authorizing legislation had been superseded. Nevertheless, for purposes of determining if the Antideficiency Act has been violated, it is immaterial whether or not the agency is at fault. *See* 58 Comp. Gen. 46 (1978). The statute flatly prohibits an agency from making expenditures or entering into obligations exceeding the amount available for that purpose regardless of the reason.

Notwithstanding the foregoing, it is our view that some modification of our position is indicated. In concluding that SBA would have to follow the procedures set forth in the Antideficiency Act if it exceeded the authorized amounts for these programs, we did not make any distinction between the three programs involved. Upon reviewing our position in this respect, we believe it is necessary to distinguish between the two direct loan programs on the one hand and the guaranteed loan program on the other. We continue to believe that if SBA exceeded the $15 million limit on direct loans to the handicapped or the $35 million limit on direct purchase of MESBIC debentures in the 1984 fiscal year, SBA is required to treat the overexpenditures as violations of the Antideficiency Act. However, if SBA exceeded the $160 million limit on guaranteed SBA loans, the situation would be different, in our view.

When an agency makes a direct loan, it enters into a valid obligation requiring the agency to disburse funds to the borrower in accordance with the terms of the loan. A loan guarantee, however, only constitutes a contingent liability that does not require the agency to make any initial disbursement of appropriated funds to the borrower. Ordinarily, when a loan is guaranteed by the Federal Government, the Government does not obligate or expend any funds unless and until the borrower defaults. *See* 60 Comp. Gen. 700, 703 (1981). Therefore, even if SBA guaranteed more than $160 million in SBIC loans in the 1984 fiscal year, thereby exceeding the authorized level for that program, SBA would not be making or authorizing "an expenditure or obligation" in excess of available appropriations, as that term is used in the Antideficiency Act. This does not mean that SBA, or any other agency with loan guarantee authority, is free to ignore Congressionally imposed limitations or ceilings on the allowable level of loan guarantee activity in a particular fiscal year. If such limitations are set forth in an authorization, appropriation, or other statutory enactment, they are legally binding on the agency involved and should be followed. *See* 60 Comp. Gen. 700 (1981). However, an agency's failure to adhere to a statutory ceiling in the level of loan guarantee activity, while unauthorized, is not a violation of the Antideficiency Act. Our opinion of July 10, 1984, is modified accordingly.

[B-216319]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Date Basis of Protest Made Known to Protester

Protest relating to awards under a prior solicitation is untimely and not for consideration.

Contracts—Competitive System—Competitive Advantage—Not Resulting from Unfair Government Action

Competitive advantage allegedly enjoyed by a mobilization base producer because of award of a prior contract at a high unit price is not improper since it was statutorily permissible and did not result from unfair government action.

Contracts—Options—Price Comparison Prior to Exercising Option

Where a contracting agency determined to fill an additional requirement by option exercise at a reduced price, with changed delivery terms, it was required to negotiate with both contractors eligible for award.

Contracts—Negotiation—Competition—Effect of Negotiation Procedures—Not Prejudicial

Although negotiations for an additional requirement may have been conducted informally because of the contracting agency's belief that it was only exercising an option, no prejudice resulted where the only eligible offerors were both afforded equal information and an equal opportunity to compete for the requirement.

Matter of: Nuclear Metals, Inc., February 21, 1985:

Nuclear Metals, Inc. (Nuclear) protest the award by the Army of a contract for penetrator cores to Aerojet Ordinance Company (Aerojet), under solicitation No. DAAA09-84-R-0084. Nuclear asserts that it had been awarded this requirement by the Army's exercise of an option under an award to Nuclear, and that subsequently improper negotiations were conducted with, and an award made to, Aerojet.

We deny the protest in part and dismiss it in part.

The award at issue is characterized by the Army as the exercise of an option for a quantity increase to run concurrently with performance under an existing contract. The original contract to Aerojet was part of a split award under the above-referenced solicitation. The procurement was negotiated pursuant to 10 U.S.C. § 2304(a)(16) (1982), as implemented by Defense Acquisition Regulation (DAR) § 3-216, as a procurement restricted to Aeroject and Nuclear as industrial mobilization base producers. This RFP, issued on February 10, 1984, was for the 106,820 cores, with a 100 percent option provision. Evaluation was on the base quantity exclusive of the option quantity. On March 30, 1984, the Army awarded Nuclear a contract for 65,000 cores at a unit price of $205.20. Nuclear's unit option price was $225.72 f.o.b. origin, or $226.12 f.o.b. destination. On April 20, the Army awarded Aerojet a contract for the balance of the requirement, 41,820 cores, at a unit price of $251.00. Areojet's unit option price was $433.10 f.o.b. origin, and $433.90 f.o.b. destination.

The reason for the split award, with award to Aerojet at the higher price, was the Army's desire to maintain its mobilization base for production of the cores, as authorized under the above-cited statute and regulations. As our Office has recognized, procurements negotiated thereunder are conducted with the normal concern of insuring maximum competition placed secondary to the needs of industrial mobilization, which permits award to a predetermined contractor or contractors in order to create or maintain their readiness to produce military supplies in the future. *Pioneer Tool & Die Company, et al.*, B-211891, *et al.*, Nov. 18, 1983, 83-2 C.P.D. ¶ 584; *National Presto Industries, Inc.*, B-195679, Dec. 19, 1979, 79-2 C.P.D. ¶ 418; 49 Comp. Gen. 846 (1970).

After making awards, the Army determined that it had an additional requirements for 12,751 cores. The Army's characterization of the ensuing course of events is that the additional requirement, eventually increased to 19,339 cores, was awarded to Aerojet by exercise of the option on August 23, implemented by a contract modifiction which reflected Aerojet's reduced option unit price of $175.00 per core, with the existing monthly delivery schedule modified to incorporate a concurrent production increase. The Army indicates that this action was taken after both Nuclear and Aerojet were advised of the additional requirement and given an opportunity to submit reduced option prices.

Nuclear's understanding of the events is different. Nuclear asserts that on July 19 it received an award of 12,751 additional cores by the Army's exercise of Nuclear's option at a price equal to the base unit price of $205.20 reduced in exchange for a shortened delivery schedule. In particular, Nuclear alleges that an Army contract specialist specifically negotiated and agreed to this arrangement with Nuclear personnel by telephone calls which occurred on July 19. Nuclear states that the Army had also previously made contract modifications by such telephone calls. Nuclear further asserts that it was advised on July 19 that a contract modification reflecting the oral agreement would be in place in time for the forthcoming shipment, and that Nuclear was advised to proceed with a production rate which reflected the increase. Nuclear contends that in reliance on this representation, it took steps to produce and ship the cores in accordance with the increased production level.

Nuclear states that on July 25, it received the following mailgram dated July 23, from the Army which Nuclear asserts is consistent with its oral agreement:

> The Government has an additional requirement for 12,751 ea core f/projectile 105MM, APFSDS-T, M833. In accordance with the option for increased quantity CH-20 of referenced contract. Request your option price be based on concurrent [extended] delivery for this increased quantity. The deliveries should be spread equally over the contract performance period or as a minimum of 10 months period.
>
> Request your option price be forwarded to the PCO as soon as possible.

Nuclear states that its copy of the mailgram, unlike the copy in the agency report, did not indicate that Aerojet had received a similar communication. Nuclear also states that on July 24, it received a letter confirming the change in delivery schedule. This letter states:

> Reference Contract DAAA09-84-C-0453.
>
> In an attempt to level out the production schedule of the referenced contract, Nuclear Metals is hereby authorized to ship to the following delivery schedule.
>
> 30 Jul 84 thru 30 Nov 84—6,000 each
>
> 30 Dec 84 thru 30 Jun 85—5,000 each
>
> Modification P00003 will be issued to the contract to reflect this delivery schedule change.

Nuclear points out that a notice was published on July 26 in the Commerce Business Daily (CBD), which refers to Nuclear's initial contract and states that:

> * * * Exercise of the option provision in Contract * * * to Mobilization Base Producer Nuclear Metals, Inc. * * *—Award date o/a 16 Aug, 84—* * *.

Nuclear contends that by these actions, the Army made award to Nuclear under the option clause of the original contract. Nuclear asserts that some time after award was made, the Army entered into negotiations with Aerojet. Nuclear indicates that it was aware of a correcting CBD notice of August 3, which states that the Army was contemplating award of the referenced additional cores "by exercise of the option provision in the contract to mobilization base producers," [plural] on or about August 16." Nuclear also indicates that on August 7 and 10, it was telephonically advised by the Army that the option quantity requirement had increased, and in each instance it verified by letter that its price would remain the same. On August 24, Nuclear learned that the Army had awarded the contract to Aerojet on August 23, at $175 per unit for the 19,339 cores.

