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[B-219666]

Contracts—Negotiation—Offers or Proposals—Rejection

An agency may reject an offer, which proposes a social government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist. Because of the longstanding policy against contracting with government employees, the agency has a reasonable basis for application of this restrictive policy to the protester's offer, even though notice of this policy was not given in statute, regulation or the Request for Proposal (RFP).

Contracts—Negotiation—Offers or Proposals—Discussion With All Offerors Requirement—Exceptions—Offers Not Within Competitive Range

Even where discussions are conducted with the sole remaining offeror in the competitive range, no discussions need be held with the protester, who had previously been determined in the competitive range, in a case where the protester's offer proposing an agency employee as a major consultant is rejected because of a potential conflict of interest and the agency reasonably determines that the employee was a primary factor in the protester's high ranking and is integral to the protester's proposal, which cannot readily be changed through negotiations.

Matter of: Defense Forecasts, Inc., Dec. 5, 1985:

Defense Forecasts, Inc. (DFI), protests the rejection of its proposal under request for proposals (RFP) No. 85-06, issued by the United States Arms Control and Disarmament Agency (ACDA). We deny the protest.

The RFP requested proposals for a research project on alternative approaches to arms control. Thirteen proposals were received and three were found to be within the competitive range. The ACDA source selection board ranked the three competitive proposals in the following order: (1) Systems Planning Corporation (SPC); (2) DFI; (3) The BDM Corporation (BDM).

Although this matter was not mentioned in the solicitation, questions were raised by the board regarding potential conflicts of interest in making award to either SPC or DFI. The board was concerned over SPC's use of the National Institute of Public Policy (NIPP) as its major subcontractor because the NIPP's president is a member of ACDA's General Advisory Committee. *See* section 26 of the Arms Control and Disarmament Act, 22 U.S.C. § 2566 (1982). The board also was concerned over DFI's proposed use of Thomas J. Hirschfeld as a major consultant. Mr. Hirschfeld periodically performs consultant work for ACDA and is currently a special government employee of ACDA. ACDA's contracting officer and counsel determined that there would be no actual conflict of interest in making award to any of the three competitive offerors. However, they recommended that the Director of ACDA make a policy decision on this matter because of the possible appearance of a conflict of interest if award were made to SPC or DFI.

The Director of ACDA recommended BDM for selection as the only competitive offeror which did not have an apparent conflict of interest. He found that the subcontract and consultant arrange-

ments of SPC and DFI were a primary factor in their high technical evaluations and were integral to their proposals. He based his decision to reject SPC's and DFI's proposals on Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.601 (1984), which provides:

> . . . a contracting officer shall not knowingly award a contract to a Government employee or a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

DFI protested to our Office that its proposal should not have been rejected because DFI is not "owned or controlled" by Mr. Hirschfeld or any other government employee and, thus, did not fall under the FAR, § 3.601, proscription. DFI contends that in the absence of an applicable statute, regulation or solicitation provision, offerors cannot be rejected for a potential conflict of interest. DFI further states that its proposal can only be rejected if there are "hard facts" showing an "actual" conflict of interest—a situation which ACDA concedes does not exist—and that a proposal cannot be rejected on the basis of a theoretical or potential conflict of interest. DFI finally contends that this matter should have been negotiated with it in any case, particularly since negotiations were admittedly conducted with BDM to revise its proposal after it was selected. SPC did not protest the rejection of its proposal.

We have consistently held that the responsibility for determining whether a firm has a conflict of interest and to what extent a firm should be excluded from competition rests with the procuring agency; we will overturn such a determination only when it is shown to be unreasonable. *Iris International, Inc.*, B-216084.2, May 10, 1985, 85-1 C.P.D. ¶ 524. It is also established that a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable law or regulations, when the needs of the agency or the nature of the procurement dictates the use of such restriction, even where the restriction has the effect of disqualifying particular firms from receiving an award because of a conflict of interest. *R.W. Beck & Associates,* B-218457, July 19, 1985, 85-2 C.P.D. ¶ 60.

Mr. Hirschfeld, DFI's consultant, is an independent consultant who had reportedly never previously been employed in any capacity by DFI. His work as a special employee for ACDA has been sporadic; he had performed no work for a year before the proposal was submitted although he performed some work for ACDA after proposal submission. It appears that none of Mr. Hirschfeld's work directly related to the subject matter of this contract, and that he was not in a position to exercise any authority or influence at ACDA over this procurement. There is no allegation that Mr. Hirschfeld's activities in this case violate the sanctions contained in 18 U.S.C. §§ 205, 208 (1982) against improper outside employment by government employees. Moreover, ACDA is not concerned

with "organizational conflict of interest" problems in making an award to DFI. That is, ACDA did not find that DFI or Mr. Hirschfeld had any special inside information which would give DFI an unfair competitive advantage. Moreover, ACDA is not concerned about DFI's objectivity in performing the contract work. FAR, subpart 9.5 (1984).

The statutes governing the conduct of government employees do not expressly prohibit contracts between the government and its employees except where the employee acts for both the government and the contractor in a particular transaction or where the service to be rendered is such as could be required of the government in his capacity as a government employee. 18 U.S.C. §§ 205, 208 (1982); *Ernaco, Inc.*, B-218106, May 23, 1985, 85-1 C.P.D. ¶ 592. FAR, § 3.601, clearly does not preclude the acceptance of DFI's proposal in this case, since DFI is not owned or controlled by a government employee. The policy statement in the second sentence of the regulation only explains the reasons for this preclusion and does not specifically prevent government employees from serving as independent consultants to government contractors which they do not own or control.

Nevertheless, the policy against contracting with government employees is deep-seated and longstanding because such awards invite criticism as to alleged favoritism and possible fraud. *See* 55 Comp. Gen. 681 (1976) and cases cited therein. Since such allegations or beliefs by competitors for government contracts can adversely affect the integrity of the procurement system, we have held that awards to firms controlled by government employees should not be made except for the most cogent reasons. 41 Comp. Gen. 569, 571 (1962); *Capitol Aero, Inc.*, 55 Comp. Gen. 295 (1975), 75-2 C.P.D. ¶ 201. *Contrast Chemonics International Consulting Division,* 63 Comp. Gen. 14 (1983), 83-2 C.P.D. ¶ 426, and *Edward R. Jareb,* 60 Comp. Gen. 298 (1981), 81-1 C.P.D. ¶ 178 (government policy on proposing former government employees). We have drawn no distinctions between special and regular government employees with regard to the application of this policy. *Ernaco, Inc.*, B-218106, *supra.*

ACDA reports that it is a very small independent agency, which significantly aggravates the allegations of conflict of interest if its employees can be proposed by offerors on competitive solicitations. In this regard, ACDA references BDM's comments on the DFI protest, which include a number of allegations about the "cozy" relationship, including access to inside information, that Mr. Hirschfeld had with ACDA officials. These allegations are denied by ACDA and DFI.

The nature of the appearance of a possible conflict of interest in making award to firms owned or controlled by government employees as compared to award to firms which propose current government employees of the procuring agency as major subcontractors or

consultants can be reasonably found to be indistinguishable. The apparent pecuniary interest of the government employees and the potential adverse affect on the integrity of the procurement system may be found to be the same in both situations. Therefore, we believe that it is within ACDA's discretion to establish a stricter policy with regard to the eligibility for award of firms which propose to use ACDA employees as major consultants on ACDA procurements. *Cf.* 41 Comp. Gen. 569, 570, *supra* (an agency may reasonably establish a policy which precludes the use of government employees as subcontractors on its contracts). *Contrast* B-144482, Feb. 20, 1961 (voucher for contract performance may be paid to a contractor which used a government employee as a major subcontractor where the employee received assurances from the agency before performing the subcontract work that the work was not illegal or improper.)

Due to the type of the apparent conflict of interest, which concerns the activities of a current government employee, no "hard facts" of an actual or potential conflict of interest need be shown for an agency to reject an affected proposal because the "policy is intended to avoid even the appearance, much less the fact, of favoritism or preferential treatment." *Valiant Security Agency,* B-205087, Dec. 28, 1981, 81-2 C.P.D. ¶ 501. Contrast, *CACI Inc.—Federal* v. *United States,* 719 F.2d 1539 (Fed. Cir. 1983) (protester must show "hard facts" of the likelihood of a conflict of interest to overturn an agency determination to make an award).

DFI contends that since it was not given notice of ACDA's restrictive policy on proposing government employees, that policy cannot be retroactively employed to reject DFI's proposal. FAR, § 9.504 (1984), requires agencies to determine what potential conflicts of interests may exist in a procurement and to include notice of such restrictions in the solicitation. In this case, the RFP did not indicate that proposals could be rejected because of potential conflicts of interest. ACDA claims that FAR, § 9.504, is inapplicable since it only concerns organizational conflicts of interest. However, FAR, § 3.603(b) (1984), provides that the contracting officer shall comply with FAR, subpart 9.5, with regard to the application of agency policy on the use of agency employees by government contractors. ACDA explains that it did not put a specific provision in the solicitation announcing its policy on proposing government employees because no previous offerors on its competitive solicitations had proposed using government employees. ACDA proposes to specifically announce this policy in future solicitations.

Ordinarily, proposals cannot be rejected because of an appearance of a conflict of interest unless there is a solicitation provision or other notice in laws or regulation which so provides. *PRC Computer Center et al.,* 55 Comp. Gen. 60, 81 (1975), 75-2 C.P.D. ¶ 35. However, in appropriate circumstances, we have recognized the propriety of rejecting bids or proposals because of an actual or po-

tential conflict of interest, even though the affected offeror or bidder had not been previously apprised that its bid or proposal may be rejected on this basis. See *Nelson Erection Company, Inc.*, B-217556, Apr. 29, 1985, 85-1 C.P.D. ¶ 482; *LW Planning Group*, B-215539, Nov. 14, 1984, 84-2 C.P.D. ¶ 531; *Acumenics Research and Technology, Inc.*, B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94.

We believe the instant situation is one where no prior notice is necessary. DFI was cognizant of Mr. Hirschfeld's status with ACDA when it submitted its proposal and did not inquire of ACDA regarding the propriety of proposing him as a principal consultant. In our opinion, DFI reasonably should have been aware that proposing a government employee could present a problem. ACDA acted in good faith and has a reasonable basis for the application of its restrictive policy on the use of ACDA employees. Consequently, we find that ACDA's failure to announce this restriction in the solicitation would not justify resolicitation of this requirement or nonapplication of the policy to DFI.

Finally, DFI argues that since ACDA conducted discussions with BDM after selection concerning its staffing mix and cost proposal, ACDA was required to conduct discussions with all offerors within a competitive range. DFI states that had it been apprised of ACDA's concern with Mr. Hirschfeld, it would have replaced him with an equally competent consultant.

However, ACDA's Director, in selecting BDM, concluded that Mr. Hirschfeld was a primary factor in DFI's high ranking and an integral part of DFI's proposal, which could not readily be changed through negotiations. That is, ACDA eliminated DFI from the competitive range because the apparent conflict of interest could not be resolved through meaningful discussions without changing an integral part of DFI's proposal.

We agree that changing DFI's proposal to replace Mr. Hirschfeld would be a major change to its proposal. DFI has provided no evidence, other than its bare assertion, that it would be able to provide a consultant with the same strengths and reputation of Mr. Hirschfeld, as evaluated by ACDA, or that its proposal would not have to be significantly modified to accommodate the abilities and strengths of an alternative consultant. Therefore, we conclude that ACDA's determination to hold no further discussions with DFI was reasonable.

Since SPC was eliminated from the competitive range for the same basic reason and the other offerors had already been eliminated, only BDM remained in the competitive range. A procuring agency may reverse its competitive range decision, eliminating a proposal formerly considered to be within the range, if it later reasonably determines through discussions and/or evaluation that the proposal is unacceptable, even if only one proposal then remains in the competitive range. *SDC Integrated Services, Inc.*, B-195624, Jan. 15, 1980, 80-1 C.P.D. ¶ 44. *WASSKA Technical Systems and Re-*

tential conflict of interest, even though the affected offeror or bidder had not been previously apprised that its bid or proposal may be rejected on this basis. See *Nelson Erection Company, Inc.*, B-217556, Apr. 29, 1985, 85-1 C.P.D. ¶ 482; *LW Planning Group*, B-215539, Nov. 14, 1984, 84-2 C.P.D. ¶ 531; *Acumenics Research and Technology, Inc.*, B-211575, July 14, 1983, 83-2 C.P.D. ¶ 94.

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Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Undue Restriction Not Established

Protest that solicitation requirement for timely performance of services notwithstanding variations in the workload is unduly burdensome because the provision for an adjustment in the delivery schedule in the event of saturation does not define when an adjustment is required is denied. The protester neither alleges nor shows that the general requirement for timely performance notwithstanding variations in the workload is not part of the agency's requirements; GAO is aware of no requirement that agencies set forth in their solicitation the precise basis for adjustments; and nothing in the provision interferes with the contractor's right to seek relief under the disputes clause in the solicitation.

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Undue Restriction Not Established

Clause in solicitation for audiovisual services which imposes liability on contractor for the costs reasonably incurred by the government—the cost of reshooting the film—as a result of the loss of exposed film is not unduly burdensome. Although the agency failed to place a definite limit on the potential liability of the contractor, the Federal Acquisition Regulation, 48 C.F.R. 45.103(a) (1984), generally provides that contractors are responsible and liable for government property in their possession, and the solicitation included estimates of the agency's annual requirements for different types of audiovisual productions and required offerors to propose a specific cost for the most frequently used elements in audiovisual productions.

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Undue Restriction Not Established

GAO is aware of no basis upon which to object to provision, in solicitation for audiovisual services, for adjusting downward the price for a particular audiovisual production in the event that the contractor utilizes fewer personnel than the number which it proposed to use when negotiating the price for that production and which formed the basis of the agreed price.

Matter of: Dynalectron Corporation, Dec. 6, 1985:

Dynalectron Corporation (Dynalectron) protests the terms of request for proposals No. DAVA01-85-R-0001, issued by the Defense Audiovisual Agency (DAVA) for the procurement of audiovisual services. Dynalectron alleges that the workload estimates in the solicitation are erroneous, that the liquidated damages provisions impose a penalty, and that the solicitation otherwise imposes undue risk and burden upon the contractor. We deny the protest.

The solicitation requested proposals for supplying audiovisual services at a firm, fixed price and for undertaking audiovisual productions on an indefinite-quantity basis, for a 9-month base period and 4 option years, in connection with DAVA's operations at Norton Air Force Base in California. The Air Force assumed the functions of DAVA after September 30, 1985. Under the audiovisual services portion of the solicitation, offerors were provided with estimates of DAVA's requirements for a number of audiovisual services (RS')—*e.g.*, black and white and color prints, slides, re-

search assistance, maintenance—and were required to propose a total price for providing all these services during each of the base and option periods. Under the audiovisual productions portion of the solicitation, offerors were provided with estimates of DAVA's annual requirements for 91 of the most frequently used elements of audiovisual productions—*e.g.*, producers, videotape editors, video cassettes—and were required to propose a per unit cost to the government for each element. When DAVA requires an individual production during the contract period, the contractor will submit a contract pricing proposal setting forth the estimated usage of costed elements, as priced at the time of contract award, and any uncosted elements likely to be required. Based upon this proposal, the government and contractor will negotiate a fixed price for the production. The solicitation provided that proposals would be evaluated for purposes of award by adding the price for all option quantities to the price for the basic quantity and that award would be made to the responsible offeror submitting the low, technically acceptable offer.

Shortly before the August 9, 1985, closing date for receipt of initial proposals, Dynalectron filed this protest against the terms of the solicitation.

Workload Estimates

Dynalectron alleges that the solicitation's workload estimates for the audiovisual services are erroneous and misleading because they differ substantially from the government's actual requirements. Dynalectron points out that the statistics concerning the workload under the current contract are reported weekly to DAVA as required under that contract. In its initial protest, Dynalectron identified 20 RS' for which the current, actual workloads under DAVA's contract with Dynalectron exceeded the estimated workloads set forth in this solicitation by at least 100 percent. In addition, Dynalectron generally alleged that the estimates for approximately 40 other unidentified RS' were overstated by at least 50 percent and that the estimates for approximately two-thirds of the RS' differed significantly from the current workload.

In the administrative report responding to the protest, DAVA conceded that figures for the actual workload experienced under the current contract were not considered in deriving the estimates in this solicitation. Rather, these estimates were instead based upon the estimates contained in the prior solicitation which resulted in the current contract so as to more easily compare the advantages of accepting an offer for a new contract with the government's option of extending the current contract.

Nevertheless, DAVA indicated that it would amend the solicitation to include revised workload estimates which took into account the actual workload experience under Dynalectron's current con-

tract. Shortly thereafter, DAVA issued amendment No. 6, which, among other things, replaced many, but not all, of the original estimates with revised estimates. DAVA describes the revised estimates as the "fruit of the Government's best judgment based on the most current data," indicating that both actual workload figures through July 1985 and projections of the future workload after the Department of the Air Force takes over the functions of DAVA were considered.

In its September 30 comments, Dynalectron admits that the corrections to the workload estimates for the motion picture laboratory and the motion media depository, covering approximately 6 of the 20 RS' originally identified as defective, appear to be "fairly accurate and reflect experience." Dynalectron, however, contends that "for the most part," DAVA has failed to provide historical workload data and argues that in all areas other than the RS' related to the motion picture laboratory and the motion media depository, the corrections were "erratic to non-existent." In support of its contention, Dynalectron now provides what it claims to be the actual 1984 and 1985 workloads for all the RS'.

When the government solicits offers on the basis of estimated quantities to be utilized over a given period, the estimates must be compiled from the best information available. They must be a reasonably accurate representation of the anticipated needs, although there is no requirement that they be absolutely correct. See *Fabric Plus, Inc.*, B-218546, July 12, 1985, 85-2 C.P.D. ¶ 46; cf. *Ace Van & Storage Co., Windward Moving & Storage Co.*, B-213885, *et al.*, July 27, 1984, 84-2 C.P.D. ¶ 120. A protester challenging an agency's estimates bears the burden of proving that those estimates are not based on the best information available, otherwise misrepresent the agency's needs, or result from fraud or bad faith. See *D.D.S. Pac*, B-216286, Apr. 12, 1985, 85-1 C.P.D. ¶ 418; *Ace Van & Storage, supra*, B-213885, *et al.*, 84-2 C.P.D. ¶ 120 at 8.

Dynalectron has not met that burden. Dynalectron essentially argues that the estimates are defective because they deviate from the current, actual workload under Dynalectron's contract with DAVA. The differences, however, between the current workload figures and the estimates in the solicitation for the 20 RS' identified in Dynalectron's original protest have in fact been significantly reduced as a result of the substitution of the revised estimates. Moreover, we point out that workload estimates should represent the best estimates of the agency's anticipated *future* requirements, not merely parrot the current workload figures. This is particularly important here where (1) a comparison of the workload figures for 1984 and 1985 as provided by Dynalectron reveals significant fluctuations in the character and quantity of the work, thus calling into question a total reliance on the figures for 1985, (2) a new agency with potentially different priorities is assuming responsibility for these functions, and (3) a contract under this solicitation

could be extended by exercise of the options to a period of nearly 5 years. Cf. *Richard M. Walsh Associates, Inc.*, B-216730, May 31, 1985, 85-1 C.P.D. ¶ 621.

We recognize that in its September 30 comments, Dynalectron has identified additional RS' for which the workload estimates in the solicitation are allegedly defective. The alleged defects in these specific RS', however, were apparent prior to the August 9 closing date for receipt of initial proposals and our Bid Protest Regulations require protests which are based upon alleged improprieties in a solicitation apparent prior to a closing date to be filed prior to that closing date. 4 C.F.R. § 21.2(a)(1) (1985). Moreover, since our Bid Protest Regulations are designed to give protesters and interested parties a fair opportunity to present their cases with the least disruption possible to the orderly and expeditious process of government procurements, they do not contemplate a piecemeal presentation or development of protest issues. See *Pennsylvania Blue Shield*, B-203338, Mar. 23, 1982, 82-1 C.P.D. ¶ 272. Accordingly, we consider Dynalectron's detailed allegations of September 30 concerning these additional, specific estimates to be untimely, notwithstanding the general allegation in its initial protest that the estimates for two-thirds of the RS' differed from the current workload. See also *Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc.*, B-215303.3, B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394; *Pennsylvania Blue Shield*, B-203338, *supra*, 82-1 C.P.D. ¶ 272 at 4-5.

Payment Deductions for Defective Performance

The solicitation incorporates by reference the standard clause "Inspection of Services—Fixed-Price." This clause provides that if any of the services do not meet the contract requirements, the government may require the contractor to perform the services again in conformity with the contract requirements. Where the defects cannot be remedied by reperformance, the government may reduce the contract price to reflect the reduced value of the services performed. Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.246-4 (1984). The solicitation further indicates that any reduction in the monthly payment to the contractor because of unacceptable performance will be based on the Performance Requirements Summary (PRS) included in the solicitation.

The PRS indicates that the government will use periodic inspections, review of customer complaints and random sampling to evaluate the contractor's performance. Prior to the issuance of amendment No. 6, the PRS apportioned a percentage of the contract price to each RS. The PRS provides that a part of the value for each RS the performance of which is unsatisfactory will be deducted from the payment to the contractor in the same proportion as the defective performance bears to the inspected lot, in the case

of random sampling, or to the entire service in other cases. The PRS states that "up to a maximum of 25% of the total value of the service" may be deducted for late performance, at a rate of 1 percent for each time unit—which varies according to the RS in question—of untimeliness. Deductions from the remaining 75 percent of the total value of the service may be made for defects relating to quality. For most services, however, the PRS provides for an allowable deviation—a permissible number of defects—for which no deductions will be taken.

