Decisions of The Comptroller General of the United States

VOLUME 64 Pages 501 to 564

MAY 1985

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300133900

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1985

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

[B-216326]

Quarters Allowance—Entitlement—Sharing Arrangements

When two members entitled to and receiving housing allowances share a residence, their "rent plus" housing allowance must be paid at the sharer's rate regardless of the financial arrangements between the members. Although the regulations were not entirely clear in defining a sharer's entitlement, the fact that the Government is paying each member a housing allowance, although of different types, supports the conclusion that sharing arrangements should be taken into account even though costs may not, in fact, be shared so that sharers cannot manipulate the allowances to their advantage.

Matter of: Rent Plus Housing Allowance, May 2, 1985:

Two members of the uniformed services reside together in Hawaii where they are entitled to housing allowances. Controlling regulations require that when members share a residence the "rent plus" housing allowance is based on each member's equal share of the cost of quarters. In this case one member claims a "rent plus" housing allowance as an unaccompanied member (a non-sharer) on the basis that the other member was merely a guest and paid no expenses. This results in a higher "rent plus" allowance for the claimant. The other member received a housing allowance at a flat rate. We find that the member claiming the "rent plus" allowance is only entitled to a sharer's rate since the regulations do not, nor were they intended to, provide a distinction for the member not sharing in the expenses.[1]

I

Housing allowances for members of the armed services stationed outside the United States or in Hawaii or Alaska are authorized by 37 U.S.C. § 405. Regulations implementing this broad authority are in Chapter 4, Part G, of Volume 1 of the Joint Travel Regulations. Housing allowances are to two types. One is called a housing allowance, the other is called a "rent plus" housing allowance. The housing allowance is based on an index of average housing costs in an area. This allowance is paid in a flat rate to a member and is not affected by the actual costs of housing that a member incurs. The "rent plus" allowance is based on actual costs incurred for living quarters. A ceiling limits the amount of allowance with may be paid. Cost factors used in arriving at the rent plus housing allowance include rent or purchase price, costs of utilities and recurring maintenance, and expenses or moving in and moving out. The member's entitlement to Basic Allowance for Quarters or a Family Separation Allowance (Type I) is subtracted from the cost of quarters to arrive at the amount of the rent plus allowance to be paid.

[1] This matter is the subject of a request for advance decision by Captain B.A. Schroeder, USAF, Accounting and Finance Officer, Headquarters 15th Air Base Wing (PACAF), Hickam Air Force Base, Hawaii, and has been assigned PDTATAC Control No. 84-10, by the Per Diem, Travel and Transportation Allowance Committee.

This actual cost-based allowance is prorated when members share a residence. When the rent plus system was made applicable to Hawaii, the flat rate housing allowance was phased out as members in receipt of that allowance who chose not to change to the rent plus program were transferred to other locations.

II

Beginning in June 1982 when the rent plus housing allowance was first put into effect in Hawaii, an Air Force captain began receiving that allowance as an unaccompanied member who was not sharing a residence. In March 1983, the Accounting and Finance Officer became aware of the fact that the captain, who is male, was sharing his residence with a female enlisted member. She was eligible for a flat rate housing allowance during the period he was receiving the rent plus allowance under the hold-over provisions applicable to individuals in receipt of such an allowance when the rent plus program was initiated. Since, as noted above, the computation of the amount paid under the rent plus system is based upon costs, a lower allowance is paid when two or more members share a residence. The Accounting and Finance Officer determined that the allowance paid the captain should have been calculated based on the fact that he was sharing his quarters and commenced collection of the difference between the non-sharer's entitlement and the amount to be paid based on shared quarters. The two members involved were subsequently married and their allowance entitlements were recalculated.

The captain objects to the collection on the basis that, at the time he became entitled to the rent plus housing allowance on June 1, 1982, Volume 1 of the Joint Travel Regulations did not define "sharer." The definition of sharer was added to the regulations effective August 23, 1982. Additionally, he points out that in June 1982 all references in Volume 1 of the Joint Travel Regulations regarding sharing of quarters were to sharing the costs. He says that the member who resided in his residence was merely a guest, and did not pay costs, nor did she own any interest in his home or have any rights as a renter. As a result he contends that he is entitled to the allowance as a non-sharer at the unaccompanied rate.

III

The captain is correct in stating that the governing regulations did not define "sharer" in June 1982, when the rent plus housing allowance was made applicable to the location in Hawaii which is involved in this case. But, effective August 24, 1982, 1 JTR paragraph M4300-3 was amended to include such a definition, which is:

> * * * a member who is entitled to a housing allowance and is residing with one or more members of the Uniformed Services and/or one or more Federal civilian employees who are authorized a living quarters allowance.

Prior to the effective date of that amendment in 1 JTR paragraph M4300-3, the Per Diem, Travel and Transportation Allowance Committee had issued a message, in May 1982, which provided with respect to sharers that:

> For the purposes of rent plus calculations, derived rent for members is calculated by dividing purchase price of house by 120 and then by number of members. Consider members sharing equally regardless of percentage of purchase price claimed by each member. Member can share without being named in sales agreement.

Additionally, local instructions implementing the rent plus program provided that payments to military members who were sharing a home would be based on each member's share of the rent or rental equivalent "computed by dividing the 'rent' by the number of military members in the home." This rule applied to members married to members and members sharing with other members.

As the captain notes, other sections of the Joint Travel Regulations in force in 1982 indicated that the actual amount of the cost shared was to be used to determine an individual's allowance. However, those provisions relate only to determining the amount of the Utility/Recurring Maintenance Allowance, which is only part of the total rent plus housing allowance. See 1 JTR paragraph M4301-3d. In June 1982 the regulations did not provide for the allocation of rent or purchase costs when sharing quarters was involved.

While the regulations in force in June 1982 may have been somewhat misleading, when sharing of rent was specifically considered by the Per Diem, Travel and Transportation Allowance Committee, members entitled to housing allowances who were living together as sharers were considered to have equal obligations to pay rent regardless of the financial arrangements between them. This is clear from the message issued in May 1982, and the regulation amendment issued in August of that year. Local instructions issued earlier adopted the same approach.

The fact that the Government is paying a housing allowance to each member, although in this case the allowances are of different types, supports the conclusion that the Government should not be obligated to pay the higher rate rent plus allowance where only one member assumes an obligation to pay the housing cost. Allowing this to happen would permit sharing members to manipulate the housing allowances to their advantage.

Since the controlling regulation did not provide for allocating rent or payments in lieu of rent on an actual expense basis instead of sharing them equally and since it is clear that equal division of those costs was contemplated and is in keeping with the purpose of rent plus housing allowance, we conclude that the captain was not entitled to the rent plus as a non-sharer. His entitlement must be based on the sharer's computation for the period involved.

[B-218196.2]

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

General Accounting Office (GAO) regulations provide that protests are to be dismissed unless the protester submits either comments on the agency report or a statement requesting GAO to decide the matter on the existing record within 7 days after receiving the report. If a conference is held, the protester must submit either comments or a similar request for a decision on the existing record within 5 working days after the conference.

Matter of: Transamerican Steamship Corporation, May 6, 1985:

Transamerican Steamship Corporation protests the award of a contract to Sea Mobility, Inc. under request for proposals No. NOOO33-84-R-4003, issued by the Military Sealift Command. Transamerican challenges the responsiveness of Sea Mobility's proposal and the responsibility of the company, arguing that the Navy changed the basis for award after submission of proposals and gave misleading information to it during discussions.

We dismiss the protest.

By letter dated February 21, 1985, we acknowledged Transamerican's protest and cautioned the company that under our Bid Protest Regulations, 4 CFR § 21.3(e) (1985), a protester must submit written comments on the agency's report concerning the protest or a statement that the protest should be decided on the existing record within 7 working days following receipt of the report. The report of the Military Sealift Command was provided to Transamerican on or about March 25.

On April 1, at the invitation of our Office, representatives of the firm attended a bid protest conference requested by Marine Transport Lines, Inc., another protester of the same Military Sealift Command procurement. Although not formally a conference on Transamerican's protest, the April 1 conference was intended to encompass issues presented in that protest if the firm wished to attend and raise them. Section 21.5 of our regulations provides that when a conference is held on a protest, the protest will be dismissed unless the protester files comments on the conference and/or the agency report, files a statement requesting a decision on the existing record, or requests an extension of the time in which to file comments within 5 working days following the conference. Those attending the April 1 conference were reminded that comments were due on or before April 8.

Transamerican has not commented on the agency report or requested that we decide the protest on the existing record, which it was required to do on or before April 4. Even if we view section 21.5 as applicable to this case because the Marine Transport Lines conference encompassed issues raised by Transamerican, Transamerican therefore had until April 8 to file the necessary com-

ments or a statement with our Office. It has not done that either. Consequently, we dismiss the protest.

[B-216647]

Bids—Responsiveness—Bid Guarantee Requirement

A bid bond is defective when no penal sum has been inserted on the bond, either as a percentage of the bid amount or as a fixed sum. Prior General Accounting Office cases to the contrary, including 51 Comp. Gen. 508 (1972), are hereby overruled.

Matter of: Allen County Builders Supply, May 7, 1985:

Allen County Builders Supply (Allen County) protests the rejection of its bid under invitation for bids (IFB) No. F12617-84-B0021, issued by the Air Force for the repair of siding on a building located at Grissom Air Force Base, Indiana. The bid was rejected as nonresponsive because no penal sum had been entered on the bid bond accompanying the bid, as required by the IFB.

We deny the protest.

The IFB required each bidder to submit with its bid a bid bond in the amount of 20 percent of the total bid price. The bid bond penalty amount could be expressed either as a fixed sum or as a percentage of the total bid price. The solicitation cautioned, in compliance with the applicable Federal Acquisition Regulation, that failure to furnish a bid bond in the proper form and amount by the time set for bid opening might be cause for rejection of the bid. *See* 48 C.F.R. § 28.101-4 (1984).

When the bids were opened, Allen County was the apparent low bidder. However, when the Air Force conducted a technical evaluation of the bids, it discovered that Allen County's bid bond did not include any penal sum or percentage figure to indicate the amount of the bond, nor had the bond been signed by the principal. The Air Force contracting officer found Allen County's bid nonresponsive because of these deficiencies and rejected it. The protester argues that the deficiencies in the bid did not affect the bid in substance, but only in form, and contends it should have been granted an opportunity to cure such deficiencies.

The purpose of a bid bond is to assure that a bidder will not withdraw its bid within the time specified for acceptance; it secures the liability of a surety to the government in the event the bidder fails to fulfill its obligations. *Hydro-Dredge Corp.*, B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Thus, the sufficiency of a bid bond will depend on whether the surety is clearly bound by its terms; when the liability of the surety is not clear, the bond properly may be regarded as defective. *Id.*

When required, a bid bond is a material part of a bid and must therefore be furnished with the bid. *Baucom Janitorial Services, Inc.*, B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. *Truesdale Construction Co., Inc.*, B-

218094, Nov. 18, 1983, 83-2 CPD ¶ 591. As with other matters relating to the responsiveness of a bid, the determination as to whether a bid bond is acceptable must be based solely on the bid documents themselves as they appear at the time of bid opening. See *Central Mechanical, Inc.*, 61 Comp. Gen. 566 (1982), 82-2 CPD ¶ 150.

While Allen County's bid bond was not signed by the principal, this constitutes a minor informality that can be waived where the unsigned bond is submitted with a signed bid, as was the case here. *Geronimo Service Co.*, B-209613, Feb. 7, 1983, 83-1 CPD ¶ 130. However, the failure to indicate the penal amount of the bond presents a more serious problem.

Although the protester asserts that its intention was to submit a bid bond for the required 20 percent of the bid amount and for the surety to be bound thereby, it is not the bidder's intent which controls. The relevant inquiry, rather, is whether the surety's obligation has been objectively manifested on the bidding documents so that the extent and character of its liability is clearly ascertainable therefrom. See *Hydro-Dredge Corp., supra.* Here, we find that the requisite obligation could not be clearly created without inserting a specific penal sum or percentage in the place provided on the bond.

It is a general rule of the law of suretyship that no one incurs a liability to pay a debt or to perform a duty for another unless he expressly agrees to be so bound, for the law does not create relationships of this character by mere implication. *See* 44 Comp. Gen. 495 (1965). Therefore, in the event of default by the bidder in this case, the blank bond could be challenged by the surety, and the purpose of the bid bond would be defeated.

Moreover, we note that the language of the bid bond specifically refers to the liability of the surety as being "the above penal sum." The question presented in cases where bonds do not comply with invitation requirements is whether the government obtains the same protection in all material respects under the bond actually submitted as it would under a bond complying with the requirement. See *Ameron, Inc. v. United States Army Corps of Engineers*, Civ. No. 85-1064, slip op. at 10-11 (D.N.J. Mar. 27, 1985); *General Ship and Engine Works, Inc.*, 55 Comp. Gen. 422 (1975), 75-2 CPD ¶ 269. Where no penal sum is inserted on the bond, no obligation in a sum certain is undertaken by the surety. Therefore the same protection simply is not afforded by a bond lacking a penal sum as would be provided by a fully completed bond. Accordingly, we conclude that the bid bond was defective here, and that the government was required to reject Allen County's bid as nonresponsive.

We note that although the Air Force originally rejected the protester's bid as nonresponsive because of the defective bid bond, it later concluded that Allen County's protest should be sustained in accordance with 51 Comp. Gen. 508 (1972), which permitted the penal sum of a bid bond to be inferred from a reference on the

bond to the IFB number. No corrective action was taken, however, because the contract had already been performed.

While the Air Force's reliance on our prior decision was entirely proper, we have concluded that the decision should no longer be followed. We now hold that a bid must be rejected as nonresponsive where no penal sum has been inserted in the bid bond accompanying the bid. 51 Comp. Gen. 508, *supra*, and any other decisions to the same effect, are hereby overruled.

The protest is denied.

[B-215972]

Contracts—Negotiation—Requests for Proposals—Tests—First Article—Waiver

A company may qualify for waiver of first article testing and product approval on the basis of the contract and production history of its predecessor company when the facilities, personnel, assets and products of the two companies are similar or identical.

Contracts—Negotiation—Offers or Proposals—Evaluation—Experience Rating

Based on its predecessor's production history, successor corporation to a government contractor properly was found to meet a solicitation requirement that the items to be offered must have been previously produced and sold commercially or to the government, where there have been no substantial changes in the product, manufacturing process, or staff.

Contractors—Responsibility—Determination—Review by GAO—Affirmative Finding Accepted

General Accounting Office will not review a procuring agency's affirmative determination of responsibility in the absence of a showing of fraud or an allegation of failure to apply definitive responsibility criteria.

Matter of: Caelter Industries, Inc., May 10, 1985:

Caelter Industries, Inc. (Caelter), protests the award to SMI Industries USA, Inc. (SMI), of a contract for two airport runway towed sweepers under request for proposals (RFP) F09603-84-R-0157, issued by Warner Robins Air Logistics Center, Robins Air Force Base, Georgia. We deny the protest in part and dismiss it in part.

The RFP invited firms to submit offers based on first article testing or based on waiver of the requirement. Award was to be based on the lowest evaluated cost to the government. The contracting agency received three proposals that complied with the solicitation requirements for waiver of first article testing [1] and, after evaluation, awarded the contract to SMI, the low offeror.

[1] A fourth company submitted a proposal that did not meet the requirements for waiver of first article; that proposal was evaluated on that basis.

Caelter's protest is founded upon its contentions that the awardee is a "newly organized nonmanufacturing subsidiary" of a Canadian corporation. Caelter protests the award on three bases: that the contracting officer improperly waived the first article requirement for SMI; that the contracting officer failed to conduct an adequate preaward survey of SMI facilities; and that SMI's proposal was not responsive in that it did not offer "an established end product" that had been supported with spare or repair parts, as required by the solicitation.

Background

The history of the corporate relationship between the protester and the contract awardee is important to the resolution of the issues of this protest. The protester, Caelter Industries, Inc., is a New York corporation located on Purdy Avenue, Watertown, New York. This corporation operates a manufacturing division in Watertown called Sicard. Prior to June 1984, Caelter's Sicard division was called SMI New York. Caelter Industries, Inc., was formerly the wholly owned subsidiary of a Canadian corporation, Caelter Enterprises, Ltd., which had a manufacturing facility in Quebec, Canada.

In December 1982, Caelter Enterprises, Ltd., went bankrupt. Most of the assets of that bankrupt Canadian corporation were purchased in May 1983 by another Canadian corporation, now known as SMI Industries Canada, Ltd. The assets of Caelter Enterprises, Ltd., that were purchased by SMI Industries Canada, Ltd., included all of its machinery and equipment, work in process and finished goods, parts and components inventory, drawings, designs, trademarks and patents.

In September 1983, SMI Industries Canada, Ltd., formed SMI Industries USA, Inc. That company assumed operations on Bradley Street Road, Watertown, New York, in October 1983 and was incorporated under the laws of the state of New York in 1984.

The solicitation set forth conditions under which the first article testing requirement could be waived, as follows:

> L.45. *Conditions For Waiver of First Article Requirements*
> a. * * *
> b. First Article test requirements may be waived by the Contracting Officer under the following conditions:
> (1) If the contract is awarded to a contractor currently in production, under a Government contract or a subcontract to a Government prime contractor, of end articles identical or similar to those specified in this solicitation.
> (2) If the contract is award to a contractor not presently in production of the item who has previously satisfactorily furnished, under a Government contract or a subcontract to a Government prime contractor, end articles identical or similar to those specified in this solicitation. * * *

The solicitation also required that the offeror list the contract numbers, if any, under which identical or similar supplies were previously accepted from the offeror by the government and stated that if first article test requirements were waived, the contractor

had to furnish end items identical to those furnished under its most recent previous government prime contract or subcontract.