In addition to its assertion that it had already received an award, Nuclear protests that the negotiations with Aerojet were undertaken without notice to Nuclear that another offer was being considered, which it considers to be unfair, secret dealings by the Army. Nuclear also objects that Aerojet's low price was the result of the government subsidy which was provided by the initial award to Aerojet at a high unit price, and that the award of the option to Aerojet results in a higher overall price than would have resulted from award to Nuclear.

With respect to Nuclear's allegation that it had been awarded an oral contract for the option exercise, the Army disputes Nuclear's version of the facts. In particular, the Army contract specialist states that he had no conversation with any Nuclear personnel on July 19, and that while on either July 17 or 18, he spoke with Nuclear personnel, this was only to solicit Nuclear's interest in the requirement for 12,751 additional cores. The specialist states that he advised Nuclear that award of the additional requirement would be made to only one of the two contractors, and sought to obtain Nuclear's price for the additional requirement. The contracting specialist states that he gave no assurances that the option quantities could be delivered during the current delivery schedule, rather than subsequently, as provided for under the contract. The Army agrees that it published a CBD notice which stated an intention to award by exercise of its option under the Nuclear contract. However, the Army points out that this notice referred only to 12,751 cores, rather than the 19,339 cores which were actually awarded, and that it refers not to an award already made, but rather to an award proposed to be made on or about August 16. In addition, the Army points to the CBD notice of August 3, which specifically indicated that it was a correction of the previous notice, and stated that award was contemplated by exercise of an option to "mobilization base producers."

The Army contends that there is no evidence of any award to Nuclear, other than Nuclear's disputed version of the July 19 telephone conversation. In this regard, it points out that the Army's July 23 mailgram formally advised both contractors that there was an additional requirement, and requested a new option price. Regarding the July 24 letter to Nuclear, the Army points out that it merely refers to leveling out the existing production schedule, and makes no change in the quantity awarded. The Army states that even under Nuclear's version of the alleged award conversation, the quantity discussed was substantially different than that eventually awarded, and, thus, there is no indication of agreement on material terms of the alleged contract. Finally, the Army asserts that Nuclear's protest is untimely since, at the latest, Nuclear had notice on August 3, by the corrected CBD notice, that it had not been awarded the contract, but Nuclear did not file its initial protest with the Army until August 27, more than 10 working days after it had knowledge of its basis for protest.

We agree that to the extent Nuclear is alleging that it was awarded a contract on July 19, its protest filed more than 10 working days after it had actual or constructive notice (by the August 3 CBD notice) that the agency did not so view the situation, is untimely under our Bid Protest Procedures. 4 C.F.R § 21.2 (b)(2) (1984); *Econometric Research, Inc.*, B-213947, Jan. 23, 1984, 84-1 C.P.D. ¶ 103.

Nuclear also asserts that award to Aerojet constituted bad procurement policy, because it is at a higher overall price than would have resulted from award to Nuclear, and that Aerojet's low option unit price is the result of the subsidy which Aerojet received by its initial award at a unit price substantially in excess of the unit price of Nuclear's award.

To the extent that this allegation protests the initial award to Aerojet, it is clearly untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2). The award to Aerojet was made on April 20, and Nuclear's protest was not filed with GAO until September 7. Regarding Nuclear's allegation that the award to Aerojet results in a higher total price than award to Nuclear, this allegation is incorrect. Aerojet's unit price is $175 versus Nuclear's unit price of $205.20. Only by combining the prices of the original award with the price for the additional requirements can Nuclear assert that its total price would be lower. The present issue concerns only Nuclear's higher quoted price for the option. Moreover, in addition to the fact that the protest of the earlier award is untimely, as noted above the Army was acting within its right to maintain mobilization capacity by awarding part of the original contract to Aerojet at a higher price.

Regarding the alleged "subsidy" which Aerojet received by virtue of its initial award, the price differential between the two awards was less than 20 percent (Nuclear's unit price was $205.20 versus Aerojet's unit price of $251). This is really a protest against the initial award to Aerojet and is untimely. If viewed as a protest against the evaluation formula in the initial solicitation, which considered only base price, without evaluation of option prices, it is also untimely. 4 C.F.R. § 21.2(b)(1). To the extent that Nuclear is objecting to any competitive advantage which Aerojet obtained by virtue of the earlier award, our Office has consistently held that the government is under no obligation to eliminate an advantage which a firm may enjoy because of its particular circumstances, including the award of other contracts by the government, unless the advantage has resulted from unfair action on the part of the government. *Pioneer Tool & Die, et al.*, B-211891, *supra; Lanson Industries, Inc.*, 60 Comp. Gen. 661, 666 (1981), 81-2 C.P.D. ¶ 176. We have specifically held that any advantage obtained as the result of an award such as this to maintain mobilization readiness, does not constitute a proscribed unfair advantage. *Pioneer Tool & Die Company, et al., supra.*

Nuclear's assertion that the Army engaged in prohibited secret dealings or negotiations with Aerojet is unsupported by the record. The Army characterizes its negotiations with Aerojet and Nuclear as testing the market after it determined pursuant to the Federal Acquisition Regulation, § 17.207(d) that both contractor's prices were excessively high. The Army offered both contractors an opportunity to lower their option prices in consideration of the right to deliver the additional requirement on a concurrent basis, rather than a follow-on basis. The Army contends that either the award constituted an option exercise, or that its action constituted proper negotiations with both parties.

As the Army correctly points out, our decisions in *Varian Associates, Inc.,* B-208281, Feb. 16, 1983, 83-1 C.P.D. ¶ 160, and *Department of the Army—Reconsideration,* B-208281.2, July 12, 1983, 83-2 C.P.D. ¶ 78, require that where an agency offers an incumbent the opportunity to reduce its option price, it is required to conduct negotiations where the facts indicate that price competition may be available. Having determined that the option prices were excessive, and having given Nuclear an opportunity to reduce its option price, the agency properly provided Aerojet a similar opportunity. While no formal negotiations were conducted, we believe that this is a question of form only. The Army had made an appropriate determination that these were the only two mobilization base producers with which negotiations for the item in question could be conducted. In the August 3, correcting CBD notice, the Army provided notice that both producers were being considered for award of the additional requirement. Both eligible offerors were given the same opportunity to reduce their option prices, and were apprised of the same information with respect to quantity and delivery changes. We do not see any prejudice to Nuclear resulting from the fact that more formalized negotiation procedures were not employed, or from the fact that the award was characterized by the Army as an option exercise.

To the extent that Nuclear believes it was entitled to award on the sole source basis, by option exercise at a modified price, this is clearly impermissible. *Varian Associates, Inc.,* B-208281, *supra.* Moreover, with respect to an option exercisable at the sole discretion of the government, as here, our Office will not consider under our Bid Protest Procedures an incumbent contractor's contention that an agency should have exercised or is obligated to exercise such an option provision. *Lanson Industries, Inc.,* 60 Comp. Gen. 661, 664, *supra.* Similarly, our Office will not review a protest that an agency should award a contract on a sole-source basis since the objective of our bid protest function is to insure full and free competition for government contracts. *Kisco Company, Inc.,* B-212832, Sept. 23, 1983, 83-2 C.P.D. ¶ 372.

Accordingly, we dismiss the protest in part and deny it in part.

[B-216203]

Officers and Employees—Transfers—Real Estate Expenses—Taxes—Tax Certification Charges

A transferred employee sold his residence at his old duty station. Among the expenses claimed incident to the sale was a tax certification fee imposed by the local taxing authority to certify that all real estate taxes on the property had been paid. Paragraph 2-6.2c of the Federal Travel Regulations (FTR) authorizes reimbursement of the cost of title search and "similar expenses." Since the purpose of a title search is to determine whether title in the seller is in any way encumbered by recorded liens, and since a claim by a taxing authority for real property taxes not paid always runs against the property, a certification of taxes paid is an essential element in establishing clear title. Thus, the fee charged by a taxing authority qualifies as a reimbursable sellers cost as a "similar expense" under the cited FTR provision.

Officers and Employees—Transfers—Real Estate Expenses—Loan Assumption Fee

A transferred employee purchased a residence at his new duty station and was charged a loan assumption fee. Para. 2-6.2d(1) of the FTR, as amended, effective Oct. 1, 1982, permits reimbursement of loan origination fees and similar fees and charges, but not items considered to be finance charges. The employee's loan assumption fee may be reimbursed where it is assessed in lieu of a loan origination fee, since it involves charges for services similar to those otherwise covered by a loan origination fee.