Dynalectron maintains that these provisions have been fixed without reference to the probable actual damages that would be suffered as a result of defective performance and, therefore, that they constitute an unenforceable penalty. In its initial protest of August 8, Dynalectron generally alleged that the deduction bases—the percentages of the contract value apportioned to each RS—bore no reasonable relation to the contractor's actual costs or to the prices upon which the contractor based its offer. In addition, Dynalectron identified the entries in the PRS relating to the three specific RS' discussed below as examples of its contention that the PRS imposes an unenforceable penalty.

First, Dynalectron noted that while the entry for RS-30 required the contractor to provide audiovisual review materials and approval screenings, meeting certain specifications, "within scheduled completion date," the entry for RS-30A required the contractor to provide those services within a "[r]esponse time in accordance with" the delivery schedule and specified a deduction of up to 25 percent of the total value of RS-30 for untimely performance. Dynalectron expressed concern that the references to timeliness in both entries permitted two deductions for the same period of lateness.

Dynalectron also alleged that the PRS permitted deduction of an amount representing the value of several different tasks where an inspection revealed a defect in only one type of task, citing RS-48 as an example. Although the solicitation includes separate workload estimates for 10 different tasks under RS-48, including providing presentation charts, briefing charts, blue line/black line prints, plaques, photoplates, nameplates, posters, displays, certificates and lobby displays, the PRS only provided for a single entry for these services, "[p]roduce quality Graphic Art work," a single deduction category based upon the defective percentage in the sample of any particular lot, and a single maximum payment percentage or RS value.

Dynalectron further contended in its initial protest that DAVA will suffer little or no damage if many of the listed products are late, citing RS-20 as an example. Under RS-20 and RS-20A, the contractor is required to provide in conformity with the delivery schedule—at least 24 workdays prior to the release print shipping date—a timed and color corrected print, a soundtrack, four video

cassettes, and a script for the monthly film "Air Force Now" for screening and editing by DAVA and Air Force officials. Once these officials have drawn up a list of required corrections, the contractor will incorporate the corrections and will produce the final answer print at least 10 workdays prior to the release print shipping date as required in RS-21. Dynalectron argues that RS-20 merely relates to an intermediate review step and that so long as the actual delivery of the final print pursuant to RS-21 is timely, the government will have suffered no damage from the untimely performance of RS-20.

In response to the initial protest, DAVA issued amendment No. 6 revising the PRS. DAVA deleted the fixed percentage of the contract price apportioned to each RS, leaving that value to be subsequently negotiated. Where the PRS had included separate entries for both the quality and timeliness of performance, DAVA deleted any reference to timeliness in the quality entry.

In addition, DAVA increased the number of RS deduction categories from 66 to 84, not counting the separate entries for timeliness. Thus, RS-48 for graphic art services was broken out into 10 separate tasks or deduction categories.

DAVA, however, maintains that further breakout of tasks is inappropriate here. It contends that the remaining categories are comprised of work which is similar in regards to both the manpower and material required for performance and explains that, in any case, it lacks the personnel required to conduct separate quality assurance surveillance for each of the approximately 200 tasks for which the solicitation includes separate workload estimates.

DAVA has also refused to delete the separate deduction provisions—RS-20 and RS-20A—relating to the delivery of the initial print, soundtrack, video cassettes and script for the monthly film "Air Force Now" for purposes of screening and review. DAVA maintains that even if the final "Air Force Now" print required under RS-21 is delivered on time, the untimely delivery of the initial print and other material for screening and editing by DAVA and Air Force officials will increase the administrative burden on the government by compressing the review period and may cause a decline in quality by depriving the government of an opportunity for a full review and discouraging changes in order to regain schedule.

The provisions here for deductions in case of defective performance constitute liquidated damages, that is, predetermined amounts fixed in the contract which one party to the contract can recover from another for a contract violation without proof of actual damages sustained. *Eldorado College*, B-213109, Feb. 27, 1984, 84-1 C.P.D. ¶ 238. FAR provides that liquidated damages should be used only where both the government may reasonably expect to suffer damage if the delivery or performance is delinquent and the extent or amount of such damage would be difficult

or impossible to ascertain or prove. Moreover, the rate of liquidated damages must be reasonable since liquidated damages fixed without reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR § 12.202 (a) and (b).

Before our Office will object to a liquidated damages provision as imposing a penalty, the protester must show that there is no possible relation between the liquidated damages rate and the reasonably contemplated losses. *Richard M. Walsh Associates, Inc.*, B-216730, *supra*, 85-1 C.P.D. ¶ 621 at 3.

DAVA's deletion of the percentage of the contract price apportioned to each RS and its deletion of any reference to timeliness in the quality entries in the PRS render Dynalectron's allegations in these regards academic. See *TeOcom, Inc.*, B-218512, May 2, 1985, 85-1 C.P.D. ¶ 495.

Likewise, the breakout of the work under RS-48 into 10 separate deduction categories as requested by Dynalectron renders Dynalectron's initial allegation in this regard academic. We recognize that Dynalectron, apparently referring to the fact that all 10 of the categories have the same allowable deviation and the same method of surveillance by random sampling, now argues that each of the 10 tasks should have its own allowable deviation and own method of surveillance. Since, however, Dynalectron has presented no evidence demonstrating that DAVA's selection of the allowable deviation and method of surveillance for each RS was arbitrary, unreasonable or otherwise improper, we find no basis upon which to object. See also *Eldorado College*, B-213109, *supra*, 84-1 C.P.D. ¶ 238 at 3.

Nor will we object to the provision for a payment deduction if the contractor fails to deliver on time the preliminary "Air Force Now" print, soundtrack, video cassettes and script for screening and editing by DAVA and Air Force officials. We recognize that Dynalectron argues that the government will suffer no damage from an untimely delivery of the preliminary materials since the review period is "simply the amount of time it takes to project and review the film, which is nominally 30 minutes in length." The possibility, however, that the review of the preliminary materials might in a particular instance require only a relatively short period of time in no way demonstrates that it was unreasonable for DAVA to expect that in other instances the government might suffer administrative inconvenience or insufficient time for a meaningful review should there be an untimely delivery of preliminary materials requiring more than a cursory review. See also *Eldorado College*, B-213109, *supra*, 84-1 C.P.D. ¶ 238 at 3.

We note that Dynalectron, in its September 30 comments, identifies (1) additional RS' which contain dissimilar tasks, (2) additional RS' which are only intermediate steps in the creation of a final product and the defective performance of which allegedly may have no relation to the timeliness and quality of the final product,

and (3) other alleged defects in the surveillance procedures. Dynalectron did not, however, identify these additional, specific RS' and additional, specific alleged defects in the surveillance procedures until after the August 9 closing date for receipt of initial proposals, even though they were apparent prior to that closing date. Since, as previously indicated, improprieties apparent prior to the closing must be protested prior to closing, 4 C.F.R. § 21.2(a)(1), and our Bid Protest Regulations do not contemplate a piecemeal presentation or development of protest issues, we consider these additional allegations to be untimely.

Undue Risk and Burden

Dynalectron alleges that the provisions of the solicitation relating to workload assignment, compensation for variations in workload and the contractor's liability for the loss of exposed film impose an undue risk and burden upon the contractor.

The solicitation warns that the estimated annual workload for each RS "will not necessarily be assigned to the contractor equally over a twelve month period" and requires the contractor to "adjust resources and work force during peak periods to maintain [the] response times" required under the delivery schedule.

Dynalectron objects that this provision makes the contractor responsible for accomplishing an unlimited amount of work in a finite period of time, with any untimeliness in performance resulting in reductions in the contract price pursuant to the deduction provisions of the PRS.

DAVA denies that the solicitation leaves the contractor unprotected against significant fluctuations in workload. The agency points to the "WORKLOAD VARIATIONS" clause, which provides, in pertinent part, that:

> [d]uring workload peaks when the Contractor determines that the full capacity of the Government's supplied equipment or facility is or will be used, he will notify the Contracting Officer to discuss the delivery times or other solutions. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time . . . . Upon the receipt of a written request for an extension, the Contracting Officer will ascertain the facts and may make an adjustment for extending the completion date as, in the judgement of the Contracting Officer, is justified.

We note that Dynalectron considers the Workload Variations clause to be insufficient protection arguing that it does not define when saturation occurs, that the contracting officer may deny a request for an adjustment and that the clause may not take into account the capacity of Dynalectron's personnel as opposed to the capacity of the equipment or facility.

We are, however, aware of no requirement that agencies set forth in their solicitations the precise basis for adjustments. Cf. *Capitol Services*, B-217505, Aug. 1, 1985, 85-2 C.P.D. ¶ 112. Moreover, nothing in the provision interferes with the contractor's right to seek relief under the disputes clause incorporated in the solicita-

tion by reference. *See* FAR, § 52.233-1. Finally, we note that some risk is inherent in most types of contracts; the mere fact that a solicitation may impose a risk does not render the solicitation defective. See *Richard M. Walsh Associates, Inc.*, B-216730, *supra*, 85-1 C.P.D. ¶ 621 at 7; *Edward E. Davis Contracting, Inc.*, B-211886, Nov. 8, 1983, 83-2 C.P.D. ¶ 541. Offerors are instead expected to allow for such risk in formulating their offers. *Edward E. Davis Contracting, Inc.*, B-211886, *supra*, 83-2 C.P.D. ¶ 541 at 9.

Since Dynalectron has neither alleged nor shown that the general requirement for timely performance notwithstanding variations in workload is not part of the agency's requirements, and, in view of the provisions for an adjustment to the performance schedule where the variation in quantity is such as to cause an increase in the time required for performance, we find no basis to object. See *Richard M. Walsh*, B-216730, *supra*, 85-1 C.P.D. ¶ 621 at 7 (requirement to perform despite fluctuations in workload); see also *Ray Service Company*, B-217218, May 22, 1985, 64 Comp. Gen. 528, 85-1 C.P.D. ¶ 582 (GAO will not object to agency determination of actual minimum needs in the absence of a showing that the determination has no reasonable basis).

Dynalectron also objects to those provisions of the Workload Variations clause providing for an equitable adjustment in the contract price to the extent that the actual workload exceeds 115 percent or falls below 85 percent of the estimated workload. In particular, Dynalectron objects to the provision for determining the net variation in workload by dividing the actual workload for each RS by the workload estimate and multiplying the result by the value apportioned to that RS in the PRS, since it believes that those RS values bear no relation to the contractor's costs or price. Dynalectron also complains that the use of the allegedly defective workload estimates in conjunction with the Workload Variations clause "virtually assures" that the government will receive up to 15 percent of the services free.

Since DAVA has deleted the percentages apportioned to each RS in the PRS, leaving the relative value of each to be determined by subsequent negotiation, we consider Dynalectron's allegation in this regard to be academic. As for the use of the allegedly defective estimates, Dynalectron, as previously indicated, has not demonstrated that the specific workload estimates which it timely protested were in fact defective. Finally, we point out that the intent of such variation in workload clauses is to enable the contractor (or the government) to seek an equitable adjustment in the event of a catastrophic, as opposed to a merely normal, variation in workload. Cf. *Talley Support Services, Inc.*, B-209232, June 27, 1983, 83-2 C.P.D. ¶ 22.

Dynalectron further objects to the provision in the solicitation imposing liability on the contractor for film lost during processing.

The solicitation provides that:

[i]n the event the contractor destroys or loses exposed film, the contractor is liable for costs reasonably incurred by the Government as the result of this loss or destruction.

In response to a question as to whether the contractor would be responsible for the cost of relaunching a missile where the film of the original launch was lost, DAVA clarified the contractor's liability, stating that:

[w]e do not expect you to restage an event but it is the intention of the Government that the contractor will be responsible for the cost of re-shooting film due to loss of film during processing if it is the Government's desire to take this action.

Dynalectron objects that DAVA has neither placed a definite ceiling on the liability of the contractor nor specified the value of the film to the government. Dynalectron argues that the failure to limit or quantify the potential liability prevents the contractor from making adequate provision for the potential liability, such as by purchasing insurance. Dynalectron points out that FAR, § 45.505–2(b)(2), requires that "[t]he Government shall determine and furnish to the contractor the unit price of Government-furnished property."

FAR generally provides, however, that contractors are responsible and liable for government property in their possession unless otherwise provided by the contract. FAR, § 45.103(a). Moreover, we point out that FAR, § 45.505–2(b)(2), cited by Dynalectron, also provides that:

[n]ormally, the unit price of Government-furnished property will be provided on the document covering shipment of the property to the contractor. In the event the unit price is not provided on the document, the contractor will take action to obtain the information.

Assuming this provision is applicable to the situation where the government furnishes exposed film to the contractor for processing, since the government has neither chosen the new contractor nor provided it with any exposed film, Dynalectron's argument that the government has failed to furnish the unit prices of the exposed film as required under FAR, § 45.505–2(b)(2), is premature at best.

We recognize that FAR also provides that:

[s]olicitations shall specify material that the Government will furnish in sufficient detail . . . to enable offerors to evaluate it accurately. FAR, § 45.303–2.

DAVA, however, has provided estimates in the solicitation as to its annual requirements in minutes of different types of productions and offerors are required to propose a specific cost for each of the 91 most frequently used elements in completing such audiovisual productions.

Dynalectron has failed to demonstrate that it was unreasonable for the government not to have also specified the total cost of reshooting film for productions for which no production orders have been issued. There is no requirement that a solicitation be so detailed as to completely eliminate all performance uncertainties or address every possible eventuality. As previously indicated, the fact that the solicitation may impose some risk on the contractor does

not render it improper. See also *Richard M. Walsh Associates, Inc.*, B-216730, *supra*, 85-1 C.P.D. ¶ 621 at 6-7.

In any case, we question the extent to which Dynalectron may have been prejudiced by any failure to provide more detailed information since the protester, as the incumbent contractor, would have a special knowledge of the nature of the productions. Cf. *Linda Vista Industries, Inc.*, B-214447, B-214447.2, Oct. 2, 1984, 84-2 C.P.D. ¶ 380.

Minimum Manning Requirements

The solicitation provides that the price negotiated for an individual audiovisual production will be subject to an equitable adjustment downward if the contractor in fact fails to meet the minimum manning requirements agreed to during the negotiations, that is, fails to use the number of personnel which it proposed to use during negotiations and which formed the basis of the agreed price for the audiovisual production.

Dynalectron argues that the provision for a downward adjustment in the production price penalizes the contractor for management efficiencies and ignores the fact that a fixed price had been negotiated for the audiovisual production.

DAVA, on the other hand, defends the provision as necessary to protect the government from being overcharged. The agency claims that Dynalectron, under its contract with DAVA, has consistently utilized fewer resources and less time than it had originally insisted were necessary when negotiating a price for a particular audiovisual production. In support of its contention, DAVA has provided our Office with documentation relating to a number of productions where Dynalectron allegedly used fewer personnel and took less time than it had originally estimated were necessary.

We are aware of no basis for objecting to a provision for adjusting downwards the price of a production order where that price is based on the use of one level of resources and the use of a different level of resources, not previously foreseen by the agency, subsequently proves necessary.

We recognize that Dynalectron denies that it has overestimated the required resources. Nevertheless, we conclude that Dynalectron has not shown that DAVA was unreasonable in determining that, given the prior history of disputes with the contractor in this regard, it was necessary in order to accommodate the agency's minimum needs to include provisions reducing the incentive for the contractor to overestimate its requirements when negotiating production orders. Cf. *Eldorado College*, B-213109, *supra*, 84-1 C.P.D. ¶ 238 at 3-4.

Finally, we note that DAVA has not only amended the solicitation to provide that the "cost of support personnel for production periods . . . may entitle the contractor to an equitable adjust-

ment," but, in addition, has also amended the solicitation to permit alternate offers excluding the disputed provision.

Production Carryover Program

Dynalectron also objects to a provision in the solicitation requiring the contractor to subcontract completion of certain productions during the last 2 months of the contract to the successor contractor. Since, however, DAVA has stated that it will delete this provision, we consider Dynalectron's protest in this regard to be academic.

The protest is denied.

[B-220007]

Contracts—Negotiation—Conflict of Interest Prohibitions—Organizational

Statements by two procurement officials that a consultant to an offeror learned the relative standing and strengths and weaknesses of competing proposals while he was employed by the government establish a reasonable basis for an agency's determination that the offeror probably received an unfair advantage in submitting its best and final offer. This determination, based on "hard facts" rather than suspicion or innuendo, justifies exclusion of the offeror's proposal from further consideration.

Contracts—Negotiation—Offers or Proposals—Rejection—Propriety

Agency is not required to refer to the Small Business Administration its determination to exclude an offeror's proposal because of the likelihood of an impropriety or conflict of interest in preparation of the proposal where there is no question as to the offeror's capability to perform or any other traditional element of responsibility.

Matter of: NKF Engineering, Inc., Dec. 9, 1985:

NKF Engineering, Inc. protests the Naval Sea Systems Command's rejection of its proposal in response to request for proposals (RFP) No. N00024-83-R-4175(Q). NKF contends that the Navy erred in concluding that the firm had obtained an unfair competitive advantage and argues that the appearance of an impropriety or conflict of interest is not a sufficient basis upon which to disqualify an offeror.

We deny the protest.

Background

The Navy issued the RFP on March 22, 1983, soliciting offers to provide engineering services in the area of ship and submarine survivability, ship signatures, vibration and noise, fire protection, damage control, and safety. Of five proposals submitted on May 24, the Navy ranked NKF's technical proposal second and its cost proposal fifth, with an overall ranking of second.

Following the initial evaluation of proposals, the Deputy Director of the Survivability Sub Group, Naval Sea Systems Command, Yip Park, retired and became a consultant to NKF. The Navy believed

that Mr. Park knew the result of the evaluation of the technical and cost proposals, as well as other information relating to the procurement. In part to mitigate any advantage NKF might obtain through its employment of Mr. Park, the Navy amended the solicitation to add additional tasks and to change both the technical evaluation factors and the weights accorded those factors. At the same time, the agency requested best and final offers.

In its best and final offer, NKF reduced its offered price by approximately 33 percent. Its technical score remained second-high, slightly below that of the highest rated offeror. Its cost score was the highest, and it was ranked first overall.

While the Navy believed that its amendment of the solicitation counteracted any advantage that NKF might have gained through Mr. Park in the technical area, it concluded from NKF's substantial price reduction that the firm probably knew the relative technical and cost standings of its competitors. Believing that an award to NKF would appear to have resulted from an unfair competitive advantage and would bring into question the integrity of the procurement, the Navy disqualified NKF for having an organizational conflict of interest. The agency announced that award would be made to the firm ranked second overall, Weidlinger Associates. This protest followed.

NKF raises three issues. First, it contends that there is no evidence of improper conduct on the part of NKF, Mr. Park, or Navy procurement officials. Without "hard facts" showing an actual impropriety or conflict of interest, NKF contends, the Navy was not justified in finding the firm ineligible for an award. Second, NKF states that the organizational conflict of interest provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 9.5 (1984), cited as the legal basis for the Navy's action, do not encompass the situation in this case.[1] Finally, NKF argues that since it is a small business concern, the Navy was required to refer its decision to exclude the firm to the Small Business Administration (SBA) for consideration under the certificate of competency program.

Evidence of Improprieties

Until his retirement on September 30, 1984, Mr. Park, as noted above, served as Deputy Director of the group within the Naval Sea Systems Command that requires the services included in the protested procurement. He was designated as the Project Engineer/Program Manager for the procurement and was listed in the RFP as the contracting officer's technical representative. The Navy states that Mr. Park prepared a revision to the source selection

[1] The Defense Acquisition Regulation (DAR), *reprinted in* 32 C.F.R. pts. 1-39 (1984), is applicable to this procurement because the RFP was issued before the April 1, 1984 effective date of the Federal Acquisition Regulation. Since differences in the two regulations are not relevant to this protest, we will observe the practice of the parties and refer to provisions of the FAR.

plan that was used in the initial evaluation, developed the government's cost estimate, and was thoroughly familiar with the required work.

On October 25, 1983, after evaluation of the technical proposals, Mr. Park was appointed chairman of the Contract Award Review Panel for the procurement. This panel had the responsibility of, among other things, directing subsequent evaluation of proposals, determining the competitive range, and recommending an award to the selecting official. The procurement record filed with our Office does not reflect any meeting of the review panel before Mr. Park retired a year later. In an affidavit submitted by NKF, Mr. Park states that the evaluation of proposals was suspended until another procurement was completed, and that he never actually served as chairman of the review panel at issue here.

The Navy contends that Mr. Park knew the relative standing of each proposal in the technical and cost areas, as well as each proposal's strengths and weaknesses. In support of these allegations, the Navy has submitted two affidavits. In the first, the legal advisor for the procurement states that the members of the review panel also served as the review panel for another procurement. He states that during a meeting of the panel to consider the other procurement, the chairman of the technical evaluation group for the protested procurement briefed the panel on the strengths, weaknesses, and relative standing of each technical proposal. Also, the cost evaluator briefed the panel regarding cost proposals, and he specifically told the panel that NKF had proposed a high cost and was not in a competitive position.

In the second affidavit, the cost evaluator for the procurement states that he saw Mr. Park working on the source selection plan and that he had discussed the appropriate labor mix for the procurement with Mr. Park. He also states that in informal discussions he told Mr. Park that the NKF's estimated cost and fee were significantly higher than those of other offerors.

NKF responds to these allegations primarily through affidavits of Mr. Park. He states that—before his retirement—he never saw or discussed the technical or cost proposals and was never advised of their relative standing. He believes that the proposals were not even evaluated before he retired, since the procurement had been suspended until award of another contract. He states that he did prepare a revised evaluation plan and did discuss with the cost evaluator the appropriate labor mix for another procurement that was proceeding simultaneously, thereby suggesting that the cost evaluator has confused the two procurements.

NKF also provided affidavits of all employees participating in the preparation of its best and final offer, stating that they never spoke to or received information from Mr. Park except for a copy of his resume. The firm's best and final offer stated that Mr. Park was available as a consultant to work on the contract, and it in-

cluded his resume. The NKF employees state that they had no information regarding the relative standing of the offerors, the Navy's cost estimate, or estimated labor mix. The revisions in NKF's cost proposal are attributed solely to questions presented by the Navy and to a desire to offer the lowest, reasonable estimated cost.