SMI's request for waiver of first article testing was made on the basis that the runway sweepers SMI offered complied with solicitation specifications, and that its product had passed all first article testing requirements since it was the same equipment that was previously manufactured by Caelter under the brand name "SMI 300." SMI also indicated that the Air Force then had in excess of 150 of the SMI units it was offering. In response to the Air Force's request for the contract numbers under which the sweepers had previously been supplied to the government, SMI listed the three most recent contracts between Caelter and the government for the SMI runway sweepers. SMI also explained to the Air Force contracting officer that its company was the successor company to Caelter Enterprises, Ltd./Sicard, which formerly controlled all the engineering, design, production, and quality assurance for the SMI series 300 runway sweepers that SMI then owned and, by court order, had exclusive right to use the SMI product name and trademark. The first article test requirement was waived with respects to SMI based in large part on the information provided.

Waiver of First Article Testing

The first issue is whether SMI qualified for waiver of first article testing following SMI Industries Canada, Ltd.'s purchase of the assets of Caelter Enterprises, Ltd., based on its apparent assumption of that company's operations.

Caelter contends that SMI did not qualify for waiver of first article testing because it had not previously manufactured or produced the SMI runway sweeper or provided the sweeper under a government contract as it claimed in its representations to the contracting officer. Although the protester admits that this equipment was manufactured by its now defunct former parent, Caelter Enterprises, Ltd., it is of the view that production of the equipment by its former parent is unrelated to SMI's ability to offer the product.

As a general rule, the determination as to whether an offeror qualifies for waiver of first article testing is within the discretion of the contracting agency, and we will not overturn the agency's decision unless it was arbitrary or capricious. *Julian A. McDermott Corp.*, B-189798, Dec. 9, 1977, 77-2 C.P.D. ¶ 449. Further, we have held that the contract history of a predecessor company may qualify a successor company for waiver of first article testing based on the similarities of the companies' manufactured products, facilities, management, staff, production and quality control processes. See *Keco Industries, Inc.*, B-207114, Aug. 23, 1982, 82-2 C.P.D. ¶165; *Kan-Du Tool & Instrument Corp.*, B-183730, Feb. 23, 1976, 76-1 C.P.D. ¶ 121.

SMI states that its Canadian manufacturing plant has the same equipment, engineering designs and personnel as the former Caelter Enterprises, Ltd. According to the record, SMI manufactures the same SMI runway sweepers at its Canadian facility that were formerly manufactured and produced by Caelter. The former executive vice president and plant manager of Caelter Industries, Inc., is now president of SMI Industries USA. Although Caelter argues that SMI did not acquire or take over the actual operations of its former Canadian manufacturing company, and that SMI has no relationship to that defunct corporation, Caelter has not suggested that there is any substantive difference between the runway sweeper formerly manufactured by Caelter Enterprises, Ltd., and that offered by SMI; nor has Caelter shown any substantive change in the management, personnel or plant location of the two companies. Under these circumstances, we cannot find that waiver of first article testing for SMI, based on the experience and previous contract history of Caelter Enterprises, Inc., was arbitrary or capricious. *Keco Industries, Inc.*, B-207114, *supra; Julian A. McDermott Corp.*, B-189798, *supra; Kan-Du Tool & Instrument Corp.*, B-183730, *supra.* The protest on this issue is denied.

Acceptability of SMI's Proposal

Caelter further contends that SMI's proposal was not acceptable in that it did not meet the solicitation requirements for providing an established end product and spare parts. The solicitation states that the end product offered must have been previously produced and sold commercially or sold to the government. In the alternative, it must be substantially the same as such product, and it must have been routinely supported by spare/repair parts produced or sold in the normal course of business. It appears that Caelter's contention on this point is founded upon its view, discussed above, that SMI has no corporate relationship with the former Caelter Enterprises, Ltd., or any right to benefit from its production history.

The contracting agency, however, determined that the runway sweeper and spare/repair parts support offered by SMI were substantially the same as that previously sold to, and then in use by, the government. In corporate transfer cases such as this, we see nothing improper in the agency looking to the actual circumstances to determine whether there have been any changes in those factors that impact upon the product itself. When there have been no substantial changes in the product, manufacturing processes or staff of a previously qualified predecessor company, we see no reason to require rejection to the offer under a qualifying provision such as the one used here. The protest on this point, therefore, is denied.

Preaward Survey

Caelter also contends that the Air Force failed to conduct an adequate preaward survey to determine whether SMI was a responsible offeror.

The record indicates that on the basis of a preaward survey, Air Force procuring officials determined that SMI was capable of performing the contract as required. A contracting agency's decision concerning an offeror's responsibility involves a high degree of discretion on the part of the procuring officials and is essentially a matter of business judgment. Therefore, we will not review a protest against the agency's affirmative determination of responsibility in the absence of a showing of possible fraud on the part of the procuring officials or an allegation of failure to apply definitive responsibility criteria. *Elliott Co., et al.*, B-212897; B-212897.2, Jan. 30, 1984, 84-1 C.P.D. ¶ 130. Caelter's disagreement with the Air Force's decision on SMI's responsibility does not involve either situation and, therefore, we will not review the agency's decision.

The protest is denied in part and dismissed in part.

[B-217216]

Bids—Invitation for Bids—Specifications—Adequacy—Scope of Work—Sufficiency of Detail

Where performance-type specifications adequately inform bidders of government's requirements for sound level audibility of fire alarm system in all building areas, fact that contractor is responsible for providing speakers in the quantities and locations necessary to satisfy the specified performance requirements does not make specifications insufficient to permit bidding on an intelligent and equal basis.

Matter of: SAFECOR Security and Fire Equipment Corporation, May 10, 1985:

SAFECOR Security and Fire Equipment Corporation (SAFECOR) protests the specifications for an alarm communication system under invitation for bids (IFB) No. GS-03-84-B-0413 issued by the General Services Administration (GSA). SAFECOR contends that the specifications and drawings are "ambiguous" because part of the design is left to the determination of the contractor and, as such, the solicitation does not comply with regulations governing formally advertised procurements. SAFECOR contends that the IFB should be canceled and the procurement conducted through two-step formal advertising or negotiation.

We deny the protest.

GSA issued the IFB on September 20, 1984, for the installation of a fire alarm, voice communication and emergency telephone system at the United States Customs House in Philadelphia, Pennsylvania. Prompted by inquiries from prospective bidders concerning technical requirements, GSA issued IFB amendment No. 1, which extended the bid opening date to November 21, 1984, in

order to permit review and clarification of the specifications. Amendment No. 2, dated November 9, modified the specifications and extended the bid opening date to November 27, 1984. On the day before bid opening, SAFECOR telephoned GSA, alleged that the specifications were defective, urged that the IFB be canceled and stated that otherwise it would protest to our Office. After consideration of the points raised by SAFECOR's oral protest, GSA advised SAFECOR by telephone that the IFB would not be canceled. Ten bids were opened on November 27, 1984; the low bid was submitted by S.O.S. Defender, Inc., in the total amount of $276,428. SAFECOR, the ninth low bidder at $490,000, filed a protest with our Office after bid opening on November 27, 1984. Subsequently, award was made to S.O.S. Defender, Inc., on March 7, 1985.

According to the protester, the specifications and drawings are "ambiguous" because they fail to specify the quantity and location of speakers required for the voice communication system, whether speakers would be required in the stair towers or elevators, and whether the system would be tested with office doors opened or closed. SAFECOR further contends that these defects are the result of the government's failure to "properly engineer the job to show all devices required on the drawings and not leave the design up to the various contractors." SAFECOR thereby contends that the government's needs should have been stated in terms of specific design requirements rather than performance requirements; otherwise, the government should have conducted this procurement under this procedures for competitive negotiation or two-step formal advertising.

GSA generally contends that the contract specifications and drawings clearly delineate specific requirements concerning the capacity, quality and quantity of all components of the fire alarm system, except for the quantity of speakers. The specification covering Voice Communication System Equipment provides as follows in paragraph 2.3.2.1, section 16723, of the IFB:

> 2.3.2.1 Speakers shall be UL listed audible signal appliances for fire alarm use. The sound pressure levels at signals generated in alarm operation shall be at least 85 dBA measured 5 feet above the floor in any area except that level shall be at least 15dB above the ambient noise-in mechanical rooms. Uniformity of sound over any occupied area shall be +9dB.

GSA states that under this performance requirement, the quantity of speakers required would change based upon the capacity of the speaker that the individual bidder chose to provide just as the location of these speakers would also be determined by the choice of that particular brand of speaker the bidder intended to provide. According to GSA, the specifications were designed to be performance oriented, allowing prospective contractors maximum flexibility to utilize their expertise, with the government receiving the benefit.

GSA further reports that its region 3 procuring office had recent experience with a similar fire alarm system procurement using a design-type speaker specification. In that procurement, performance deviations were encountered in the testing phase which required promulgation of change orders on speakers and speaker placements resulting in both delay and additional expense to the government. In addition, GSA states, through the widespread commercial use of similar fire alarm systems, experienced fire alarm contractors have demonstrated their ability to provide satisfactory results utilizing their own designs. Therefore, GSA framed its specifications in the belief that government-mandated design requirements in this area are unnecessary and would not foster the government's policy of obtaining full and free competition.

With regard to SAFECOR's contention that the specifications fail to state whether speakers would be required in the stair towers or elevators, GSA points out that paragraph 3.2, section 16723, of the IFB provides as minimum requirements that the system shall be tested to show that alarm signals are audible in all building areas. In addition, the new fire alarm riser diagram on drawing 9E17 also reflects the requirement that the voice communication system speakers shall provide total building coverage. The stair towers and elevators were not excepted from these performance requirements. Accordingly, the actual location of the speakers required to provide coverage in the stair towers and elevators is the contractor's design responsibility.

Finally, SAFECOR complains that specifications failed to state whether the system would be tested with the office doors opened or closed. GSA responds that the primary purpose of the fire alarm system is to provide audible alarm signals in all building areas for the safety of all building occupants and, if office doors, or any other doors, remained open during system tests, there would be no assurance that building occupants would hear alarm signals in the event of an actual emergency. In GSA's view, this would present an unacceptable threat to life, health and safety. Accordingly, since occupants may have their office doors closed and since the specifications stipulate that the system shall be tested to show that alarm signals are audible in all building areas, GSA concludes that it would be unreasonable for a bidder to assume system testing with office doors open.

As the protester acknowledges, its "major problem" with this solicitation is that the specifications for the voice communication system speakers are of the performance type, which means that the choice of speakers and the selection of their location are within the judgement of the bidder, providing that the performance requirements are met. SAFECOR contends that this approach is impermissible in a formally advertised procurement and mandates some other method of procurement in which firms compete on the

basis of technical proposals which describe, in detail, the system each proposes to furnish.

With regard to the use of formal advertising as the method of contracting, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.103-1 (1984), provides that contracts shall be awarded in accordance with formal advertising procedures whenever feasible and practicable, and this rule shall be followed even where specified conditions would permit negotiating a contract. The specifications used in a formally advertised procurement must provide a description of the technical requirements for the product or service that includes the criteria for determining whether these requirements are met. At the same time, however, the specifications shall state only the government's actual minimum needs in a manner to encourage maximum practicable competition, FAR, 48 C.F.R. § 10.001 (1984), and unnecessarily restrictive specifications or requirements that might unduly limit the number of bidders must be avoided. FAR, 48 C.F.R. § 14.101.

We view these regulations as requiring that specifications used in a formally advertised IFB must be unambiguous and inform bidders of the minimum requirements of contract performance so that they may bid intelligently and based on equal information. *Operational Support Services,* B-215853, *supra,* citing *Crimson Enterprises, Inc.,* B-209918.2, June 27, 1983, 83-2 C.P.D. ¶ 24. We have also recognized that to ensure specifications are stated in terms that will permit the broadest field of competition within the minimum needs of the agency, such specifications may be performance oriented, requiring offerors to use their own inventiveness and ingenuity in devising approaches that will meet the government's performance requirements. *GTE Automatic Electric, Inc.,* B-209393, Sept. 19, 1983, 83-2 C.P.D. ¶ 340; *Auto-Trol Corporation,* B-192025, Sept. 5, 1978, 78-2 C.P.D. ¶ 171. Indeed, we have found that the requirements of a design specification may inappropriately restrict competition for a solicitation where an agency is capable of stating its minimum needs in terms of performance specifications which alternative designs could meet. See *Viereck Company,* B-209215, Mar. 22, 1983, 83-1 C.P.D. ¶ 287.

Here, prospective bidders were on notice of what would be expected of them in meeting contract performance requirements and, since paragraph 1.7, section 16723, of the IFB indicates that the electrical contractor performing the installation must be experienced in such systems and have manufacturer representation for the installation, presumably each bidder is knowledgeable enough to recognize the effort and risks associated with that expectation. See *Talley Support Services, Inc.,* B-209232, June 27, 1983, 83-2 C.P.D. ¶ 22 at 4. And, in this case, where the specification in question refers to usage by an established trade, such as the fire alarm system here, we find that the specification provides an adequate frame of reference on which bidders may prepare their bids. *Crim-*

son Enterprises Inc., B-209918.2, *supra*, citing *Industrial Maintenance Services, Inc.*, B-207949, Sept. 29, 1982, 82-2 C.P.D. ¶ 296.

Although the IFB specifications were not in the detail or format suggested by the protester, they did not conceal the performance requirements in the protested areas. *Operational Support Services*, B-215853, *supra*, citing *Palmer and Sicard, Inc.*, B-192994, June 22, 1979, 79-1 C.P.D. ¶ 449. A bidder preparing a bid could have reasonably interpreted the IFB requirements when read as a whole in only one way. That is, the specifications and drawings require that voice communication system speakers shall be installed throughout the entire building in order to achieve the prescribed sound pressure levels in all areas, except the enclosed parking areas and garages, where bells are required instead of speakers. The system shall be tested to show that alarm signals are audible in all building areas, and that voice messages are intelligible in all areas of coverage. Therefore, the contractor is responsible for providing speakers in the quantities and locations necessary to satisfy the specified performance requirements.

While SAFECOR contends that these provisions are ambiguous, it is clear from the protest that SAFECOR understands the requirements and is actually complaining about the reasonablemenss of the specifications. See *Kleen-Rite Corporation*, B-212743, Jan. 16, 1984, 84-1 C.P.D. ¶ 73. We believe that the IFB documents provided adequate explanation of the solicitation's minimum requirements and are adequate to permit competitive bidding. The IFB provisions complained of affect all potential bidders equally and the fact that bidders may respond differently in formulating their approaches and calculating their prices is a matter of business judgment and does not preclude a fair competition. See *Saxon Corporation*, B-214977, *supra*. In this regard, we also noted that of the 10 bidders submitting bids, only SAFECOR complained concerning the reasonableness of the solicitation. This fact leads us to believe that the level of alleged uncertainty and attendant risk in bid preparation was altogether acceptable. Compare *Industrial Maintenance Services, Inc.*, B-207949, *supra*, and *KenCom, Inc.*, B-200871, Oct. 5, 1981, 81-2 C.P.D. ¶ 275.

The protest is denied.

[B-218090.2]

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

Fact that the contracting agency sent its protest report directly to the protester instead of to the firm's counsel does not affect the propriety of General Accounting Office (GAO's) dismissal of the protest for failure to comment on the report within 7 working days after the date anticipated for receipt. Counsel was advised when the protest was filed that receipt would be presumed to be on the anticipated date, yet failed to advise us of any problem in that respect within the 7-day comment period, as required by GAO's Bid Protest Regulations.

Matter of: AFL-CIO Appalachian Council Inc.—Reconsideration, May 10, 1985:

AFL-CIO Appalachian Council Inc. requests reconsideration of our March 19, 1985, dismissal of its protest under the Department of Labor's request for proposals No. JC-1-84-01. The protester objected to the technical evaluation and ultimate rejection of its offer to provide recruitment services for the Department's Job Corps program. We dismissed the protest because we did not receive the protester's comments responding to the contracting agency's report on the protest within 7 working days after we received the report, as required by our Bid Protest Regulations, 4 C.F.R. § 21.3(e) (1985). The Regulations provide that the protester's failure within the 7-day period to file comments, or to file a statement requesting that the protest be decided on the existing record, or to request an extension of the period for submitting comments, will result in the dismissal of the protest.

We affirm the dismissal.

The 7-day comment period ended March 19, 1985. The protester, through counsel, explains that while a copy of its protest was filed with the contracting agency and specifically stated that notices regarding the protest should be addressed to counsel, the contracting agency sent a copy of its report directly to the protester. Counsel states that the person having knowledge of the protest at the AFL-CIO Appalachian Council did not discover the report until March 21 when he returned from a business trip, and furnished the report to counsel the following day. March 22 also was the day the counsel received our dismissal notice, which was dated the eighth working day after we received the agency report. Based on these circumstances, the protester argues that the 7-day period for filing comments should have begun on the date counsel actually received a copy of the report. We disagree.

When the protest was filed with this Office, we promptly sent counsel a standard acknowledgement notice (dated January 30) advising it that the contracting agency's report was due on March 7, and that it should receive a copy of the report at about that time. The letter further stated that counsel should promptly notify our Office if it did not receive the report, and that:

> Unless we hear from you we will assume that you received your copy of the report when we received ours. . . . If we have not heard from you by the seventh working day [after our receipt of the report], we will close our file without action.

Counsel thus knew that our Office would presume that the 7-day period commenced on the date after the report was due unless we were notified by counsel within the period that it had not received the report on that date; we received no such notice, however.

The effect of the presumption regarding receipt of the report is to place the slight burden on the protester or its counsel to advise us if it did not receive an agency report when due, since we other-

wise have no way of knowing whether or not it received the report. Our Office generally is required to issue a final decision within 90 working days after the protest is filed, while the contracting agency is afforded 25 working days after notification of the protest to prepare its report. 31 U.S.C. §§ 3553 and 3554, as added by the Competition in Contracting Act, Pub. L. No. 98-369, 2741, 98 Stat. 1175, 1199 (1984). If there were no requirement that a protester notify us of its failure to receive a report, then the protester could idly await the report for an indefinite time to the detriment of the protest system generally, as well as to our ability to resolve bid protests expeditiously.