Officers and Employees—Transfers—Real Estate Expenses—Insurance

A transferred employee sold his residence at his old duty station. Among the expenses claimed incident to that sale was the cost of an ERA warranty, which protects him as seller against the cost of replacement or repair of latent defects in the residence for a specified period after its sale. His claim is denied since FTR para. 2-6.2d(2) specifically excludes the cost of property loss and damage insurance and maintenance costs.

Matter of: Raymond P. Keenan—Real Estate Expenses, February 22, 1985:

This decision is in response to a request from an Authorized Certifying Officer, Southeast Region, Internal Revenue Service (IRS), Department of the Treasury. It involves the entitlement of one of its employees to be reimbursed certain real estate transaction expenses incident to a permanent change-of-station transfer in January 1984. Reimbursement is authorized, in part, for the following reasons.

BACKGROUND

Mr. Raymond P. Keenan, an IRS employee, received a permanent change-of-station transfer from New York, New York, to Memphis, Tennessee, in January 1984. As an incident of his transfer he was authorized reimbursement for relocation expenses.

Following completion of his transfer to Memphis, Mr. Keenan Submitted a claim totaling $15,581.44, for travel and relocation expenses. The agency allowed $13,953.99 and provided an itemized explanation as to why the remaining claimed real estate transaction expenses totaling $1,627.45 were either suspended or disallowed.

On reclaim, Mr. Keenan asserted entitlement to all suspended and disallowed items and provided either an explanation, or evidence of expense incurred, for each. On administrative reconsideration, reimbursement of the following items pertaining to the sale of his house at his old station and purchase of a house at his new station remained in doubt:

1. Tax certification fee—$30
2. Loan assumption fee—$893.95
3. ERA warranty—$330

DECISION

The provisions of law governing reimbursement of residence transaction expenses of transferred employees are contained in 5 U.S.C. § 5724a (1982), and implementing regulations. Those regulations are contained in Part of Chapter 2, Federal Travel Regulations (FPMR 101-7, September 1981) (FTR), as amended, in part, by GSA Bulletin FPMR A-40, Supp. 4 (October 1982).

Tax Certification Fee

The authorized certifying officer has suggested that this item is for disallowance based on our ruling in decision *George J. Wehrstedt,* B-192851, May 11, 1979. We do not agree.

In *Wehrstedt,* we considered, in part, the propriety of reimbursing an employee for a tax service charge. The fee there was a charge made by the lender to the employee as the purchaser of a residence for a service performed by the lender to compute and prorate the tax obligation of the parties for the tax year in which settlement was made. We concluded that the charge made was an expense incident to the extension of credit, which in actuality, was a finance change, and not reimbursable. See also *John G. Barry,* B-199944, April 16, 1981, and *John S. Derr,* B-215709, October 24, 1984.

According to Mr. Keenan, the tax certification fee was charged to him by the taxing authority for the Township of Northhampton, Pennsylvania, to provide a certificate attesting that all real estate taxes due on the property he was selling were paid.

Paragraph 2-6.2c of the FTR provides, in part, for reimbursement of legal and related expenses incurred in connection with the sale of a residence if such costs are customarily paid by the seller of a residence at the old official station, but not to exceed the amount customarily charged in that locality. These permitted expenses include, among others, the cost of searching title, preparing abstracts, preparing conveyances, other instruments and "similar expenses."

The purpose of a title search is to determine whether the seller has clear title to the property being sold and whether it is in any way encumbered. One such encumbrance would be a recorded real property tax lien. Thus, the failure to have a tax lien recorded, even as late as the date of settlement, would not defeat the lien since a property tax claim always runs against the property. Therefore, a certification by a taxing authority that all property tax payments are current is an essential element in the ability of the seller to pass clear title. Accordingly, while such expense is not specifically listed in FTR para. 2-6.2c, we believe that it does qualify as a reimbursable seller's cost as a "similar expense," and Mr. Keenan may be reimbursed the $30 claimed.

We wish to note that this case is to be distinguished from those cases where we have denied reimbursement for a tax certification on the basis that it was a finance charge. Here, Mr. Keenan was the seller, not the purchaser, and the certification service was not performed incident to obtaining financing. Compare *John S. Derr*, above.

Loan Assumption Fee

As an incident of his transfer, Mr. Keenan purchased a residence in the Memphis, Tennessee, area and assumed the mortgage loan of his seller. The authorized certifying officer disallowed reimbursement on the basis that it was not specifically authorized under FTR para. 2-6.2d, as revised and restated in GSA Bulletin FMPR A-40, Supp. 4 (October 1982).

The matter of reimbursement of a loan assumption fee incident to the purchase of a residence at an employee's new station, was the subject of decision *Edward W. Aitkin*, B-214101, May 7, 1984, 63 Comp. Gen. 355. We noted in that decision that FTR para. 2-6.2d(1)(f), as revised, allows reimbursement of "other fees and charges similar in nature" to those listed in para. 2-6.2d(1)(a-e), unless specifically prohibited in para. 2-6.2d(2). Accordingly, we held that where a loan assumption fee involves costs similar to those covered by a loan origination fee, was not specifically prohibited by the FTR, and is assessed instead of a loan origination fee, it may be reimbursed under FTR para. 2-6.2d(1) as a miscellaneous expense. See also *Lawrence R. Lyons*, B-214255, July 30, 1984.

Therefore, Mr. Keenan may be reimbursed the loan assumption fee charged him, not to exceed the amount customarily paid in the locality of his new residence.

ERA Warranty

On reclaim, Mr. Keenan admits that the warranty obtained was insurance. He states, however, that because of heavy competition from new residence construction in the Northhampton area, the selling of a 17 year old, one-family dwelling was difficult. As a result, he found that in order for him to dispose of his residence in a reasonable time it was necessary for him to secure such a warranty.

The agency disallowance of this item was based on our decisions *Phillip R. Rosen,* B-187493, April 1, 1977, and *Vincent A. Crovetti,* B-189662, October 4, 1977.

In our *Rosen* and *Crovetti* decisions we considered the question whether the cost of an insurance contract which provided an employee, as the seller of a residence, with protection against the cost of replacing or repairing latent defects discovered within a specified period after its sale, may be reimbursed as a miscellaneous expense under FTR para. 2-6.2d. In the process of analyzing the matter, we established as a test whether the contract for such protection was required by law, custom or the lending institution as a condition of making the mortgage loan. We ruled that so long as the contract was not so required, its cost could not be reimbursed.

In our decision *John D. Garrity,* B-193578, August 20, 1979, which also involved a service maintenance contract, we rejected the test used in *Rosen,* above, to determine whether that expense could be reimbursed. We concluded in *Garrity* that since the contract was insurance, then regardless of whether it was required and by whom, its cost may not be reimbursed since insurance against loss and damage of property as well as maintenance costs are specifically excluded under para 2-6.2d of the FTR. The holding in *Garrity* has been consistently followed. See *Daniel J. Everman,* B-210297, July 12, 1983.

As we understand the situation here, an ERA warranty is in the nature of insurance which was secured by Mr. Keenan through his real estate agent. Its purpose was to minimize or eliminate his potential liability to the buyer for latent defects in the home and the cost of maintenance or repair should such defects become apparent during a specified period following sale. Therefore, it is our view that the decisions in *Garrity* and *Everman,* above, are controlling here and the $330 cost of the ERA warranty may not be certified for payment.

[B-216205]

Officers and Employees—Transfers—Real Estate Expenses—Husband and Wife Divorced, etc.—House Sale

A transferred employee who was divorced from his wife after reporting for duty at his new duty station but prior to the sale of his residence at his old duty station may be reimbursed for only one-half of the real estate expenses incurred since his wife, with whom he held title to the residence, was not a member of his immediate family at the time of settlement.

Matter of: Alan Wood—Real Estate Expenses—Title Requirements, February 22, 1985:

This decision results from the request of G. J. Pellon, an authorized certifying officer with the Internal Revenue Service (IRS), for our opinion concerning the entitlement of Mr. Alan Wood to reimbursement for expenses incurred incident to the sale of his residence at his former duty station. The IRS reimbursed Mr. Wood for only one-half of the expenses he claimed because on the date of settlement he was divorced from his wife, with whom he held title to the residence, and, therefore, was deemed to have had only a one-half interest in the residence. We hereby affirm the determination of the IRS.