NKF's consultant agreement with Mr. Park specifically prohibits him from disclosing or using any secret or confidential information of others, including his former employer. Before entering the agreement, the president of NKF requested that Mr. Park verify with Navy officials that Mr. Park's consulting with NKF would be appropriate and not create a conflict of interest. According to the president of NKF, Mr. Park reported that Navy legal counsel saw no reason why he could not provide consulting services to NKF or any other contractor.

In light of this factual record, NKF asks that we apply the standard of review applicable to the issuance of an injunction against a contract award where the disappointed bidder alleges improprieties or a conflict of interest. In *CACI, Inc.—Federal* v. *United States*, 719 F.2d 1567 (Fed. Cir. 1983), the court reversed a judgment of the United States Claims Court enjoining an award because the lower court's inferences of actual or potential wrong-doing were based upon "suspicion and innuendo" rather than "hard facts." This standard is consistent with our traditional view that offerors should not be excluded because of a "theoretical" conflict of interest, *Cardiocare, a division of Medtronic, Inc.*, 59 Comp. Gen. 355 (1980), 80-1 CPD ¶ 237, and we have applied the standard specifically to a protester's allegations of impropriety involving a former government employee assisting a proposed awardee with proposal preparation. See *Culp/Wesner/Culp*, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17.

We agree that it is appropriate to use the *CACI* standard in this case. We disagree, however, with NKF's contention that an "actual" impropriety or conflict of interest must be established before an agency may consider an offeror ineligible. The court in *CACI* was concerned that the lower court's opinion regarding the possibility and appearance of impropriety was not supported by the record. 719 F.2d at 1575, 1581-2. No requirement to establish an actual impropriety was imposed or implied, and we do not believe that agencies must meet such a requirement in order to take action they believe necessary to maintain the integrity of the procurement system. Our role is to determine whether there was a reasonable basis for the agency's judgment that the likelihood of an actual conflict of interest or impropriety warranted excluding an offeror. See *Chemonics International Consulting Div.*, 63 Comp. Gen. 14 (1983), 83-2 CPD ¶ 426. A reasonable basis must include more than mere innuendo or suspicion. *Culp/Wesner/Culp, supra.*

Here, we find that the potential for a decisive unfair advantage was reasonably established to the Navy by the statements of two procurement officials, subsequently presented to our Office in sworn affidavits, that they had witnessed Mr. Park being told the relative standing of offerors and other confidential information about the procurement. We do not believe that the mere possibility that both Navy officials were mistaken, or, alternatively, that Mr. Park might not recall receiving the information, or that no advantage may actually have been received by NKF made the Navy's belief in the likelihood of a serious impropriety unreasonable. Also, we note that the procurement record contains no evidence that NKF took any steps, other than the standard restriction in its consulting agreement, to prevent improper use of Mr. Parks' possible knowledge about the procurement, to apprise the Navy of any concern in this regard, or to address in any way the clear appearance that the firm would gain an unfair advantage by employment of Mr. Park. Therefore, we find that the Navy had a reasonable basis to conclude that an impropriety or conflict of interest was likely and to exclude NKF from the competition.

Conflict of Interest Regulations

The Navy states that its rejection of NKF's proposal was pursuant to the regulation governing organizational conflicts of interest. As NKF points out, the FAR, 48 C.F.R. § 9.501, states that an organizational conflict of interest exists when the work under a proposed contract may, without a restriction on future activities, result in an unfair competitive advantage to the contractor or impair the contractor's objectivity. Such a conflict would arise where, for example, a contractor prepares and furnishes specifications for items to be competitively procured and then is allowed to furnish those items in the subsequent procurement. FAR, 48 C.F.R. § 9.505-2.

We agree with NKF that the situation here does not establish an organizational conflict of interest specifically encompassed by the procurement regulations. However, a contracting agency may impose a variety of restrictions, not explicitly provided for in applicable regulations, where the needs of the agency or the nature of the procurement dictate the use of such restrictions. *Acumenics Research and Technology, Inc.*, B-211575, July 14, 1983, 83-2 CPD ¶ 94. We see little difference between excluding an offeror because of an unfair advantage gained helping prepare the statement of work, *Nelson Erection Co., Inc.*, B-217556, Apr. 28, 1985, 85-1 CPD ¶ 482, and excluding an offeror that has entered a consulting arrangement with a retired official who not only was involved in planning the procurement, but is reasonably believed to know the standing of other offerors and details of their proposals.

Certificate of Competency

The FAR, 48 C.F.R. § 19.602-1, requires a contracting officer, upon determining that a responsive small business lacks certain elements of responsibility (including "competency, capability, capacity, integrity, perseverance, and tenacity"), to refer the matter to the SBA. NKF argues that the Navy is required to refer the determination to exclude NKF to the SBA. The protester is joined in its opinion by SBA's Chief Counsel for Advocacy, who filed comments with our Office on this issue.

The Navy responds that FAR, 48 C.F.R. § 19.602-1(a)(2)(i), excludes from the certificate of competency program determinations that a small business concern is not responsible because it is "unqualified or ineligible" to receive an award under applicable laws and regulations. The Chief Counsel for Advocacy points out that we have questioned whether this regulatory exception overcomes a small business concern's right to a certificate of competency referral under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), when compliance with a traditional element of responsibility is at issue. *International Business Investments, Inc., et al.*, 60 Comp. Gen. 275 (1981), 81-1 CPD ¶ 125.

We do not believe that the Navy's exclusion of NKF involves a question of responsibility. Some conflict of interest issues, such as whether an offeror's performance on a contract will be influenced by conflicting economic interests, involve the offeror's capability to perform and are, therefore, matters of responsibility. In this case, however, no one has questioned NKF's capability. Rather, the Navy believes that it is so likely that NKF received an improper advantage that the integrity of the competitive process in general and of this procurement in particular require exclusion of the firm. This question is not related to any of the traditional elements of responsibility, and it therefore, in our view, need not be referred to the SBA.

The protest is denied.

[B-218198.6, et al.]

Contracts—Transportation Services—Procurement Procedures

General Accounting Office (GAO) will consider protests of competitive selections of no cost, no fee travel management services contractors under GAO's bid protest authority under the Competition in Contracting Act since the selections are procurements of contracts for services.

Contracts—Transportation Services—Procurement Procedures

Competitive selections of no cost, no fee travel management contractors by the General Services Administration are subject to the procurement provisions of the Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act. These selections are not distinguishable from those noncompetitive business arrangements for substantially similar services that some agencies have with Scheduled Airline Ticket Officers (SATO's). Therefore, these SATO business arrangements are subject to applicable procurement laws. *Omega World Travel, Inc.*,

Society of Travel Agents in Government, Inc., B-218025, B-218025.2, May 23, 1985, 64 Comp. Gen. ——, 85-1 C.P.D. 590 is overruled.

Joint Ventures—Status

Scheduled Airline Ticket Office proposed by Air Transport Association is a joint venture with capacity to contract with government.

Joint Ventures—Statutes

Proof of authority of person who executed proposal to bind the joint venture on a negotiated procurement may be furnished after receipt of proposals or best and final offers.

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

Protest that awardee will not meet contract requirements concerns affirmative determination of responsibility, which will not be considered except in limited circumstances not present here, or is a matter of contract administration not for consideration under GAO's Bid Protest Regulations.

Contracts—Protests—Authority to Consider—Contract Administration Matters

Letter received from awardee after award concerns contract administration and does not constitute improper discussions.

Contracts—Negotiation—Offers or Proposals—Evaluation—Administrative Discretion

Evaluation of 37 proposals by a 26-person technical panel where only four of the evaluators read and rated each proposal is not an abuse of agency discretion.

Contracts—Negotiation—Offers or Proposals—Evaluation—Criteria—Application of Criteria

Evaluation of awardee's proposal under rating plan used to evaluate proposals in three areas, where it was apparently not downgraded, appears to be improper, when the proposal fails to address two areas and in the third area proposes less than the optimum staffing preference indicated in rating plan and solicitation evaluation criteria. Protest is therefore sustained and it is recommended that proposals in the competitive range be rescored and award made to highest rated offeror.

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

Protest filed more than 10 working days after the protester was apprised that award was made to another bidder is untimely under GAO's Bid Protest Regulations.

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

Award to large business under small business set-aside is proper where contracting officer is unaware of SBA determination when it made the award and he has waited more than 10 business days from when SBA received a size protest of the awardee's status and where there has been no showing that the awardee's small business self certification is in bad faith or that contracting officer knew it was not a small business. However, GAO recommends that options not be exercised on large business awardee's contract.

Matter of: T.V. Travel, Inc.: World Travel Advisors, Inc.; General Services Administration—Request for Reconsideration, Dec. 10, 1985:

T.V. Travel, Inc. (T.V. Travel) and World Travel Advisors, Inc. (World Travel), request reconsideration of our decision in *T.V. Travel, Inc.; World Travel Advisors, Inc.; Discovery Tour Wholesalers, Inc.*, B-218198, *et al.*, June 25, 1985, 81-1 C.P.D. ¶ 720. Additionally, the General Services Administration (GSA) requests reconsideration of this decision and our decisions in *W.B. Jolley*, B-219028, June 27, 1985, 85-1 C.P.D. ¶ 737; *Vida Fox Clawson Travel Services, Inc.*, B-218637, July 2, 1985, 85-2 C.P.D. ¶ 16; and *Get-A-Way Travel, Inc.*, B-219007, July 2, 1985, 85-2 C.P.D. ¶ 18.

These decisions dismissed various protests of GSA awards for the arrangement of travel services for official government travel for various geographical areas because we found that the award selections are exempt from the procurement statutes. The awards were based upon competitive solicitations which led to no cost, no fee contracts for travel management centers. The travel agents or Scheduled Airline Ticket Offices (SATO) which become travel management centers obtain their compensation from the air carriers and the other firms which supply travel to the government or government employees. We concluded that these contracts are no more than a management vehicle to obtain travel services which themselves are exempt from the procurement procedures. These decisions followed our decision in *Omega World Travel Inc.; Society of Travel Agents in Government Inc.*, B-218025, B-218025.2, May 23, 1985, 64 Comp. Gen 551, 85-1 C.P.D. ¶ 590, which denied a protest of the noncompetitive selection by the Navy of a SATO to provide basically the same travel management services.

GSA's request for reconsideration is untimely on the *T.V. Travel* and *W.B. Jolley* decisions, since GSA did not request reconsideration until more than 10 days after its receipt of these decisions. 4 C.F.R. § 21.12 (1985). Consequently, GSA's request for reconsideration of *W.B. Jolley* (B-219028) is dismissed. However, since T.V. Travel and World Travel timely filed their reconsideration requests, GSA's views as an interested party in that case will be considered.

• T.V. Travel, World Travel and GSA contend that our decisions on the GSA travel management center selections are erroneous as a matter of law because the selections are subject to the procurement statutes and regulations, and are subject to our bid protest jurisdiction. In this regard, GSA asks us to reconsider the rationale of our decision in *Omega World Travel*, where we held that obtaining such services was not a procurement subject to the procurement laws. We have solicited and considered the views of the Navy in response to GSA's reconsideration request.

For the reasons stated below, we reverse our dismissal of those protests of GSA travel management center selections on which we received timely requests for reconsideration, and will consider the merits of those protests under our Bid Protest Regulations, 4 C.F.R. Part 21 (1985). We also overrule our decision in *Omega World Travel*, 64 Comp. Gen. *supra*. T.V. Travel and World Travel's protests (B-218198) are sustained; Vida Fox Clawson Travel's (Clawson Travel) protest (B-218637) is denied; and Get-A-Way Travel's protest (B-219007) is dismissed as untimely.

GAO JURISDICTION OVER PROTESTS

We now decide that consideration of the merits of the protests of GSA's travel management center selections would be appropriate under our Office's newly defined bid protest authority under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551-3566, West Supp. 1985, as added by § 2741(a) of Pub. L. 98-369, and that the GSA selections are subject to the Federal Property and Administrative Services Act (FPASA). Furthermore, we conclude that the noncompetitive contracts or other business arrangements, which various federal agencies have with SATO's or travel agents to perform travel management services, are procurements subject to the applicable procurement laws.

Prior to the implemenation of the procurement protest system authorized by CICA, we decided bid protests based on our authority to adjust and settle government accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. § 3526 (1982). See *Monarch Water Systems, Inc.*, B-218441, Aug. 8, 1985, 64 Comp. Gen. ——, 85-2 C.P.D. ¶ 146. CICA redefined a protest cognizable by our Office as a:

> Written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services, or a written objection by an interested party to a proposed award or the award of such a contract. 31 U.S.C.A. § 3551(1) (West Supp. 1985).

That is, our authority is no longer based upon our "accounts settlement" authority, but rather is based on whether the complaint concerns a procurement contract for property or services. GSA is obtaining services under contract from the selected travel management center contractor, even though it is not paying the contractor for these services. The contract awarded contains most of the ordinary clauses contained in procurement contracts. Also, GSA utilizes the procurement system to select the travel management contractors.

Furthermore, GSA has stated that its selections of travel management center contractors are procured pursuant to the Federal Acquisition Regulation (FAR) and the FPASA. GSA is the cognizant agency responsible for prescribing policies and methods of procurement and supply of transportation services for the federal government. 40 U.S.C. § 481 (1982). *See also*, Federal Property Manage-

ment Regulation, Temporary Regulation A-24, 50 Fed. Reg. 27951 (1985) which governs the use of travel management centers for federal civilian agencies.

We now agree with GSA. As indicated in the *Omega World Travel* decision, transportation obtained through Government Bills of Lading (GBL) or Government Travel Requests (GTR) is not subject to the procurement laws. *See* FAR, 48 C.F.R. §§ 47.000(a)(2), 47.200(b)(2) (1984). However, the travel management services in question here are obtained by procurement solicitations which are contractual vehicles considerably different from GBL's or GTR's. GSA states that it consistently adheres to the FPASA and the FAR when it obtains transportation services through procurement solicitations and contracts.

Moreover, it is clear that the government is receiving a number of valuable services, other than the airline tickets, from the travel management centers, such as ticket delivery, making of reservations, management reports, etc., and that the travel management contractor is obtaining considerable benefits with his concomitant exclusive access to the government business and entitlement to commissions.

Furthermore, 40 U.S.C. § 481(a)(1) empowers GSA to prescribe policies for the "procurement and supply of . . . nonpersonal services, including related functions such as . . . transportation". Further, 40 U.S.C. § 481(a)(3) empowers GSA to "procure and supply . . . nonpersonal services for the use of executive agencies". By definition nonpersonal services includes transportation. There is nothing in the FPASA or any other statute that specifically exempts the procurement of transportation services from the FPASA.

Moreover, we have held that the FPASA is applicable where services or supplies are obtained by a civilian agency through contract, even where no cost or fee is paid to the contractor. *Use of Government Property by Private Firm for Commercial Purpose,* B-191943, Oct. 16, 1978 at pgs. 5-6 (the selection of a firm to be given an exclusive license to operate on government property where the firm will provide for a fee, certain documents to the public on behalf of a federal agency, is subject to the Federal Procurement Regulations (FPR) (FAR's civilian agency predecessor regulation); B-217448, Mar. 31, 1985 (letter and memorandum to the Chairman, House Committee on Government Operations holding that a no cost no fee exchange agreement between the Patent and Trademark Office (PTO) and a firm to exchange the firm's automatic data processing nonpersonal services for special access to PTO information on trademarks and patents was subject to the Brooks Act, 40 U.S.C. § 759 (1982), the FPR, and the FPASA).

In view of the foregoing, we find the services obtained through the GSA travel management centers are subject to our bid protest jurisdiction and are covered by the procurement laws contained in

the FPASA, as amended by CICA. Our previous decisions on these selections are modified accordingly and we reinstate those protests on which we received timely protests.

As was noted in our previous decisions dismissing the protests of the GSA selections, the GSA's business arrangements for travel management centers are not distinguishable from those noncompetitive SATO arrangements, such as the Navy's in *Omega World Travel,* where the SATO's perform services substantially similar to those performed by the GSA travel management center contractors. Consequently, such business arrangements with SATO's or travel agencies are subject to applicable procurement laws.[1] Consequently, we overrule our decision in *Omega World Travel.*

T.V. TRAVEL AND WORLD TRAVEL PROTESTS

1. *Background*

T.V. Travel and World Travel protested the award by GSA under solicitation No. AT/TC 19791 of a contract to a SATO to be the federal civilian travel management center for the Atlanta, Georgia, metropolitan area. The SATO proposal was submitted by the Air Transportation Association of America (ATA).

Fifteen proposals were received for the Atlanta travel management center and the initial technical scores (out of a total possible 900 points) awarded the five proposals found by GSA to be within the competitive range were:

T.V. Travel	882 points
SATO	872 points
Corporate Travel International	843 points
World Travel	820 points
Universal Travel	813 points

After site visits, discussions and best and final offers, the SATO was selected for award. GSA's selection statement reads, in pertinent, part as follows:

> During "best and final" negotiations SATO agreed to include Corporation Services International as part of their services, to include the Corporate rate hotel program. Thus bringing their proposal above 882 points. Added advantages are: Billing and delivery of ticket procedures are already presently established and no change in operation would be necessary. Administrative burden of setting up these procedures would be burdensome and time consuming because of lack of resources for 60 federal agencies and GSA thus saving administrative costs.

[1] Also section 1464 of the Department of Defense Authorization Act of 1986, Pub. Law 99-145, November 7, 1985, states:

> It is the sense of the Congress that the Secretary of each military department should provide, in the establishment of travel offices or the acquisition of travel services for official travel, for free and open competition among commercial travel agencies, scheduled airline traffic offices (SATOs), and other entities which provide such services.

Award to SATO is therefore considered to be in the Government's best interest as they have the best qualified offer.

There is no indication or documentation in the record of SATO's final score, except that it is said to be more than 882 points. T.V. Travel's initial high technical score of 882 points apparently was not raised or lowered after best and final offers.

On February 15, 1985, as timely supplemented on April 8, 1985, T.V. Travel and World Travel protested the award because (1) the SATO lacks contractual capacity; (2) the SATO is not a responsible contractor because it cannot issue boarding passes by April 1, 1985, as promised in its proposal; (3) GSA improperly considered a letter submitted by SATO concerning its boarding pass capability a month after best and final offers; (4) not all members of the GSA technical evaluation panel reviewed the awardee's proposal; (5) SATO's proposal received too many points and should have been downgraded in a number of technical areas; (6) the SATO did not comply with the RFP requirement that it have a "system with a direct interface between the reservation, ticketing and accounting elements"; and (7) SATO was improperly credited with its incumbency in making the award selection.

In its May 8, 1985, response to a supplementary agency report, the protesters list a number of additional areas where the SATO proposal should have been downgraded. However, these additional contentions, raised piecemeal, are untimely and will not be considered under our Bid Protest Regulations since they were not protested within 10 working days of when the protesters were made aware of the scoring of the SATO's proposal. 4 C.F.R. § 21.2(a) (1985); *Professional Review of Florida Inc.; Florida Peer Review Organization, Inc.*, B-215303.3; B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394.

2. *SATO's Alleged Lack of Contractual Capacity*

T.V. Travel and World Travel protest that the SATO lacks contractual capacity because it is not a legal entity. The protesters contend that the SATO arrangement is merely an agreement among scheduled airlines to cooperate on ticketing.

SATO's are operating under the auspices of the ATA through its marketing and service division, the Air Traffic Conference of America (ATC). The ATA is a national trade and service organization whose membership consists of various scheduled air carriers. The ATA submitted to SATO proposal and identified itself as a joint venture. See also *Omega World Travel Inc., et al.*, 64 Comp. Gen. *supra*.

Joint ventures are recognized legal entities for contracting with the government. *See* FAR, 48 C.F.R. subpart 9.6 (1984). A joint venture is an association of persons or firms with an intent, by way of contract, to engage in and carry out a single business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge. 46 Am. Jur. 2d *Joint Ventures* § 10

(1969); 48A C.J.S. 2d *Joint Ventures* § 1 (1981). In this case, a number of scheduled air carriers entered into a written agreement to propose SATO's on GSA's travel management center contracts. This agreement provides for the responsibilities, profits, liabilities and resources provided by the participating airlines. Consequently, we believe that the proposing entity, ATA, is a joint venture for the purpose of proposing on this solicitation and that the ATA participating members are the joint venture partners with all the liabilities that that status entails.

The protesters also argue that the SATO lacks contractual capacity because the proposal, which was signed by ATA's Director of the Military and Government Transportation Services Bureau, did not contain powers-of-attorney signed by officials of each of the joint ventures nominating this person as attorney-in-fact for the joint venture for purposes of executing the proposal and resultant contract.

This protest basis also has no merit. It is clear that under formally advertised procurements a bidder may furnish evidence of the authority of the person which executed its bid to bind the bidder after bid opening. *Marine Power and Equipment Company*, 62 Comp. Gen. 75 (1982), 82-2 C.P.D. ¶ 514; *Sevcik-Thomas Builders and Engineers Corporation*, B-215678, July 30, 1984, 84-2 C.P.D. ¶ 128. The rule should be no more strict in negotiated procurements and evidence of authority to bind an offeror may be submitted after the closing date for receipt of proposals or best and final offers, if there is any question of the authority of the person who executed the proposal. *Cambridge Marine Industries, Inc.*, 61 Comp. Gen. 187, 189 (1981), 81-2 C.P.D. ¶ 517.

From our review, the ATA and ATC, of which the participating airlines are members, granted the ATA representative who executed the proposal the requisite authority to bind the SATO joint venture. This protest basis is therefore denied.