The protester argues that it is unfair to place the burden on the protester to advise us of its failure to receive a report within 7 working days after the report's due date without first publishing formal notice of the requirement in the Federal Register. We point out, however, that the protester had actual notice of the requirement since there is no question, but that the protester's counsel received our acknowledgment letter, dated more than 6 weeks before the protester's comments were due.

Accordingly, our dismissal of the protest, because we received no notice from the protester's counsel that it had failed to receive its copy of the agency report within seven working days after the report was due, is affirmed.

[B-217280]

Transportation—Household Effects—Drayage—Between Non-Government Quarters Overseas

An Internal Revenue Service employee moved from leased premises at one location to another residence in the vicinity of his Canadian post of duty when his landlord refused to renew or extend his 1-year lease. The employee's claim for reimbursement of drayage expenses cannot be allowed as an administrative expense of the agency involved since his move was not the result of any official action. 52 Comp. Gen. 293 (1972).

Matter of: Richard L. Leonard, May 13, 1985:

We have have been asked to determine whether a Government employee may be reimbursed the costs of local drayage of household goods between leased premises at a post of duty outside the United States.[1] Since the employee's move between local quarters was not the result of official action, there is no legal basis for reimbursement.

Mr. Richard L. Leonard, an employee of the Internal Revenue Service, filed a claim with his agency for $490.98, the amount he paid to have his household effects moved to a different residence in the vicinity of his post of duty.

[1] The request for an advance decision, made by Thomas N. Lyall, Authorized Certifying Officer of the Internal Revenue Service, Department of the Treasury (reference RM:F:A:V), includes the employee's travel voucher and related correspondence.

In May 1982, the Internal Revenue Service transferred Mr. Leonard to Vancouver, British Columbia, Canada. Incident to that transfer the Government paid for the transportation of his household effects. Delivery was made to the West Vancouver residence he occupied under a 1-year lease. In May of the following year he was notified that title to the property would be conveyed to another party and that the lease would be terminated. He located another residence in the Vancouver area and on June 30, 1983, his household goods were moved to his new residence by a commercial mover at a cost of $490.98.

Mr. Leonard contends that he is entitled to reimbursement for the $490.98 drayage charge based on language contained in regulations issued by the Department of State. He refers to a specific provision in title 6 of the Foreign Affairs Manual, which he contends provides circumstances under which relief may be granted to employees covered by the manual who, despite reasonable precautions, exceed allowances authorized by the manual. These circumstances include expenses in the nature of those incurred by Mr. Leonard in connection with his local move between rental quarters. Foreign Affairs Manual, title 6, § 121.1-4 (August 10, 1982). He explains that the termination of his lease was a matter beyond his control. He states that when he was transferred to Vancouver he signed a 1-year lease for the West Vancouver residence only after two real estate agents informed him that market conditions and local law made it unlikely that he would be able to rent any residence under a lease for a period in excess of 1 year.

The Foreign Affairs Manual is not applicable to employees of the Internal Revenue Service. Mr. Leonard states, however, that in the absence of an agency regulation covering local moves, the Department of State rule applies to his case as a matter of Department of the Treasury policy. This statement was refuted by the Director, Finance Division, of the Internal Revenue Service in a letter dated April 16, 1985. He explains that the Department of the Treasury applies the Federal Travel Regulations to travel and transportation matters and he correctly points out that the expenses claimed by Mr. Leonard may not be paid under the Federal Travel Regulations. These regulations, issued pursuant to 5 U.S.C. Chapter 57, do not permit payment of costs associated with local moves. See generally, 52 Comp. Gen. 293, 296 (1972).

Despite the absence of specific statutory authority we have recognized that expenses associated with local moves may be paid as administrative expenses where the relocation was the result of governmental action. For example, we authorized reimbursement of costs incurred by an Air Force member who was officially ordered to relocate his mobile home from an off-base trailer park to another location for sanitary and safety reasons. See 52 Comp. Gen. 69 (1972). The same rationale is evident in the following excerpt from 52 Comp. Gen. 293, 297:

As in the case of military members, civilian employees who are obliged to obtain other non-Government quarters because their landlords refuse to renew leases or otherwise permit them to remain in their local economy housing, but who do not move their household goods as the direct result of or in connection with an official order or action, are not entitled to Government drayage as such change of quarters is not for the convenience of the Government * * *.

Our decisions would not provide a basis for reimbursement to Mr. Leonard inasmuch as his move was not the result of governmental action. The termination of his lease, though due to no fault of his own, is a matter of a personal nature and the costs associated with his local move to a new residence may not be paid as an administrative expense of the agency involved.

Accordingly, Mr. Leonard's claim may not be allowed.

[B-218167]

Bids—Unbalanced—Propriety of Unbalance—"Mathematically Unbalanced Bids"—Materiality of Unbalance

The apparent low bid on a contract for a 1-year base period and two 1-year options is materially unbalanced where there is reasonable doubt that acceptance of the bid will result in the lowest ultimate cost to the government. Such doubt may exist where the bid has a substantially front-loaded base period and does not become low until well into the last option year.

Matter of: International Shelter Systems, Inc., May 15, 1985:

International Shelter Systems, Inc. (ISS) protects the Navy's award of contract to Coastal American Corporation (Coastal) under Invitation for Bids (IFB) No. N00421-85-B-0083. The Patuxent River Naval Air Station issued this solicitation in order to lease a mobile office facility for engineers working at its Naval Air Test Center. The lease was to cover a base period of 1 year, and to include two additional 1-year options. ISS challenges the Navy's rejection of its bid as materially unbalanced and thus nonresponsive. We deny the protest.

The solicitation required bidders to submit prices for the base year and option periods, and for installation/removal costs. ISS and Coastal submitted the following bids:

	Coastal	ISS
Install/remove	$9,286	$11,770
Base year	36,000	75,600
Option year 1	36,000	720
Option year 2	36,000	720
Total	117,286	88,810

ISS argues that its own bid was low, based on the total amounts submittted by each bidder, and that it is therefore entitled to

award. In support of this argument, the protester refers to Section M of the IFB, entitled "Evaluation Factors for Award," which provides that the government will evaluate offers by adding the total price for all options to the total price for the basic requirement.

In response, the Navy points out that IFB Section M further provided that the government may reject an offer as nonresponsive if it is materially unbalanced as to prices for the basic requirement and the option quantities. A materially unbalanced offer was defined as one based on prices significantly less than cost for some work and significantly overstated for other work. The Navy argues that ISS's bid was heavily front-loaded and therefore mathematically unbalanced. Furthermore, the Navy argues that prices listed for each of the lease years do not accurately represent the true costs for those periods.

There are two aspects to unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect, that of material unbalancing, involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the government—a bid found to be materially unbalanced may not be accepted. *Solon Automated Services, Inc.,* B-206449.2, Dec. 20, 1982, 82-2 CPD ¶ 548.

ISS contends that its bid is not mathematically unbalanced because it accurately reflects the true costs of providing the modular building. The protester insists that all of the major costs for constructing the custom-design, single-use building would be incurred in the first year of the lease, and that it is therefore appropriate for the bidder to seek to recover those costs during the base-year period. ISS reasons that although its base-year bid is significantly higher than its bid for the two option-years, the base-year price nonetheless only carries its proportional share of cost and profit. Therefore, ISS contends, it would receive no unjust enrichment if the options were not exercised, but would only receive an appropriate return on its initial investment.

According to ISS, the only costs that the bidder would incur during the option years would be the cost of insurance and limited maintenance expenses, and thus the price to the government should be much lower during these periods. Moreover, ISS emphasizes that buildings of this sort have little or no salvage value once the original tenant is finished using them so that, apparently, the useful life of the asset should be deemed to be the base period of the contract.

However, both the Navy and Coastal contend that the modular building is not unique; rather it is a five-unit structure composed of

individual sections that can be combined in different ways to suit the specific needs of each tenant. The Navy reasons that the structure can therefore be resold or rented at any time. In support of this argument, the Navy notes that ISS's bid was the only unbalanced bid among the four bids the Navy received. Additionally, Coastal has submitted an affidavit from its sales manager stating that the office facility in question is a standard type that can be easily modified for different uses, and which Coastal has been able to sell and lease in the past.

Our Office generally has been willing to consider a bidder's business reasons for front-loading its bid only where a majority of the submitted bids had similarly front-loaded pricing structures. *Crown Laundry & Dry Cleaners, Inc.*, B-208795.2, B-209311, Apr. 22, 1983, 83-1 CPD ¶ 438. Here, we note that the other bidders are able to distribute their costs over the natural life of the asset and to charge a proportionate amount for each year of the lease. Moreover, although business reasons for front-loading bids may well exist in a particular circumstance, we cannot ignore the fact that a bid with this pricing structure enables the bidder to receive during the base contract period government funds more properly allocable to option periods, and permits a windfall to the bidder if all options for some reason are not exercised. The proper test for determining whether a bid is mathematically unbalanced focuses on the pricing structure of all bids and the scope and nature of the services to be rendered, rather than focusing on the business reasons of each bidder. *Id.* In this regard, we observe that the business reason ISS offers for its bid, *i.e.*, the recoupment of all building costs in the first year even though it will own and use the equipment in subsequent years, assumes that it is proper to obtain in the base year government funds that are more properly allocable to the option years.

Since ISS's bid for the base period is more than 100 times its price for each of the two option years, even though the goods and services to be provided are the same during each of these periods, we find that the bid is mathematically unbalanced. Furthermore, since ISS submitted the only front-loaded bid, we will not consider whether its internal business reasons justify this pricing method.

However, it is still necessary to determine whether the bid is materially unbalanced. A bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the government. *Solon Automated Services, Inc., supra.* The determination of whether reasonable doubt exists is a factual one which varies depending upon the particular circumstances of each procurement. *Id.*

ISS argues that its bid will result in the lowest cost to the government because the Navy reasonably expects that the requirement will exist and that funds will be available during the two

option periods. The protester stresses that the Navy expressed a strong expectation that the options would be exercised, and that similar options had uniformly been exercised in the past. ISS reasons that since there is no reasonable doubt that the options will be exercised, there is a reasonable doubt that its own bid will provide the lowest cost to the government over the 3-year period.

Prior to our decision in *Lear Siegler, Inc.,* B-205594.2, June 29, 1982, 82-1 CPD ¶ 632, the material unbalancing analysis was limited to determining whether the government reasonably expected to exercise the options. If the exercise was reasonably anticipated, we concluded that the bid was not materially unbalanced. E.g., *Jimmy's Appliance,* 61 Comp. Gen. 444 (1982), 82-1 CPD ¶ 542. We modified this test, however, in the *Lear Siegler* case. We held that even though the Army expected to exercise the options, since the bid in question was extremely unbalanced and would not become low until the 39th month of a possible 42-month contract, there was a reasonable doubt whether the unbalanced bid would ultimately provide the lowest cost to the government. We recognized that despite the intent to exercise the options, intervening events could cause the contract not to run its full term, resulting in an inordinately high cost to the government and a windfall to the bidder. Here, the front-loaded bid would require the government to pay 86 percent of the total 3-year price in the first year. ISS's bid would not become low until both of the options had been exercised.

Although the Navy generally does expect to exercise the options under this contract, it has expressed some uncertainty in this regard. The agency notes, for example, that the mobile offices would be used by overflow personnel working on a broad range of projects, and that fluctuations in the need for personnel and workspace are more difficult to estimate in this situation than where the specific needs of a single client are involved. Under the circumstances, we are persuaded that there is a reasonable doubt that ISS's bid would actually result in the lowest cost to the government. Therefore, we find that ISS's bid is materially unbalanced and was properly rejected as nonresponsive.

Finally, ISS argues that it has successfully submitted front-loaded bids in the past, and that none of those bids were determined to be materially unbalanced. However, the government's acceptance of an ISS bid in the past is irrelevant to the evaluation of the present bid. Each contract award is a separate transaction, and an agency is not required to accept an offer simply because a previous offer with similar terms was considered acceptable under a different set of circumstances. See *M.S. Ginn Co.,* B-215579, Dec. 26, 1984, 84-2 CPD ¶ 701. As discussed above, the determination of whether a bid is materially unbalanced may vary according to the particular circumstances of each procurement.

The protest is denied.

[B-218304, B-218305]

Contracts—Protests—Interested Party Requirement—Prospective Subcontractors

To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be 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. A potential subcontractor on a direct federal procurement cannot be considered an actual or prospective bidder or offeror.

Matter of: PolyCon Corporation, May 17, 1985:

PolyCon Corporation (PolyCon) protests the specifications included in invitations for bids (IFB) DAKF11-85-B-0035 and DAKF11-85-B-0040, both issued by the Department of the Army at Fort McPherson, Georgia. Respectively, the solicitations are for the replacement of the condensate line from building 210 to building 208 and for the replacement of the steam distribution system that runs from building 160 to various other buildings, all at Fort McPherson. The protests are dismissed.

Concerning both solicitations, PolyCon, a supplier of underground heat distribution systems and a potential subcontractor, protests that certain of the specifications are at variance with PolyCon's federal-agency-approved brochure, but that there are no apparent circumstances that would justify the extra expense required by the deviation. PolyCon also contends that other requirements of IFB DAKF11-85-B-0040 exclude its system from consideration.

Prior to the enactment of the Competition in Contracting Act of 1984 (CICA), Pub. L. 98-369, our Bid Protest Procedures required, as a prerequisite to our consideration of a protest, that the protesting party have a sufficiently legitimate interest in the procurement. 4 C.F.R. § 21.1(a) (1984). In determining whether a protester satisfied the interested party requirements, we considered the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. *Edison Chemical Systems, Inc.*, B-212048, Mar. 27, 1984, 84-1 C.P.D. ¶ 353. Generally, a potential subcontractor was not considered to be an interested party essentially because it did not stand in a position to assert a right concerning which it had the greatest interest and, therefore, was not likely to be the most zealous protector. See *Elec-Trol, Inc.*, 56 Comp. Gen. 730 (1977), 77-1 C.P.D. ¶ 441.

In certain limited circumstances, however, we have found that a potential subcontractor met the interested party requirement where no other immediate party had a greater interest in the issue raised or where there was a possibility that the subcontractor's interest would not be adequately protected if our bid protest forum were restricted solely to potential awardees. See *Radix II Incorporated*, B-208557.3, Nov. 29, 1982, 82-2 C.P.D. ¶ 484; see also *Die Mesh Corporation*, 58 Comp. Gen. 111 (1978), 78-2 C.P.D. ¶ 374.

However, under section 2741(a) of the CICA (to be codified at 31 U.S.C. § 3551, *et seq.*), an interested party is defined as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." This statutory definition of an "interested party" is reflected in the language of our Bid Protest Regulations which implement the CICA. 4 C.F.R. § 21.0(a) (1985). Accordingly, with respect to all bid protests filed on or after January 15, 1985, the effective date of subtitle "D" of the CICA, only protests involving a direct federal procurement filed by a party that comes within the statutory definition of an interested party can be considered. Thus, our Office will no longer consider subcontractor protests except where the subcontract is by or for the government. 4 C.F.R. § 21.3(f)(10) (1985).

As a potential subcontractor-supplier, the protester in this case is not an actual or prospective bidder or offeror on the protested solicitations, and the solicitations do not involve subcontracts by or for the government. Therefore, under the CICA and our implementing Bid Protest Regulations, PolyCon is not an interested party and its protests will not be considered.

The protests are dismissed.

[B-217202]

Contracts—Negotiation—Offers or Proposals—Discussion With All Offerors Requirements—Varying Degrees of Discussions—Propriety

Where a solicitation provides that award will be made to the technically acceptable offeror offering the lowest price and the protester's proposal is technically acceptable, the procuring agency properly may conduct detailed technical discussions with a technically deficient offeror while only affording the protester an opportunity to furnish a best and final offer; an agency need conduct detailed discussions only with offerors whose proposals contain technical uncertainties.

Contracts—Negotiation—Offers or Proposals—Discussion With All Offerors Requirement—What Constitutes Discussion

A statement from the procuring agency to the low offeror following submission of best and final offers does not constitute improper discussions where award is to be made to the low technically acceptable offeror; the offeror already had been found technically acceptable; and the statement thus was not part of an effort to determine the acceptability of the offeror's proposal.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Solicitation Improprieties—Apparent Prior to Bid Opening/Closing Date for Proposals

Allegations that (1) the agency should have canceled the solicitation after relaxing technical requirements; (2) the amended solicitation contained an ambiguous specification; and (3) the 30 days allowed to prepare best and final offers was insufficient are untimely and not for consideration since the facts on which the allegations are based should have been apparent prior to the final closing date, but they were not raised until after that date.

Matter of: Weinschel Engineering Co., Inc., May 21, 1985:

Weinschel Engineering Co., Inc. (Weinschel), protests the award of a contract to Hewlett Packard Company (Hewlett) under request for proposals (RFP) N00123-84-R-0070 issued by the Department of the Navy. The RFP contemplated the award of a fixed-price contract for 14 microwave signal generator calibrators. Weinschel contends that, due to several procurement deficiencies, the award to Hewlett was improper. We deny the protest in part and dismiss it in part.