Mr. Wood was transferred from his position with the IRS in Florence, South Carolina, to one in Tampa, Florida, effective March 16, 1981. In May 1983, Mr. Wood separated from his wife, and on September 30, 1983, they were divorced. Their former residence was sold, with the closing taking place on October 17, 1983. (Mr. Wood had requested and was granted two 1-year extensions of the time limit for reimbursement of real estate expenses.)

One of the prerequisites for reimbursement of real estate expenses, found in 5 U.S.C. § 5724a(a)(4) (1984) and its implementing regulation, paragraph 2-6.1c of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), is that title to the residence must be in the name of the employee alone, or in the joint names of the employee and one or more members of his immediate family, or solely in the name of one or more members of his immediate family. We have consistently held that where the employee holds title to a residence with an individual who is not a member of his immediate family, the employee may be reimbursed only to the extent of his interest in that residence. See *Thomas G. Neiderman*, B-195929, May 27, 1980; *James A. Woods*, B-184478, May 13, 1976; B-167962, November 7, 1969.

The IRS determined that since his former wife was not a member of his immediate family on the date of settlement, Mr. Wood could be reimbursed only to the extent of his interest in the residence. Mr. Wood contends that he should receive full reimbursement because on the date he reported for duty his former wife was a member of his immediate family.

Although there is no statutory definition of immediate family, FTR para. 2-1.4d defines immediate family to include:

> (1) Any of the following named members of the employee's household *at the time he/she reports for duty at the new permanent duty station* or performs authorized or approved overseas tour renewal agreement travel or separation travel:
> (a) Spouse;

This definition would seem to support Mr. Wood's contentions. However, it must be examined in connection with the other provisions concerning reimbursement of real estate expenses. Both 5 U.S.C. § 5724a(a)(4) and FTR para. 2-6.1 provide that an employee must have been required to pay any real estate expenses for which reimbursement is sought. Our decisions, cited above, which provide that reimbursement should be limited to the extent of an employee's interest when he holds title with an individual who is not a member of his immediate family are based on the presumption that in such situations, the liability for expenses is shared.

Since the expenses of a real estate transaction are generally paid at settlement we hold that that date is the appropriate date to use to determine how the employee holds title to the residence. In this case, because Mr. Wood was divorced from his wife before the date of settlement he did not hold title with a member of his immediate family when the property was actually sold. We find no evidence in the record which would rebut the presumption that liability for expenses was to be shared. In fact, that appears to have been the specific intention of the parties, since the IRS had informed us that the divorce agreement provided that the proceeds of the sale of the residence were to be split between Mr. and Mrs. Wood.

We note Mr. Wood's argument that he could have delayed the divorce until after the settlement and thus qualified for full reimbursement. We have held, however, that since a separated spouse is not a member of an employee's household, such a spouse does not fall within the definition of immediate family. See *William A. Cromer,* B-205869, June 8, 1982, and cases cited therein.

In previous cases we have held, as we do in this case, that employees who are divorced at the time of settlement, may be reimbursed only to the extent of their interest in the residence as determined at that time. *Charles R. Holland,* B-205891, July 19, 1982; *Gerald S. Beasley,* B-196208, February 28, 1980. Those cases differed from the present one in that the employees were separated from their spouses at the time they reported for duty at their new duty stations. However, for the reasons explained earlier we do not believe the present case can be distinguished from those cases on that basis.

We hereby affirm the determination of the IRS to reimburse Mr. Wood for his claimed expenses in direct proportion to the extent of his interest in the residence at the time of settlement.

[B-214315]

Office of Personnel Management—Jurisdiction—Retirement Matters

A retired civil service employee requests the time of his voluntary retirement be backdated from Jan. 8 to Jan. 3, 1983, so that he may be allowed an annuity payment for the month of Jan. 1983. The employee suggests that his selection of Jan. 8 as the retirement date resulted from a mistake or ignorance of the law. The Office of Personnel Management is vested with exclusive authority to adjudicate civil service retirement annuity claims. Regarding amount of pay already paid the claimant there is no basis to change the employee's status as an employee on duty and on leave based on the claimant's assertion that he was not aware of the requirements of existing law.

Matter of: Antoni Sniadach, February 25, 1985:

The question presented is whether a retired civilian employee of the United States Coast Guard, Mr. Antoni Sniadach, may have his civil service records modified to change the date of his retirement from January 8 to January 3, 1983.[1] We are unable to find a lawful basis for allowing this proposed revision of the official records.

In November 1982 Mr. Sniadach applied to be retired from the Coast Guard on December 31, 1982. Several weeks after submitting that application he read an article about civil service retirements in a commercial newsletter. The article contained information to the effect that Federal employees who postponed their pending retirement until January 1983 would gain eligibility for social security medicare coverage. The article further advised that those retiring on January 8, the end of the leave year for most employees, could also collect payment for excess annual leave which they would forfeit if they retired after that date.

On the basis of this information, Mr. Sniadach elected to change the date of his pending retirement from December 31, 1982, to January 8, 1983, and he was paid his Coast Guard salary until he entered retirement on January 8. Under a provision of the retirement laws, payment of a civil service retirement annuity to him was delayed until February 1, 1983.[2]

Mr. Sniadach indicates that after he retired he learned that the retirement laws had been amended on December 21, 1982, to grant immediate rather than delayed annuities to employees who served 3 days or less in the month of their retirement.[3] He further indicates that if he had been aware of this amendment at the time it was enacted, he would have elected to retire on January 3 rather than on January 8, 1983. For that reason he requests that his civil service records now be changed to backdate the time of his retirement to January 3, 1983. In effect, this request sets out a monetary claim for a civil service retirement annuity payment for the period from January 3 to January 31, 1983.

The Office of Personnel Management is by specific provision of statute vested with exclusive authority to adjudicate civil service retirement annuity claims, subject solely to administrative appeal to the Merit Systems Protection Board and further judicial review by the United States Court of Appeals for the Federal Circuit.[4] We are without jurisdiction to render authoritative decisions on claims for civil service annuity payments.[5] Moreover, with respect to matters properly within our jurisdiction, we have held that as a general rule a civil service separation may not be changed retroactively after it has become an accomplished fact, and exceptions to this

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[1] This decision is issued at the request of the Commandant of the Coast Guard.

[2] 5 U.S.C. § 8345(b)(1)(A) directs payment of an annuity commencing on the first day of the month after separation from service, except as otherwise provided by law.

[3] See section 124 of the Further Continuing Appropriations Act, 1983, Public Law 97-377, approved December 21, 1982, 96 Stat. 1913.

[4] See 5 U.S.C. § 8347 (b) and (d).

[5] Compare 41 Comp. Gen. 460, 463 (1962); 30 Comp. Gen. 51 (1950); and 19 Comp. Gen. 352, 354 (1939).

rule are not warranted by bare assertions of mistake or ignorance of the law.[6]

In the present case, we may not properly consider or adjudicate Mr. Sniadach's claim for a civil service retirement annuity payment for the month of January 1983, and we are otherwise unable to find any proper basis for sanctioning the alteration of his official employment records to show a retirement date that is contrary to the actual facts.

The question presented is answered accordingly.

[B-215194]

Accountable Officers—Embezzlement, Loss, etc.—Liability

Accountable officer who embezzled collections is liable only for the actual shortage of funds in her account. Although her failure to deposit the funds in a designated depositary caused the Government to lose substantial interest on the funds, the loss interest should not be included in measuring her pecuniary liability as an accountable officer.

Officers and Employees—Debts to U.S.—Satisfaction

Upon convicting an accountable officer of embezzlement, court ordered restitution as condition of probation as authorized by 18 U.S.C. 3651. Since agency was still attempting to mitigate its loss, amount submitted to court was an estimate not intended to reflect full amount of actual loss. In these circumstances, lower amount in restitution order does not preclude agency from asserting civil claim for actual loss as finally determined.

Matter of: Liability of Accountable Officer for Lost Interest, February 25, 1985:

An Authorized Certifying Officer of the Forest Service, United States Department of Agriculture, has requested our opinion as to the liability of Bernette Floyd Jackson, a former Forest Service collection officer, for unrecovered losses caused by her misappropriation of funds and for interest lost to the Government as a result of her failure to place these funds in the designated depositary. The question is whether Ms. Jackson should be held liable for both the actual loss of funds in her account and for the lost interest. For the reasons stated below, we find that Ms. Jackson is not liable for the lost interest. Ms. Jackson's liability is limited to the unrecovered losses in her account.