3. *Boarding Pass Capability*

The protesters contend that the SATO was not able to issue boarding passes by April 1, 1985, as required by the solicitation. This criteria admittedly concerns SATO's responsibility. This Office will not review an affirmative determination of responsibility, where, as here, possible fraud or bad faith by the contracting officer has not been shown and no allegation had been made that definitive responsibility criteria have not been applied. *AT&T Information Systems, Inc.*, B-216386, Mar. 20, 1985, 85-1 C.P.D. ¶ 326. Additionally, whether the SATO will perform the contract in accord with the requirements is a matter of contract administration, and as such, it is the contracting agency's responsibility not encompassed by our bid protest functions. *Advanced Structures Corporation*, B-216102.2, B-216102.3, Mar. 28, 1985, 85-1 C.P.D. § 370. Consequently, this protest basis is dismissed.

The protesters also object to GSA's reference to a letter dated February 25, 1985, from Delta Airlines, Inc., one of the joint venturers, promising timely installation of the equipment necessary to assure the boarding passes by April 1, 1985. The protester contends that this constitutes improper discussions, under the FAR, with one offeror in the competitive range to make its proposal acceptable without opening up discussions with all firms in the competitive range. This contention has no merit. The referenced letter was submitted 3 weeks after award and obviously concerned the administration of the contract and not award selection. Consequently, no discussions were required with the other offerors who had been in competitive range. This protest basis is therefore denied.

4. *Scoring by all Technical Evaluators*

The protesters allege that GSA committed a procedural error in that one or more members of the technical review panel did not review SATO's proposal. GSA reports that the technical review panel was made up of 26 persons from the user agencies of which four persons were to evaluate each initial proposal. If a proposal contained a recommendation by a user agency for a particular offeror, that user agency's representatives were excluded from evaluating that particular proposal. The initial technical score of each offeror is the sum of the scores of the four evaluators who read and rated the proposal.

It is within the contracting agency's discretion as to how many and which members of a technical evaluation panel will review each proposal. *Data Resources, Inc.,* B-203166, Aug. 5, 1981, 81-2 C.P.D. ¶ 98. Consequently, we have recognized that a procuring agency may properly evaluate individual proposals with less than the entire evaluation panel and not all members of the panel need review each proposal. *Data Resources, Inc.,* B-203166, *supra; Design Concepts, Inc.,* B-186125, Oct. 27, 1976, 76-2 C.P.D. ¶ 365. In this procurement, where 37 total proposals for six city areas were received, GSA did not abuse its discretion in this evaluation method.

5. *Rating of SATO's Proposal*

T.V. Travel and World Travel protest the evaluation of SATO's proposal. The protesters allege that SATO's proposal was "nonresponsive" because it did not propose a system with "direct interface" between the reservation, ticketing and accounting elements. The protesters also allege that SATO could not have earned the 872 out of 900 possible points that it was awarded on the initial evaluation. In this regard, the protesters allege a number of SATO proposal deficiencies including (A) SATO's alleged failure to have its headquarters in the Atlanta area; (B) its failure to propose one travel counselor for each $500,000 in anticipated travel volume; (C) its inability to reconcile automatically Diners Club credit card bil-

lings with management reports; and, (D) its inability to transmit management reports electronically.

The initial proposals of the offeror were scored in accordance with a rating plan with a total possible 225 points (900 possible points with four evaluators). This rating plan was not disclosed to any offeror until after award. These protest contentions are based upon GSA's scoring of SATO's proposal under the rating plan.

A. Atlanta Headquarters

Under the rating plan, seven points (28 points for four evaluators) were to be awarded if the firm's headquarters is located in the city to be served. In the initial report, GSA states that SATO identified its headquarters as Washington, D.C.—the ATA headquarters. However, in the report on the supplemental protest, GSA indicates that SATO's proposal was evaluated under the rating plan with Atlanta as the headquarters.

In response to our query, GSA indicated that it no longer has in its files any of the evaluators' individual scoring sheets under the rating plan for either initial or best and final offers. Consequently, we are unable to verify precisely how this matter was evaluated. GSA did provide summary scores for the five general areas evaluated. These indicate that SATO was downgraded only four points out of 280 possible points (four evaluators) for the general area of project management, whereunder this aspect of the rating plan was evaluated. It follows that SATO was not downgraded for its headquarters location.

Our review of SATO's proposal indicates that the Atlanta SATO office has the authority to implement, coordinate and supervise the services provided. The proposal also indicates that an ATA employee located in Washington, D.C., has the ultimate total responsibility for oversight, management and operations. It appears that the Atlanta SATO operates as an individual entity with the ATA providing only policy guidance. Further, the only evaluation criteria stated in the solicitation, to which this aspect of the rating plan relates, is that "the offeror facilities will be evaluated on the basis of how the location . . . relate[s] to the level of services provided to government." Under the circumstances, we find that GSA acted reasonably in not downgrading SATO's proposal.

B. Direct Interface of System Elements

T.V. Travel and World Travel also contend that SATO's proposal should have been rejected as "nonresponsive," or at least downgraded, because of its failure to have a system with "direct interface" between certain system elements. In this regard, paragraph "M(1)" of the solicitation states in pertinent part:

> . . . The Contractor must provide automated reservation equipment capable of displaying all available fares. In addition, the Contractor must have a system with

direct interface between the reservation, ticketing and accounting elements so that all passenger reports and summary data may be automatically generated from point-of-sale information.

Under the rating plan, three points (12 points for four evaluators) were allocated to a rating plan criteria which stated in pertinent part:

> The Offeror has already computer support for accounting, including software which interfaces with the reservation and ticketing functions . . . . If the offeror has developed his/her own program, the proposal should clearly indicate that it interfaces with the res/ticketing system.

SATO's offer proposed the TYNMET MARSPLUS (Multi-Access Reservation System) automated reservations and ticketing system. SATO also enhanced its system with a Tandy 1000 personal computer to prepare the required management information reports and to perform accounting and billing. GAS states that it has no reason to question SATO's capability to meet it requirements.

The SATO proposal does not state that the accounting, reservation and ticketing functions will directly interface. Also, there is no explanation of how reports will be automatically generated from point-of-sale information. Further, there is no statement of any specific hardware or software interface between the MARSPLUS system and the Tandy 1000 computer. On the other hand, the solicitation does not define what is meant by "direct interface," and thus what GSA actually intended by this paragraph is not entirely clear. In this case, it appears that a data base for ticketing and reservations is obtained from the MARSPLUS system which is some how put into the Tandy computer to prepare the required management reports and to perform accounting and billing. Therefore, despite the less than clear explanation in SATO's proposal, we are unable to conclude that SATO's proposal is not in compliance with paragraph "M(1)" or that the proposal should have been downgraded in this area.

C. Number of Travel Agents

The protesters also contend that SATO should have been downgraded for not proposing one travel counselor for each $500,000 of anticipated travel. This criteria is worth three points (12 points for four evaluators) in the rating plan utilized. GSA states that SATO proposed 15 travel counselors and that only one travel counselor per $700,000 in anticipated travel was required by the solicitation.

However, our review of SATO's proposal only indicates that 14 travel counselors were proposed. The government's estimated travel under this contract is reported to be approximately $10 million. Therefore, it appears that SATO proposed only one travel counselor for approximately $715,000 in anticipated travel. Although this ratio does not violate solicitation requirements, both the evaluation criteria set forth in the solicitation and the rating plan indicate that offerors which proposed one travel counselor per

$500,000 in anticipated travel will be rated higher than those who proposed fewer counselors. Consequently, the SATO apparently should have been downgraded for not proposing one counselor per $500,000.

This aspect of the rating plan is also under the project management category, where SATO was downgraded only 4 points out of a total possible 280 points (four evaluators). Consequently, it seems likely that the SATO was not downgraded in this area either. Therefore, it appears this aspect of the evaluation was improper.

D. Diners Club Account Reconciliation

The protesters also contend that the SATO should have been downgraded for failing to "demonstrate willingness and capability to perform automated reconciliation of accounts for agencies participating in GSA's Diners Club contract." Five points (20 points for four evaluators) are allocated to this evaluation criteria in the rating plan. The evaluation criteria set forth in the solicitation states that this is an enhancement which will be awarded additional points in the evaluation.

GSA has not responded to this protest contention. SATO received a perfect score in the initial evaluation for the general category of equipment capability, of which this aspect of the rating plan is a part. Therefore, it is apparent that GSA did not rate this as a deficiency. From our review of SATO's proposal, there is no indication that SATO has this capability. Therefore, it appears that GSA did not properly evaluate this matter.

E. Electronic Transmission of Summary Reports

GSA again did not respond to the protest allegation that SATO should have been downgraded because it cannot "transmit summary reports electronically." Under the rating plan, two points (eight points for four evaluators) were allocated to this item. As noted above, SATO was not downgraded for any aspect of equipment capability of which this aspect of the rating plan is a part. Our review of SATO's proposal reveals that there is no indication that SATO has this capability. Therefore, it appears that GSA did not properly evaluate this matter.

6. *Recommendation*

SATO's proposal was apparently not properly rated in a number of evaluation areas. There is no indication that these matters were discussed with SATO or corrected in its best and final offer. Indeed, the record does not reveal SATO's final point score. In view of the relatively close point scores, GSA's award selection conclusion that SATO's proposal received the highest point score may well be incorrect.

T.V. Travel's and World Travel's protests are therefore sustained. It is recommended that GSA reevaluate those proposals in the competitive range in the aforementioned areas and determine which offeror is the highest ranked. If SATO is not the highest ranked, then we recommend that its contract be terminated for the convenience of the government and award made to the highest rated offeror.

T.V. Travel and World Travel protest that the award was improperly based upon SATO's incumbent status—an evaluation criteria not set forth in the solicitation. In its report, GSA states that this was not a factor in the award selection. GSA explains that the statements in the selection statement regarding the advantage of selecting the incumbent are only "added advantages," not controlling the award selection, and SATO received the award because it received the highest score. In view of GSA's position, we need not consider this protest basis further and it is denied.

GET-A-WAY TRAVEL'S PROTEST

Get-A-Way Travel protested the award by GSA under solicitation No. GSA-3FC-85-N-001 of a contract to Cherry Hill Travel, Inc., to be the travel management center for the Philadelphia, Pennsylvania, metropolitan area. Get-A-Way Travel contends that GSA was biased against it in evaluating its proposal.

GSA contends that Get-A-Way's Travel's protest is untimely under our Bid Protest Regulations. We agree.

Get-A-Way Travel protested this same matter to the contracting officer by letter dated April 2, 1985. GSA denied this protest by letter dated May 9, 1985. The protester was orally apprised on May 10, 1985, that award had been made to Cherry Hill Travel. Get-A-Way Travel's protest was filed in our Office on May 30, 1985.

Section 21.2(a)(3) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1985) requires that when a protest has been initially filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of when the protester becomes actually aware of the adverse agency action on the protest. Get-A-Way Travel's protest to our Office was filed more than 10 working days after it was apprised of the award to Cherry Hill Travel. Therefore, the protest is untimely and is dismissed.

CLAWSON TRAVEL PROTEST

Clawson Travel protests the GSA award of a contract under solicitation No. 8FCG-E6-DU008 to Morris Travel Corporation (Morris) to be the travel management center for the Salt Lake City, Utah, metropolitan area. The protester alleges that the Small Business Administration (SBA) found that Morris is not a small business and that GSA should not have made award to Morris until it re-

ceived the SBA's ruling on a size protest of Morris' status. We deny the protest.

A size protest had been filed on March 26, 1985, with GSA alleging that Morris was not a small business. GSA forwarded the matter to the SBA on March 28, 1985, and made several telephone calls (April 18 and May 2) to ascertain the status of the SBA size determination. GSA reports that no indication was given by SBA that a decision on the protest was imminent. On May 6, 1985, the SBA found that Morris was not a small business concern. On May 7, 1985, GSA made award to Morris. GSA reports that it was unaware of SBA's size determination at that time.

FAR, 48 C.F.R. § 19.302(h)(1) (1984) provides that a contracting officer shall not award a contract after receiving a timely size protest until the SBA has made a size determination or until 10 business days have expired since the SBA's receipt of the protest, whichever occurs first. Since the contracting officer waited more than 10 business days and did not receive notice of the size determination prior to award, he was justified in proceeding to award. *John C. Holland Enterprises,* B-216250, Sept. 24, 1984, 84-2 C.P.D. ¶ 336; *J.R. Youngdale Construction Co., and John R. Selby, Inc.,* B-214448, B-214484, Mar. 13, 1984, 84-1 C.P.D. ¶ 306. There is no legal duty for the contracting officer to telephonically check with the SBA as to the status of a size determination, nor does the fact that he had previously checked such status with the SBA estop him from making award if he complied with the FAR.

Clawson Travel also asserts that GSA should have known the Morris' small business self-certification was erroneous and that the protest to SBA would be upheld, and should therefore not made an award. However, by Clawson Travel's own admission, this protest was "not a typical appeal in that it challenged one of the fundamental size formulas used by the SBA." Since Clawson Travel has not established that Morris' small business self-certification was not made in good faith, its protest is denied.

Nevertheless Morris has been found by SBA to be other than a small business concern on this small business setaside procurement. In view of Morris' status, we recommend that the options in its contract not be exercised.

[B-219726]

Transportation—Household Effects—Pets—Status as Household Effects

The statute providing for the transportation, within prescribed weight limitations, of the "baggage and household effects" of transferred service members applies only to inanimate objects that can be packed, stored, and shipped by commercial carrier at standard costs computed on the basis of weight. Hence, the statute does not authorize the transportation of live animals, including household pets, since the transportation of live animals involves special handling and extraordinary cost that cannot be calculated on the basis of weight, and animals are fundamentally unlike

the inanimate household furnishings and personal effects acceptable for shipment by commercial movers.

Matter of: Transportation—Household Goods—Live Animals, Dec. 16, 1985:

The question presented here is whether animal pets may be shipped at public expense under the authority of the statute which provides for the transportation of the "baggage and household effects" of service members who are ordered to make a permanent change-of-station move.[1] We conclude that this statute does not provide authority for the shipment of pets.

Background

Subsection 406(b)(1)(A) of title 37, United States Code, provides that a member of a uniformed service who is ordered to make a change of permanent station "is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, within such weight allowances prescribed by the Secretaries concerned."

Implementing statutory regulations are contained in Volume 1 of the Joint Travel Regulations (1 JTR). Those regulations define the term "household goods" as generally including all personal property associated with the home and personal effects belonging to service members and their dependents, on the effective date of the permanent change-of-station orders, which can be accepted and transported as household goods by an authorized commerical carrier.[2] It is clear from Chapter 8 of 1 JTR and from the definition of household goods that that term encompasses all items referred to in 37 U.S.C. § 406(b) as "baggage and household effects." The definition contains a list of items specifically excluded from coverage under the term "household goods," and among the enumerated exclusions are:

> 3. live animals not required in the performance of official duties, including birds, fish, and reptiles;

Hence, under the current regulations, since live animal pets are specifically excluded from the definition of "household goods," they are not "baggage and household effects" which may be transported at public expense when service members are ordered to make a permanent change-of-station move.

It is indicated that Army officials believe this prohibition against the shipment of pets should be rescinded. The officials reportedly believe that the prohibition has resulted in a hardship to service

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[1] This action is in response to a request for a decision received from the Chairman of the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control Number 85-25).

[2] The definition of "household goods" is contained in Appendix J of Volume I, Joint Travel Regulations.

members, not only because of the out-of-pocket expenses incurred by them, but also because of the inconvenience they experience in having to name personal arrangements for their pets' transportation.

The officials recognize that Federal departments and agencies must act within their statutory authority in issuing regulations, but the officials question whether the governing provisions of statute contained in 37 U.S.C. § 406(b)(1)(A) actually require the exclusion by regulation of household pets from the "baggage and household effects" which may be transported at public expense when service members are ordered to make a permanent change-of-station move. The issue thus presented is whether the Joint Travel Regulations may properly be amended under the provisions of 37 U.S.C. § 406(b)(1)(A) which are currently in effect to permit the transportation of pets at Government expense.

Analysis and Conclusion

As indicated, 37 U.S.C. § 406(b)(1)(A) broadly authorizes the transportation, including the packing and temporary storage, of transferred service members' "baggage and household effects," subject to prescribed weight limitations. Another statute, 37 U.S.C. § 554(b), provides similar authority for the transportation of the "household and personal effects" of service members who are officially reported as dead, injured, ill, or in a mission status. Also, civilian employees who are transferred are broadly authorized the transportation of their "household goods and personal effects" under 5 U.S.C. § 5724(a).

We have repeatedly observed that "baggage," "household effects" and "household goods" are general terms not lending themselves to precise definition, but varying in scope depending upon the context in which they are used.[3] We have consistently held, however, that the statutes and regulations providing for the shipment of household goods or personal effects of service members and civilian employees contain no authority for the transportation of household pets.[4] In those decisions we have referred to regulations specifically prohibiting the shipment of live animals in such circumstances, but we have also observed generally that live animals, including pets and mascots, could not properly be regarded as household goods or effects under the applicable statutes because they were not classified by carrier tariffs as household goods.[5]

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[3] See, e.g., 53 Comp. Gen. 159, 160 (1973); 52 Comp. Gen. 479, 481 (1973); 44 Comp. Gen. 65, 66 (1964).

[4] See, e.g., 27 Comp. Gen. 760 (1948) (service members in a missing status); *Major General Joseph T. Palastra, Jr.*, B-205577, May 18, 1982 (service member transferred); *Ramon V. Romero*, B-190330, February 23, 1978 (civilian employee transferred).

[5] 27 Comp. Gen., *supra*, at 761-762. Cf. 52 Comp. Gen., *supra*, at 480-482.

We have reviewed the rationale of our prior decisions on this subject and find the conclusion was properly reached that live animals are not includable as "baggage," "household effects," or "household goods" under 37 U.S.C. § 406(b)(1)(A) or the other provisions of statute mentioned. The statutes plainly contemplate that the transportation of household goods at public expense be limited to inanimate objects that can be packed, stored, and shipped by a commercial carrier at standard costs computed on the basis of weight. The transportation of live animals involves special handling and extraordinary costs that cannot be calculated on the basis of the animals' weight, so that we regard living animals as being fundamentally unlike the inanimate household furnishings and personal effects handled in the ordinary manner by commercial movers. Moreover, we note that in the past when the Congress has enacted legislation authorizing transferred Government personnel to ship live animals as well as household furnishings to a new post of duty, the type of animal and manner of shipment was specifically prescribed. For example, Army officers were once authorized the transportation of their private "mounts" or horses.[6]

We are consequently unable to conclude that the Congress intended to authorize the shipment of animal pets at public expense by enacting the legislation currently in effect which generally provides for the transportation of service members' "baggage and household effects." Hence, we conclude that the provisions of statute in question do not provide authority for the transportation of animal pets at public expense, and that the Joint Travel Regulations therefore may not be amended to authorize their transportation.

The question presented is answered accordingly.

[B-220079]

Contracts—Negotiation—Offers or Proposals—Rejection—Proposed Technical Approach Insufficiently Proven

Where protester's initial proposal is found technically unacceptable although capable of being made acceptable, but protester fails to submit a timely response to agency's request for clarification, agency's subsequent exclusion of protester from negotiations with remaining offeror is proper, since without additional information, protester's proposal was technically unacceptable.

Matter of: Data Resources, Inc., Dec. 16, 1985:

Data Resources, Inc. (DRI) protests the rejection of its proposal by the Federal Emergency Management Agency (FEMA) under request for proposals (RFP) No. FMW-85-R-2057. DRI's proposal was evaluated and found to be technically unacceptable but capable of being made acceptable through clarifications. FEMA refused to consider DRI's proposal after DRI failed to submit a timely re-

[6] See 8 Comp. Gen. 627 (1929); 6 Comp. Gen. 320 (1926); 2 Comp. Gen. 346 (1922).

sponse to clarification questions sent to DRI. DRI states that it never received FEMA's request for clarifications and argues that FEMA unreasonably excluded DRI from the competition.

We deny the protest.

The RFP was for the identification and analysis of the supply, bottleneck and dislocation problems expected to occur in the United States' civilian economy during an extended military mobilization. Two of the four proposals received were rejected as technically unacceptable, and the remaining two proposals, submitted by DRI and The Analytical Sciences Corporation (TASC), were found technically unacceptable but capable of being made acceptable. Thereafter, DRI and TASC were sent written questions and were informed that responses were due by a specific date. FEMA received a response from TASC but none was received from DRI.

FEMA contacted DRI regarding its failure to submit a response. At that time, DRI indicated that it had never received the questions sent by FEMA and requested that the firm be provided an opportunity to submit a response. FEMA advised DRI that no late submissions would be considered unless the requirements of section 15.412 of the Federal Acquisition Regulation (FAR), FAC, 84-7, April 30, 1985, regarding the acceptance of late proposals or modifications were met. Since there was no evidence that any of the exceptions which permit the consideration of late proposals or modifications were applicable, FEMA advised DRI that any late submission would not be considered.

The response submitted by TASC was evaluated by the technical evaluation panel and TASC's proposal was found to be acceptable. Discussions were then conducted with TASC and due to an urgent and compelling need to award the contract, award was made to TASC on September 30, despite DRI's prior protest to our Office.

DRI indicates that its initial proposal, as well as TASC's, had been found capable of being made acceptable by FEMA and that based on this determination, a competitive range comprised of DRI and TASC was established. DRI argues that notwithstanding its failure to respond to the questions sent by FEMA, the firm should have been included in further discussions since based on its initial proposal, the firm still stood a reasonable chance of being selected for award. DRI notes that its initial proposal was within 5 points of TASC's revised proposal and that substantial changes were not required to address adequately the questions raised by FEMA. Since only one offeror was left within the competitive range, DRI argues that FEMA's decision to exclude it from further consideration is subject to close scrutiny and, under the circumstances, should not be upheld.

FEMA contends that the initial questions sent to the offerors were merely requests for clarification and that DRI was never considered to be within the competitive range. FEMA states that DRI was given the same opportunity to participate as TASC, and

through no fault of the government, DRI failed to respond timely to the agency's request for clarification of its proposal. FEMA argues that its refusal to consider any late submission by DRI was entirely consistent with the late proposal and modification provision contained in the solicitation and that DRI was properly excluded from further negotiations.