Weinschel and Hewlett were the only companies that submitted proposals in response to the December 15, 1983, RFP. Following a technical evaluation, the Navy found Weinschel's proposal to be technically acceptable and Hewlett's to be technically unacceptable. Hewlett challenged this determination in a May 7, 1984, letter, explaining how it intended to meet the Navy's requirement. After reviewing this letter, the Navy determined that the company's proposal, while still technically unacceptable, was susceptible of being made acceptable. The Navy meanwhile determined that certain of the RFP's technical specifications should be revised to reflect more accurately calibration requirements for the signal generators identified in the solicitation, and that the award criteria should be modified to provide that award would be made to the responsible, technically acceptable offeror proposing the lowest price. In a letter dated July 19, the Navy informed Weinschel of the intended specification and award criteria changes and stated that all competitive offerors would be allowed to submit best and final offers. The Navy informed Hewlett at the same time that its proposal was found capable of being made technically acceptable.

By letter of September 19, the Navy requested that best and final offers be submitted by October 19. Both companies submitted timely responses—Weinschel choosing, however, to let its original proposal stand without revision. The Navy evaluated Hewlett's best and final as technically acceptable and, because Hewlett's revised price was lower than Weinschel's, prepared to make award to Hewlett. Although Weinschel protested prior to award, the Navy made a determination to proceed with the award on April 26, 1985.

Weinschel charges that the Navy violated the statutory mandate of 10 U.S.C. § 2304(g) (1982) to hold discussions with all offerors in the competitive range by failing to hold discussions with Weinschel at any time prior to making the decision to award to Hewlett. At the same time, Weinschel contends, the Navy conducted detailed technical discussions with Hewlett after initially finding its proposal technically unacceptable. Weinschel considers this unequal, improper treatment.

We have held that a mere request for best and final offers will satisfy the discussions requirement where a proposal contains no technical uncertainties. *Information Management, Inc.,* B-212358,

Jan. 17, 1984, 84-1 C.P.D. ¶ 76. Here, since Weinschel's proposal was found technically acceptable under both the original and revised specifications, there were no technical deficiencies or uncertainties that required discussion. As Weinschel's offered price apparently was not deemed unreasonable, the Navy simply had nothing to discuss with Weinschel. Under these circumstances, the Navy's request for Weinschel's best and final offer was sufficient to satisfy the requirement for discussions with that firm.

Our conclusion is not altered by the fact that the Navy's communications with Hewlett regarding the acceptability of its proposal may have constituted detailed discussions. Applying the same rule as above, since Hewlett's proposal was viewed as technically deficient, the Navy could not merely request Hewlett's best and final offer without first informing Hewlett of the deficiencies. An agency is not required to hold the same detailed discussions with all offerors, since the degree of proposal weaknesses or deficiencies, if any, obviously will vary. See *Bank Street College of Education,* B-213209, June 8, 1984, 63 Comp. Gen. 393, 84-1 C.P.D. ¶ 607. It thus was not improper or unfair for the Navy to conduct technical discussions with Hewlett.

Weinschel also asserts that the Navy told the company that it was the only offeror in the competitive range and that further negotiations would be held with it following the Navy's receipt of its best and final offer. Weinschel claims that, relying on this information, it did not submit its lowest price in its best and final offer and argues that, since it was misled, it should now be afforded a second opportunity to modify its price.

The Navy denies it told Weinschel that further negotiations would be conducted following the submission of best and final offers and states that it informed Weinschel from the very beginning that the procurement was competitive. The record shows, furthermore, that the Navy informed Weinschel in its July 19 letter that while at one point the company was the only offeror in the competitive range, Weinschel and "other offerors" were going to be allowed to submit best and final offers. We thus do not understand how Weinschel reasonably could have expected further negotiations after the submission of best and final offers.

In any case, it long has been our view that offerors rely on oral advice at their own risk, *Trident Motors, Inc.,* B-213458, Feb. 2, 1984, 84-1 C.P.D. ¶ 142, and we have specifically held this rule applicable to oral representations that negotiations will be reopened after receipt of best and final offers. See *Asgard Technology, Inc.,* B-215706, Aug. 13, 1984, 84-2 C.P.D. ¶ 171. Thus, when an offeror is asked to submit a "best and final" offer, it is responsible for assuring that it submits just such an offer, even if the offeror believes it is in a sole-source position. An offeror certainly will not be afforded a second chance to reduce its price where it did not do so in its

initial best and final offer simply because the offeror believed there would be no price competition.

Weinschel also contends it must be allowed to submit a new best and final offer because the Navy negotiated with Hewlett subsequent to the submission of best and final offers. The Navy apparently contacted Hewlett after best and finals to ask whether the company understood that it would be bound by the RFP terms and conditions and to inform Hewlett that the Navy would hold its "feet to the fire" on the technical specifications. Weinschel argues that this had the effect of eliciting information essential for determining the acceptability of Hewlett's proposal and, thus, constituted discussions.

Weinschel is correct that discussions may not be conducted with one offeror after best and final offers without conducting discussions with all offerors in the competitive range. *ABT Associates, Inc.*, B-196365, May 27, 1980, 80-1 C.P.D. ¶ 362. Discussions occur if an offeror is afforded an opportunity to revise or modify its proposal, or information requested and provided is essential for determining the acceptability of the proposal. *Alchemy, Inc.*, B-207338, June 8, 1983, 83-1 C.P.D. ¶ 621. The record shows that while the Navy initially wanted further clarification from Hewlett, it ultimately decided on its own that the company's best and final offer was technically acceptable as submitted. Thus, the Navy's communication with Hewlett was not for the purpose of determining the acceptability of Hewlett's proposal and, thus, did not constitute discussions necessitating reopening negotiations.

Weinschel raises several arguments we find to be untimely. Weinschel argues that after determining that some of the solicitation's technical specifications could be relaxed, the Navy should have canceled the RFP and resolicited the requirement instead of amending the RFP. Weinschel takes the position that cancellation and resolicitation were necessary to comply with the statutory requirement to maximize competition. Weinschel also argues that the RFP should have been canceled because one of the changed specifications was ambiguous. Finally, Weinschel believes it should be given a chance to submit a new best and final offer because the 30 days allowed for preparing its initial best and final were insufficient.

Under our Bid Protest Procedures, alleged solicitation improprieties which do not exist in the initial solicitation, but which subsequently are incorporated therein, must be protested no later than the next closing date for receipt of proposals. 4 CFR 21.2(b)(1) (1984). The fact that the Navy did not plan to cancel and resolicit should have been apparent to Weinschel from the September 19 best and final offer request, which set forth the changed specifications and award criteria. Likewise, this September 19 request also put Weinschel on notice of any allegedly ambiguous specification

and any inadequacy in the time allowed to respond.[1] Weinschel did not raise any of these arguments until mid-November, however, 1 month after the closing date for submitting best and final offers. More specifically, Weinschel did not raise these matters until it learned that the Navy intended to award to Hewlett. We will not now consider these untimely allegations. See *Stewart & Stevenson Services, Inc.*, B-213949, Sept. 10, 1984, 84-2 C.P.D. ¶ 268.

Finally, Weinschel objects to the Navy's awarding of a contract prior to the resolution of its protest. While an award ordinarily must be withheld pending resolution of a protest, we have consistently held that the alleged failure to follow regulatory requirements in making an award notwithstanding a pending protest is merely a procedural defect which does not affect the validity of an otherwise valid award. *Creative Electric Inc.*, B-206684, July 15, 1983, 83-2 C.P.D. ¶ 95.

Weinschel's protest is denied in part and dismissed in part.

[B-217218]

Bids—Invitation for Bids—Specifications—Minimum Needs Determination—Reasonableness

Protest that specifications are in excess of contracting agency's minimum needs and unduly restrictive of competition is denied where there is no showing that agency lacked a reasonable basis for requiring contractor (1) to respond to request for emergency service on refrigeration equipment at commissary store within 3 hours, and with the tools the agency considered minimally necessary for prompt and efficient service, in order to avoid spoilage of perishable refrigerated food items, and (2) to schedule routine preventive maintenance when the commissary store is closed so as to minimize disruption of commissary operations.

Bids—Competitive System—Superior Advantages of Some Bidders

That requirement for contractor to respond to emergency service calls within 3 hours and agency refusal to pay travel expenses to and from the place of performance may leave some potential bidders at a competitive disadvantage vis-a-vis competitors located closer to the place of performance does not in itself render the solicitation unduly restrictive of competition. A contracting agency is under no obligation to compensate for the advantages enjoyed by some firms, advantages which are not the result of preferential or unfair government action, in order to equalize the competitive position of all potential bidders.

Bids—Evaluation—Delivery Provisions—Relocation Costs

Section 13.107(c) of the Federal Acquisition Regulation, 48 C.F.R. 13.107(c) (1984), which requires contracting officers to evaluate requests for quotations inclusive of transportation charges, does not require contracting agency to provide in a formally

[1] We have recognized an exception to the requirement that alleged ambiguities be raised prior to the closing date where the protester was not aware, before that date, that its interpretation was not the only reasonable one possible. A November 16 telex from Weinschel to the Navy indicates that Weinschel was previously aware of alleged problems with one of the changed specifications (involving the required measurement accuracy of the calibrators), however, and Weinschel has not responded to the Navy's express assertion that any ambiguity in this specification should have been apparent to Weinschel prior to the October 19 closing date. The exception to our timeliness requirements thus is inapplicable.

advertised invitation for bids for the payment of travel expenses to and from the place of performance.

Personal Services—Private Contract v. Government Personnel—Legality

Allegation that solicitation will create an illegal personal services contract is denied where protester fails to demonstrate that government employees will actually supervise the contractor's personnel so as to create an employer-employee relationship between the government and contracting personnel.

Contracts—Time and Materials—Materials at Cost Requirement—Agency Discretion

Protest of solicitation provision limiting reimbursement for spare parts under a time-and-materials maintenance contract to the "actual cost invoiced to" the contractor is denied where protester fails to demonstrate that contracting officials abused their discretion when they determined that it would be more appropriate for a contractor to recover its material handling costs and any profit on the parts under its fixed labor rate rather than on a cost reimbursement basis.

Bids—Invitation for Bids—Specifications—Adequacy

Protest in which protester argues for more restrictive specifications—that a safety observer be present whenever maintenance or repair work is performed on refrigeration equipment—is denied where protester fails either to present evidence of fraud or willful misconduct by government officials or to point to a particular regulation which clearly requires the presence of a safety observer under the circumstances.

Matter of: Ray Service Company, May 22, 1985:

Ray Service Company (Ray) protests as unduly restrictive and otherwise defective the specifications in invitation for bids No. FO8651-84-B-0105, issued by the Department of the Air Force (Air Force) for the maintenance and repair of refrigeration equipment at the commissary store at Eglin Air Force Base, Florida. We deny the protest.

The Air Force solicited bids for award of a time-and-materials contract under which the contractor would be paid (1) a fixed price for scheduled initial, monthly and yearly preventive maintenance on the refrigeration equipment, (2) an hourly labor rate for non-scheduled, emergency service work calls, and (3) the "actual cost invoiced to" the contractor for any required parts and materials.

Prior to bid opening, Ray protested that a number of the specifications unduly restricted competition, exceeded the agency's minimum needs, tended to create a personal services contract, or failed sufficiently to protect the interests of the government and the safety of those servicing the refrigeration equipment. Although the Air Force amended certain solicitation provisions in response to the protest, it refused to make all the changes requested. Ray thereupon filed this protest with our Office.

Ray initially alleges that the solicitation provisions requiring the contractor to respond to a request for a service work call within 3 hours and denying the contractor reimbursement under the hourly

labor rate for travel time to and from the base, except when travel to the nearest parts supply source has been authorized, are unduly restrictive of competition in that they give bidders located adjacent to the base a distinct competitive advantage over bidders, such as Ray, located further away.

Ray, moreover, questions the necessity for any required response time of less than 4 hours, alleging that Air Force contracts for servicing air-conditioning equipment at certain types of radar sites only require a 4-hour response time. Ray also questions the necessity for the requirement in the solicitation that the contractor provide certain refrigeration service instruments during service work calls or preventive maintenance, arguing that a competent contractor will have the necessary equipment available and that contracting officials need only concern themselves with whether the job is done. In addition, Ray both questions the necessity for the solicitation requirement that scheduled monthly and yearly preventive maintenance commence on the morning of the first Monday of every month, and expresses concern that adverse weather may prevent a contractor from meeting this schedule.

In response, the Air Force points out that it has already amended the solicitation to increase the required maximum response time from 2 to 3 hours and insists that it can relax this requirement no further. It argues that the response time is critical to the preservation of the refrigerated and frozen foods stored at the commissary because temperatures sufficient to avert spoilage can be maintained only for a short period after failure of the refrigeration equipment. The Air Force disputes the relevance of the 4-hour response time allegedly permitted in contracts to maintain air-conditioning equipment at certain radar sites, stating that substantially more time would be required for damage to occur as a result of the failure of the air-conditioning equipment at radar sites than for deterioration of food items to occur as a result of the failure of the refrigeration equipment at the commissary.

The Air Force also defends the other solicitation provisions to which Ray objects. The agency argues that it has neither the obligation nor the authority to pay travel expenses to and from the commissary in order to redress the cost disadvantage suffered by Ray vis-a-vis its competitors located closer to the base. It contends that the tools and test equipment required under the solicitation are the minimum necessary for properly repairing and maintaining the refrigeration equipment. The Air Force justifies restricting the times at which preventive maintenance may be undertaken as necessary in order to minimize the disruption of commissary operations. It notes that since the commissary is closed on Monday, scheduling routine work for that day enables the store to avoid the loss of business likely to result from shutting down the refrigerated display cases on other days. Moreover, the Air Force denies that the contractor is at risk from adverse weather, stating that servic-

ing the equipment occurs indoors and that, in any case, delays caused by adverse weather may be excused under the contract.

Finally, the Air Force questions the extent to which any of the contested provisions in fact restricted competition, noting that three other firms submitted bids under the solicitation.

The determination of the government's minimum needs and the best method of accommodating those needs are primarily the responsibility of the contracting agencies. We have recognized that government procurement officials, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future, are generally in the best position to know the government's actual needs. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. *Sunbelt Industries, Inc.*, B-214414.2, Jan. 29, 1985, 85-1 C.P.D. ¶ 113.

When a protester challenges a specification as unduly restrictive of competition, the burden initially is on the procuring agency to establish *prima facie* support for its contention that the restrictions it imposes are needed to meet its minimum needs. But, once the agency establishes this *prima facie* support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. See *Sunbelt Industries, Inc.*, B-214414.2, *supra*, at 5-6.

Ray has failed to rebut the agency's justification for the specifications in question. It has not demonstrated that the Air Force lacked a reasonable basis for requiring the contractor to arrive within 3 hours after the request for a service call, with the tools which the Air Force deemed minimally necessary for prompt and efficient service, in order to avoid the spoilage of perishable refrigerated food items. Nor has it demonstrated that the Air Force lacked a reasonable basis for requiring the contractor to commence routine, preventive maintenance at the time most likely to prove least disruptive to the operation of the commissary.

That some of the solicitation provisions, such as the required response time and the refusal to pay the hourly labor rate for travel to and from the base, may leave Ray at a competitive disadvantage vis-a-vis other firms because of Ray's greater distance from the base does not in itself render those provisions unduly restrictive of competition. A contracting agency is under no obligation to compensate for the advantages enjoyed by some firms, advantages which are not the result of preferential or unfair government action, in order to equalize the competitive position of all potential bidders. See *Superior Boiler Works, Inc.; Conservco, Inc.*, B-215836; B-215836.3, Dec. 6, 1984, 84-2 C.P.D. ¶ 633 (specifications which express the agency's minimum needs are not unduly restrictive because some bidders are unable to meet them); *Emerson-Sack-Warner Corporation*, B-206123, Nov. 30, 1982, 82-2 C.P.D. ¶ 488 (no

entitlement to reimbursement for travel costs to and from the place of performance in order to equalize the competitive position of all bidders); cf. *Stayfresh Processing Corporation,* B-181116, Nov. 7, 1974, 74-2 C.P.D. ¶ 243 (requirement for delivery of milk within 72 hours after pasteurization).

We note that Ray further objects to the Air Force's refusal to pay travel expenses to and from the commissary on the ground that it is in violation of Federal Acquisition Regulation (FAR), § 13.107(c), 48 C.F.R. § 13.107(c) (1984). That section provides that:

> Contracting officers shall evaluate quotations inclusive of transportation charges from the shipping point of the supplier to the delivery destination.

However, nothing in that section, which concerns quotations received in response to a request for quotations for supplies, requires an agency to provide in a formally advertised invitation for bids for services that it will pay travel expenses to and from the place of performance.

Ray next argues that the solicitation provisions requiring the contractor to provide certain tools and equipment, specifying the time at which the contractor must commence preventive maintenance, and limiting reimbursement for parts provided under the contract to the "actual cost invoiced to" the contractor tends to "put the contract in a quasi personal services status."

The general rule, established by decisions of our Office and the former Civil Service Commission, is that personal services may not be obtained on a contractural basis, but, rather, must be performed by personnel employed in accordance with the civil service and classification laws. Contracts for services are proscribed if they establish an employer-employee relationship between the government and contracting personnel. The critical factor in determining whether an employer-employee relationship exists is the presence of actual supervision of contractor personnel by government officers and employees. See *Computer Sciences Corp.*, B-210800, Apr. 17, 1984, 84-1 C.P.D. ¶ 422.

Ray has failed to demonstrate the existence of factors creating a prohibited relationship. While the solicitation provided for government quality assurance evaluators to evaluate the contractor's performance, nothing in the solicitation, or otherwise brought to our attention, indicates that government employees will actually supervise the contractor's personnel so as to create an employer-employee relationship. On the contrary, the solicitation required the contractor to furnish "all management, personnel, equipment" necessary to perform the preventive maintenance and service work calls.

Ray further argues that the limitation of reimbursement for parts to the "actual cost invoiced to" the contractor forces a bidder either to " 'load profit' into the labor rate," thereby rendering its bid noncompetitive, or to forego a reasonable profit. In addition, Ray argues that by forcing the contractor to finance the costs of maintaining a stock of spare parts, the limitation is likely to result

in a smaller spare parts inventory and, accordingly, more government financed trips to the nearest parts supply source.