Ms. Jackson's position as a Forest Service collection officer required her to deposit funds in a local designated depositary on a periodic basis. An investigation revealed that for several months, Ms. Jackson failed to deposit a total approximating $760,000. Ms. Jackson was subsequently found guilty of 19 counts of embezzlement (18 U.S.C. § 649). Most of the funds consisted of uncashed checks which were later replaced, and the actual loss of funds in Ms. Jackson's account has been determined to be $973.10. However,

[6] See, generally, 22 Comp. Gen. 291, 292 (1942); 14 Comp. Gen. 585 (1935); 10 Comp. Gen. 11 (1930); and 26 Comp. Dec. 448 (1919).

Ms. Jackson's fraudulent scheme also caused the Government to lose $56,279.56 it would have earned in interest had Ms. Jackson deposited the funds according to procedure.

An accountable officer of the Government is an insurer of the public funds in his custody and is excusable only for loss due to acts of God or the public enemy. *United States v. Thomas,* 82 U.S. (15 Wall) 337 (1872). Under 31 U.S.C. § 3527(a), the General Accounting Office is authorized to relieve an accountable officer from liability for the physical loss or deficiency of public funds, upon concurrence with agency determinations that the loss occurred while the accountable officer was acting in the discharge of official duties and that it occurred without fault or negligence on his part. Since the accountable officer in this case has been convicted of embezzlement, there is, of course, no question of relief. The only question is the extent of Ms. Jackson's liability.

In B-190290, November 28, 1977, we decided that an accountable officer of the Farmers Home Administration who negligently delayed forwarding collections from borrowers to the proper office for deposit was not liable for the interest charges that accrued during the delay. We held that the loss "is not the type of loss which is cognizable under the law applicable to accountable officers."

There are several points of distinction between that case and this one. First, in B-190290, the Farmers Home Administration actually had to pay the amount of the lost interest since it pays daily interest on money borrowed from the U.S. Treasury. There is no corresponding payment requirement here. Second, the lost interest here stems directly from a loss of funds for which the accountable officer is clearly liable, whereas there was no similar underlying loss or deficiency in the account of the accountable officer in B-190290. Finally, in B-190290, while there was a loss to the Farmers Home Administration, it is not clear that there was actually a net loss to the United States.

Nevertheless, we think the result in B-190290 is equally applicable here. The essence of our 1977 decision is that the strict liability of an accountable officer does not extend to money which the Government never had, even though the reason the Government never had it may have been fault or negligence on the part of the accountable officer. While there was certainly a loss to the Government in this case, the lost interest is not money which was ever actually in the custody of or in the "account" of the accountable officer. As such, as in B-190290, we do not think the loss here is the type of loss contemplated by the laws relating to the liability and relief of accountable officers.

A conceptually similar situation is the acceptance of a personal check subject to collection. If the check proves uncollectible and the Government has not parted with something of value in exchange for the check, there is no loss or deficiency within the scope of the accountable officer laws. B-201673 *et al.,* September 23, 1982.

As we said in that case, "the Government incurs a loss in the sense that it does not have money to which it was legally entitled, but it had not lost anything that it already had."

Accordingly, while there may be other consequences flowing from Ms. Jackson's conduct in a situation like this,[1] her liability by virtue of her status as an accountable officer is limited to the actual loss or deficiency in her account.

Having said this, determining the proper amount of Ms. Jackson's liability in this case raises another issue. The Forest Service has computed the actual loss to be $973.10. However, according to the Judgment and Probation/Commitment Order, the court suspended a portion of Ms. Jackson's sentence, placed her on probation for 5 years, and ordered restitution of $700 as a condition of the probation. The question is the relationship of the $700 to the $973.10.

The order of restitution was authorized by 18 U.S.C. § 3651 which, as relevant here, provides that a defendant may, as a condition of probation, "be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." [2]

In discussing a state statute with restitution language similar to that of 18 U.S.C. § 3651, the Oregon Supreme Court noted that a court could order restitution in an amount less than the victim's actual loss, and that in any event, any amount paid as restitution should be set off against any civil judgment arising from the same incident. *State v. Stalheim,* 275 Ore. 683, 552 P.2d 829, 832 n.8 (1976). While we are not aware of any Federal cases discussing this issue with respect to 18 U.S.C. § 3651, we see no reason why similar concepts should not apply.

As noted earlier, the receipts which Ms. Jackson failed to deposit totalled nearly $760,000 consisting of some cash but mostly checks. The checks were apparently never negotiated. We have been informally advised that, during the course of the criminal proceedings, the Forest Service was in the process of contacting the makers of the checks to seek replacement checks, a process which turned out to be largely successful. When the court was ready for sentencing, the Forest Service had not yet completed this process and thus was not able to state the amount of its loss with certainty. The $700 figure submitted to the court, we are advised, was merely an estimate based on the cash count, and was not intended to represent the actual amount of the loss.

Thus, assuming there is nothing in the record of the court proceedings to indicate the contrary, it would appear that the $700 ordered as restitution was never intended to reflect the full amount

[1] B-201673 *et al.*, September 23, 1982, at 6. *See also* 45 Comp. Gen. 447 (1966).

[2] For offenses occurring after January 1, 1983, restitution is addressed in more detail in 18 U.S.C. §§ 3579 and 3580.

of Ms. Jackson's civil liability. Accordingly, we think the Forest Service may proceed to assert its civil claim against Ms. Jackson for $973.10 without the need to seek amendment of the restitution order. The $700, of course, is to be treated as part of the $973.10 and not in addition to it.

We understand further that there is approximately $5,000 in Ms. Jackson's Civil Service Retirement account against which any unpaid portion of her indebtedness may be offset. Offsets against Civil Service Retirement monies are made in accordance with the Federal Claims Collection Standards, specifically, 4 CFR § 102.4 (49 Fed. Reg. 8889, 8899, March 9, 1984). While the Forest Service should still notify Ms. Jackson of its intent to collect by offset, the court proceedings have obviated any need for further "administrative review" of the indebtedness. See 4 CFR § 102.3(b)(2)(ii), 49 Fed. Reg. at 8898 (no need to duplicate "due process" protections).

As a final note, while we have concluded that lost interest may not be included in determining Ms. Jackson's liability as an accountable officer, there may be some basis for asserting a claim for the lost interest on common-law tort principles. Should the Forest Service wish to explore the feasibility of such a claim, we suggest that it consult with the Department of Justice.

[B-216251]

Officers and Employees—Transfers—Real Estate Expenses—Loan Origination Fee

A transferred employee purchased a new residence and was charged 1 percent of his loan, plus $250, as a "loan origination fee." He was reimbursed the 1 percent and now claims the additional $250. Under the Federal Travel Regulations (FTR) para. 2-6.2d(1)(b), such fees are reimbursable not to exceed amounts customarily charged. Since HUD advised that the customary range of fee charged in the area is 1 to 1½ percent of the loan, the maximum of the customary range may be used for FTR purposes and when reduced to a dollar amount, establishes the not to exceed amount which may be reimbursed in any one case. Thus, the employee may be reimbursed an additional amount up to the maximum of 1½ percent.

Regulations—Force and Effect of Law—Federal Travel Regulations

A transferred employee purchased hazard insurance on his new residence as a condition of obtaining a mortgage loan. He claims reimbursement based on his agency's "Employees Relocation Guide" publication as authority. The Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), which are specifically authorized by law and have the force and effect of law, strictly govern the relocation expense entitlements of Federal employees. The cited publication is administrative and does not have the force and effect of law. Therefore, to the extent that such publication may be inconsistent with provisions of the FTR it is not binding on the Government.

Officers and Employees—Transfers—Real Estate Expenses—Insurance

A transferred employee was required to purchase hazard insurance as a condition of obtaining a mortgage loan. He claims that since it was property insurance and required by the lender, it is reimbursable. The term "property insurance" is a term describing, generally, all types of real or personal property insurance and is not a term used in the FTR to describe such potentially reimbursable cost. Under FTR, para. 2-6.2(d)(1) only the cost of the one type of property insurance, title insurance, may be reimbursed and then only if it is required by a lender. Hazard insurance is another type of property insurance which relates to financial protection against loss or damage to structures or improvements to real estate, occasioned by specific catastrophic events. Since FTR, para. 2-6.2(d)(2)(a) specifically precludes reimbursement of the costs of loss and damage insurance, the claims may not be paid.

Matter of: Mark Kroczynski—Real Estate Expenses—Loan Origination Fee—Hazard Insurance, February 25, 1985:

This decision is in response to a request from an Authorized Certifying Officer, Internal Revenue Service (IRS), Southwest Region, Department of the Treasury. The matter involves the entitlement of one of its employees to be reimbursed certain real estate related expenses which were incurred incident to a permanent change-of-station transfer in June 1983. We conclude that the employee may be reimbursed, in part, for the following reasons.