We agree FEMA was clearly justified in refusing to consider any late proposal modification by DRI. See *Woodward Assoc., Inc., et al.,* B-216714 *et al.,* Mar. 5, 1985, 85-1 CPD ¶ 274. Further, we think that DRI's proposal was properly excluded from the subsequent negotiations due to its failure to respond to the agency's request for clarification.

It is well established that the determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion. Our Office will not disturb such a determination unless it is shown to be unreasonable or in violation of procurement laws or regulations. *Leo Kanner Assoc.,* B-213520, Mar. 13, 1984, 84-1 CPD ¶ 299. In addition, we will closely scrutinize any determination that results in only one offeror being included in the competitive range. *Falcon Systems, Inc.,* B-213661, June 22, 1984, 84-1 CPD ¶ 658.

Here, both proposals were initially found technically unacceptable, although capable of being made acceptable. The questions sent by FEMA to both offerors were part of the ongoing process to determine which offerors were within the competitive range. Both offerors were provided the same opportunity to revise their proposals and we note that after receiving the information requested of TASC, FEMA concluded that TASC's previously unacceptable proposal was now acceptable. While DRI's initial proposal was within 5 points of TASC's revised proposal, the weaknesses in DRI's initial proposal remained and the proposal was still technically unacceptable. In contrast, TASC's revised proposal was now considered acceptable and under these circumstances, we find that FEMA could reasonably exclude DRI from the competitive range.

The protest is denied.

[B-220110]

Mileage—Travel by Privately Owned Automobile—Between Residence and Temporary Duty Station

Army employee whose use of his privately owned vehicle was determined to be advantageous to the Government is entitled to mileage for travel on a daily basis between his place of abode and his alternate duty point under Volume 2 of the Joint Travel Regulations. Under para. C2153 Department of Defense components do not have discretion to limit the payment of mileage to the mileage amount by which his travel to the alternate duty site exceeds the employee's commute between his residence and his permanent duty station.

Matter of: Talmadge M. Gailey, Dec. 17, 1985:

The question in this case is whether Mr. Talmadge M. Gailey, an employee of the Department of the Army, is entitled to a mileage allowance for the use of his privately owned vehicle on official business between his place of abode and an alternate duty point where travel by privately owned vehicle was determined to be advantageous to the Government.[1] We conclude that Mr. Gailey is entitled to mileage for such travel.

Background

Mr. Gailey is a quality assurance inspector whose permanent duty station is Fort Eustis, Virginia. During the period from July 1984 through March 7, 1985, he was assigned to the Hampton Marine Railway Terminal to perform duties in connection with the contractor's repair of Army vessels. During this period Mr. Gailey did not report to Fort Eustis, but on a daily basis drove his own vehicle from his residence in Saluda, Virginia, directly to Hampton. Hampton, Fort Eustis, and Saluda are considered to be within the same commuting area. The distance between Saluda and Fort Eustis is 39 miles, while the distance between Saluda and Hampton is 49 miles.

In accord with installation policy concerning use of privately owned vehicles, Mr. Gailey's use of his vehicle for local transportation to and from Hampton during the period in question was approved as being advantageous to the Government. Initially Mr. Gailey was reimbursed on a mileage basis for his daily round-trip travel of 98 miles between his residence and Hampton. However, in December 1984, the finance and accounting officer limited payment of mileage to the difference between the Saluda-to-Terminal distance and the Saluda-to-Fort Eustis distance—10 miles each way for each day of work. In disallowing Mr. Gailey's claim for an additional 78 miles each day, the finance and accounting officer relied upon Comptroller General decisions giving agencies discretion to limit mileage reimbursement for travel between an employee's residence and places of temporary duty in the vicinity of headquarters to the amount that exceeds the distance between his residence and his permanent duty station. He also cites the general principle that an employee must bear the expense of commuting to his job and points out that there is no local agency policy governing the payment of mileage in this situation. In claiming the additional mileage that has been disallowed, Mr. Gailey relies upon Joint Travel Regulations (JTR), vol. 2, para. C2153 as mandating the payment of

[1] This action is in response to a request for a decision received from Major P.L. Capestany, Finance and Accounting Officer, Finance and Accounting Division, U.S. Army Transportation Center, Fort Eustis, Virginia. The Per Diem, Travel and Transportation Allowance Committee has assigned the request Control Number 85-27.

mileage for the full distance each way between his residence in Saluda and his alternate duty point, the Hampton Marine Railway Terminal.

Analysis and Conclusion

We have long held that agencies have discretion to limit the mileage allowance paid for travel between an employee's residence and a temporary duty site when use of a privately owned vehicle is approved as advantageous to the Government. 36 Comp. Gen. 795 (1957). Prior to September 1, 1970, Department of Defense components had discretion to limit the mileage allowance paid for travel beginning at an employee's residence. Under 2 JTR para. C6153 (Change No. 43, Feb. 1, 1969), the predecessor to 2 JTR para. C2153, mileage could be limited to an amount representing the mileage difference between reporting to the employee's permanent duty station and the temporary duty station. However, effective September 1, 1970, this regulation was amended to mandate payment of mileage for the entire distance traveled from an employee's place of abode to his temporary duty station and return when the use of the automobile was determined to be advantageous to the Government.[2] 2 JTR para. C6153 (Change No. 59, September 1, 1970). This regulation was renumbered in 1976. 2 JTR para. C2153 (Change No. 131, September 1, 1976). As in effect during the period of Mr. Gailey's assignment to Hampton, 2 JTR para. 2153 (Change No. 212, June 1, 1983), allows no discretion, but mandates payment of mileage for the entire distance to an alternate duty point when travel begins at the employee's place of abode and the employee does not first travel to his regular place of work. *Joe B. Knight,* B-210660, September 27, 1983, *aff'd.*, B-210660, December 26, 1984. Since individual Department of Defense components no longer have discretion to limit the payment of mileage to an alternate duty point when an employee travels directly from his place of residence, the finance and accounting officer's disallowance of Mr. Gailey's claim for an additional 78 miles each day is contrary to the controlling regulation.

The finance and accounting officer has also raised a question concerning the location of Mr. Gailey's permanent duty station. He asks whether, during Mr. Gailey's assignment to the Hampton Marine Railway Terminal, the Terminal became Mr. Gailey's permanent duty station. The question is significant because an employee must bear the expenses of commuting between this place of abode and his permanent duty station. *Gretchen Ernst,* B-192838, March 16, 1979. Mr. Gailey's assignment to the Hampton Marine Railway Terminal was for the purpose of monitoring repair work

[2] For a brief period in 1981, 2 JTR para. 2153 (Change No. 185, March 1, 1981) again gave Department of Defense components authority to limit mileage reimbursement for travel between an employee's residence and an alternate duty point.

on four vessels. It was not intended to be of indefinite duration and, in fact, it lasted 8 months. In the case of prolonged assignments, 2 JTR para. C4455 provides:

> When a period of temporary duty assignment at one place will exceed 2 months, consideration will be given to changing the employee's permanent duty station unless there is reason to expect the employee to return to his permanent duty station within 6 months from the date of initial assignment or the temporary duty expenses are warranted in comparison with permanent change-of-station movement expenses.

The finance and accounting officer has furnished nothing to indicate that a determination was made to change Mr. Gailey's permanent duty station. To the contrary such documentation as he has furnished indicates that the Hampton Marine Railway Terminal was a temporary duty site and the nature and duration of that assignment does not establish otherwise. Accordingly, Mr. Gailey is entitled to be paid mileage from his place of abode to his alternate duty point and return according to 2 JTR para. C2153 (Change No. 212, June 1, 1983).

[B-220820]

Bids—Responsiveness—Nonresponsive—Alternative Bid—Effect on Conforming Base Bid or Other Alternatives

When a bidder submits a bid offering either of two products, one of which will meet the specifications and the other of which will not, the government is not precluded from accepting that option which meets the solicitation's requirements.

Contracts—Modification—Change Orders—Within Scope of Contract

A contractor was issued a change order so that 5-inch vinyl siding was to be used as opposed to 6-inch vinyl siding called for in the specifications. We do not view this change as being substantial so as to be beyond the scope of the contract.

Matter of: Sidings Unlimited, Dec. 18, 1985:

Sidings Unlimited (Sidings) protests the award of a contract under request for quotations (RFQ) 10/46-85, issued by the Forest Service, Department of Agriculture, for the installation of vinyl siding on three buildings at Hungry Horse Ranger District, Hungry Horse, Montana.

The protest is denied.

Sidings alleges that the Forest Service awarded the contract to Riverside Construction (Riverside) based on Riverside's bid of 5-inch siding instead of 6-inch siding which was required in the specifications. Sidings states that 5-inch siding is cheaper than 6-inch and, had Sidings known that this requirement in the solicitation was going to be changed, Sidings material cost would have been $600 less and its bid, accordingly, would have been lowered by that amount. Finally, Sidings states that it does not understand why the government's cost has not been reduced now that a change order

has been issued to Riverside to install 5-inch rather than the 6-inch siding the specifications originally called for.

The Forest Service reports the following two quotes were received:

Quoter	Quote	Terms	Net
Riverside	$9,447	Less 5% for payment within 30 days	$8,974.65
Sidings Difference	9,998	None	9,998.
Difference	$551		$1,023.35

We note that the Forest Service could not consider the prompt-payment discount when it evaluated the bids. *Tri-State Laundry Services, Inc. d/b/a/ Holzberg's Launderers and Cleaners—Request for Reconsideration,* B-218042.2, Mar. 11, 1985, 85-1 C.P.D. ¶ 295.

Riverside's proposal offered the Forest Service its choice of 4-, 5-, 6- or 8-inch siding for the same price. The contracting officer states that she awarded the contract on September 30, 1985, to Riverside on the basis of 6-inch siding specified in the RFQ.

Subsequently, on October 1, a change in width of the siding was discussed at the prework conference. The government decided that the 5-inch siding would be stronger and less flexible and provide sturdier "J" channels for windows and doors than the 6-inch siding. Riverside proposed a no-cost change order so that 5-inch rather than 6-inch siding be used and the contracting officer approved the change.

The Forest Service contends that the change in the siding width was made for the government's convenience and that this change was within the scope of the contract and, therefore, was allowable. Moreover, the Forest Service states that in regard to Siding's contention that the change to 5-inch siding should have resulted in a lower cost to the government, Riverside's supplier of siding confirmed that there was no difference in price between 5-inch or 6-inch siding.

The protest initially raises the issue of whether Riverside bid was responsive because it offered nonresponsive alternate items. Where a solicitation does not provide for alternative bidding but a bidder nevertheless submits a bid offering either of two products, one of which will meet the specifications and the other of which will not, the government is not precluded from accepting that option which will meet the solicitation's requirements. *P&N Construction Company, Inc.,* 56 Comp. Gen. 328, 333 (1977), 77-1 C.P.D. ¶ 88. Riverside's inclusion of offers of alternate siding sizes which are nonresponsive under the solicitation did not preclude the Forest Service from accepting its responsive offer for 6-inch siding.

Northwest Forest Workers Association, B-213180, May 2, 1984, 84-1 C.P.D. ¶ 496.

With respect to Siding's concern about the change order, as a general rule our Office will not consider protests against contract modifications, since these involve contract administration—a responsibility of the procuring agency. *Symbolic Displays, Inc.,* B-182847, May 6, 1975, 75-1 C.P.D. ¶ 278. We, however, will review an allegation that a modification exceeds the scope of an existing contract and, therefore, should be the subject of a new procurement. *American Air Filter Co.—Reconsideration,* 57 Comp. Gen. 567 (1978), 78-1 C.P.D. § 493; *Aero-Dri Corp.,* B-192274, Oct. 26, 1978, 78-2 C.P.D. ¶ 304. In determining whether a modification is beyond the scope of the contract, our Office looks to whether the original purpose or nature of a particular contract has been changed so substantially that the contract for which the competition was held and the contract to be performed are essentially different. *E.J. Murray Co., Inc.,* B-212107, Dec. 18, 1984, 84-2 C.P.D. ¶ 680.

The change here is minor, does not affect the cost of the contract and, thus, is not beyond the scope of the contract. Although Sidings alleges that 5-inch siding is cheaper than 6-inch siding, the price offered by Riverside for 5- and 6-inch siding, was the same. Evidently, the size of the siding did not affect Riverside's costs since Riverside also offered 8-inch siding, which, by Sidings' argument, would have been more expensive. Accordingly, we find no prejudice to Sidings because of the change order.

The protest is denied.

[B-220961.2]

Contracts—Small Business Concern—Awards—Responsibility Determination

The bidder, not the contracting officer, has the burden of proving the bidder's competency when applying to the Small Business Administration (SBA) for a Certificate of Competency (COC). General Accounting Office (GAO) will dismiss protests alleging that the contracting officer failed to forward to SBA for its COC determination information tending to show that a contractor is responsible where the contractor had the information, but did not provide it to that SBA when applying for a COC.

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Error of Fact or Law—Not Established

Dismissal of protest is affirmed where request for reconsideration does not establish that the decision was based on error of law or fact.

Matter of: R.S. Data Systems—Reconsideration, Dec. 18, 1985:

R.S. Data Systems (RSD) requests that we reconsider our decision in *R.S. Data Systems,* B-220961, Nov. 21, 1985, 65 Comp. Gen. ——,

85-2 C.P.D. ¶ ——. In addition, RSD requests that it be paid its bid preparation expenses and its attorney's fees.

We affirm our prior decision and deny RSD's claim for its costs.

In our prior decision, we dismissed RSD's protest against the Department of Housing and Urban Development's (HUD) rejection of RSD's bid under invitation for bids (IFB) No. 85-877. RSD, a small business, protested that, after the contracting officer found RSD to be nonresponsible, he failed to submit to the Small Business Administration (SBA), for its certificate of competency (COC) determination, information which RSD supplied to the contracting officer which RSD believes supports RSD's position that it is a responsible contractor. However, we rejected RSD's argument that the contracting officer was required to supply SBA with the information, because the burden is on the contractor to prove through its COC application to SBA that it is responsible, and RSD itself had the opportunity to supply SBA with the information. See Federal Acquisition Regulation (FAR), 489 C.F.R. § 19.602-2(a) (1984); *JBS Construction Co.*, B-187574, Jan. 31, 1977, 77-1 C.P.D. ¶ 79.

The protester cites our decision in *Kepner Plastics Fabricators, Inc.; Harding Pollution Controls Corp.*, B-184451, B-184394, June 1, 1976, 76-1 C.P.D. ¶ 351, for the proposition that the GAO may recommend that SBA reconsider its COC determination when vital responsibility information has not been considered. However, *Kepner* is a case where the SBA did issue a COC, and the record disclosed that the contracting officer may not have forwarded to the SBA all available information which would tend to show that the awardee was not responsible. We concluded that the possible failure of the SBA to consider certain definitive responsibility issues may have prejudiced other bidders.

Kepner is not applicable to the case at hand. In *Kepner*, the contracting officer failed to alert the SBA to all the ways that the prospective awardee may be nonresponsible. Here, however, the contracting officer submitted to SBA adequate information to show that RSD was nonresponsible. At that point, it was incumbent upon RSD, to submit all relevant information and prove through its application for a COC to SBA that it was responsible. See *Shiffer Industrial Equipment, Inc.*, B-184477, Oct. 28, 1976, 76-2 C.P.D. ¶ 366, RSD has not shown how it was prejudiced by the contracting officer's failure to submit information that RSD itself had the burden and opportunity to submit to SBA in making its application for a COC. See *Shiffer Industrial Equipment, Inc.*, B-184477, *supra; Gallery Industries, Inc.—Request for Reconsideration*, B-185963, June 16, 1976, 76-1 C.P.D. ¶ 383.

RSD also cites our decisions in *Harper Enterprises*, B-179026, Jan. 25, 1974, 53 Comp. Gen. 496, 74-1 C.P.D. ¶ 31. and *Gallery Industries, Inc.—Request for Reconsideration*, B-185963, *supra*, as standing for the proposition that GAO will make "appropriate recommendations in COC situations where the record discloses that

information vital to responsibility determination has not been considered." However, neither of these cases involved a situation, as here, where the contractor had an opportunity to provide SBA with information but did not. In fact, in our *Gallery Industries* decision, in declining to consider the merits of a protest against the determination of nonresponsibility and the SBA's denial of a COC, we concluded:

> Of particular importance, after the determination of nonresponsibility by the agency, Gallery was afforded an opportunity to furnish detailed data to SBA on the question of its competency to do the work.

Similarly, RSD had an opportunity to provide SBA with the information in question after HUD determined RSD was nonresponsible, but did not.

RSD also objects to the statement in our prior decision that we did not consider it material if no copy of the solicitation was sent to SBA by the contracting officer notwithstanding that FAR, 48 C.F.R. § 19.602-1(c)(2), requires a copy to be furnished in connection with a COC referral. RSD objects to this statement because it believes that SBA needs the solicitation to determine whether it is necessary for its COC determination. However, as we indicated in the prior decision, if it was necessary, we are not aware of anything that would preclude SBA from obtaining a copy when it is found to be absent from the referred record. In our view, the omission is a matter of form that SBA could have readily remedied and RSD had not shown otherwise.

Since RSD's request for reconsideration does not establish that our prior decision was based on error of fact or law, the dismissal of RSD's protest is affirmed. RSD's request that it be paid its bid preparation expenses and attorney's fees is therefore denied. *Monarch Engineering Co.*, B-218374, June 21, 1985, 85-1 C.P.D. ¶ 709.

[B-217739]

Pay—Retired—Survivor Benefit Plan—Remarriage of Member—Spouse's Annuity Eligibility

A retired Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when in 1980 he was divorced. In the divorce settlement he agreed to provide survivor benefit coverage for his former spouse should the law ever be changed to allow it. He remarried, and a year later (1981) his new spouse was automatically covered under the SBP. In Sept. 1983 Public Law 98-94 was enacted authorizing a person in this situation to elect SBP coverage for a former spouse. He did so in Dec. 1983 stating that the election was made pursuant to the divorce settlement. Such an election is irrevocable; thus, a later attempt to revoke it is ineffective and the former spouse is the beneficiary of the SBP annuity upon his death.

Pay—Retired—Survivor Benefit Plan—Election Status

A terminally ill retired officer made an irrevocable election of Survivor Benefit Plan (SBP) coverage in Dec. 1983 for his former spouse pursuant to a clause in his divorce settlement agreeing to do so. Such election precluded his current spouse from SBP coverage. In February 1984 an affidavit was received from him with a letter from his and his current spouse's attorney attempting to revoke the election

on the basis that he was too ill to have understood the implications when he made the election and stating that he wanted his current spouse to be covered. The former spouse election was made in proper form, the member was never adjudicated incompetent, and the great weight of medical and other evidence presented supports the former spouse's contention that he was mentally competent when he made the election. Thus, the election should be given effect.

Pay—Retired—Survivor Benefit Plan—Contribution Indebtedness

An Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when he retired in 1978, but he was later divorced whereupon SBP deductions from his retired pay ceased. He remarried in 1980 and his new spouse became automatically covered under the SBP a year later. However, he failed to advise the Air Force of the remarriage so retired pay SBP deductions were not reinstated. In Dec. 1983 he elected SBP coverage for his former spouse pursuant to their divorce settlement agreement, and he died in Apr. 1984. The delinquent SBP premiums should be collected from the former spouse's annuity notwithstanding that they covered a period when the current spouse was covered under the SBP rather than the former spouse.

Matter of: Brigadier General Fred A. Treyz, USAF, Retired, Deceased, Dec. 19, 1985:

The primary question in this case is who, the current or the former spouse of a deceased Air Force officer, is entitled to his Survivor Benefit Plan annuity. The retired officer elected coverage for this former spouse when he was seriously ill. Later he attempted to revoke his election of coverage for his former spouse and obtain coverage for this current spouse on the basis that he had been too ill to realize the implications of his actions at the time he elected coverage for his former spouse.[1] We find that the former spouse rather than the spouse at the time of his death is the proper beneficiary of the annuity in this case.

Also, an ancillary question is asked concerning whether delinquent premiums which were not deducted from the officer's retired pay may be collected from the former spouse's annuity. We find that they may be collected from her annuity.

Background

Brigadier General Fred A. Treyz, USAF, retired on September 1, 1978. At that time he began participation in the Survivor Benefit Plan, 10 U.S.C. §§ 1447–1455, providing spouse coverage for his wife, Elva M. Treyz, to whom he was married in 1945. On May 27, 1980, the Superior Court of the State of Arizona, County of Pima, granted a divorce to Fred and Elva Treyz. The court's order incorporated a May 20, 1980 property settlement agreement which included a clause providing that General Treyz's military retired pay would be divided equally between him and Elva. It also included a clause providing:

[1] This matter was presented for an advance decision by Lieutenant Colonel J. N. Johnson, Accounting and Finance Officer, Air Force Accounting and Finance Center, Denver, Colorado. It has been assigned control number DO-AF-1451 by the Department of Defense Military Pay and Allowance Committee.

The Husband further agrees that in the event Congress shall hereafter enact legislation that would allow the Wife to receive any portion of his retirement benefits after his death through a survivor's benefit plan, the Husband shall take any and all actions necessary or appropriate to insure that the Wife qualifies for and receives such survival benefits upon his death, it being understood that if the Husband should re-marry, the amount of money the Wife would receive hereunder would lessen.

At the time of the divorce, there was no authority for a retiree to elect coverage for a former spouse under the military Survivor Benefit Plan. Thus, upon the divorce Elva lost her coverage under the Plan.

General Treyz subsequently married Carolyn H. Treyz and she became an eligible beneficiary under the Survivor Benefit Plan on July 26, 1981, 1 year after the marriage. 10 U.S.C. § 1447(3), and *Master Sergeant Paul J. Metzler*, 56 Comp. Gen. 1022 (1977).