The Air Force, on the other hand, views the supply of spare parts as merely incidental to the supply of the services and maintains that overhead and profit should be included in the pricing of the other items. It questions whether any bidder suffered competitive prejudice since all bidders bid on the same basis, *ie.* supplying parts at cost. Moreover, it believes that any contractor in the refrigeration business will already stock the parts normally required here.

The Department of Defense FAR Supplement, § 16.601, 48 C.F.R. § 216.601 (1984), provides that a time-and-materials contract may be used in the procurement of repair, maintenance or overhaul services. While FAR, § 16.601(b)(3), permits agencies, under certain circumstances, to enter into a time-and-materials contract which provides for charging materials on a basis other than cost, we have recognized that the option of doing so is within the discretion of the contracting agency. See *Advanced Business Systems, et al.*, B-195117, *et al.*, Nov. 6, 1979, 79-2 C.P.D. ¶ 329. Ray has not demonstrated that contracting officials abused this discretion by choosing to reimburse for parts on a cost basis, without provision for the contractor to include in the reimbursement for the materials a profit on the materials.

As for the Air Force's decision to reimburse the contractor only for the "actual cost invoiced to him," with no provision for the direct reimbursement of the costs incurred by the contractor in handling the parts, we note that FAR, § 16.601(a), describes a time-and-materials contract as providing for the acquisition of supplies or services on the basis of "materials at cost, including, *if appropriate,* material handling costs as part of material costs" [Italic supplied.]. That the cost of materials to be reimbursed by an agency under a time-and-material contract need not include material handling costs is further suggested by FAR, § 16.601(b)(2), which states that "[*w*]*hen included* as part of material costs, material handling costs shall include only costs clearly excluded from the labor-hour rate" [Italic supplied.].

We also note that in a prior decision, *Advanced Business Systems et al.*, B-195117, *et al.*, *supra,* at 4-5, where the protester argued that overhead costs directly related to parts should be added to the contractor's cost for the parts, we recognized the force of the agency's justification for the cost limitation, that the government had previously been overcharged for parts on time-and-materials contracts and that parts-related overhead could be anticipated and, thus, covered in the hourly labor rates, and we therefore denied the protest. Under these circumstances, in particular given the risk of the government being overcharged for parts, we do not believe that Ray has demonstrated that contracting officials abused their discretion by determining that it would be more appropriate for

the contractor to recover its material handling costs under its fixed labor rate than on a cost reimbursement basis.

Finally, Ray questions the refusal of the Air Force to require that a safety observer, a second "technician," be present whenever work is performed on the refrigeration equipment, noting that a safety observer could obtain rapid assistance for an injured coworker. Ray argues that the failure to require a safety observer violates Occupational Safety and Health Administration (OSHA) and Air Force regulations and may expose the government to liability in the event of an accident.

The solicitation as issued provided that the contractor would be paid the hourly labor rate for no more than one refrigeration journeyman for each service work call unless the contractor requested and received written authorization from contracting officials for an additional journeyman. No specific provision was made with respect to the number of journeymen authorized for preventive maintenance work, for which, as previously indicated, the contractor was to be paid the predetermined fixed price set forth in the contract. In response to the above concerns expressed by Ray, the Air Force amended the solicitation to provide that the contractor could request verbal authorization from contracting officials for an additional journeyman. Payment for the additional journeyman, however, was contingent upon receipt of subsequent written confirmation of the oral authorization.

As a general rule, we will not consider the merits of an allegation that a more restrictive specification is necessary to serve the government's interest. The purpose of our role in resolving bid protests is to ensure that the statutory requirements for free and open competition are met; a protester's presumable interest as a beneficiary of more restrictive specifications is not protectable under our bid protest function. Procurement officials and the user activities are responsible for ensuring that solicitations utilize sufficiently rigorous specifications to meet the government's legitimate needs and to protect the government's interest, since they suffer the consequences of obtaining inadequate services or supplies. Therefore, absent evidence of possible fraud or willful misconduct by government officials, evidence which Ray has not presented here, we consistently have refused to review allegations that a contracting agency should have used more restrictive specifications. See *Olson and Associates Engineering, Inc.,* B-215742, July 30, 1984, 84-2 C.P.D ¶ 129.

Moreover, even where a protester has alleged that OSHA or other regulations require more restrictive specifications, our Office has held that absent a specific regulation which clearly requires an agency to tailor its specifications in a particular way, there is nothing for us to enforce. See *King-Fisher Company—Request for Reconsideration,* B-209097.2, Sept. 2, 1983, 83-2 C.P.D ¶ 289.

The solicitation included Department of the Air Force FAR Supplement § 52.223-9004, subsection (b) of which provides that if the contract is to be performed on an Air Force installation, then Air Force Occupational Safety and Health Standards (AFOSH) shall apply. The Air Force reports that although AFOSH require the presence of a safety observer where work is to be done on energized equipment with a voltage of 600 volts or greater, there is no requirement under AFOSH for a safety observer where, as here, the work is to be done on equipment with a maximum voltage of only 110/208 volts and while the power is off. In addition, the Air Force reports that it was informed by OSHA that there was no OSHA requirement for a safety observer under these circumstances. We note in this regard that OSHA has reserved section 1910.331-1910.398 of it regulations in 29 C.F.R. (1984) for the future issuance of regulations pertaining to Safety-Related Work Practices, Safety-Related Maintenance and Safety Requirements for Special Equipment.

Since Ray has neither presented evidence of fraud or willful misconduct by government officials, nor shown us particular regulations which clearly require the presence of a safety observer under these circumstances, we will not consider the merits of its contention that more restrictive specifications, a requirement for a safety observer, were necessary to serve the government's interest and conform to applicable regulations.

The protest is denied.

[B-217236.2]

Courts—Administrative Matters—Employees—Accountable Officers

The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, establishes a bankruptcy court as a unit of the district court, in each judicial district. The bankruptcy judges may appoint clerks of bankruptcy courts. Amendment of 28 U.S.C. 1930 providing that bankruptcy filing fees are to be paid to "the clerk of the court" does not exclude payment to the bankruptcy clerk as the accountable officer for the funds. Incident to his office, the bankruptcy clerk also is the accountable officer for registry funds entrusted to the bankruptcy court.

Matter of: Accountable Officer for Bankruptcy Fees and Registry Funds, May 22, 1985:

A judge of the U.S. Bankruptcy Court for the Eastern District of Kentucky, on behalf of the clerk of the district court and of the clerk of the bankruptcy court, Eastern District of Kentucky, requests our views as to which clerk is the proper accountable officer for bankruptcy fees and registry funds under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, enacted on July 10, 1984. The judge refers to a memorandum issued by the Administrative Office of the U.S. Courts which indicates that the clerk of the district court rather than the clerk of

the bankruptcy court is now responsible both for bankruptcy fees and costs and for the maintenance of registry funds. The bankruptcy judge disagrees with the memorandum and is of the opinion that the bankruptcy clerk is the proper accountable officer for bankruptcy fees and costs, as well as for registry funds.

For the reasons indicated below, it is our opinion that the clerk of bankruptcy court is the appropriate accountable officer for bankruptcy fees and costs, and for registry funds, in connection with bankruptcy matters before the bankruptcy court.

LEGISLATIVE BACKGROUND

Changes in the structure of bankruptcy courts in recent years have affected the status of the clerks of these courts. The judge asks us to determine how the accountability of the clerks has been affected by these changes. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, codified and enacted the law relating to bankruptcy as title 11 of the U.S. Code. The Act also amended title 28 of the U.S. Code to provide the United States District Courts with original and exclusive jurisdiction of all cases under title 11, with certain specified exceptions, and to provide the bankruptcy court for the district in which a case under title 11 is commenced, with the jurisdiction conferred by the Act on the district courts. 28 U.S.C. § 1471 (1982).

The Act further provided that the bankruptcy court, based on need, "may appoint a clerk who shall be subject to removal only by the court." 28 U.S.C. § 771 (1982). It also provided that the clerk of each bankruptcy court would pay into the Treasury all fees, costs and other moneys collected by him. *Id.* It stated, as well, that "the parties commencing a case under title 11 shall pay to the clerk of the bankruptcy court * * * filing fees." 28 U.S.C. § 1930 (1982).

The Act amended 28 U.S.C. § 451 (see note to this section in 1982 edition of United States Code) to change the term "court of the United States" to include "bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years."

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, June 28, 1982, the U.S. Supreme Court struck down the bankruptcy court's jurisdiction under section 1471 because the bankruptcy judges were not afforded the protections set forth in Article III of the Constitution to insure the independence and impartiality of the Federal judiciary. A stay of entry of the Supreme Court's order was granted and extended to December 24, 1982, to provide the Congress time to correct the constitutional problem and to protect the orderly administration and adjudication of bankruptcy cases in the interim. On December 25, 1982, in the absence of congressional action or a further extension of the stay, the bankruptcy system began operating under a suggested temporary emer-

gency rule issued by the Judicial Conference. *See* H.R. Rep. No. 9, Part 1, 98th Cong., 1st Sess. 2-4 (1983).

On July 10, 1984, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, was enacted. Under section 113 of the Act, the provisions concerning the bankruptcy court and bankruptcy clerk described above, sections 1471, 771 and 451 of title 28, among other provisions of the Bankruptcy Reform Act of 1978, whose effective dates had been postponed, were not to become effective.[1]

Similar to the 1978 Act, the 1984 Act amended 28 U.S.C. § 1334 to provide, with certain stated exceptions, that the U.S. District Courts shall have original and exclusive jurisdiction of bankruptcy cases. Section 101(a), 98 Stat. 333. The Act, however, added section 151 to title 28 of the U.S. Code. Section 104(a), 98 Stat. 336. It states that—

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter * * * except as otherwise provided by law or by rule or order of the district court.

Further, in a change particularly important to this case, the Act amended 28 U.S.C. § 1930 to provide that parties commencing a case under title 11 shall pay filing fees to the "clerk of the court." Section 111(a), 98 Stat. 342. Section 1930 had previously required payment to be made to the clerk of the *bankruptcy* court.

Additionally, the Act amended 28 U.S.C. § 156 to provide that the bankruptcy judges for a district, after making the required certification of need, may appoint an individual to serve as clerk of the bankruptcy court. Section 104(a), 98 Stat. 339. The Bankruptcy Clerk may, with the approval of the bankruptcy judges, appoint and remove deputies. *Id.*

BANKRUPTCY FEES

The Director of the Administrative Office of the U.S. Courts, in his memorandum dated October 11, 1984, addressed the issue of fees in bankruptcy petitions. These are principally filing fees paid by the party commencing a case under title 11. He indicated that under 28 U.S.C. § 1930, as amended, bankruptcy fees are to be paid to the clerk of the district court because the amendment which requires that the fees be paid to the "clerk of the court," refers to the clerk of the district court. Thus, the memorandum concludes "[t]his means that the clerk of the district court is an accountable officer for such fees and costs."

[1] The effective date of these sections was originally established by section 402(b) of the 1978 Act, *id.*, at 92 Stat. 2682. This effective date was postponed several times; the last date prior to the cancellation was June 28, 1984, established by Pub. L. No. 98-325, 98 Stat. 268 (1984).

Under the Bankruptcy Reform Act of 1978, a bankruptcy court was to exercise the jurisdiction of a district court in bankruptcy matters. Under that legislative plan bankruptcy matters would have gone directly to a district bankruptcy court, which was given the status of a "court of the United States." The bankruptcy court was empowered to appoint and remove a clerk of the bankruptcy court to whom filing fees would be paid. Under the Bankruptcy Amendments and Federal Judgeship Act of 1984 this plan was changed so that the district court decides if bankruptcy matters are referred to the bankruptcy court in that district, which is not a separate "court of the United States" but rather a unit of the district court. The bankruptcy judges, upon a certification of need, may appoint bankruptcy clerks to serve at their pleasure.

In light of this background we do not read the current Act, which provides that bankruptcy fees are to be paid to "the clerk of the court," to require payment only to the clerk of the district court. The disputed language seems to us to be the result of an effort to accommodate those potential situations created under the Act, for cases where there is no bankruptcy court clerk.

Under the 1984 Act, bankruptcy matters sometimes may be retained by a district court rather than be dealt with by the bankruptcy court in that district. Also the judges of the district courts of the territories serve as the bankruptcy judges for those courts. (Section 104(a) of the Act, 28 U.S.C. § 152(b)(4).) Finally, in some districts a bankruptcy clerk may not be appointed because of an insufficient caseload. In all these instances the clerk of the district court will receive the fees paid incident to the bankruptcy proceedings since in the first two cases he is the clerk of the court in which the proceedings will be held, and in the latter case, he is the only available court clerk.

When, however, the bankruptcy judges in a particular district appoint a clerk and the bankruptcy matter is handled in the bankruptcy court, the bankruptcy clerk is, in fact, the clerk of the cognizant court. Because of the change in court structure, the current Bankruptcy Act provides that payment will be paid to the "clerk of the court" where formerly filing fees were to be paid to "the clerk of the bankruptcy court." The 1978 Act contemplated that the bankruptcy court established under that Act would handle bankruptcy matters within district court jurisdiction. However, as we have seen, under the present arrangement this may not always be the case since in response to the *Marathon* case, the Congress has provided for the retention of bankruptcy matters by the district courts.

Accordingly, it appears that the purpose in changing reference to the clerk of the bankruptcy court to the "clerk of the court" was not to preclude the bankruptcy court clerk from having responsibility for the fees, but rather to recognize that a bankruptcy court might not be the appropriate or available forum for some bank-

ruptcy matters; or that there might not be a bankruptcy clerk appointed. The legislative history we have examined does not show an intention to preclude the bankruptcy court clerk from prime responsibility for fees paid to him incident to bankruptcy matters. Indeed, there seems little purpose to requiring the district court clerk to be the accountable officer for the bankruptcy fees when a functioning bankruptcy court clerk will receive the fees, and he is not, as noted by the memorandum of the Administrative Office, subordinate or responsible to the district court clerk.

Subsequent to the passage of the 1984 Act, an interview with Senators Dole and DeConcini, conference committee managers for the Senate, appeared in the American Bankruptcy Institute Newsletter (Winter 1984/1985, Vol. III, No. 3). They were asked whether it was the intent of Congress to augment the role of the district court clerks in bankruptcy. Senator Dole replied that:

> No change in their functions and duties was anticipated. Cases should still be filed with the bankruptcy court, not the district court. There was also no change anticipated regarding the handling of monies coming through the bankruptcy court.

Senator DeConcini made the following comments:

> I agree. These battles were fought years ago, and despite differences in approach to the court system, nobody had any desire to revisit the concerns of "consolidation" and the like. We sought to maintain the status quo.

While these comments were made after passage of the Act, they confirm our understanding of congressional intent and our conclusion that the bankruptcy court clerk is the sole accountable officer for fees that come to him.

BANKRUPTCY REGISTRY FUNDS

Regarding registry funds, which are disputed assets of the bankrupt estate paid into the court subject to disbursement in accord with the bankruptcy proceedings, the Director in his memorandum of October 11, 1984, stated:

> Bankruptcy clerks no longer have statutory authority for the maintenance of *registry funds.* Under 28 U.S.C. § 2041, that authority is vested in the district courts. Therefore, registry accounts formerly maintained by bankruptcy clerks must be redesignated as district court accounts to comply with section 2041. This does not preclude the district court from designating the bankruptcy clerk as the accountable officer for the bankruptcy portion of the registry funds * * *

Section 2041 of title 28, U.S. Code states that:

> All moneys paid into any court of the United States, or received by officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depository, in the name and to the credit of such court.

Under the Bankruptcy Reform Act of 1978, bankruptcy courts were to be included as "courts of the United States." However the amendment of 28 U.S.C. § 451 which was to be effective on June 28, 1984, by virtue of section 113 of the 1984 Act, "shall not be effective." Today, therefore, a bankruptcy court is not a "court of the United States," but is instead a unit of the District court for the district in which it is located.

Section 2041 places a specific limitation on where funds received by courts of the United States may be deposited—either with the Treasurer of the United States or a designated depositary. By its terms, this section does not constitute a grant of authority to receive funds, which appears to be assumed. It is derived from the Act of March 24, 1871, ch. 2, sec. 1, 17 Stat. 1, which referred to "all moneys in the registry of any court of the United States." In presenting the Committee on Finance's favorable report on S. 74, a bill relating to moneys paid into the courts of the United States, Senator Sherman told the Senate that, "It is a bill to guard the Treasury." Cong. Globe, 42nd Cong., 1st Sess. 90 (1871).

The clerk of the bankruptcy court, which is a unit of the district court, would appear to us subject to 28 U.S.C. § 2041 as an officer of the district court. Even in the absence of this provision he would be accountable for the funds placed in his care.

Accordingly, it is our view that the bankruptcy clerk is the accountable officer for the registry funds which are to be entrusted to him for matters before the bankruptcy court even without an official designation as such by the district court. A court order as recommended in the Administrative Office's memorandum that would make the clerk of a bankruptcy court the accountable officer for registry funds would therefore be redundant.

CONCLUSION

From the foregoing, it follows that the clerk of a district court is not the accountable officer for either fees or registry funds received by the bankruptcy court clerk. The bankruptcy court clerk is the accountable officer in the described circumstance. We think this conclusion provides the most appropriate means of carrying out the legislative scheme created by the Congress.

[B-217072.2]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Additional Information Supporting Timely Submission

Where protester's statement that written protest to procuring agency, initially viewed by General Accounting Office as untimely, was merely confirmation of timely oral protest is unquestioned by agency, it establishes that protest to GAO was timely.

Contracts—Negotiation—Offers or Proposals—Evaluation—Competitive Range Exclusion—Reasonableness

Agency's failure to include protester's proposal in the competitive range, based upon the evaluation of proposals and revised technical scores reflecting projected improvement in proposals if discussions were held, was not unreasonable or in violation of applicable statutes and regulations.