BACKGROUND

Mr. Mark Kroczynski, an IRS employee, received a permanent change-of-station transfer from New York, New York, to Lake Charles, Louisiana. He reported for duty at his new station on June 11, 1983.

By supplemental travel voucher, Mr. Kroczynski sought reimbursement for expenses incurred attendant to the purchase of a residence in the area of his new duty station, in the amount of $1,510. All of the expenses claimed on that voucher, including a 1 percent loan origination fee, with the exception of an additional $250 fee charged by the lending institution, and $283 fee charged as a premium for hazard insurance, were allowed. The two items which were disallowed, were disallowed for the reason that the $250 charge by the lending institution in addition to the 1 percent loan origination fee was not a customary charge in that area, and that insurance against loss or damage to property is not reimbursable, citing to Internal Revenue Manual (IRM) 1763, section 593(1)(d)(2).

Mr. Kroczynski submitted a reclaim voucher for the disallowed items. In support of entitlement, he asserts that the information supplied the agency concerning loan origination fees only pertains to FHA loans and that since his was a conventional loan the additional $250 charge is properly reimbursable. In support of reimbursement for the cost of hazard insurance, he refers to the Internal Revenue Service, Employees Relocation Guide, Document 6076 (Rev. 1/83), which provides, in part, that property insurance is a nonreimbursable expense "if purchased for the protection of you and not required by the lender." He asserts that the lender required him to purchase and maintain such insurance as one of the conditions contained in his mortgage loan agreement.

DECISION

The provisions governing reimbursement for real estate expenses incident to a transfer of duty station are contained in 5 U.S.C. § 5724a (1982), and regulations issued thereunder. Those regulations are contained in Chapter 2 of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended, in part, by GSA Bulletin FPMR A-40, Supp. 4 (October 1982). Since these regulations are specifically authorized by law, they have the force and effect of law. In the absence of terms in the law or the regulations otherwise permitting, the provisions of the FTR may not be modified by agency regulations or waived in an individual case by the employing agency or our Office. See *Dominic D. D'Abate,* B-210523, October 4, 1983, 63 Comp. Gen. 2, and *Charles R. Stebbins,* B-215263, October 1, 1984. Therefore, an employee's right to be reimbursed for relocation expenses is strictly limited to that authorized by statute and the Federal Travel Regulations.

Loan Origination Fee

Paragraph 2-6.2d of the FTR, as amended by GSA Bulletin FPMR A-40, Supp. 4 (October 1982), provides, in part:

> d. *Miscellaneous expenses.*
>
> (1) *Reimbursable items.* The expenses listed below are reimbursable in connection with the * * * purchase of a residence, provided they are customarily paid * * * by the purchaser of a residence at the new official station to the extent they do not exceed amounts customarily paid in the locality of the residence.
>
> * * * * * * *
>
> (b) Loan origination fee;

A loan origination fee, generally, is a fee assessed a mortgagor by a lending institution to compensate the lender for the time and expenses associated with originating a loan, such as, processing documents, securing a credit investigation on the prospective mortgagor and performing other related activities. While the most common method of charging for these expenses is stating it as a percentage of the amount to be loaned, the charge for those services can also be stated as set charge not specifically tied to the amount of the loan, or, as in the present case, a percentage of the loan, plus a set charge.

A complicating feature of a loan origination fee is that many lenders will include a mortgage discount or "points" to the charges made, especially where the method of charging is as a percentage of the loan. We have defined a mortgage discount or "points" as being part of the price paid for the hire of money where the interest rate charged on the loan is below the mortgage market level, or lower than the interest rate income available to the lending institution from alternative investment opportunities. B-164812, September 3, 1970; and *Roger J. Salem,* B-214018, June 27, 1984, 63 Comp. Gen. 456.

In decision *Roger J. Salem*, above, we considered a situation in which a particular lending institution charged 5 percent of the loan as a loan origination fee. On analysis, we expressed the view that the amount charged was so unreasonable that it could not possibly represent only administrative costs associated with the making of the loan or a reasonable approximation thereof and concluded that the excess represented a mortgage discount add on. We ruled, therefore, since much of the charge represented a mortgage discount, we would give great weight to the information provided by the Department of Housing and Urban Development (HUD). Since they determined that the customary charge in the home purchase locality was 1 percent of the loan, we held that in the absence of a definitive showing that the customary charge there was higher, reimbursement was limited to 1 percent.

In the present case, we have been informally advised through the HUD office servicing the Lake Charles, Louisiana, area that the customary method of charging a loan origination fee is as a percentage of the loan and that the customary percentage range is between 1 and 1½ percent of the loan. The method used by the particular lending institution servicing Mr. Kroczynski's account, i.e., 1 percent of the loan, plus $250, clearly is a departure from the customary method of charging. However, when all percentages are reduced to dollar amounts in this case, he paid $552 as a loan origination fee. Since the upper limit of the customary range of fee charging in that locality was 1½ percent, that limit may be used to establish the not to exceed amount in this case. On that basis, the maximum loan origination fee on his loan ($30,200), would have been $453. In view of the fact that the limitation expressed in paragraph 2-6.2d of the FTR, as amended, is that the reimbursement may "not exceed the amounts customarily paid," and based on the information from HUD, Mr. Kroczynski's reimbursement is limited to $453. Since he has already been reimbursed $302, an additional $151 may be certified for payment to him for his loan origination fee.

Hazard Insurance

Mr. Kroczynski has sought reimbursement for the cost of this insurance by asserting that it is an otherwise reimbursable property insurance item described in his agency's relocation quide, because its purchase was required by his mortgage lender.

The publication in question (Internal Revenue Service, Employees Relocation Guide, Document 6076 (Rev. 1/83)), merely provides employees with a general outline of their rights and responsibilities on permanent change-of-station transfers. The Federal Travel Regulations govern employee relocation expense entitlement. Thus, to the extent that the cited publication may be inconsistant with the FTR, any erroneous information contained therein is not binding on the Government. See *D'Abate* and *Stabbins*, above.

Paragraph 2-6.2d(2) of the FTR provides in part:

(2) *Nonreimbursable items.*

(a) * * * insurance against loss or damage of property * * *.

The term "property insurance" is a broad generic term often used to describe, generally, all types of insurance an individual may purchase which relates to ownership or possession of property, real or personal. The FTR provisions regarding insurance cost reimbursement do not deal in such a broad descriptive term. They deal only with certain specific types of property insurance. For example, under FTR para. 2-6.2(d)(1), the only insurance costs which are deemed reimbursable are the premiums charged for a mortgage title insurance policy where required by the lender as a condition of the loan, and an owner's title insurance policy, under certain stipulated circumstances. In contrast to that type of insurance, hazard insurance is typically insurance which provides financial protection against loss or damage to structures and improvements to real estate, occasioned by specific potentially catastrophic events, such as, fire, flood, windstorm or earthquake. Regardless of whether a lending institution requires the purchase of such insurance as a condition of making the mortgage loan, since FTR para. 2-6.2d(2)(a) provides, without exception, that the cost of loss and damage insurance is nonreimbursable, Mr. Kroczynski's hazard insurance cost claim may not be certified for payment.

[B-216119]

Subsistence—Per Diem—Additional Expenses—Early Departure From Duty Station

A handicapped employee claims reimbursement for additional subsistence expenses he incurred when he arrived at his temporary duty site several days early, and then delayed returning to his official duty station, in order to avoid driving in inclement weather. We hold that the employee may be reimbursed for the additional subsistence expenses because he acted prudently in incurring those expenses. Furthermore, reimbursement is justified as a "reasonable accommodation" to the employee under the Rehabilitation Act of 1973.

Leaves of Absence—Traveltime—Delay—Annual Leave Charge—Administrative Discretion

A handicapped employee arrived early at his temporary duty site in order to avoid driving in inclement weather. Whether or not the employee should be charged annual leave in connection with his early arrival is primarily a matter of administrative discretion. However, under the circumstances of this case, we would not object to an administrative determination to excuse the employee for the time in question, without a charge to his annual leave account.

Matter of: Steve Stone—Subsistence Expenses for Excess Traveltime—Charging of Annual Leave, February 26, 1985:

Mr. James D. Clark, an authorized certifying officer with the National Park Service, Rocky Mountain Regional Office, requests an advance decision concerning the claim of Mr. Steve Stone. The principal issue for our determination is whether Mr. Stone, a handicapped employee, may be reimbursed for the additional subsistence expenses he incurred when he arrived early at his temporary duty site and then delayed his return travel in order to avoid driving in inclement weather. We hold that Mr. Stone may be reimbursed for the additional subsistence expenses because he acted prudently in incurring those expenses, and reimbursement is supported by the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.*, (1982).