Effective September 24, 1983, Public Law 98-94 was enacted, section 941 of which made changes in various provisions of the Survivor Benefit Plan statutes to enable a retiree to elect coverage for a former spouse to the exclusion of the current spouse. On December 28, 1983, the Air Force Accounting and Finance Center received documents executed on December 15, 1983, by General Treyz electing coverage under the Survivor Benefit Plan for his former spouse, Elva M. Treyz. The documents included the required forms indicating that General Treyz was then married to Carolyn Treyz, that he was divorced from Elva Treyz, and that he was electing coverage for Elva pursuant to a voluntary written agreement he had previously entered into incident to and incorporated in the court's order in the divorce proceeding. Also included was a copy of the court's divorce order and the property settlement agreement. The documents were executed by General Treyz's mark (an X or his initials) witnessed by two persons, one of whom was a notary public. The Finance Center put the election into effect on January 1, 1984.

Subsequently, the Finance Center received a letter dated March 2, 1984, from an attorney representing General Treyz and Carolyn Treyz indicating General Treyz was not competent to make the election in favor of his former spouse, and requesting that it be withdrawn. Enclosed with the attorney's letter was an affidavit the attorney indicated he had prepared at General Treyz's request. In the affidavit, dated February 17, 1984, General Treyz states that he had had brain surgery in May 1982, that he had received a series of cobalt treatments in June 1982 and in August 1983, and that he was taking strong dosages of medication. He stated that, in December 1983, his son and former wife, Elva, visited him. He also stated that his son indicated that General Treyz needed to update his Survivor Benefit Plan forms, and his son made the arrangements to have him sign the forms, which he did. He stated further that due to his illness, the treatments he received, and the medication he was receiving, he did not realize what was being signed or the im-

plications of those documents as far as his wife, Carolyn, was concerned. General Treyz concluded by stating that he never at any time intended to eliminate his wife, Carolyn, as beneficiary for his military survivor benefits, that he never knew that he had signed any forms changing the beneficiary until he was recently advised of this fact, and that it was his desire that his wife, Carolyn, receive all of his survivor benefits.

On April 9, 1984, General Treyz died and the Survivor Benefit Plan annuity became payable.

The Disbursing Officer notes that the election forms General Treyz executed in December 1983 appear valid on their face, and such execution appears to have been done pursuant to the agreement made in the divorce property settlement. Also, there is no indication that General Treyz was ever adjudged incompetent by a court or through any administrative proceeding. Thus, the Disbursing Officer states that it does not appear proper to invalidate the election. He notes, however, that in addition to General Treyz's affidavit, a statement of Dr. Richard B. McAdam, who treated General Treyz, raises the question of whether General Treyz was capable of making a voluntary election at the time he executed the forms.

General Treyz's Competency

We are not empowered to render decisions on persons' mental competency. However, in determining whether an expenditure may be made we consider the record before us, and if that record raises extreme doubt as to the competency of a party at the time the party executed a document upon which our determination depends, we may find the matter too doubtful to authorize payment. That is our inquiry here.

The statement of Dr. McAdam referred to by the Disbursing Officer was forwarded by the attorney with General Treyz's February 17, 1984 affidavit. This was a letter dated February 14, 1984, from Dr. Richard B. McAdam indicating that he had been treating General Treyz since May 2, 1982, for brain tumors and stating further in part:

> In the last several months, General Treyz has exhibited evidence of recurrent metastatic disease, that is, he has evidence clinically and by computerized head scan of further metastatic brain tumors. He has also exhibited tremendous decline in intellectual function in the last number of months.
>
> Based on the objective findings of CAT scan and surgical procedure and my following the patient now for an extensive period of time, I can state with certainty that General Treyz is totally unable to take care of any of his personal affairs. He is unable to make any decisions concerning himself or his economic status. I can further state with certainty that this has been the case now for several months.

In support of Elva's claim to the annuity, her attorney wrote to the Finance Center on July 10, 1984, stating that it is Elva's contention that at the time he executed the former spouse's election in her favor in December 1983, General Treyz was alert, cognizant of his situation, and mindful of his affairs. She contends that he was

desirous of honoring the agreement he previously had made with her and that he was fully competent to make the election.

As further support for her contention that General Treyz was mentally competent when he executed the election forms in December 1983, her attorney forwarded a second letter, dated September 25, 1984, from Dr. McAdam clarifying the statements made in his February 14 letter. In the September 25 letter Dr. McAdam indicates that he reviewed his records concerning General Treyz, including notes he made on November 28, 1983. Those notes indicate that while General Treyz walked in a slow shuffling gait and generally was declining, he seemed to be mentally competent. Dr. McAdam went on to state in part:

> I have enclosed copies of my office notes, November 28, 1983, and also a letter that I dictated on February 14, 1984. As you can see based on my examination of November 28, 1983, I did state that the patient seemed to be mentally competent. However on February 14, 1984, I stated that the patient was unable to make any decision concerning himself or his economic status which means that I felt that he was not mentally competent.
>
> Based on this record, I would have to state that General Treyz was most probably competent in December of 1983.

Reading these two statements of Dr. McAdam together, we are drawn to the conclusion that he found General Treyz was "most probably competent" to handle his affairs in December 1983 when he executed the election forms, but by February 1984, when he executed the affidavit attempting to withdraw the election, he had declined to the point where he was no longer able to make "any decisions concerning himself or his economic status."

In addition to Dr. McAdam's statements, the record also includes statements from four other physicians who treated General Treyz for his brain tumors. One physician, Dr. John Mattern II, indicates that he first saw General Treyz on May 12, 1982 (and apparently at other times thereafter), and that it was his opinion that General Treyz was not "totally mentally competent" from the time of his original surgery until his death. The other three physicians, however, state differently. Dr. Michael A. Savin and Dr. J. Joseph Regan, who indicate they saw General Treyz in their clinic at various times during the period of November 1982 through May 1983, state that at the time they saw General Treyz he was "always fully oriented" and "able to make sound decisions" (Dr. Savin), and in "full possession of his mental capacities" (Dr. Regan). Dr. J.A. Wassum, who indicates he administered radiation therapy to General Treyz during August 16 through 27, 1983, and saw him for a follow-up visit on October 11, 1983, states that while his condition was quite poor, "I do feel that he was oriented and mentally competent at that time." Thus, Dr. Mattern's general statement that General Treyz was not "totally" mentally competent is rebutted by the statements of the other four physicians who treated him.

The record also contains affidavits of several other persons submitted on behalf of Mrs. Elva Treyz testifying to General Treyz's

mental competency. Some of these affidavits may be summarized as follows:

1. General Treyz's son, Major Fred A. Treyz III, testifies in part that he was stationed in Norfolk, Virginia, near his father's residence, during the period of July 1983 through February 1984, during which time he visited his father for several hours each day. He states that General Treyz was aware that he was terminally ill, and that in the Fall of 1983 he became increasingly concerned about the financial status of his former wife, Elva (Major Treyz's mother). When General Treyz was made aware of the September 1983 change in the survivor benefit law, he asked Major Treyz to obtain more information from the Air Force, which he did. Due to his father's physical infirmity, Major Treyz obtained the necessary forms from the Air Force, and arranged to have Judge Advocate General's Corps officers discuss the matter with his father. He also states that at the suggestion of one of these officers and at his father's request, he made an appointment for his father to see Mr. Felix Hatchett, a civilian lawyer, on December 15, 1983. Mr. Hatchett went over the forms with his father and witnessed his mark thereon after Major Treyz had reminded his father that he did not have to sign the forms if he did not want to. To this, Major Treyz states, his father responded, "I know it, but I want to." Major Treyz states that without a doubt, his father's health was poor in December 1983, but equally without a doubt his mental health was excellent. He further states that—

> There is no doubt that my father was competent. At all times during the period prior to and including his execution of the SBP beneficiary change on December 15, 1983, my father had full comprehension of the meaning and effect of his act. His mind was sound and alert. To the best of my knowledge, my father was never adjudicated mentally incompetent nor did Carolyn Treyz take any steps to have him so adjudged or to have herself appointed as the guardian of his property. * * *
>
> Neither my mother nor I took any advantage of my father's infirmity to secure the SBP change. We engaged in no artifice. My father's change of the SBP beneficiary was the result of his deliberate judgment.

2. Mr. Hatchett, the attorney at whose office General Treyz executed the former spouse election forms, states that on December 15, 1983, General Treyz came to his office in a wheel chair accompanied by his son, Fred. He further states that at that time he was the attorney for the former spouse, Mrs. Elva Treyz. He states that during the conference, General Treyz "freely and voluntarily, and with apparent knowledge and understanding of the consequences," executed the election forms.

3. Captain Mark A. Exley, an Army Reserve Judge Advocate General's Corps officer, indicates that Major Fred Treyz was a client of his. At Major Treyz's request, he met with General Treyz at the General's home in early December 1983 to discuss the Survivor Benefit Plan. Captain Exley indicates that after advising the General that he was Major Treyz's lawyer, not the General's, he advised him to talk with a lawyer representing his own interest.

Captain Exley states that General Treyz indicated that he wanted to and had a duty to make the election change in favor of his former wife if the law had been changed to allow it. Captain Exley further states that there was no indication whatsoever that General Treyz was under any duress or suffered from any sort of diminished mental capacity, that his words were clear and his thoughts were logical, that he knew what he was preparing to do, and that he was capable of managing his own affairs.

4. Ms. Mary DiPaola, an attorney, who at the time was a captain in the Army Judge Advocate General's Corps, states that in late November 1983 she visited the Treyz family for 4 days during which she spent several hours each day with General Treyz. She indicated that he spoke to her about many topics with coherence and wit, that his opinions were sensible and resolute, that his memory was excellent, and that although his speech was slow and he was physically frail, his mental facilities appeared to be sound.

The weight of evidence before us, therefore, falls heavily on the side of Elva's contention that General Treyz was mentally competent in December 1983 when he executed the election forms, and that he did so to carry out the agreement he had made in the 1980 divorce settlement. Accordingly, we find insufficient basis for us to question his December 1983 execution of the election forms which appear valid on their face.

Law

The Survivor Benefit Plan provisions applicable here, as modified by Public Law 98-94, effective September 24, 1983, are found in 10 U.S.C. §§ 1448(b) and 1450. Sections 1448(b) (3) and (4), governing application of the Plan, provide in pertinent part

(3) (A) A person—

(i) who is a participant in the Plan and is providing coverage for a spouse * * * and

(ii) who has a former spouse who was not that person's former spouse when he became eligible to participate in the Plan,

may * * * elect to provide an annuity to that former spouse. Any such election terminates any previous coverage under the Plan and must be written, signed by the person, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment.

* * * * * * *

(C) An election under this paragraph may not be revoked except in accordance with section 1450(f) of this title and is effective as of the first day of the first-calendar month following the month in which it is received by the Secretary concerned.

* * * * * * *

(4) A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) shall, at the time of making the election, provide the Secretary concerned with a written statement (in a form to be prescribed by that Secretary and signed by such person and the former spouse) setting forth whether the election is being made pursuant to a written agreement previously entered into voluntarily by such person as a part of or incident to a proceeding of divorce, dissolution, or annulment

and (if so) whether such voluntary written agreement has been incorporated in, or ratified or approved by a court order.

Under section 941(b) of Public Law 98-94, a person who on the date of enactment of the law, September 24, 1983, was a participant in the Plan providing coverage for a spouse, was given 1 year from that date of enactment to elect coverage for a former spouse. The 1 year allowed in subsection (b)(3)(A) as quoted above began to run not from the date of divorce but from the date of enactment. This provision was included to allow persons such as General Treyz, who prior to the enactment of the law had been married, retired and divorced, the opportunity to elect coverage for their former spouses.

Elva was General Treyz's former spouse in December 1983, but she was not his former spouse when he became eligible to participate in the Plan upon his retirement in 1978 since, at that time, she was still married to him. Accordingly, when General Treyz elected coverage for Elva in December 1983, he was a person described in section 1448(b)(3)(A), and he made the election within the prescribed 1-year period as modified by section 941(b) of Public Law 98-94.

Also, General Treyz's election was made on the forms prescribed by the service and included the statements that the election was being made pursuant to a voluntary written agreement previously entered into incident to a divorce proceeding and that such agreement had been incorporated in or ratified by court order. Thus, the election complied with the provisions of 10 U.S.C. § 1448(b)(4).

Section 1450(f)(2) of title 10, United Stated Code, provides in part:

> (2) A person who, incident to a proceeding of divorce, dissolution, or annulment, enters into a voluntary written agreement to elect under section 1448(b) of this title to provide an annuity to a former spouse and who makes an election pursuant to such agreement may not change such election * * * unless—
>
> * * * * * * *
>
> (A) in a case in which such agreement has been incorporated in or ratified or approved by a court order, the person—
>
> (i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and modifies the provisions of all previous court orders relating to the agreement to make such election so as to permit the person to change the election; and
>
> (ii) certifies to the Secretary concerned that the court order is valid and in effect; * * *

There is some ambiguity in the language of the clause of the 1980 separation agreement in which General Treyz agreed to provide survivor benefit coverage for Elva should the law be changed to permit it in that it indicates that, if he should remarry, Elva might expect not to receive the full annuity. Such ambiguity is understandable since at the time of the agreement the law had not been changed and the parties did not know the provisions of the future change. As it turned out, the modification to the law made no provisions for dividing the annuity between wives, and the elec-

tion form General Treyz executed clearly so indicates. In addition it seems clear that in executing the election in favor of Elva, he considered himself to be carrying out an obligation he had assumed under the 1980 divorce settlement. Also, as is noted previously, Congress made specific provision in Public Law 98-94 to enable a person in General Treyz's situation to provide former spouse coverage although he had been retired and divorced before the law was enacted. Thus, General Treyz's election may be revoked only to the extent authorized by 10 U.S.C. § 1450(f)(2). Since the 1980 separation agreement provision requiring him to elect survivor benefit coverage for Elva apparently was never modified by court order to permit him to disregard that requirement, under 10 U.S.C. § 1450(f)(2) the revocation would be of no effect. This is so even if he had been competent at the time he executed the February 1984 affidavit attempting to revoke the election.

Accordingly, we find that Elva Treyz is the proper beneficiary for General Treyz's Survivor Benefit Plan annuity.

Delinquent Premiums

The Disbursing Officer also advises us that at the time of his death General Treyz had an outstanding debt of $3,695.14 for the cost of Survivor Benefit Plan coverage which accumulated during the time Carolyn Treyz was the named beneficiary under the Plan. This debt accrued because upon his divorce from Elva the deductions from his monthly retired pay for the cost of her coverage ceased since he then had no eligible beneficiary. 10 U.S.C. § 1450(a). General Treyz did not give prompt notice to the Air Force Accounting and Finance Center of his marriage to Carolyn, so when she became the eligible beneficiary on July 26, 1981, the deductions were not reinstated as they should have been.

The Disbursing Officer notes that regulations require that, upon the death of a retiree, delinquent costs are to be collected from the annuitant's benefits before the annuitant can receive payment. He questions, however, whether this requirement is applicable in a case such as this where the delinquent costs were accumulated during a period when a spouse who is not the ultimate beneficiary because of a changed election would have been the beneficiary.

The Survivor Benefit Plan was designed on an actuarial basis as a contributory plan. That is, generally, in return for protection of their dependents upon the retirees' deaths, the retirees contribute premiums usually in the form of deductions from their retired pay. 10 U.S.C. § 1452. These deductions are calculated as provided by statute regardless of who may be the potential spouse beneficiary. We have held that where the required deductions to cover the cost of the annuity were not made from a member's retired pay, the annuity is to be reduced or withheld to make up the amount due. See 54 Comp. Gen. 493, 497 (1974). The changes in the law to allow a

member to shift coverage from a current spouse to a former spouse did not change this. General Treyz participated in the Plan for which he was required to contribute specified premiums as the cost of his participation. While the premiums which were not collected in this case should have been collected when Carolyn would have been the beneficiary had General Treyz died during that period, they are due as a part of the total cost of General Treyz's participation of the Survivor Benefit Plan and Elva has become the sole and full beneficiary of the Plan. Accordingly, the amount due should be collected from the annuity payable upon his death.

[B-219177]

Meals—Reimbursement—Expenses Incident to Official Duties

Employee was invited to speak at luncheon session of agency training program at her duty station, and she seeks reimbursement of cost of luncheon. Cost of luncheon may be paid under 5 U.S.C. 4110 since the record indicates that (1) the meal was incidental to the training program, (2) attendance at the meal was necessary for full participation in the meeting, and (3) the attendees were not free to take their meals elsewhere. *Gerald Goldberg, et al.*, B-198471, May 1, 1980.

Matter of: Ruth J. Ruby—Claim for Luncheon Cost at Training Conference, Dec. 19, 1985:

ISSUE

The issue in this decision involves the claim of an employee for the cost of a luncheon at her official duty station which was part of an agency training program. We hold that although meal costs normally may not be paid at the employee's official duty station, this expense may be paid as a necessary training expense under the circumstances presented.

BACKGROUND

This decision is in response to a request from Mr. Donald C. Sutcliffe, Regional Commissioner, Seattle Region, Social Security Administration (SSA), reference SDX71:FF-5. The request concerns the claim of an SSA employee, Ms. Ruth J. Ruby, for reimbursement of luncheon expenses incurred while she was a guest speaker at an agency training class held within the vicinity of her official duty station.

The agency request states that in September 1984, the agency held a training class in the Seattle area for SSA Operation Supervisors, and Ms. Ruby was invited as a guest speaker for the opening day luncheon. Ms. Ruby later claimed reimbursement for the cost of the lunch ($9), but payment was denied on the basis that subsistence expenses are not reimbursable within 35 miles of the employee's official duty station. In an earlier memorandum, the certifying officer also questioned (1) whether providing meals was necessary to achieve the objectives of the training program, and (2)

whether the luncheon agenda could be rescheduled to provide the trainees with an "ordinary lunch break."

Ms. Ruby contends that the training course, Basic Supervisory Concepts, is part of the agency's internal training program under the Government Employees Training Act, 5 U.S.C. §§ 4101-4118 (1982), and the "Role of the Supervisor" lesson, presented during the lunch period, is a required part of this training course. She states that the students are not free to take meals elsewhere without being absent from an essential portion of the training program. Finally, she argues that the course is "very tightly structured," and she implies it would be difficult to reschedule the luncheon agenda to another portion of the training session.

OPINION

As the certifying officer pointed out, we have long held that an employee may not be paid per diem or actual subsistence expenses at the official duty station since those expenses are considered to be personal to the employee. See 53 Comp. Gen. 457 (1974), and Federal Travel Regulations, para. 1-7.6a, incorp. by ref., 41 C.F.R. § 101-7.003 (1984).

On the other hand, meals during meetings at the official duty station may be paid where the registration fee for the meeting is paid under the training statute, 5 U.S.C. § 4110 (1982), and the meals are included in the fee at no additional charge and represent an incidental part of the meeting. See 50 Comp. Gen. 610 (1971); 48 Comp. Gen. 185 (1968); and 39 Comp. Gen. 119 (1959).

Where the meals are not included in a registration fee for attendance at the meeting and a separate charge is made, our decisions require that three conditions be met for payment. Those three conditions are (1) the meals must be incidental to the meeting, (2) attendance at the meal must be necessary to full participation in the meeting, and (3) the employee may not be free to take meals elsewhere without being absent from the essential business of the meeting. *Gerald Goldberg, et al.,* B-198471, May 1, 1980.

In the present case, Ms. Ruby argues that all three conditions outlined in the *Goldberg* decision have been met in this situation, and there is no conclusive evidence from the certifying officer or other agency officials to the contrary. We note that there was no registration fee required in this case since this was an internal agency training program, but, in cases decided prior to *Goldberg,* we have allowed agencies to pay meal costs for internal training programs under similar circumstances. See B-193955, September 14, 1979; and B-193034, July 31, 1979.

The situation in the present case is clearly distinguishable from cases involving agency meetings with working lunches or dinners at the official duty station which were not organized under the training statutes and for which payment was denied. See *J. D.*

MacWilliams, B-200650, August 12, 1981; *Frank W. Kling*, B-198882, March 25, 1981; and B-180806, August 21, 1974. Similarly, we have denied reimbursement to employees attending Federal Executive Association meetings, Combined Federal Campaign luncheons, or an agency-sponsored labor relations luncheon at their official duty stations where reimbursement is not authorized under 5 U.S.C. § 4110, and where meals were not incidental to the meetings. See *Pope and Ryan*, B-215702, March 22, 1985, 64 Comp. Gen. 406; *Sandra L. Ferguson, et al.*, B-210479, December 30, 1983; *Henry C. DeSeguirant*, B-202400, September 29, 1981; *Gentry Brown, et al.*, B-195045, February 8, 1980; and B-160579, April 26, 1978.

Accordingly, in the absence of evidence contrary to the statements offered by the employee, we conclude that the employee may be reimbursed for the cost of the luncheon as a necessary training expense.

[B-219684]

Contracts—Negotiation—Offers or Proposals—Evaluation—Brand Name or Equal—Salient Characteristics-Satisfaction of Requirement

In a brand name or equal procurement, the contracting agency improperly found the awardee's product technically acceptable where it failed to comply with two salient characteristics in the request for proposals. Specifically, the awardee's product (1) did not comply with the requirement for an "impedance meter," where the product offered a device which only measured, but did not register, the data being monitored; and (2) did not comply with the requirement for "digital filtering," where the product offered only one of various techniques ("digital smoothing") necessary to provide the full range of capabilities contemplated by digital filtering.

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

Issue regarding agency's technical evaluation of awardee's product first raised in protester's comments on agency report is timely, where protester first had access to awardee's proposal when the agency included it as part of the agency report; protester's comments were filed within 10 days after receiving the report; and agency and awardee had full opportunity to respond to the protester's allegation.

Contracts—Protests—Preparation—Costs—Compensable

Protester is entitled to recover the cost of filing and maintaining its protest, including attorney's fees, as well as its proposal preparation costs, where protester was unreasonably excluded from the procurement but corrective action is not feasible in light of agency's decision not to suspend performance during pendency of the protest.