Matter of: Joule Engineering Corporation—Reconsideration, May 23, 1985:

Joule Engineering Corporation requests reconsideration of our decision in *Joule Engineering Corporation,* B-217072, Nov. 26, 1984, 84-2 CPD ¶ 575 dismissing its protest. Joule had protested a National Aeronautics and Space Administration (NASA) determination that the company's proposal under request for proposals (RFP) No. 5-01919/603 was not within the competitive range and thus not eligible for further consideration. In its protest letter to our Office, Joule represented that it had initially filed a protest with NASA on September 26, 1984. Based upon this information, we held that Joule's protest to our Office was untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1984), because the NASA protest had not been filed within 10 days after Joule knew of the basis for its protest. In its request for reconsideration, Joule states that it orally protested to NASA on August 15, 2 days after learning of the NASA competitive range determination, and that its September 26 protest letter was in confirmation of the timely oral protest. NASA has not contested this account, and, based upon the new information provided by Joule, we find the protest to have been timely and reverse our earlier decision. On the merits, however, we deny the protest.

The RFP sought proposals for engineering and related services to support sounding rocket and balloon programs, aeronautical programs, and launch range operations at Wallops Flight Facility, Wallops Island, Virginia. The procurement is the result of the merger of requirements currently being performed under two separate contracts. Joule is the current contractor for metal trades and instrumentation services, about one-third of the effort to be required under the protested procurement. The solicitation provided that proposals would be evaluated based upon four weighted "mission suitability" factors, cost experience and past performance, and "other factors" such as financial condition and capability and stability of labor-management relations.

NASA received four proposals and on August 8 it informed Joule that the Source Evaluation Board found Joule's proposal outside the competitive range. The agency stated that Joule's proposal contained numerous technical weaknesses under three of the four mission suitability factors, that there was a deficiency under one of those factors, and that Joule's experience and past performance had been determined to be weak.

Joule contends that, in excluding its proposal from further consideration, NASA failed to address the extent to which the proposal could be improved through written or oral discussions with the agency. In a procurement such as this one, in which evaluations are conducted in accordance with the NASA Source Evaluation Board Manual (NHB5103.6A), the Source Evaluation Board must

include proposals "which have a reasonable chance of being selected for final award" within the competitive range for purposes of conducting written or oral discussions. NASA Procurement Regulation § 3-804-3(b)(4), *reprinted in* 41 C.F.R. ch. 18 (1983). The Board must evaluate the potential for improving each proposal by written or oral discussion in determining the competitive range. *Id.*

The Board did that here. First, it gave the initial proposals numerical scores on each of the mission suitability factors described in the RFP, with a possible maximum total of 1000 points.[1] The other evaluation areas were rated as "good," "adequate" or "poor" without numerical scores. The Joule proposal was initially scored third of the four proposals received on the mission suitability factors. (820, 739, 398 (Joule) and 80.) NASA then rescored each proposal based upon assumed positive responses that it anticipated it would receive during discussions regarding ambiguities and uncertainties found in the initial evaluation. The total projected scores were 825, 771, 477 (Joule) and 210. Again, the Joule proposal scored third, well below the two more highly rated proposals. NASA also conducted an evaluation of each offeror's cost/price proposal to determine its probable cost to the government. All four proposals were relatively close with regard to both initial estimated costs and their probable costs to the government. The experience and past performance of the offerors and most of the "other factors" evaluated were in NASA's view unlikely to be improved through written or oral discussions, and NASA did not project improvements in those areas in determining which proposals were within the competitive range.

Joule does not agree that its proposal should have been evaluated as it was. Moreover, Joule argues that NASA's conclusion that the Joule proposal had insufficient potential for improvement is unreasonable. According to Joule, the weaknesses and deficiencies perceived in its proposals were "of the type easily improvable through oral discussions."

In reviewing complaints about the reasonableness of the evaluation of a technical proposal, and the resulting determination of whether an offeror is within the competitive range, our function is not to reevaluate the proposal and to make our own determination about its merits. That determination is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Procuring officials have a reasonable degree of discreation

[1] The Board initially gave each proposal a score between 0 and 5 (from "unacceptable" to "outstanding") for each factor or, if a factor was divided into criteria, for each criterion. Each of these raw scores was then "weighed" by multiplying the number of points available for the factor or criterion by the raw score divided by 5. *I.e.*, a raw score of 3 for a factor having 100 possible points would result in a weighed score of 60 for that factor. The scores discussed in this decision are all weighed scores.

in evaluating proposals, and we therefore determine only whether the evaluation was arbitrary, that is, unreasonable or in violation of the procurement laws and regulations. *Essex Electro Engineers Inc.; ACL-Filco Corp.*, B-211053.2; B-211053.3, Jan. 17, 1984, 84-1 CPD ¶ 74.

Although Joule has the burden of affirmatively proving its case, NASA has denied the company access to most of the written procurement record because the agency is withholding contractor selection pending our decision on this protest. NASA is concerned that Joule would have a competitive advantage after receiving access to the evaluation record if it is included within the competitive range as a result of our decision. The agency did meet with Joule officials to provide an oral debriefing about the evaluation decision, and, based upon Joule's submissions to our Office, it appears the debriefing provided Joule with considerable detail about the reasons for NASA's determination. In any event, consistent with our practice in such situations, we have examined the record *in camera* to determine whether the evaluation had a reasonable basis. See *RMI, Inc.*, B-203652, Apr. 20, 1983, 83-1 CPD ¶ 423.

The governing statute, 10 U.S.C. § 2304(g) (1982), requires that oral or written discussions be held with all offerors within a competitive range. Such discussions must be meaningful, and in order for discussions to be meaningful, agencies must point out weaknesses, excesses or deficiencies in proposals unless doing so would result in disclosure of one offeror's approach to another or result in technical leveling when the weakness or deficiency was caused by a lack of diligence or competence. *The Advantech Corp.*, B-207793, Jan. 3, 1983, 83-1 CPD ¶ 3; *Ford Aerospace & Communication Corp.*, B-200672, Dec. 19, 1980, 80-2 CPD ¶ 439.

Consequently, in projecting the potential for improvement of a proposal during discussions, an agency must base its projection upon the assumption that the discussions would be meaningful. Our review of the Board's findings in this case will be based on the requirement for meaningful discussions.

The first mission suitability factor described in the RFP is "Management." This factor is given the highest weight (43 percent) of the four mission suitability factors, and is divided into the following criteria: 1.1 Organizational Structure, 1.2 Task Assignment Administration, and 1.3 Staffing Plan and Personnel Administration. With regard to 1.1 Organizational Structure, the Board found several weaknesses, most of which concerned insufficient information in the proposal. Assuming a positive response to discussion of the need for additional information, NASA projected an improvement of Joule's weighted score on Organizational Structure from 62.22 to 96.22 (out of 170 possible points). One major weakness, the unacceptability of Joule's proposed organization at the Wallops Island facility, is not related to a lack of information in the proposal, but represents the Board's judgment on Joule's management approach.

Joule claims that its proposed method of operation could be improved through discussions. This might be true if NASA were to point out the weakness to Joule during discussions. We believe, however, that it is reasonable to consider the weakness in Joule's proposed local organization to be one which is inherent in the offeror's proposed management structure and would likely require extensive proposal revisions to resolve. We do not believe it was improper for NASA to conclude that this matter would be excluded from discussions.

The Board considered Joule's proposal to be adequate in regard to the second management criterion, 1.2. Task Assignment Administration, and it did not cite specific weaknesses. Consequently, the Board reasonably projected no improvement in Joule's initial weighted score (66 out of a possible 110). The weaknesses found in the proposal concerning the third criterion, 1.3 Staffing Plan and Personnel Administration, substantially concerned matters which Joule did not address in its proposal, such as a failure to provide an initial staffing plan for personnel not already employed by the company. This need for information would have been included as a subject of discussions with Joule, and NASA projected a substantial improvement in Joule's score—from 60 to 105 (out of 150 possible points). In sum, the Board concluded that the Joule proposal has a strong potential for improvement in the management factor score from 188 to 267.

The protester argues that, because it is the current incumbent contractor for a large portion of the work described in the RFP, its proposal should have been considered particularly capable of improvement in the management area. It is not clear why Joule's prior experience would give its proposal more potential for improvement than others. Joule's current contract is not necessarily a positive factor with respect to aspects of the work which it has not previously performed. For example, the Board emphasized that Joule provided an inadequate initial staffing plan in spite of the fact that it already employed personnel in one-third of the required positions. It can be argued that an incumbent contractor that scored as low as Joule on its initial proposal may have less potential for improvement since it may be less likely to revise its proposed personnel and method of operations during discussions. In any event, we do not find NASA's evaluation of the "Management" factor to have been unreasonable.

The second mission suitability evaluation factor, "Understanding Requirements," is divided into two criteria: 2.1 Designated Positions and Commitment Thereof, and 2.2 Total Compensation Plan for Professional Employees. The first criterion requires offerors to describe in their proposals specific personnel that meet detailed qualifications for 25 positions listed in the RFP and that are available for the listed jobs. This criterion is considered very important because it gives NASA a specific measure of each offeror's under-

standing of what is required to perform the work and its demonstrated capacity to fill the designated positions. The second criterion is used to evaluate each offeror's total proposed compensation compared to levels paid by the predecessor contractor for the same work. The RFP cautions offerors that lowered compensation for the same professional work may be considered a lack of sound management judgment in addition to a lack of understanding of the contract requirements.

The Board gave Joule only 68 out of a possible 170 points for Designated Positions and projected no improvement during discussions. This was primarily because, according to the resumes submitted, more than one-third of the individuals proposed did not meet the education or experience qualification requirements listed in the RFP. Joule also did not provide required evidence of commitments by the individuals to assume the designated positions at the salaries proposed. Joule asserts that it contemplated hiring incumbent personnel for all of the designated positions, but, because the individuals not already employed by Joule were concerned about reprisals from their current employer, Joule could not include their resumes in the proposal. The protester contends that the resumes submitted were for "similarly qualified" personnel, and that any weaknesses could be improved through discussions.

The resumes submitted for designated positions do not meet the unambiguous qualifications listed in the RFP. Joule's proposal offered no explanation of why, based upon the company's understanding of the work, the proposed personnel need not meet the required qualifications. We share NASA's view that this is a major weakness either reflecting a lack of understanding of the requirements to perform the work or resulting from a lack of diligence or competence in proposal preparation. Discussions would effectively result in NASA rewriting Joule's proposal in this area, bringing the proposal toward the level of other superior proposals. We believe that NASA reasonably considered this weakness in Joule's proposal to be one that need not be pointed out, and, therefore, not one that would be improved during discussions.

Further, in this regard, Joule does not address the omission from its proposal of salary commitments for designated positions. It contends that the salary commitments for three key persons required in another section of the proposal were omitted by error. In that case, Joule believes NASA should have recognized that the omission for key personnel was inadvertent rather than assuming that no commitments existed. The protester argues that, if NASA pointed out that omission during discussions, the company would supply the commitments. We believe that the same argument is applicable to the omission of salary commitments for designated personnel. An inquiry during discussions would quickly resolve whether the salary commitments for designated positions were omitted by error or resulted from an inability of Joule to obtain the commitments.

NASA should have anticipated a rating improvement based upon some positive response to discussions in this area.

The Board gave the Joule proposal a relatively low rating (11.7 out of 50) for Total Compensation Plan for Professional Employees, and projected no potential for improvement. NASA cited such weaknesses in the proposal as a reduction in professional employee salaries posing the possibility of hiring difficulties, an absence of detail regarding medical and disability benefits, and a lack of a pension plan. Joule replies that its ability to negotiate lower salaries under the prospective contract should not be viewed as a weakness, and that further detail regarding its medical and disability benefits would have been provided upon request.

Joule proposes to reclassify 13 positions involving 25 employees from being exempt from the requirements of the Service Contract Act to not being exempt. Twenty-six of the remaining exempt positions (31 employees) were to receive salary reductions averaging 16 percent, while 5 positions (5 employees) were to receive increases averaging 4 percent. Salary reductions averaging 12.9 percent were proposed for 19 exempt personnel currently employed by Joule, while 3 would receive raises averaging 2.3 percent. In view of the protester's failure to provide an initial hiring plan and the required evidence of a commitment to specific salaries by prospective personnel in designated positions, we do not consider unreasonable the Board's view that Joule would have a problem hiring qualified personnel. Further, we do not believe that NASA erred in considering this weakness to be inherent in the company's management judgment and unnecessary to include in possible discussions. See *Dynalectron Corp., Lockheed Electronics Co., Inc.*, 54 Comp. Gen. 562,570-1 (1975), 75-1 CPD ¶ 17 at 14-15, aff'd on recon. 54 Comp. Gen. 1009 (1975), 75-1 CPD ¶ 341. We do, however, question whether NASA should not have attributed some potential for improvement in Joule's proposal with respect to the need for details on medical and disability benefits. While offerors are reasonably expected to discuss medical and disability plans in connection with their proposed total compensation for professional employees, the RFP does not indicate the level of detail desired. We believe that this weakness was more in the nature of a lack of clarity rather than a weakness inherent in Joule's judgment or level of competence, and NASA should have recognized some potential for improvement.

The third mission suitability factor, "Corporate Resources," represents an evaluation of proposed corporate technical support to personnel performing the contract work. Here, the Board believed that the Joule proposal had two strong points, and cited no weakness or uncertainties. The proposal was rated at 90 out of 150 points, with no projected improvement during discussions. Joule does not take specific exception to this score, and based on our review of the proposals we have no reason to question the Board's

judgment in the rating given the Joule proposal for corporate support.

The Board gave the Joule proposal a low score for the "Key Personnel" factor (40 out of 200 possible points), which is used to evaluate the qualifications of the Contract Manager, the Metal Trades Supervisor and the Instrumentation Construction Supervisor. The Board found that the proposed Contract Manager had good plant management experience but no service contract management experience and limited engineering expertise, a major weakness since two-thirds of the required work consists of engineering services in many technical areas. The Board also cited minor weaknesses based upon its findings that the Metal Trades Supervisor does not have the required general or related experience listed in the RFP for the position, and that no salary commitments for key personnel were provided.

Joule argues that NASA should have discussed with the proposed Contract Manager his experience and should not have relied only upon the resume in the proposal and discussions with references listed in the resume. The protester does not suggest what additional facts NASA might learn from such a discussion, stating merely that the matter would be "clarified." We believe that NASA was reasonable in basing its evaluation upon the resume and references, and have no reason to question the evaluation itself.

Joule argues that the proposed Metal Trades Supervisor has been performing the job for 10 years with no complaints. Indeed, the Joule proposal described the individual's current position and the record establishes that the Board was informed of his work on the predecessor contract. The RFP, however, states a requirement for 4 years of recent journeyman experience that Joule's proposed Metal Trades Supervisor lacks. Thus, it was reasonable for the Board to conclude that the proposal contained a minor weakness in this respect.

As discussed previously, Joule contends that its failure to comply with the requirement of the RFP for commitments of key personnel to work at proposed salaries constituted an oversight. We believe that NASA should have anticipated discussions to determine if the omission of salary commitments resulted from Joule's inability to reach an agreement with the proposed employees or constituted a minor oversight in proposal preparation. Thus, the agency should have projected some improvement in score based upon a positive response during discussions.

The Board attributed Joule's performance of approximately one-third of the contract work for 14 years as a strong point. Joule, however, did not demonstrate across-the-board technical experience or depth in past performance. The company only cited five government contracts in its proposal which were of a comparable or related nature and complexity and under which work was performed in the past 5 years—two for support of programs at the Wallops

Flight Facility under which the agency rated Joule's performance as adequate, two other NASA contracts under which no work had begun, and a $50,000 Navy contract completed in 1979. The RFP contemplates an award fee contract, and no experience with such contracts was cited in the proposal. Also, apparently none of the corporate references about subcontract performance responded to NASA contacts.

Joule contends that its potential for improvement in this area is strong because of its experience at the Wallops Flight Facility. We disagree, since by its nature Joule's experience had to have been accumulated prior to this procurement. There is no reason to assume that Joule omitted from the proposal relevant government contract experience at Wallops Island or in addition to its NASA Wallops Island support contracts that would be disclosed during discussions. Moreover, Joule has not contended that it has additional relevant experience that would present a potential for improvement during discussions.

Joule also argues that NASA should have pursued the corporate references or discussed the lack of responses. The proposal contains the name, address, and telephone number of individuals in five companies or divisions of companies for which Joule provided subcontract services related to the proposed NASA work. The protester included no description of the services rendered to the companies, no dates for performance, or any other information helpful in evaluating experience and past performance. The individuals listed as references apparently did not respond to NASA contacts, and Joule was given no credit for whatever experience and past performance it may have had. We do not believe that NASA was obligated to pursue references listed in Joule's proposal who did not respond to initial contacts, particularly since there was no evidence of how closely related Joule's subcontract experience was to the proposed contract work. Although difficulties in reaching the references might be a subject of discussions, Joule's failure to provide details about its subcontract experience makes any projection of an improvement highly speculative. Nevertheless, if apprised during discussions of difficulties in reaching corporate references, Joule might have been able to establish the necessary contacts. Consequently, some potential for improvement based upon the references should have been considered by NASA.

The Board determined that the Joule proposal was not within the competitive range because its projected score on mission suitability factors and its rating for experience and past performance fell so far below the two more highly rated proposals that there was no reasonable chance for Joule to receive an award. This approach to determining the competitive range based upon the array of initial evaluation scores and the offeror's relative standing is acceptable. *Art Anderson Associates,* B-193054, Jan. 29, 1980, 80-1 CPD ¶ 77.