BACKGROUND

Mr. Stone, an Outdoor Recreation Planner with the National Park Service in Denver, Colorado, was scheduled to perform temporary duty in San Francisco, California, during the months of March and April 1983. Pursuant to a General Travel Authorization, Mr. Stone completed and obtained approval of an itinerary for travel beginning March 24 and ending April 18, 1983.

Mr. Stone has severe physical disabilities as the result of an automobile accident, and is medically classified as a quadriplegic. Because of his handicap, the agency authorized Mr. Stone to use his own specially equipped automobile for the temporary duty travel.

On Monday, March 21, 1983, Mr. Stone advised his supervisor that he intended to begin driving to San Francisco that day, 3 days before his scheduled departure date, because a severe snowstorm was predicted for the days on which he had planned to travel. His supervisor verbally approved the early departure, and Mr. Stone left Denver at 10 p.m. on Monday, March 21. He arrived in Concord, California, on the evening of Wednesday, March 23, and lodged there in a private residence until the morning of Sunday, March 27. Mr. Stone claimed meal costs, but no lodging expenses, for the period of his stay in Concord.

Mr. Stone traveled from Concord to San Francisco on Sunday, March 27, and began his temporary duty assignment on the following Monday morning. He completed his assignment on the afternoon of Friday, April 8, but chose to delay his return travel to Denver because weather reports indicated poor driving conditions in the Rocky Mountains. Mr. Stone lodged in a private residence in San Francisco on Saturday, April 9 and Sunday, April 10, claiming meal expenses but no lodging costs for the weekend. He used annual leave on Monday, April 11 and Tuesday, April 12, and then performed return travel to Denver between Wednesday, April 13 and Friday, April 15, 1983.

The agency allowed Mr. Stone's claim for subsistence expenses during the 2-week period of his temporary duty assignment, and for the days he spent traveling during the periods March 21 to March 23 and April 13 to April 15, 1983. However, the agency denied Mr. Stone reimbursement for the meal expenses he incurred between Thursday, March 24 and Saturday, March 26, the days following his early arrival in Concord, and for Saturday, April 9 and Sunday, April 10, the weekend after he had completed his temporary duty assignment.[1]

Mr. Stone reclaimed the disallowed meal expenses, arguing that poor weather conditions forced him to travel from Denver to San Francisco earlier than he had planned, and then to delay his return travel to Denver. He explains that, as a physically handicapped individual, he would be exposed to extraordinary problems if he were required to drive in adverse weather conditions. Further, Mr. Stone refers to the Rehabilitation Act of 1973 and its implementing regulations, which, as discussed below, require Federal agencies to make reasonable accommodations to the physical limitations of qualified handicapped employees, unless such accommodations would impose an undue hardship on the agencies' programs. Finally, Mr. Stone has furnished his supervisor's statement that he could not have postponed his trip to San Francisco pending the improvement of weather conditions.

Against this background, the agency questions whether Mr. Stone may be reimbursed for the additional subsistence expenses associated with his early arrival in, and late departure from, California. In support of reimbursement, the agency cites para. 2-2.3d(2) of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1983), which allows additional per diem for delays during relocation travel where the delays are caused by an employee's physical handicap, an act of God, or other circumstances beyond the traveler's control. Also, the agency cites several of our decisions allowing additional per diem where employees interrupt temporary duty travel because of inclement weather. See, for example, 52 Comp. Gen. 135 (1972); and 41 Comp. Gen. 605 (1962). However, the agency notes that FTR para. 2-2.3d(2) and the cited decisions governing temporary duty travel concern delays en route, rather than the "early arrival" and "late departure" involved in Mr. Stone's case.

The agency also cites the provisions of the Rehabilitation Act of 1973 and its implementing regulations which, as noted previously, require agencies to accommodate the limitations of qualified handicapped employees to the extent that such accommodations do not impose an undue hardship on the agencies' programs. The National Park Service states that Mr. Stone qualifies as a handicapped employee within the meaning of the Rehabilitation Act, and that the expenditure involved in this case would not impose an undue hardship on its program.

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[1] Apparently, Mr. Stone did not claim subsistence expenses for April 11 and 12, 1983, since he was in an annual leave status on those days.

Additionally, the agency questions whether it must charge Mr. Stone annual leave for Thursday, March 24, 1983, the day after he arrived in Concord, since he was neither traveling nor in a duty status on that day.[2]

DISCUSSION

The general rules governing reimbursement for travel and subsistence expenses are found in Chapter 1 of the FTR. Under FTR para. 1-1.3a, an employee traveling on official business is expected to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business. The provisions of FTR par. 1-1.3b further state that reimbursable travel expenses are confined to those essential to the transaction of official business. The determination as to whether an employee has used due care in incurring a travel expense, and whether the expense is officially necessary, depends upon the facts and circumstances involved in each case. See *Walter Wait,* B-208727, January 20, 1983; and 33 Comp. Gen. 221 (1953).

In this case, Mr. Stone chose to begin his travel to San Francisco 3 days before his scheduled departure date because a snowstorm had been predicted for the scheduled days of travel. After completing his temporary duty assignment in San Francisco, he remained there for several days pending the abatement of a snowstorm in the Rocky Mountains. In view of Mr. Stone's physical limitations and the extraordinary problems he could encounter by traveling in inclement weather, we believe he exercised good judgment and prudence in departing early for his temporary assignment in San Francisco, and in delaying his return trip to Denver.

Furthermore, as both the agency and Mr. Stone point out, regulations implementing the Rehabilitation Act of 1973 require agencies to make reasonable accommodations to known physical limitations of qualified handicapped employees, unless such accommodations would impose an undue hardship on the agencies' programs. 29 CFR 1613.704 (1984). Our decisions reflect this commitment to assist handicapped employees. See the discussion in B-211812, March 26, 1984, 63 Comp. Gen. 270. Thus, in *Norma Depoyan,* B-215616, October 30, 1984, 64 Comp. Gen. 30, we held that a handicapped employee could be reimbursed for the cost of shipping her specially equipped automobile pursuant to a permanent change of station, because the expenditure represented a "reasonable accommodation" under the Rehabilitation Act of 1973 and did not impose an undue hardship on the agency's travel program.

Here, it appears that payment of the additional subsistence expenses incurred by Mr. Stone would represent a "reasonable ac-

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[2] The agency states that it does not question Mr. Stone's leave status on Friday, March 25, because he worked a compressed work schedule and Friday was his regular day off.

commodation" under the Rehabilitation Act of 1973. The agency has determined that Mr. Stone qualifies as a handicapped individual within the meaning of the Act, and that the character and amount of the expenditure would not impose an undue hardship on the operation of its travel program.

Accordingly, we conclude that Mr. Stone acted prudently in incurring additional subsistence expenses, and that payment of the expenses is further supported by the Rehabilitation Act of 1973 and its implementing regulations. Therefore, Mr. Stone may be paid the meal expenses he has claimed for the period Friday, March 25 through Saturday, March 26, 1983, and for the weekend of April 9 and 10, 1983.

Finally, the agency questions whether Mr. Stone should be charged annual leave for Thursday, March 24, 1983, since he was neither traveling nor in a duty status that day. We have held that the charging of annual leave is primarily a matter of administrative discretion. *Laxman S. Sundae,* B-185652, December 28, 1976. However, under the circumstances of this case, we would not object to an administrative determination to excuse Mr. Stone on Thursday, March 24, without a charge to his annual leave account. Thus, he would also be entitled to his meal expenses as claimed for that date.

For the reasons stated above, we hold that Mr. Stone's claim for additional subsistence expenses may be allowed.

[B-216208]

Transportation—Vessels—Foreign—Reimbursement

The Foreign Service Travel Regulations impose "personal financial responsibility" on employees for using a foreign-flag vessel under certain conditions. Since those regulations do not specify the amount of financial responsibility, they may be interpreted as precluding reimbursement of any part of the cost of such travel only if an American-flag vessel is also available. If American-flag vessels are not available, then the regulations are viewed as imposing financial responsibility for such use to the extent that the cost of the foreign-flag vessel exceeds the constructive cost of less than first-class airfare.