Matter of: Nicolet Biomedical Instruments, Dec. 23, 1985:

Nicolet Biomedical Instruments protests the award of a contract to Tracor Northern under request for proposals (RFP) No. DLA120-85-R-0023, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA). The solicitation sought proposals for

three electrodiagnostic systems. Nicolet contends that the product offered by Tracor did not satisfy all the salient characteristics listed in the brand name or equal purchase description.

We sustain the protest.

The solicitation, originally issued on October 11, 1984, after a notification was published in the Commerce Business Daily (CBD), was initially intended as a sole-source procurement for three Nicolet Pathfinder II Evoked Potential Systems. In addition to receiving an offer from Nicolet, the agency received offers from three unsolicited sources in response to the CBD notice, including one submitted by Tracor. Nicolet's unit price was $94,930; Tracor's price was $68,882.66. (The other two offers were found technically unacceptable and were not considered in the final evaluation for award.)

The agency's technical personnel determined that Tracor's product, its model TM-3500, could satisfy the agency's needs, based on Tracor's proposal and a previously scheduled demonstration of Tracor's product. Consequently, the agency decided to amend the solicitation to add a brand name or equal purchase description. The amended solicitation listed the Nicolet Pathfinder II model as the brand name product.

The agency issued amendment No. 1 to the solicitation on March 11, 1985, adding the brand name or equal purchase description, including numerous salient characteristics. In an attempt to make the requirements less restrictive, the agency subsequently issued three additional amendments, changing several of the salient characteristics and extending the date for receipt of offers.

Only Nicolet and Tracor submitted offers in response to the amended solicitation. Both were found to be technically acceptable. The agency awarded the contract to Tracor as the low offeror on August 5.

Nicolet contends that Tracor's equipment cannot comply with the solicitation's salient characteristics in five areas: (1) Multi-tasking; (2) Dual Averaging with Bilateral Somatosensory Stimulation; (3) Electrode Impendance Testing; (4) EEG Analysis with Trending; and (5) Digital Filtering. In support of its position, Nicolet initially relied on its familiarity with the capabilities of Tracor's product, and specifically cited areas where Tracor's product does not conform to its own. After receipt of the agency report, the protester based its contentions in part on Tracor's offer under the RFP. The protester argues that the agency necessarily must have either waived or relaxed the requirements which the Tracor product allegedly does not meet, in order to find Tracor's product technically acceptable. The protester says that if the requirements were so relaxed, the agency was required to amend the solicitation and to afford it an opportunity to propose less sophisticated equipment at a lower price.

The agency maintains that Nicolet's protest should be dismissed for failure to state a basis for protest that is reviewable by our

Office. The agency views Nicolet as essentially contesting Tracor's capability to satisfy the solicitation's minimum requirements. Consequently, the agency considers this protest as a challenge to the contracting officer's affirmative determination of Tracor's responsibility. The agency correctly states that we do not review such challenges absent a showing of possible fraud or bad faith on the part of producing officials or of a failure to apply definitive responsibility criteria, neither of which is alleged here. *See* Bid Protest Regulations, 4 C.F.R. § 21.3(f)(5) (1985).

We do not agree that Nicolet is protesting the agency's responsibility determination. Although in its initial protest submission Nicolet used terms which more appropriately relate to such a determination, the protest, when viewed in its entirety, is a challenge tom the agency's technical evaluation of Tracor's product. It is therefore appropriate for our review.

As to the agency's technical evaluation, our decisions generally recognize that the procuring agency is responsible for evaluating the data supplied by an offeror and ascertaining if it provides sufficient information to determined the acceptability of the offeror's product. *International Systems Marketing, Inc.* B-215174, Aug. 14, 1985, 85-2 CPD ¶ 166. The overriding consideration in determining the equivalency of an offered product to the named product for purposes of acceptability is whether the "equal" product performs the needed function in a like manner and with the desired results, *See Lanier Business Products of Western Maryland, Inc.*, B-214468, July 23, 1984, 84-2 CPD ¶ 84; it need not be an exact duplicate of the brand name product in design or performance. *Cohu, Inc.*, B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207. Rather, the product must meet the salient characteristics as they are set forth in the solicitation; it need not meet features of the brand name product that are not specified in the solicitation. *Security Engineered Machinery*, B-220557, Sept. 27, 1985, 85-2 CPD ¶ 353. We will not disturb the technical determination by the agency unless it is shown to be unreasonable. *Automated Production Equipment Corp.*, B-210476, Mar. 6, 1984, 84-1 CPD ¶ 269.

We have reviewed Nicolet's contentions regarding the evaluation of Tracor's offer, along with the agency's and Tracor's responses. As discussed in detail below, we find that it was unreasonable for the agency to conclude that Tracor's product satisfied the RFP requirements with regard to impedance meters and digital filtering.

Electrode Impedance Testing

The salient characteristics listed in the solicitation concerning impedance testing are as follows:

(17) The remote jack box (electrode montage) shall have built-in impedance meters for each input channel for monitoring and electrode-subject interface. Electrode montage must be programmable at console.

(18) Must have impedance meter for each channel at each amplifier recording channel and at electrode interface box so that cable and electrode integrity can be fully analyzed remotely at console.

Nicolet argues that Tracor's offer fails to comply with this requirement because Tracor's system provides for impedance checking only at the console, rather than at both the console and the jack box as required by the solicitation. The protester maintains that the jack box impedance testing capability is necessary because the patient is normally prepared for monitoring outside the operating room and the jack box meters are used to check electrode-patient interface at the time the electrodes are being placed on the patient.

The agency responds that the protester has misinterpreted the requirement. Specifically, according to the agency, the requirement in salient characteristic No. 17 that impedance meters be built into the jack box does not mean that the meter readings must also be available at the jack box; rather, the agency states, the meter readings need only be displayed at the system console. Consequently, in the agency's view, Tracor's product with a reading site at the console only was acceptable.

We find DLA's position to be unreasonable. In our view, the only reasonable interpretation of the term "impedance meter" is that it refers to a device which both measures and displays data. See *Random House College Dictionary* 841 (1980) (a meter is "an instrument that automatically measures and registers a quantity consumed, distance traveled, degree of intensity, etc."). The agency argues that Tracor complied with this requirement by offering a "meter" which merely transmits the data it measures to the console, where it then is actually displayed. The device referred to by the agency cannot reasonably be described as a meter, however; rather, the agency describes a sensor-like mechanism which simply transmits data to a metering device. See *Institute of Electrical and Electronics Engineers, Inc., Standard Dictionary of Electrical and Electronics Terms* 626 (2d ed. 1978) (a sensor "converts a parameter at a test point to a form suitable for measurement by the test equipment"). Moreover, Tracor itself states only that its jack box contains "impedance checking circuitry"—*i.e.*, a sensor device as described by the agency—which then transmits the data to the console. While the Tracor proposal concludes that this arrangement provides an "equivalent method" for complying with the impedance checking requirement, Tracor itself does not contend that its product actually includes an impedance meter in the jack box or that readings can be made at the jack box.

Since Tracor's product did not provide an "impedance meter" in the jack box as, in our view, that term is reasonably construed, Tracor's offer did not comply with salient characteristic No. 17.

Digital Filtering

Salient characteristic No. 24 provides as follows:

> Must have zero-phase shift digital filtering allowing evaluation of spectrum of acquired waveform with specific filtering out of information with certain frequencies defined by user and reconstruction of waveforms with unique filter characteristics without destroying original data.

In essence, this characteristic requires a capability to filter out certain frequencies chosen by the user at the time of use. Tracor's proposal stated that its product complies with this requirement by offering "digital smoothing."

The protester contends that Tracor did not comply with the salient characteristic because "digital smoothing" is insufficient to meet the requirement for user flexibility as to filter type and frequencies. Specifically, Nicolet contends that digital filtering requires the capability to implement high-pass, low-pass, band-pass, and band-reject filtering where the user can specify all frequency breakpoints. According to the protester, the method offered by Tracor, digital smoothing, consists of low-pass filtering only.

The agency first contends that the issue of Tracor's compliance with salient characteristic No. 24 is untimely and should not be considered because it was first raised in Nicolet's comments on the agency report. Since those comments were filed more than 10 days after Nicolet knew or should have known this basis of its protest, the agency argues, the issue was untimely raised under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2).

As the agency states, Nicolet did not raise this issue in its original protest letter. We do not find the issue untimely, however, because Nicolet did not have access to Tracor's actual proposal until the agency provided the proposal as part of the agency report. Thus, while Nicolet based the allegations in its original protest letter on its general familiarity with the Tracor product, Nicolet was not on notice of the specific features specified in Tracor's proposal on which the protest is based until it had access to the Tracor proposal. Since Nicolet's comments on the report were filed within 10 days of the filing of the agency report, this ground of protest is timely. In addition, these comments were filed before the conference on the protest was held so both the agency and Tracor had a full opportunity to respond to Nicolet's contention both in the conference and in their subsequent comments to our Office.

The agency does not take issue with Nicolet's description of the methods required to fully provide digital filtering. The agency's only response to Nicolet's contention is to agree that Tracor's method is a type of "low-pass filtering," and to conclude, without further explanation, that Tracor therefore complied with the salient characteristic. We disagree. Low-pass filtering permits the exclusion of only certain combinations of frequencies. As the protestor points out, other frequency combinations can be filtered out, but only by use of other types of filters. Since we read the specifica-

tions as calling for user capability to define the frequencies that are to be filtered, and given that the agency concedes that the Tracor product offers only low-pass filtering, we fail to see how such a product could provide the user with the capability specified in the salient characteristics.

In view of our conclusion that Tracor failed to comply with the salient characteristics regarding the jack box impedance meters and digital filtering, we find that the agency improperly found Tracor's product to be technically acceptable. If the requirements for an impedance meter and digital filtering as described in the salient characteristics exceeded the agency's minimum needs, the agency should have amended the RFP to reflect the agency's actual needs and to afford Nicolet the opportunity to offer a lower-priced product which complied with the less stringent requirements. See *Sargent Industries,*, B-216761, Apr. 18, 1985, 85-1 CPD ¶ 442. By accepting Tracor's proposal under these circumstances, the agency unreasonably excluded Nicolet from any change of receiving the award.

Because the agency determined, pursuant to 31 U.S.C.A. § 3553(d)(2) (West Supp. 1985), not to suspend performance of the contract by Tracor during the pendency of the protest, and the equipment has been delivered, we cannot recommend corrective action in the form of resolicitation. See Bid Protest Regulations, 4 C.F.R. § 21.6(b); *Computer Data Systems, Inc.*, B-218266, May 31, 1985, 85-1 CPD ¶ 624. Based on our conclusion that the agency unreasonably excluded Nicolet from any chance of receiving the award, however, we find that Nicolet is entitled to its costs. Our regulations, implementing the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3554(c), provide that the costs of filing and pursuing a protest, including attorney's fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the protester receives the award. The recovery of costs for bid or proposal preparation may be allowed where the protester has been unreasonably excluded from competition and where other remedies as enumerated in our regulations are not appropriate. *See* 4 C.F.R. § 21.6(d), (e). Accordingly, by separate letter we are advising the head of the contracting agency of our determination that Nicolet be allowed to recover its costs of filing and pursuing the protest, including reasonable attorney's fees, as well as its proposal preparation costs. Nicolet should submit its claims for such costs directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

[B-220276]

Bids—Multiple—Certificate of Independent Pricing Determination

Mere fact that individual bidders are partners and share common business address does not establish that they engaged in price collusion in violation of their Certificates of Independent Price Determination.

Bids—Multiple—Propriety

There is no blanket prohibition against partners and their partnership competing on the same procurement.

Bonds—Miller Act Coverage—Contract Price Limitation

It is not legally objectionable for a member of a partnership to bid as an individual on several solicitation items, and to include a $25,000 award limitation so that it would not have to secure the Miller Act bond applicable to awards in excess of $25,000, even though its bid, if combined with the partnership's bid, would exceed $25,000.

Matter of: Ace Reforestation, Inc., Dec. 23, 1985:

Ace Reforestation, Inc. (Ace), protests the proposed award of contracts to other firms and individuals under United States Forest Service solicitation No. R6-15-85-86, which included six bid items covering the construction of six big game fences in the Umpqua National Forest in Oregon. Ace claims that the firms and individual partners in the firms violated their Certificates of Independent Price Determination (CIPD), engaged in multiple bidding, and structured their bidding in a manner that enabled them to avoid the solicitation's various bond requirements. Ace contends that any award to these bidders, therefore, would be improper. We deny the protest.

The solicitation stated that multiple awards, by items would be made based on the lowest acceptable prices per item. The bids challenged by Ace were submitted by S&S Contractors (S&S) and three S&S partners. Each of these bidders offered prices on no more than three of the six items, and each bid totaled less than $25,000. As this was the amount above which bonds (bid bond, and Miller Act performance and payment bonds, *see* 40 U.S.C. § 270a-270f (1982)) were required by the solicitation, none of the bids included bonds.

Mr. Holmgren, a partner in S&S, bid only on items 1, 2 and 3, and S&S bid only on items 4, 5 and 6. The bids were low for all six items; each bid included an award limitation of $25,000 or three items and, thus, did not include bonds. The S&S bid was signed by Mr. Holmgren, and the Forest Service subsequently learned from records on file with the state of Oregon that S&S was a business name used by Mr. Holmgren. The Forest Service thus deemed the Holmgren and S&S bids a single bid and proposes awarding S&S/Holmgren items 1, 3 and 6, which yields the combined bid's lowest three-item price, totaling less than $25,000.

The second low bid on items 1, 2 and 3 covered only those three items and was submitted by an individual, Mr. Perry, who, according to information Mr. Holmgren gave the Forest Service, also was a partner in S&S. The Forest Service proposes awarding Mr. Perry a contract for item 2. The second low bidder on items 4, 5 and 6 was another S&S partner (accordingly to Mr. Holmgren), Mr. Nash. The Forest Service proposes awarding items 4 and 5 to Mr. Nash. Both Mr. Perry and Mr. Nash also included a $25,000/three-item limitation in their bids, obviating the need for bonding.

Ace was the third low bidder, after S&S and its partners, on items 1, 2 and 5.

Independent Price Determination

Ace argues that the proposed awards to S&S/Holmgren, Mr. Perry, and Mr. Nash would be improper because these bidders violated their CIPDs. Ace's argument is based on the fact that S&S and its partners were affiliated through their partnerships and the fact that some of the parties share business addresses. Ace believes the bidders thus must have acted in concert when arranging their bid prices.

The purposes of the certification is to assure that bidders do not collude among themselves to set prices or restrict competition by inducing others not to submit bids, which would constitute a criminal offense. *B.F. Goodrich Co.*, B-192602, Jan. 10, 1979, 79-1 C.P.D. ¶ 11. We have specifically held that the fact that two bidders may have common offices, ownership or business addresses is not by itself sufficient to establish a violation of the CIPD or, in other words, price collusion. Ace has presented no other evidence showing that the S&S partners did not arrive at their bid prices independently, and we will not assume that this was the case. *Northwest Janitorial Service*, B-203258, May 28, 1981, 81-1 C.P.D. ¶ 420.

In any event, it is within the jurisdiction of the Attorney General and the federal judiciary, not our Office, to determine what constitutes a violation of a criminal statute. Thus, if Ace wishes to pursue this matter, it should do so through the Department of Justice. *Northwest Janitorial Service*, B-203258, *supra*.

Multiple Bidding

Ace also contends that the bidders engaged in multiple bidding. Multiple bids and bids submitted on the same requirement by more then one commonly owned or commonly controlled company, or the same entity. Multiple bidding is not objectionable where not prejudicial to the interests of the government or other bidders. *Atlantic Richfield Co.*, 61 Comp. Gen. 121 (1981), 81-2 C.P.D. ¶ 453 (prejudice where awardee to be selected by lottery, so submission of multiple bids unfairly increased chance for award).

Here, although S&S and three of its partners submitted bids, there were no multiple bids as each partner bid in his own name, as an individual, not on behalf of the partnership. We are aware of no blanket prohibition against partners competing as individuals for awards for which their partnership also is competing and, in any case, the mere submission of bids by a firm and its partners does not necessarily prejudice the other bidders. See *Pioneer Recovery Systems, Inc.*, B-214700, B-214878, Nov. 13, 1984, 84-2 C.P.D. ¶ 520 (no prejudice from multiple bidding by two divisions of same company where award is based on lowest bid and all offerors had same opportunity to submit lowest bid).

Bonding Requirement

Ace claims that S&S and its partners improperly evaded the bid bond and Miller Act bond requirements by each submitting separate bids on no more than three of the items, limited to $25,000, so that no individual bid reached the $25,000 bonding floor.

The Miller Act requires that performance and payment bonds be acquired for federal construction contracts in excess of $25,000. The performance bond is for the protection of the government in case of default by the contractor, and the payment bond is for the protection of persons supplying labor and material in the performance of the contract. The purpose of a bid bond is to guarantee that the government will recover its costs if the bidder revokes its offer after award, and also to insure that the successful bidder will furnish the Miller Act bonds. *Southern Systems, Inc.*, B-193884, Feb. 14, 1980, 80-1 C.P.D. ¶ 133.

The solicitation provided for multiple awards and allowed bidders to exempt themselves from the bonding requirements by limiting their potential awards to $25,000. This exemption well may have been the incentive for the S&S partners to compete as individuals, but we see nothing legally objectionable in any individual deciding to submit a bid based on such an incentive. In so doing, the individual bidder even if also a member of a partnership that also submitted a bid, accepts sole legal responsibility for performing the contract.

Ace speculates that if the bidding on this procurement is condoned, partnerships bidding on future similar procurements will engage in similar practices and thereby undermine the bonding requirements. The advisability of a bonding exemption, and the proper dollar amount below which the exemption may be involved are matters for the contracting agency to consider for each future procurement. The Forest Service currently does not share Ace's concerns in this regard.

The protest is denied.

[B-214597]

Contracts—Term—Time Extension

The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule.

Contracts—Modification—Propriety

The Environmental Protection Agency may not modify a level of effort contract to accommodate a non-severable task extending beyond the original contract period of performance. Since the period of performance is an essential part of a level of effort contract, any change in that term would substantially change the contract such that the contract for which competition was held and the contract to be performed are essentially different. Accordingly, such a contract could not be extended by contract modification.

Matter of: EPA Level of Effort Contracts—Appropriation Availability, Dec. 24, 1985:

This is in response to a request from C. Morgan Kinghorn, Comptroller of the Environmental Protection Agency (EPA), for a decision regarding the propriety of issuing a hypothetical nonseverable work assignment under a cost-reimbursement, level of effort, term contract, in which the effort furnished will extend beyond the contract's initial period of performance. EPA has also asked informally whether it may modify an existing level of effort contract to accommodate a work assignment extending beyond the term of the original contract to be funded with appropriations available during the initial contract period. Although the contract described in EPA's hypothetical also contains options to extend the contract for additional periods of performance, EPA recognizes that performance under any options would be funded with appropriations available during the fiscal year covered by the option period. EPA's second question, however, is whether a modification, prior to option exercise, extending performance beyond the end of the fiscal year during which the original period of performance takes place, may encumber the funds of the expiring fiscal year.

For the reasons set forth below, we conclude that EPA may not issue a work assignment extending beyond the term of a level of effort contract, nor may it modify the term of an existing level of effort contract to accommodate such a work assignment.

Background: EPA uses level of effort, term contracts to perform service-intensive type work, including, for example, economic cost and benefit analyses and technical analyses of hazardous waste regulations. Typically, EPA, through its level of effort term contracts, purchases, on a cost-reimbursement basis, a specified quantity of person-hours (the level of effort) for the contract's base period and each option period. The contract's estimated cost is established,

based upon a maximum number of hours set forth in the contract. EPA is obligated to order and the contractor is obligated to furnish the specified level of effort within the time period set forth in the contract. The contract provides for a downward adjustment in the contractor's fees if the contractor provides less than 90 percent of the specified level of effort. The contract's scope of work merely sets forth the broad outlines of the type of work to be performed. During the term of the contract, EPA issues work assignments which draw on the contractor's specified quantity of person-hours and require the contractor to work on a specific task.

EPA raises the following hypothetical situation:

> Assume a level of effort, work assignment contract is awarded October 1, 1982, with a period of performance through September 30, 1983. The contract has an option for one additional year running from October 1, 1983, through September 30, 1984. Both the basic period of performance and the option year are for 10,000 professional hours for each period. Assume that the contractor has provided 9,000 hours as of September 25, 1983 and EPA issues a work assignment on September 26, 1983, for 1,000 hours. The contractor will provide the bulk of hours in FY 1984. The work assignment, when viewed alone, is for nonseverable services.

For purposes of our analysis of this hypothetical situation, we have assumed what EPA has implied but not stated, that the contract is being funded under an appropriation that is available for obligation only through the end of the contract term.[1]

EPA asks two questions regarding this hypothetical situation. The first question is whether it properly may issue the 1,000 hour-work assignment on September 26, 1983, recognizing that the contractor will provide the bulk of hours in fiscal year 1984. The second question is whether it could modify the terms of a level of effort contract to accommodate a work assignment extending beyond the term of the contract.

Analysis: We conclude that in the hypothetical situation posed by EPA, the issuance of a work assignment which could not be completed within the contract's initial term of performance, *i.e.*, by September 30, 1983, would have violated both the Federal Procurement Regulations (FPR) [2] and the "bona fide need" rule, 31 U.S.C. § 1502(a). As EPA concedes, EPA's level of effort contracts fall squarely within the FPR definition of "term contracts." Section 1-3.405(e)(2) of the FPR provide:

> The Term form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time for the conduct of research and development.

The FPR further provides in section 1-3.405(e)(5):

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[1] Our assumption is based on statements in EPA's inquiry letter such as "so long as a nonseverable work assignment was issued during the period of availability of a particular appropriation * * *." P.4. We are aware that EPA generally receives appropriations which are available for 2 fiscal years, but the principles remain the same.