In our view, crediting the Joule proposal with improvements in the areas in which we think the Board should have considered potential improvement would not substantially change Joule's relative standing or place it within the competitive range. NASA considered the omission of salary commitments for designated and key personnel and the lack of detail about medical and disability benefits to be minor weaknesses. In each of the evaluation factors or criteria in which these minor weaknesses were found, the Joule proposal had other major weaknesses.

Even if the proposal were credited with one-third of all available points in the Understanding Requirements and Key Personnel factors (140 and 160 possible points, respectively), Joule's projected score (577) would remain almost 200 points below that of the next more highly rate offeror (771). Similarly, Joule's experience and past performance as disclosed in its proposal is so far below that of the two more highly rated proposals that discussions with the company's subcontract references could increase its standing very little. Consequently, we do not believe that Joule was prejudiced by the NASA evaluation approach, and that exclusion of its proposal from the competitive range was not unreasonable or in violation of applicable statutes or regulations.

The protest is denied.

[B-217337]

Bidders—Debarment—Labor Stipulation Violations—Davis-Bacon Act—Wage Underpayments—Debarment Required

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records, and induced several of its employees to rebate substantial portions of their back wages. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and rebate inducement was intentional. Therefore, the contractor will be debarred under the Act.

Matter of: Bryant Paint Contracting, Inc.—Davis-Bacon Act Debarment, May 23, 1985:

The Deputy Administrator, Employment Standards Administration, United States Department of Labor (DOL), by a letter dated April 17, 1984, recommended that the names Bryant Paint Contracting, Inc. (Bryant); Roy W. Bryant, individually; and Ralph W. Newcombe, individually; be placed on the ineligible bidders list for violations of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982), which constituted a disregard of obligations to employees under the Act. For reasons that follow, we concur in DOL's recommendation.

Byrant performed work under thirteen contracts (DABT 39-76-C-5058, DABT 39-76-C-5014, (DABT 39-76-C-5007, DACA 63-75-C-0233, DACA 63-75-C-0182, DACA 63-76-C-0277, DACA 63-75-

C-0228, DACA 63-75-C-0193, DACA 63-75-C-0236, DACA 63-77-C-0184, DACA 63-77-C-0139, DACA 63-75-C-0179, DACA 63-76-C-0227), variously with the Departments of the Army and Air Force doing painting and related work. These contracts were subject to the Davis-Bacon Act requirements that certain minimum wages be paid. Further, pursuant to 29 C.F.R. § 5.5(a) (1984), the contractor was to submit payroll records certified as to correctness and completeness.

The DOL found as a result of an investigation that employees were not paid the minimum wages required pursuant to the Davis-Bacon Act. Further, DOL found that certified payrolls were falsified and incomplete, and that employees were induced to rebate portions of their back wages. The DOL informed us that by certified letters dated October 14, 1983, Bryant was given notice in detail of the violations with which it was charged, and that debarment was possible. Further, Bryant was given an opportunity for a hearing on the matter before an administrative law judge in accordance with 29 C.F.R. § 5.12(b) (1984). The DOL reported to us that while the record indicates that these letters were received, no hearing was requested. After reexamining the record, DOL found that Bryant violated the Davis-Bacon Act without any factors militating against debarment. Therefore, DOL recommended that the names Bryant Paint Contracting, Inc.; Roy W. Bryant, individually; and Ralph W. Newcombe, individually; be placed on the ineligible bidders list for violations of the Davis-Bacon Act which constituted a disregard of obligations to employees under the Act. We concur in this recommendation.

The Davis-Bacon Act provides that the Comptroller General is to debar persons or firms whom he has found to have disregarded their obligations to employees under the Act. 40 U.S.C. §276a-2. The DOL recommended that Bryant and Messrs. Bryant and Newcombe, individually and as owners of Bryant, be debarred for violations of the Davis-Bacon Act constituting a disregard of obligations to the employees under the Act. In B-3368, March 19, 1957, we distinguished between "technical violation" which result from inadvertence or legitimate disagreement concerning classification, and "substantial violations" which are intentional as demonstrated by bad faith or gross carelessness in observing obligations to employees with respect to the minimum wage provisions of the Davis-Bacon Act. Falsification of payroll records is a basis for debarment under the Davis-Bacon Act. See, e.g., *Metropolitan Home Improvement Roofing Co., Inc.,* B-215945, January 25, 1985.

Based on our independent review of the record in this matter, we conclude that Bryant and Messrs. Bryant and Newcombe, individually and as owners of Bryant, disregarded their obligations to their employees under the Davis-Bacon Act. There was a substantial violation of the Davis-Bacon Act in that the underpayment of employees was intentional as demonstrated by Bryant's bad faith

in the falsification of certified payroll records. In addition, the record indicates that Bryant induced several of its employees to rebate substantial portions of their back wages.

Therefore, the names Bryant Paint Contracting, Inc., Roy W. Bryant, and Ralph W. Newcombe, individually and as owners of Bryant Paint Contracting, Inc., will be included on a list to be distributed to all departments of the Government, and, pursuant to statutory direction (40 U.S.C. § 276a-2), no contract shall be awarded to them or to any firm, corporation, partnership, or association in which they, or any of them, have an interest until 3 years have elapsed from the date of publication of such list.

[B-218025.1 & .2]

Contracts—Transportation Services—Procurement Procedures

The Navy is not required to follow procurement procedures to establish a scheduled airline traffic office (SATO) through which to acquire travel services, since establishment of a SATO does not involve a procurement of services within the meaning of the Competition in Contracting Act of 1984.

Matter of: Omega World Travel, Inc.; Society of Travel Agents in Government, Inc., May 23, 1985:

Omega World Travel, Inc. and the Society of Travel Agents in Government, Inc. (STAG) protest the Navy's plan to establish a scheduled airline traffic office (SATO) to provide travel management services in the Washington, D.C. metropolitan area. A SATO is an office run by a joint venture of air carriers to provide airline ticket reservations and related travel services. The protesters contend that the Navy is required to acquire its travel management services through an agreement to establish a SATO. We deny the protests.

Under a memorandum of understanding (MOU) dated April 6, 1981, the Department of Defense (DOD) and the Air Transport Association agreed to the terms and conditions under which SATOs would operate at military installations. In essence, the SATO agreed to reserve and issue airline tickets, and arrange for hotel accommodations, car rentals and other services related to the air travel. In addition, the SATO would furnish certain management data and reports to the installation in return for which DOD agreed that the military installation would furnish office space and other services related to operating the SATO on the installation. The MOU provides that the SATO arrangement may be terminated by either party on 90 days notice.

Prior to April 1984, our Office for many years prohibited the use of commercial travel agents to procure official government travel. 4 C.F.R. § 52.3 (1980). During the period when the prohibition was in effect, DOD's practice apparently was to acquire travel management services through the establishment of SATOs at military installations. In April 1984, our Office lifted the prohibition on the

use of commercial travel agents. 49 Fed. Reg. 17,721 (1984). As a result, the protesters contend, the Navy may not continue the practice of entering into an agreement to establish a SATO; it now must conduct a competitive procurement to acquire its travel management services. We disagree.

The purchase of travel services provided by the air carriers and other concerns has been exempted from the procurement statutes. See 40 U.S.C. § 481 (1982); Federal Property Management Regulations subpart 101-41.2, 41 C.F.R. subpart 101-41.2 (1984); Joint Travel Regulations, para. C2250; Federal Acquisition Regulation § 47.000, 48 C.F.R. § 47.000 (1984). The Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175 (1984), does not affect this exemption. Thus, government agencies generally are free to obtain travel services directly from the providers without using the procedures in the Act and its implementing regulations.

The SATO arrangement is no more than a management vehicle to facilitate the Navy's purchase of travel services which themselves are exempt from the procurement procedures. Using a SATO does not affect the cost of the travel services themselves since the government does not pay the SATO for the management services. The government provides only office space and related services to the SATO, the cost of which would be incurred by the government in any event as general overhead. Thus, the Navy's plan to establish a SATO is not subject to the Competition in Contracting Act. The protests are denied.

We recognize that since the prohibition on use of commercial travel agents was lifted, many government agencies have conducted competitive procurements to establish travel services offices. In addition, under Defense Transportation Program Policy memorandum 84-6, issued on May 11, 1984, to provide interim policy guidance regarding selection of travel services systems, the military departments are called on to use competitive procedures as a general rule when establishing travel services offices. Whether the Navy's plan is consistent with the policy set out in the DOD Memorandum, however, is a matter of internal agency policy, not an issue cognizable under our jurisdiction to review bid protests, 31 U.S.C. § 3551 *et seq.*, added by section 2741(a) of the Competition in Contracting Act.

Both protesters claim the costs of filing and pursuing the protests. The Competition in Contracting Act and our Bid Protest Regulations provide for recovery of costs only where a protest is found to have merit. *See* 31 U.S.C. § 3554(c)(1), as added by section 2741(a) of the Competition in Contracting Act; 4 C.F.R. § 21.6(d) (1985). Here, since we have denied the protests, we also deny the protesters' claims for recovery of costs.

[B-216068]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Adverse Agency Action Effect

General Accounting Office Bid Protest Procedures encourage protesters to seek resolution of their complaints initially with the contracting agency. Where protest was timely filed initially with the contracting agency and subsequent protest to GAO was filed within 10 working days of the contracting agency's initial adverse action on the protest, protest to GAO is timely.

Bids—Responsiveness—"No-charge", etc. Notations

Bidders may elect not to charge the government for certain services, and when they have indicated that they are aware of and willing to commit themselves to furnishing the item in question—as by inserting a zero, "no charge," or "not separately priced, "—the bid is responsive and the bidder may be considered for award notwithstanding agency's desire for dollar amount entry to serve as incentive to perform the service.

Matter of: Grumman Aerospace Corporation, May 24, 1985:

Grumman Aerospace Corporation (Grumman) protests the award to Burnside-Ott under solicitation No. N61339-84-B-0031 issued by the Naval Training Equipment Center, Orlando, Florida, as a two-step, formally advertised procurement of services under the Contractor Operation and Maintenance of Simulators (COMS) program. The COMS program was developed to provide contractor operation and maintenance of training equipment formerly operated and maintained by civilian employees and military personnel. Grumman submitted its technical proposal in the first step, was found to be technically acceptable, and was invited to submit its bid under the second step Grumman's apparent low bid was rejected as nonresponsive because Grumman failed to include a positive dollar amount for a specific line item as directed by an oral amendment to the solicitation. Grumman protests that it was improperly disqualified for failing to follow a purported telephonic directive which it contends it did not understand and never received in writing, thereby prejudicing its ability to compete and rendering the procurement defective.

We sustain the protest.

On June 20, 1984, the invitation for bids (IFB) was issued to the three firms that had submitted technically acceptable offers under the first step of this two-step procurement. Under the terms of the IFB, the contract would include a mobilization or preparation period of 2 months, a 1-year base period, four 1-year option periods, and a 2-month transition phase [1] to take effect at the end of the

[1] The "transition phase" describes the 60-day period of time at the end of a contract when the incumbent COMS contractor is turning over the operation and maintenance of specified training devices to a successor contractor or to the government. The incumbent contractor will be tasked, via a priced option in the existing contract, to provide transitional support while the successor contractor is preparing for COMS takeover coincident with the successor contractor's mobilization phase.

basic performance period (or at the end of the last option period for which the option was exercised). Bid opening was scheduled for July 23.

The IFB initially contained spaces for the price for the transition phase at the end of the base performance period and at the end of each option period, although only one transition period would be performed. The IFB indicated that the average price of all five transition period prices would be used to evaluate the total price to the government.

On July 12, 1984, the Navy issued amendment 0002, which revised the solicitation to require only one price for the transition phase work and to eliminate from the evaluation of prices the averaging concept with regard to the transition period. The Navy reports that amendment 0002 did not convey the Navy's intent that all bidders place a positive dollar amount (as opposed to "no charge (NC)" or "not separately priced (NSP)") in the space provided for pricing the transition phase line item.

This perceived deficiency in the solicitation became apparent to the Navy when a Grumman official called the contracting officer on July 18, 1984, to discuss pricing aspects of the mobilization phase line item for which Grumman contemplated submitting a "0" bid to reflect its ability to assign trained maintenance personnel from an existing contract with another government activity on the site. The Navy deferred answering the Grumman official's inquiry and sought advice of legal counsel concerning the manner by which offerors were required to price independent services for the mobilization and transition periods.

The Navy determined that offerors were required to enter a positive dollar amount in their bids on each of the contract line items for the mobilization phase and the transition phase. The Navy reasoned that if the "transition phase" item entry contained expressions such as "no charge (NC)," "not separately priced (NSP)," or "$0" as the consideration for the effort, the government would not be able to enforce performance of that transition effort.

According to the Navy, on July 19, 1984, a Navy contracting official contacted each offeror to inform them that some positive dollar amount was required for the mobilization line item and the transition line item and that bid entries of "no charge," "not separately priced," or "$0" would render a bid nonresponsive. The Navy did not provide confirming written notification of this telephonic amendment.

Bid opening on July 23, 1984, revealed that Grumman's overall bid was the lowest of the three offers by approximately $150,000. However, Grumman's bid included an "NC" (no charge) bid entry for the transition phase line item. Accordingly, Grumman's bid was declared nonresponsive for failing to include a positive dollar amount in accordance with the telephonic amendment of July 19, and the Navy awarded the contract to the next low bidder, Burn-

side-Ott, on July 23. Grumman was notified of the award to Burnside-Ott on July 24 and, on July 25, protested the award to the contracting officer. By letter of July 27, received by Grumman on July 30, the contracting officer denied Grumman's protest. Grumman filed its protest with this Office on August 10.

The Navy contends that Grumman's protest is untimely under section 21.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 21 (1984), because it was filed with our Office 17 days after Grumman knew that the contract had been awarded to Burnside-Ott. Citing our decision in *TSI, Inc.—Reconsideration,* B-202171, May 6, 1981, 81-1 C.P.D. ¶ 357, the Navy points out that a protester's continuing to pursue its protest at the contracting agency level after initial adverse agency action on its protest does not toll the running of the 10-day filing requirement. The Navy considers notification that award was made to Burnside-Ott to be the initial adverse agency action on Grumman's protest to the Navy. Thus, the Navy concludes that Grumman's protest is untimely and not for consideration on the merits by this Office.

We conclude that Grumman's protest was timely filed with this Office. Grumman is protesting the rejection of its low bid as nonresponsive and award to the second low bidder. Grumman could not have known its basis for protest until July 24, when it was notified of the rejection of its bid and the award to Burnside-Ott. Our procedures encourage protesters to seek resolution of their complaints initially with the contracting agency. 4 C.F.R. § 21.2(a) (1984). This is what Grumman did with its letter of protest to the Navy on July 25, just 1 day after it learned the basis for its protest. Thus, Grumman's protest to the Navy was timely. 4 C.F.R. 21.2(b)(2) (1984). If a protest is filed initially with the contracting agency, as is the case here, any subsequent protest to our Office must be filed within 10 working days of the protester's learning of the initial adverse action by the agency on the protest. 4 C.F.R. § 21.2(a) (1984). Here, the Navy's denial of Grumman's protest was received by Grumman on July 30 and constituted the agency's initial adverse action on Grumman's protest. Accordingly, Grumman's filing of its protest with this Office 9 working days later, on August 10, 1984, was timely.

We turn next to the merits of Grumman's protest that its bid was fully responsive to the requirements of the IFB as written and that it should have been awarded the contract. Having indicated in the cover letter to its bid dated July 10, 1984, that "Grumman offers to provide the services as described within our Technical Proposal for a total Firm Fixed Price of $2,101,247," and having specifically bid "NC" (or "no charge") on the transition phase item, Grumman argues that its bid was fully responsive to the written requirements of the IFB, because it clearly offered to provide all of the services called for at the total firm, fixed price offered. Grumman urges that the Navy's rejection of its "no charge" bid on the

transition phase is unsupportable when viewed against evidence that the Navy would have accepted even a "$1" bid on this item. As to the Navy's assertion that it issued a telephonic amendment making a positive dollar amount on the transition phase item a material matter of bid responsiveness, Grumman counters that although telephone conversations did take place between Grumman personnel and a Navy contracting official, it was never Grumman's understanding that a "no charge" bid on the transition phase item would be considered unacceptable.

We find this purported telephonic amendment had no effect on the responsiveness of Grumman's bid. While the Navy contends that it made bidding a positive dollar amount on the transition phase a material matter of bid responsiveness by its telephone directives of July 19, 1984, the Navy also admits it did not comply with the requirement of Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.208 (1984) that such conversations be followed up in writing where they have a material effect on the solicitation's requirements. See *I.E. Levick and Assoc.*, B-214648, Dec. 26, 1984, 84-2 C.P.D. ¶ 695. Since there were no mitigating circumstances offered by the Navy to justify its failure to provide a written amendment confirming the telephonic change to the alleged material pricing provision as required by FAR, 48 C.F.R. § 14.208, the bidders would not be bound by the ostensible requirements of the failed amendment. Cf. *Porta-Fab Corp.*, B-213356, May 7, 1984, 84-1 C.P.D. ¶ 511, where we held that oral amendments to a written solicitation are authorized—even if not subsequently confirmed—where exigent circumstances and urgent requirements would not permit the delay attendant to the processing of written amendments. However, in any event, we do not agree that the inclusion of a positive dollar amount on the transition phase could be construed as a material matter of bid responsiveness in this case.

The Navy's stated reason for requiring a positive dollar amount to be entered for the transition phase work, instead of allowing bids of "no charge" or "not separately priced" for this item, was to allow it to enforce performance of the transition effort. We point out, however, that we have specifically held that a bidder may elect not to charge the government for certain work and still have its bid be responsible. See *National Mediation Board—Request for Advance Decision*, B-209037, Oct. 8, 1982, 82-2 C.P.D. ¶ 323. All that is necessary is some affirmative indication in the bid—such as inserting a zero, the words "no charge," dashes, etc.—that the bidder is aware of and intends to furnish the services required. *Id.* at 4.