Matter of: Foreign-Flag Vessels, February 7, 1985:

The question in this case is whether the Foreign Service Travel Regulations preclude reimbursement when an employee travels on a foreign-flag vessel without obtaining specific authority for such travel as provided in the regulations or whether they allow reimbursement in such circumstances to the extent of the constructive cost of less than first-class airfare.[1] Since the language of the applicable regulations does not clearly and unequivocally preclude constructive cost reimbursement in these conditions, reimbursement to the extent of the constructive cost of less than first-class airfare should be allowed.

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[1] Robert C. Myers, Chief, Transportation Division, Department of State, submitted this question.

The Foreign Service Act of 1980 gives the Secretary of State the authority to prescribe regulations for the payment of specified relocation and travel expenses for foreign service officers. Sections 206 and 901, Pub. L. 96-465, October 17, 1980, 94 Stat. 2071, 2079, 2124; 22 U.S.C. §§ 3926, 4081 (1982). The applicable regulations are contained in the Foreign Service Travel Regulations published in the Foreign Affairs Manual (FAM), Volume 6. These regulations cover travel and relocation expenses for foreign service officers and employees of State, AID, and USIA.

Relevant to the question presented 6 FAM, para. 133.2-1 provides:

A foreign-flag ship may be used only * * *

a. When the use of air transportation by the traveler would be hazardous or detrimental to his health or well-being *and:*

(1) American-flag ships do not operate between the ports servicing the points of origin and destination which are reasonably accessible by adequate surface transportation; or

(2) American-flag ships do operate but space or service is unavailable and the traveler would be delayed more than 15 days awaiting available American-flag service.

Further, 6 FAM para. 133.4 provides:

Failure to comply with the provisions of section 133 will subject the employee to personal financial responsibility. * * *

Obviously, these regulations do not allow employees to use a foreign-flag vessel without qualifying for a special exception. But the financial responsibility paragraph does not indicate the amount of the employee's personal responsibility when he does use a foreign-flag vessel without qualifying for a special exception.

The financial responsibility paragraph has been interpreted as precluding reimbursement of any part of the transportation cost to an employee who travels by a foreign-flag vessel without qualifying for a special exception. However, this interpretation has been questioned in view of the conclusion reached in a memorandum of instruction from the General Counsel of the General Accounting Office to the Director of the Claims Division, B-194689-O.M., July 20, 1979. In that memorandum the General Counsel did not consider the language of the Foreign Service Travel Regulations, but advised the Director of the Claims Division that when an employee of the United States Information Agency used a foreign-flag vessel he could be reimbursed on a constructive cost basis because no American-flag vessel was available. We find that the financial responsibility paragraph should be interpreted to provide for two different amounts of employee personal responsibility, depending on the circumstances.

The quoted provisions of the Foreign Service Travel Regulations were issued to implement section 901 of the Merchant Marine Act of 1936, 46 U.S.C. § 1241(a) (1982). 6 FAM paras. 133.1 and 181.3. Section 901 precludes the use of a foreign-flag vessel when an American-flag vessel is otherwise available and specifically requires that no reimbursement be allowed for use of a foreign-flag vessel when an American-flag vessel is available. Therefore, the personal financial responsibility provision of 6 FAM para. 133.4 must necessarily be interpreted to preclude reimbursement of any part of the cost of travel by a foreign-flag vessel when an American-flag vessel is also available. However, section 901 does not restrict reimbursement when an American-flag vessel is not available. Thus, any personal responsibility under paragraph 133.4 for the cost of travel by foreign-flag vessel when an American-flag vessel is not available results from the exercise of Secretary of States authority to prescribed regulations.

The Secretary generally has not attached any personal financial responsibility for traveling on a vessel. 6 FAM para. 131.1-1. The traveler does not suffer any personal financial responsibility for traveling on a foreign-flag vessel if he qualifies for a special exemption. 6 FAM para. 133.2-1. Although the traveler does suffer an unspecified financial responsibility under 6 FAM para. 133.4 when he does not qualify for a special exemption, there appears to be no reason why that amount should be any greater than the amount specified for indirect travel in 6 FAM para. 131.3-2(a):

> Reimbursement for costs incurred on that portion of the journey which is traveled by indirect route is limited to the total cost of per diem, incidental expenses, and transportation by less than first-class air accommodations (regardless of mode of travel used in indirect travel * * *) which would have been incurred by traveling on a usually traveled route.

When the employee is given a greater degree of personal financial responsibility under the Foreign Service Travel Regulations, that greater degree is ordinarily stated in clear and specific terms. See 6 FAM para. 134.6, entitled "Traveler's Financial Responsibility." We believe the better view is that in the circumstance were an American-Flag vessel is not available, reimbursement on a constructive basis should be allowed.

That is consistent with the result reached when the Federal Travel Regulations were applied to an employee's use of a foreign-flag vessel when travel by sea was not authorized. *Thomas H. Hamara,* B-183310, December 3, 1976.

We are further inclined to this view because we do not think that an employee should be denied reimbursement, at least on a constructive cost basis, for travel performed on official business except when the consequences of the employee's actions are made clear and when there is a substantial reason justifying such drastic action. They Fly America Act, section 1117, Pub. L. 85-726, added by section 5(a), Pub. L. 93-623, January 3, 1975, 88 Stat. 2104, as amended, 49 U.S.C. App § 1517, and section 901 of the Merchant Marine Act deny reimbursement to employees when they use foreign means of transportation when similar American Services are available. These, however, are statutory restrictions.

When an employee is not in violation of those Acts and when cost of transportation is reimbursed on a constructive basis and leave is charged for excess travel time, the cost to the Government is not increased. The employee should not be subjected to the further penalty of denying reimbursement even on a constructive cost basis unless a substantial Government purpose is served.

Accordingly, when an American-flag vessel is not also available and when the employee does not qualify for a special exemption from foreign-flag vessel travel under the regulations, the cost of his travel on a foreign-flag vessel may be reimbursed under the Foreign Service Travel Regulations to the extent of the constructive cost of less than first-class airfare for comparable travel.

[B-217047]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Adverse Agency Action Effect—Interim Appeals to Agency—Effect on 10 Working Day GAO Filing Period

Where initial protest is untimely filed with the contracting agency (more than 10 working days after protest basis is known), subsequent protest to General Accounting Office will not be considered even though it was filed within 10 working days of the agency denial of the protester's initial protest.

Matter of: Dakota Woodworks, February 27, 1985:

Dakota Woodworks (Dakota) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. F32605-84-B-0059, issued by the Contracting Division, Grand Forks Air Force Base (Air Force), for the repair, alteration and renovation of the 319th Bomb Wing Headquarters, building 607. Dakota's bid was rejected because it was considered to be materially unbalanced.

We dismiss the protest.

The Air Force states that on October 4, 1984, a representative of Dakota took delivery of a letter of the same date from the Air Force detailing the reasons for the rejection of Dakota's bid. On October 22, 1984, Dakota filed a protest with the Air Force against the rejection of its bid. The Air Force denied Dakota's protest by letter dated October 29, 1984, and Dakota protested here on November 6, 1984.

Our Bid Protest Procedures require that protests be received in our Office or the contracting agency within 10 working days after the basis of the protest is known. 4 CFR § 21.2(b)(2) (1984); *Schlegel Associates, Inc.*, B-213739, June 28, 1984, 84-1 C.P.D. ¶ 688.

A protest initially filed with the contracting agency and subsequently filed with our Office within 10 days of the protester's notification of the initial adverse agency action will be considered *only if* the initial protest to the agency was filed in accordance with the time limits set forth in § 21.2(b) of our Bid Protest Procedures, outlined in pertinent part above. *See* 4 CFR § 21.2(a); *Century Metal Parts Corp.,* B-194421, Apr. 17, 1979, 79-1 C.P.D. ¶ 272. Although Dakota's protest to our Office was filed within 10 working days of the Air Force's denial of its protest, Dakota's initial protest was not filed with the Air Force within the time limits outlined above, a prerequisite to our consideration of the protest before us. Dakota was notified on October 4, 1984, that its bid was rejected and Dakota did not protest to the Air Force unitl October 22, 1984, more than 10 working days after Dakota learned of the basis of its protest. The fact that Dakota protests the rejection of its bid in the context of the Air Force's denial of its protest does no change the fact that the grounds of the protest were and are untimely presented for resolution. Our Bid Protest Procedures may not be waived by the actions of a procuring agency such as considering an untimely protest. See *Evans Inc.—Request for Reconsideration,* B-213289.3, Feb. 27, 1984, 84-1 C.P.D. ¶ 240; *Century Metal Parts Corp.,* B-194421, *supra.*

The protest is dismissed.

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