We view the test of a bid's responsiveness as whether the bid as submitted complies with the IFB's material provisions without exception. *Lusardi Construction Co.*, B-210276, Sept. 2, 1983, 83-2 C.P.D. ¶ 297, at 6. We find Grumman has committed itself to perform and is therefore contractually bound to perform all services, including the transition phase, required by the solicitation. Where

the bidder is thus obligated to perform the required service the entry of a positive price for that line item simply serves as an incentive without changing the nature of the existing legal obligation. Practically, the Navy's concern that Grumman might fail to perform in the transition phase is a matter of hypothetical hesitancy obviated by its own finding that Grumman is a responsible bidder. Thus, this incentive or informational line item figure was not in itself material and the failure to submit it could not render Grumman's bid nonresponsive in these circumstances.

In view of our conclusion, we recommend that the Navy consider the feasibility of terminating Burnside-Ott's contract for convenience and awarding Grumman a contract for this requirement. Alternatively, if the Navy determines that termination is not feasible, we recommend that the Navy not exercise the options in the Burnside-Ott contract and recompete those requirements among the three technically acceptable firms which competed here. By letter of today, we are advising the Secretary of the Navy of our findings and recommendation.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and to the House Committees on Government Operations and Appropriations in accordance with 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 recommendations.

[B-217063]

Officers and Employees—Transfers—Real Estate Expenses—Broker's Fees

Employee exchanged residence at old duty station for another residence in the vicinity of the old duty station incident to a change of official station. Employee may be reimbursed under 5 U.S.C. 5724a(a)(4) for real estate broker's commission and other allowable expenses incurred as "seller" in the exchange of residence since the assumption of the balance of the employee's mortgage loan is tantamount to a cash payment. Amount of broker's commission which is reimbursable is governed by the Federal Travel Regulations, para. 2-6.2a, as amended, and is limited by the amount generally charged for such services by the broker or by the brokers in the locality where the residence is located.

Matter of: Bonnie S. Petrucci—Reimbursement of Real Estate Broker's Commission—Exchange of Residences at Old Duty Station, May 28, 1985:

This decision is in response to a request by Mr. Don E. Hansen, Chief, Fiscal Standards Branch, Financial Systems Division, Office of Accounting, Federal Aviation Administration (FAA), Department of Transportation, for a decision as to whether a travel voucher submitted by Ms. Bonnie S. Petrucci, an employee of the agency, may be certified for payment. The voucher is for reim-

bursement of a real estate broker's commission, document preparation charge, and state revenue stamps paid by Ms. Petrucci in an exchange of residences at her old duty station. For the reasons hereafter stated, the expenses may be certified for payment in accordance with the applicable law and regulations.

Ms. Petrucci was authorized a permanent change of station from Dayton, Ohio, to Miami, Florida, pursuant to a travel order dated June 26, 1984. Ms. Petrucci and her husband entered into a real estate exchange contract with the Baileys, husband and wife, under which they exchanged their residence in Tipp City, Ohio, for a house owned by the Baileys in Monroe, Ohio. The sales price of the property owned by the Petruccis was $183,600, and the sales price of the property owned by the Baileys was $96,350. The loan portion of the Petrucci sales price was assumed by the Baileys.[1]

Ms. Petrucci is claiming reimbursement of $12,852 as the real estate broker's commission for the sale of her residence. However, this amount is not shown on the settlement statement for the "sale" of the Petrucci residence to the Baileys. Upon questioning of this fact, Ms. Petrucci obtained a letter from the lender (Milton Federal Savings and Loan Association) which acknowledged the payment of a 7 per cent real estate commission to a realty company on a selling price of $183,600, associated with the sale of the Petrucci residence to the Baileys. The lender stated that the commission amount, $12,852, should have been inserted on line 703 of its closing statement dated July 24, 1984, in connection with the sale of the Petrucci residence.

The FAA points out that the amount of $12,852 is identified as an expense paid by the Petruccis on the "purchase" of the Baileys' property. Further, no other real estate commission is shown on the two closing statements, indicating that the commission involved in the trade of properties was paid entirely by the Petruccis, and none paid by the Baileys.

The fiscal officer asks the following questions concerning this transaction:

1. May the Government reimburse the employee for costs incurred in trading a residence at the old duty station for another residence in the same area?
2. If so, is the letter from Milton Federal sufficient to indicate that the real estate commission was related to the sale portion of the transaction?
3. Is it reasonable that the entire commission in this transaction was paid by our employee?
4. May we properly reimburse the employee for the $12,852.00 real estate commission involved in this transaction?

The reimbursement of real estate expenses incurred in connection with a federal employee's change of duty station is governed

[1] While the Petrucci's exchanged one residence for another at Ms. Petrucci's old duty station, we have no reason to question that this transaction was prompted by, and related to, her change of station. In any event, a specific determination to this effect is not necessary in the circumstances of this case in order to establish eligibility for reimbursement of real estate expenses. See *Warren L. Shipp*, 59 Comp. Gen. 502, 504 (1980).

by 5 U.S.C. § 5724a(a)(4) and the implementing regulations, Chapter 2, Part 6 of the Federal Travel Regulations (Supp. 4, August 23, 1982), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984) (FTR). Paragraph 2-6.1 of the FTR provides that to the extent allowable "the Government shall reimburse an employee for expenses by him/her in connection with the sale of one residence at his/her old official station, * * *." We have recognized that the regulation permits reimbursement of certain expenses incurred for the purpose of transferring title by other than the usual sale or purchase transaction. 61 Comp. Gen. 112 (1981).

In responding to the questions asked by the fiscal officer, first, the FAA may reimburse Ms. Petrucci for the allowable costs incurred in the sale and exchange of her residence for another house, both in the vicinity of the employee's old duty station. In a case with similar factual circumstances, involving an exchange of residential properties at the old duty station, we stated that the assumption of the balance of the mortgage loan of the employee by another party was tantamount to a cash payment to the employee. We recognized the transaction as a sale within the meaning of the predecessor law and regulations of 5 U.S.C. § 5724a(a)(4) and FTR para. 2-6.1. See B-166419, April 22, 1969.

Our review of the letter from the lender, as well as informal contact with the writer of the letter, discloses that the real estate broker's commission of $12,852 was inadvertently entered on the closing statement for the Bailey's property. In line with the usual and local custom that the seller pay the broker's commission and since the realty company had listed the employee's (Petrucci) property for sale and made efforts to sell it, such commission should have been listed on line 703 of the closing statement for the sale and exchange of the Petrucci property. Therefore, the letter is sufficient to show that the broker's commission was related only to the sale and exchange of the Petrucci residence and further, that it was reasonable that the entire broker's commission be paid by Ms. Petrucci and her husband. Questions 2 and 3 are answered accordingly.

As to whether Ms. Petrucci may be properly reimbursed the real estate broker's commission, the commission may be certified for payment provided it is not in excess of the rates generally charged for such services by the broker or by brokers in the locality of the old duty station. See FTR paras. 2-6.2a and 2-6.3c.

[B-218138]

Contracts—Industrial Readiness Planning Program—Restricted v. Unrestricted Procurement

Agency is not required to procure component of an item listed on the industrial readiness program planning list on an unrestricted basis unless the component itself is on the list and a large business listed as a Planned Emergency Producer of the component desires to be a source of supply.

Matter of: ConDiesel Mobile Equipment, May 29, 1985:

ConDiesel Mobile Equipment protests the rejection of its low bid and the award of a contract to Freund Precision, Inc., under invitation for bids (IFB) No. DAAA09-85-B-0031, issued and set aside for small business by the United States Army Armament, Munitions, and Chemical Command, Rock Island, Illinois. The solicitation sought offers to supply manifold assembles that are components of M198/M39 155 millimeter howitzer carriages. ConDiesel, a large business, contends that, since it is a Planned Emergency Producer of the howitzer carriages and since it wished to compete, applicable regulations prohibit the Army from restricting the procurement to small business.

We deny the protest.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502-2 (1984), requires agencies to set aside a procurement for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price. The regulation makes an exception to this general rule for items that are on an established planning list under the Department of Defense (DoD) Industrial Readiness Planning Program. 48 C.F.R. § 19.502-5 states that a total set-aside shall not be made when the planning list contains "a large business Planned Emergency Producer of the item" that desires to be the source of supply.

The manifold assemblies being procured by the Army in this case are spare parts for M198/M39 howitzer carriages. As a Planned Emergency Producer of these carriages, ConDiesel argues that the procurement may not be set aside for small business as long as it desires to supply the manifold assemblies. The protester has previously supplied the manifold assemblies as components under contracts for howitzer carriages and as spare parts under a contract for the manifold assemblies.

ConDiesel initially protested to the Army concerning the decision to set aside the procurement before bid opening, which took place on January 8, 1985. At the contracting officer's suggestion, ConDiesel submitted a bid while the Army considered the protest. On January 30, ConDiesel received a letter from the Army confirming its decision to set aside the procurement.

In response to ConDiesel's protest to our Office, filed on February 7, the Army points out that the manifold assemblies are themselves not on an established planning list. The agency argues that since ConDiesel is not a planned producer of the assemblies, the restriction on small business set-asides in FAR § 19.502-5(b) is inapplicable.

We agree. DoD's Industrial Readiness Planning Program (also described as the Industrial Preparedness Production Planning Pro-

gram) encompasses planning by DoD with possible producers of essential military items in order to assure the capability for production during periods of national emergency. *See* DoD FAR Supplement, 48 C.F.R. 208.070 (1984). In selecting items for industrial readiness planning, defense agencies are required to include and list separately components of essential military end items which meet the criteria established for selection of the end items themselves, such as those which require a long lead time for production or require specialized production equipment. DoD Instruction 4005.3, "Industrial Defense Preparedness Planning Procedures" (July 28, 1972), p. 2. Defense agencies enter into planning agreements with subcontractors which manufacture critical components that are included on the list of items in the planning program. DoD Manual 4005.3-M, "Industrial Preparedness Planning Manual" (July 1972), pp. 33-47.

In view of the policy DoD to include separately critical components on the established planning list, we do not believe that an agency is prohibited from setting aside its requirement for a component of a military item unless the component is itself on the list and a large business Planned Emergency Producer of the component desires to be the source of supply. Since the manifold assemblies being procured by the Army are not on the established planning list, the Army could restrict the procurement to participation by small businesses. We therefore find that the Army properly rejected ConDiesel's low bid, since the firm was not eligible for an award.

The protest is denied.

[B-218230]

Bids—Ambiguous—Two Conflicting Prices for Same Item

Where firm submits three copies of its bid, each with a total price of $820,000; prices masonry work at $495 on two copies and $4,495 on the third; and claims that $495 was intended and that the total bid should be $816,000 ($820,000 incorporates the $4,495 figure), it is not clear what the bid actually intended was, particularly since $4,495 is consistent with the other four bidders' prices for the work.

Matter of: W.G. James, Inc., May 31, 1985:

W.G. James, Inc. (James), protests award of a contract to Certified Mechanical Contractors, Inc. (CMC), under invitation for bids (IFB) No. 2994 issued by the Federal Bureau of Investigation (FBI) for construction services for secure communications renovation of the FBI's Chicago Field Office. James, which was tied with CMC as the apparent low bidder, complains that CMC was permitted to correct its bid downward.

We sustain the protest.

Each bidder was required to submit three copies of the bidding documents, which were bound in a Bidding Submittals Booklet. Although award was to be based on low total price, appendix "B" to

the solicitation, entitled Base Bid Price Breakdown, provided for the listing of prices by divisions. Each of the 16 divisions covered a type of material and labor, including overhead and profit, within the scope of the work to be performed.

James and CMC submitted total bids of $820,000. However, review of the three copies of appendix "B" submitted by CMC disclosed a discrepancy in division four, covering the price for masonry work. On two of the copies, the amount for division four was listed as $495; whereas, on the third copy, the price for division four was listed as $4,495. At the $495 figure, the total bid would be $816,000 and would be the low bid. At the $4,495 figure, the total bid is $820,000 as bid on each of the three copies of CMC's bid. The other four bidders listed $4,500, $5,000, $7,000 and $7,900 (James) for the division four masonry work.

In response to an inquiry by the FBI, CMC advised that $495 was the intended price for the division four work and that the total bid should be $816,000. In support, CMC submitted a copy of its masonry takeoff and pricing sheet, dated the same date as bid opening, showing $495 as the price for masonry. The FBI also contacted the architectural firm that had prepared the plans for the construction and was told that this firm estimated the price for the masonry work on division four to be $470. Finally, the FBI field office engineer computed the probable cost of the masonry work from a standard industry guide and advised the contracting officer that a price of $495 was reasonable. The FBI considered the evidence to be clear and convincing of the mistake and the bid intended; permitted CMC to correct its bid; and awarded the contract to that firm as low bidder.

James complains that the FBI used evidence outside CMC's bid to permit correction. In this regard, the procurement regulations provide that a determination may be made to permit a bidder to correct a mistake if clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, except that if this correction would result in displacing one or more "lower bids," the mistake and the bid actually intended must be ascertainable substantially from the solicitation and the bid itself. Federal Acquisition Regulation (FAR), 48 CFR § 14.406 (1984). James further contends that in view of the other four individual prices quoted for the masonry work, the $4,495 amount was the only reasonable interpretation of the conflicting figures. James asserts that the masonry subcontractor it intended to use for the division four work has advised that it quoted both CMC and James a price of $4,495. At best, James argues, the bid should have been rejected as ambiguous.

The FBI justifies resort to CMC's masonry worksheet by the fact that the regulations only preclude such evidence where a lower bidder will be displaced; whereas, here, FBI points out, there is a tie bid situation. The FBI also argues that, even where a lower

bidder would be displaced, an agency may consider extrinsic evidence over which the bidder has no control, like the architectural firm's and the FBI engineer's post-bid-opening estimates, which the FBI asserts provide clear and convincing evidence of the mistake and the intended bid. The FBI discounts the other four bidders' prices for the masonry work because the masonry work accounts for only about 0.0006 percent of the cost of the project, and such a small job thus might be performed either by the prime contractor or subcontracted, so that considerable price variation might be expected. Finally, as to the alleged masonry subcontractor quotation of $4,495 to both James and CMC, the FBI notes that James actually priced the work at $7,900 and suggests CMC may well have received a lower quotation than the one alleged by James.

Even considering CMC's masonry worksheet and the two post-bid-opening estimates for division four, we cannot agree with the FBI that the evidence clearly and convincingly establishes that CMC meant to bid $495 for the division four work. The total bid CMC entered on each of the three copies of the bid was $820,000, which includes the $4,495 figure, and on one the firm entered a price for division four of $4,495. While the two estimates are closer to the allegedly intended price of $495, it is significant that the price alleged to be in error is much more in line with the prices of other actual bidders on the IFB: $4,500, $5,000, $7,000, and $7,900. Under these circumstances, we think it just as likely that CMC intended to bid the total it actually entered, $820,000, as the total it alleges it really meant, $816,000. We therefore believe the evidence of the allegedly intended bid was not clear and convincing, so that correction of the bid downward was improper.

Generally, where a bid price is subject to two reasonable interpretations and the bid would be low under only one of them, the bid must be rejected. See *Hudgins Construction Co., Inc.*, B-213307, Nov. 15, 1983, 83-2 C.P.D. ¶ 570. Here, however, except for the correction of CMC's bid, the award of the contract would have been determined in accordance with the tie-bid provisions of FAR, 48 C.F.R. § 14.407-6, under which priority is given in the following order: small business labor surplus area concerns; other small businesses; and other labor surplus area concerns. The regulation further provides that if two or more bidders remain equally eligible even then, award is determined by drawing lots. Since the FBI advises that neither CMC nor James would have been entitled to a priority, so that the award would have been determined by lot, CMC still would have had a chance at award even at $820,000.

We therefore, are recommending to the FBI that award of the contract be redetermined by lot in accordance with the provisions of FAR, 48 C.F.R. § 14.407-6; if James wins by lot, the contract with CMC should be terminated for the convenience of the government and reawarded to James.

We point out that our recommendation is made without regard to the extent of contract performance to date, since performance has proceeded despite the protest filing. Where, as here, a federal agency receives, within 10 days of the date of contract award, notice of a protest filing[1] under the statutory bid protest provisions at 31 U.S.C. § 3551-3556, as added by the Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1199 (1984), the agency must suspend performance of the contract until the protest is resolved. 31 U.S.C. § 3553(d)(1). The only exceptions are where the head of the responsible procuring activity makes a written finding that either contract performance is in the best interest of the United States, or there are urgent and compelling circumstances significantly affecting the interests of the United States which do not permit waiting for a decision, and so notifies this Office. 31 U.S.C. § 3553(d)(2) (A), (B). Further, the statute requires that our Office, in making a recommendation in connection with the resolution of a bid protest, disregard any cost or disruption from terminating, recompeting, or reawarding the contract if the head of the procuring agency determined to proceed with contract performance. 31 U.S.C. § 3554(b)(2). Not only did the FBI not suspend performance in this case but, in fact, we are not aware that the procuring activity head even made the requisite finding to authorize continued performance.

Accordingly, we make our recommendation irrespective of any factors other than that the contract award was improper.

Should the FBI fail to adopt our recommendation, we declare James to be entitled to the costs of filing and pursuing the protest, including reasonable attorney's fees, and the costs of preparing its bid in response to the solicitation, as expressly authorized by statute. 31 U.S.C. § 3554(c)(1); *see also* our Bid Protest Regulations implementing that authority, 4 C.F.R. § 21.6 (1985).

The protest is sustained.

[1] The contract was awarded on February 20; James filed the protest in our Office on February 25; and we notified the FBI of the filing on that same date.

U.S. GOVERNMENT PRINTING OFFICE : 1985 0 - 486-420