[2] The FPR, rather than the Federal Acquisition Regulation (FAR), governed procurements by civilian agencies during the time period specified in EPA's hypothetical questions. However, the FAR has nearly identical provisions. *See* FAR 16.306(d)(2) and (4).

In no event should the term form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort *within a definite period of time.* [Italic supplied.]

Accordingly, to permit a contractor to provide a portion of the required 10,000 professional hours beyond the basic period of performance, *i.e.*, after September 30, 1983, would be contrary to the FPR requirement that such term contracts "provide a specific level of effort within a definite period of time."

Further, the issuance of a work assignment which could not be completed within the contract's initial term of performance would also violate the bona fide need rule. The bona fide need rule requires that appropriations made available for obligation during a given fiscal year or years may be obligated only to meet a legitimate need arising in that fiscal year (or years). 31 U.S.C. § 1502(a) (1982). *See, e.g.*, 38 Comp. Gen. 628 (1959).

As a general rule, service contracts can extend beyond the duration of an appropriation period only when the portion of the contract to be performed after the expiration of the appropriation period is not severable from the portion performed during the prior period. *See* 60 Comp. Gen. 219 (1981). In the EPA case, the level of effort contract is, by definition, a severable services contract. It requires the performance of a certain number of hours of work within a specified time period rather than requiring the completion of a series of work objectives. Because the original contract in EPA's hypothetical is for 10,000 hours of work to be performed in fiscal year 1983, funds obligated under the contract may not be expended for work performed within fiscal year 1984. *See* B-183184, May 30, 1975. The fact that a work assignment issued under the contract late in the fiscal year might, by its nature, be considered nonseverable if this were what the FPR (as well as the FAR) call a "completion" form of term contract, does not change the result in this case. A completion contract would require the contractor to complete and deliver a specified end product—*e.g.*, a final report. As long as the end product is a bona fide need of the year in which it was ordered, the funds could remain obligated until the end product was delivered. *See* FPR 1-3.405(e)(1) and FAR 16.302(d)(1). In contrast, the EPA hypothetical contract calls for 10,000 work hours before the end of the fiscal year. Performance of those hours in the next fiscal year would not be consistent with the requirements of the contract.

The second question raised informally by EPA is whether it may modify the original contract to accommodate the completion of a work assignment, performace of which will extend beyond the end of the contract period of performance. In raising this question, EPA says it recognizes that a modification cannot be issued which extends the term of the contract beyond the period of availability of the fiscal year appropriation to be charged. Essentially, EPA is asking whether it may amend a level of effort contract near the

end of the fiscal year to provide for the performance of a nonseverable task, performance of which will extend beyond the end of the fiscal year. As noted, EPA's modification would for the purpose of funding the modification with expiring appropriations. Any options exercised, of course, would be funded with currently available appropriations.

The determination of whether a particular modification should be treated as a new procurement is generally decided on a case-by-case basis. For example, we have held that if the contract as changed is materially different from the contract for which the original competition was held, the new requirement should be procured competitively, unless a noncompetitive procurement is justifiable. 57 Comp. Gen. 285, 286 (1976).

The essential characteristics of a level of effort contract are the stated level of work and the term in which that work is to be performed. Therefore, any change in that structure—particularly a change from a specified level of effort for a fixed term to the performance of specified, non-severable tasks—would "substantially" change the contract such that "the contract for which competition was held and the contract to be performed are essentially different." Accordingly, we conclude that a modification of the sort suggested by EPA to a level of effort contract could not be done by contract modification, but rather would require the execution of a new contract. This is because EPA's suggested modification would turn a level of effort contract into a contract for one or more nonseverable tasks.

In a memorandum prepared by the EPA Office of General Counsel on this issue before it was submitted to us, the suggestion was made that use of indefinite quantity or requirements contracts would eliminate the end of year problems encountered with level of effort term contracts. We would agree that the kind of services explained in EPA's hypothetical question could be acquired under such an arrangement, provided that the nature of the services themselves is nonseverable. It appears that the most satisfactory form of contract, for EPA's purposes, may be the completion contract, described earlier as requiring a specific end product as a condition for payment of the full fee and costs. As a nonseverable contract, performance could extend into a subsequent year but be payable from funds obligated at the time the contract was executed. *See* FAR 16.306(d)(1), (2) and (3).

[B-219260]

Officers and Employees—Transfers—Real Estate Expenses—Interim Financing Loans

Transferred employee sold residence at old duty station, received $5,000 cash and accepted a second mortgage from the purchaser. In order to obtain sufficient funds to purchase a residence at his new official station, employee later assigned his interest in and to 120 monthly installments under the second mortgage and received the

sum of $12,000. The transaction entered into by the employee was an "interim personal financing loan." It was not a loan secured by the employee's interest in his old residence, and thus was not a part of the total financial package in the purchase of a residence at his new duty station. Hence, the costs incurred in securing assignment of the second mortgage are not reimbursable.

Matter of: Kenneth C. Barnum—Real Estate Expenses—Assignment of Second Mortgage, Dec. 26, 1985:

This decision is in response to a request by Mr. F.P. Cantrell, Manager, Accounting Division, Federal Aviation Administration (FAA), United States Department of Transportation, as to whether he may certify for payment a reclaim travel voucher in the amount of $1,764.15. The reclaim was submitted by Mr. Kenneth C. Barnum, an employee of the agency, for reimbursement of costs incurred in the assignment of 120 monthly installments due him under a second mortgage on his residence at his old duty station in order to purchase a residence at his new official station. For the reasons stated later, the costs in the reclaim travel voucher may not be certified for payment.

By travel order dated March 12, 1984, Mr. Barnum was authorized a permanent change of station from Thatcher, Arizona, to Chandler, Arizona. He sold his residence in Thatcher on July 10, 1984. As part of the settlement, Mr. Barnum (and his wife) accepted a second mortgage from the purchaser. He received approximately $5,000 in cash. In October 1984, Mr. Barnum assigned his interest in and to 120 monthly installments payable under the second mortgage to a lending institution. He received a net sum of $12,000.

In his reclaim voucher of February 4, 1985, Mr. Barnum submitted a claim for reimbursement of the sum of $1,764.15 incurred when he assigned one-half of his interest in his second mortgage. The costs involved in the sale of the second mortgage were for a sales commission charged by an investment company for selling one-half of the second mortgage, an escrow fee, an owner's policy, and recording fees.

Mr. Barnum was reimbursed the sum of $4,450.50 by FAA for real estate expenses in connection with the sale of his residence at his old duty station. Of this amount $3,980 was for a real estate sales commission. He was also reimbursed the amount of $1,286.92 for real estate expenses incident to the purchase of a residence at his new duty station.

The statutory and regulatory authority for reimbursement of real estate expenses incurred by a federal civilian employee upon transfer of official station is contained in 5 U.S.C. § 5724a(a)(4) (1982) and Chapter 2, Part 6, of the Federal Travel Regulations, *incorp. by ref.*, 5 C.F.R. § 101-7.003 (1984). Under these authorities, we have allowed reimbursement of the expenses incurred by an employee in obtaining a new mortgage, or a second mortgage on his residence at his former duty station, where the mortgage trans-

action on that residence was part of the "total financial package" essential to the purchase of a residence at the new duty station. *Arthur J. Kerns, Jr.*, 60 Comp Gen. 650 (1981); *Charles A. Onions*, B-210152, June 28, 1983; *James R. Allerton*, B-206618, March 8, 1983. See also, *Marshall L. Dantzler*, B-217462, June 3, 1985, 64 Comp. Gen. 568.

In *Kerns*, 60 Comp. Gen. 650, the second mortgage obtained by the employee was not on the residence which he was purchasing but on his old residence which he had been unable to sell. The purpose of the second mortgage transaction was to obtain funds to make the downpayment on the residence which he was purchasing at his new duty station. We viewed the second mortgage transaction as being a part of the total financial package essential to the purchase of his new residence, and granted reimbursement. In *Onions*, B-210152, we permitted an employee to be reimbursed for the cost of refinancing his old residence in order to obtain an assumable mortgage for the new purchaser and the downpayment on a residence at his new duty station. In *Allerton*, B-206618, the employee refinanced his residence at his old duty station in order to facilitate its sale and in order to obtain a downpayment for the purchase of a residence at his new duty station. The costs of refinancing the mortgage on the old residence were allowed. The mortgages in *Kerns*, *Onions*, and *Allerton* were all secured by the employees' interests in their old residences. Therefore, the mortgage loans obtained by the employees were not deemed to be "interim personal financing loans," but loans made to the employees, secured by their interests in their old residences, to enable them to make the downpayments on the purchases of the residences at their new official stations.

The common thread present in these decisions is that the financial transactions involved, a second mortgage, a refinanced mortgage, and a new mortgage, were secured by the employees' interests in their residences at their old duty stations. In this case, Mr. Barnum sold his residence at his old duty station and title passed to the purchaser. Therefore, he no longer had an ownership interest in his former residence. Consequently, the assignment of his interest in 120 monthly installments of the sales price of the property was more in the nature of an "interim personal financing loan," which occurred subsequent to and was disassociated from the sale of the employee's residence at his old official station. This Office has denied reimbursement of expenses incurred by an employee in obtaining an "interim personal financing loan." See 55 Comp. Gen. 679 (1976), wherein we held that since a personal loan was not secured by the property being purchased, by means of either a mortgage or deed of trust, the expenses incurred in obtaining the short-term loan were not reimbursable.

Accordingly, the reclaim travel voucher submitted by Mr. Barnum may not be certified for payment.

[B-219937]

Contracts—Protests—What Constitutes Protest

Inquiries to a contracting agency by a congressional aide regarding rejection of a constituent's bid can reasonably be considered as a protest to the agency where the aide ostensibly represents the interests of the constituent and, while not expressly indicating an intent to protest, adequately conveys the constituent's dissatisfaction to the agency.

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

Protest filed with General Accounting Office (GAO) before resolution of an initial protest filed with the contracting agency is timely under Bid Protest Regulations.

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

Failure of an agency simultaneously to furnish a copy of a protest report to the protester and to GAO does not warrant rejection of the report where the protester is not prejudiced by the agency's noncompliance with this procedural requirement.

Bids—Invitation for Bids—Amendments—Failure to Acknowledge—Bid Nonresponsive

A bid must be rejected as nonresponsive although the bidder indicates its awareness of one aspect of a solicitation amendment, *i.e.*, the fact that the bid opening had been extended, where this action does not clearly indicate that the bidder received or even had knowledge of the other substantive changes made by the amendment.

A solicitation amendment is material where the requirements aided by the amendment, although not affecting the overall price of performance, will affect the quality of the product being procured in more than a trivial manner.

Matter of: Kinross Manufacturing Corporation, Dec. 26, 1985:

Kinross Manufacturing Corporation protests the award of a contract to Martin Electronics, Inc. under invitation for bids (IFB) No. DAAA09-84-B-0989, issued October 24, 1984 by the United States Army Armament, Munitions, and Chemical Command, Rock Island, Illinois. Kinross contends that the Army improperly rejected its low bid as nonresponsive for failure to acknowledge an amendment to the solicitation.

We deny the protest.

The Army issued four amendments to the solicitation, which was for a quantity of signal illumination kits used with Navy survival vests. Bidders were required to acknowledge all amendments when submitting their respective bids. Amendment No. 4, issued April 22, 1985, extended the bid opening date from April 23 to May 22, 1985. The amendment also referenced certain technical drawings and specifications that, according to the contracting officer, required that a "chamfered," or beveled, edge be added to the signal kit's case mouth. The amendment also required that an originally-prescribed clear enamel sealant be replaced with a varnish sealant.

Kinross, the apparent low bidder, expressly acknowledged receipt of only the first three amendments, returning them with its bid

package on May 18, 1985. Instead of returning the fourth amendment, however, Kinross merely indicated, by means of a handwritten note in the appropriate box of the amendment acknowledgment form, that the opening date had been extended and that the extension was per a named agency official. Kinross indicated that the effective date of amendment No. 4 was April 29, 1985, 7 days after the actual effective date of that amendment.

After consulting the Naval Weapons Support Center as to the effect of amendment No. 4, the contracting officer determined that Kinross' bid should be rejected as nonresponsive for failure to acknowledge the fourth amendment. The Army subsequently awarded the contract to Martin Electronics, Inc.; performance has been delayed pending our resolution of the protest.

Timeliness

The Army contends that Kinross' protest is untimely and accordingly should be dismissed under our Bid Protest Regulations, which require protests to be filed not later than 10 days after the basis for them is known or should have been known, whichever is earlier. *See* 4 C.F.R. § 21.2(a)(2) (1985). Kinross, the Army maintains, was at least on constructive notice of its basis for protest on July 18, when the contracting officer and several other agency officials met with an aide of the Congressman representing the district in which Kinross is located regarding the determination that Kinross' bid was nonresponsive. The Army contends that Kinross' protest should have been filed within 10 working days of July 18. In fact, our Office did not receive the protest, filed by the Member of Congress on behalf of Kinross, until August 13.

Kinross responds that the Army did not complete its review of the nonresponsiveness determination until August 15, the date of a letter from the Secretary of the Army to the Member of Congress. Kinross thus argues that its protest is timely.

We find the protest to our Office timely. Although the Army did not treat them as such, we believe the actions of the congressional aide, who expressed dissatisfaction with the rejection of Kinross' bid during the July 18 meeting and made further inquiries on July 23, can reasonably be regarded as an agency-level protest. The Army evidently viewed the interest expressed as warranting further internal review, which was completed on August 15 when the Secretary of the Army concurred with the contracting officer's decision. This decision, in effect, constituted initial adverse agency action on the protest. Kinross' protest to our Office therefore, is timely, since it was filed on August 13, or 2 days before that adverse action was taken. *See* 4 C.F.R. § 21.2(a)(3), which permits protests to be filed here up to 10 days after a protester learns of adverse agency action on its protest to the agency.

In reaching the above conclusion, we recognize that the congressional aide never expressly advised the Army that he was filing a

protest on behalf of Kinross. We note, however, that a protest need not be in any particular form, so long as it can be reasonably considered as lodging specific objections to the agency's actions. See *Hill Industries*, B-210093, July 6, 1983, 83-2 C.P.D. ¶ 59. Here, the Army was aware that the aide was ostensibly representing the interests of Kinross. Moreover, the aide adequately conveyed Kinross' dissatisfaction with the rejection of its bid and requested that this decision be reviewed. See *Worldwide Marine, Inc.*, B-212640, Feb. 7, 1984, 84-1 C.P.D. ¶ 152; compare *Lion Recording Services, Inc.—Reconsideration*, B-188768, Nov. 15, 1977, 77-2 C.P.D. ¶ 366 (letters sent by congressman to procuring activity did not constitute a protest when letters merely initiated an informational exchange between the congressman and the agency concerning rejection of constituent's bid).

Kinross' Contentions

Preliminarily, Kinross argues that we should not consider the administrative report submitted by the Army in response to its protest because of the Army's failure to comply with section 21.3(c) of our Bid Protest Regulations. This section provides in pertinent part that the contracting agency "shall simultaneously furnish a copy of the report to the protester." Here, the Army submitted the report to our Office on September 26. Kinross, however, did not receive its copy, which was sent via regular mail and which was postmarked September 30, until October 4.

While the Army did not comply with this procedural requirement, its failure to do so does not warrant rejection of the report. Kinross was not prejudiced by the Army's actions, since under section 21.3(e) of our regulations, it still had 7 days from receipt of the agency report in which to file comments with our Office, and has done so.

Primarily, Kinross protests the Army's determination of nonresponsiveness, based on Kinross' failure expressly to acknowledge all aspects of amendment No. 4. Kinross, citing two decisions of our Office, *Atlantic Scientific Corp.*, B-204895, Feb. 25, 1982, 82-1 CPD ¶ 166, and *Algernon Blair, Inc.*, B-182626, Feb 4, 1975, 75-1 CPD ¶ 76, contends that it should nevertheless be considered as having done so implicitly. Alternatively, Kinross contends that its failure to acknowledge all aspects of amendment No. 4 should be waived as a minor informality, since the amendment is not material.

In each of the two cases cited by Kinross, the bidder failed expressly to acknowledge an amendment that made several changes to the terms of a solicitation, including an extension of the bid opening date. The bidder in each case nevertheless submitted its bid on the new opening date.

As a general rule, a bid, to be considered for award, must comply in all material respects to the terms of a solicitation. 48 C.F.R. § 14.405 (1985). Minor irregularities, however, may be waived. 48 C.F.R. § 14.405 (1985). For example, the failure of a bid to include

an express acknowledgment of a material amendment does not preclude a contracting activity from considering the bid for award where the bid "*clearly* indicates that the bidder received the amendment." 48 C.F.R. § 14.405(d)(1). [Italic supplied.] In the two cited cases, we determined that each bidder, although failing expressly to acknowledge an amendment, had clearly indicated its knowledge of the amendment. In this regard, we noted that each bidder's submission of its bid by the respective bid opening date reflected actual knowledge of the amendment and all the information contained therein. We concluded that this action constituted an implied acknowledgment of the amendment, thereby binding the bidder to perform all the changes set forth in the amendment at the prices stated in its bid.

We believe Kinross' actions are distinguishable. Kinross expressly indicated its awareness of one aspect of amendment No. 4, *i.e.*, the fact that the bid opening date had been extended. In a handwritten note, Kinross indicated that its source of information as to the extension was an agency official, not the amendment itself. In addition, Kinross inserted an effective date that was different from the effective date of the amendment. We do not consider this action as clearly indicating that Kinross received or even had knowledge of the amendment. At most, the bid indicates that Kinross' knowledge was limited to the new bid opening date. We therefore cannot waive Kinross' failure to acknowledge amendment No. 4 as a minor irregularity. Consequently, we cannot charge Kinross with knowledge of the entire amendment, and we do not believe the firm could be legally required to provide the changes required by the amendment at its original bid price.

We find that the Army acted properly in rejecting Kinross' bid as nonresponsive, because it was neither an express nor an implied offer to provide the exact thing described in the solicitation, as amended. See *McGraw Edison Co., et al.*, B-217311, *et al.*, Jan. 23, 1985, 85-1 CPD ¶ 93.

We also reject Kinross' alternate argument that its failure to acknowledge the amendment should be waived as a minor informality. Essentially, Kinross argues that so far as the changes made by amendment No. 4 minimally affect the overall price of the contract, the amendment is not material. We note, however, that price is not the only dispositive factor in determining whether a particular amendment is material. Other factors, such as the effect of the amendment on quality of performance, must also be considered. See *L.B. Samford, Inc., et al.*, B-215859, *et al.*, Nov. 14, 1984, 84-2 CPD ¶ 533. Here, the change to a new sealant apparently will not affect the quality of the signal kit. The record indicates that this change was only issued because the originally-prescribed sealant is no longer available. The Army, however, asserts that the addition of the chamfer, or beveled edge, affects the quality of this product. This requirement, the Army states, will facilitate the assembly of the signal kit's case mouth and permit better seating and sealing of

the cap. Moreover, according to the Army, the Naval Weapons Support Center will not accept the signal kits without this change. Kinross has presented no evidence to the contrary.

The record therefore supports the Army's determination that the addition of the chamfer is material, and we agree that Kinross' failure to acknowledge the amendment in its entirety rendered its bid nonresponsive.

The protest is denied.

[B-219906]

Bids—Invitation for Bids—Specifications—Restrictive

Options clause is not unduly restrictive of competition because of risk to bidders resulting from political and economic instability of countries in which weather data necessary for contract performance will be collected where agency establishes *prima facie* support that clause is reasonably related to its needs for continuous service on long-term basis and protester fails to demonstrate that use of options places undue risk on bidders.

Bids—Invitation for Bids—Specifications—Restrictive—Unduly Restrictive

Time period between award and commencement of performance is unduly restrictive of competition where agency has not provided *prima facie* support that 30-day startup period is reasonably related to its minimum needs and, in fact, acknowledges that longer startup period is required for bidders without established communication circuits necessary for contract performance.

Matter of: Rampart Services, Inc., Dec. 27, 1985:

Rampart Services, Inc., protests that the requirements for four 1-year options and a 30-day startup period in invitation for bids (IFB) No. F41613-85-B0041 unduly restrict competition.[1] The IFB, issued by Carswell Air Force Base, Texas, solicted bids to furnish South American weather data for dissemination by the Automated Weather Network, which supports the meteorological requirements of the Department of Defense and other federal agencies.

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

Rampart first contends that the solicitation's inclusion of options violates the Federal Acquisition Regulation (FAR) prohibition against their use where the contractor will incur undue risks, citing FAR, 48 C.F.R. § 17.202(c)(2) (1984). Rampart maintains that the risks posed in gathering weather data from governmental or quasigovernmental sources in South America are considerable, due to policital instabilities of the area, and alleges that those risks would be reflected in excessively high bid prices for contract periods beyond the initial year. The protester also submits statistics establishing that inflation rates in South American countries are highly variable, contending that as a result of currency fluctuations, South American officials are reluctant to enter into long-term contracts.

[1] Originally, Rampart also protested a requirement for performance and payment bonds. Amendment No. 0005, issued on August 27, 1985, deleted that requirement, and it therefore is no longer at issue.

The protester also maintains that the time available to the low bidder to commence performance violates the FAR requirement that contracting officers ensure realistic delivery schedules that do not tend to restrict competition and cause resulting higher contract prices, citing FAR, 48 C.F.R. § 12.101(a). According to Rampart, international communications companies require 90 days to implement an international communications circuit for weather data collection, and they charge a significant cancellation fee if a circuit is ordered and then cancelled. The IFB required bids to be submitted by August 23 and performance to begin on October 1, 1985. The protester maintains that the approximately 30-day startup period limits competition to companies with established communication circuits throughout South America. The Air Force obtained a 90-day extension of the current contract after this protest was filed. Consequently, Rampart argues that there is no reason why the agency could not seek an extension sufficient to allow reasonable competition for the contract.

The Air Force responds that the use of options is appropriate here because the government anticipates the need for services beyond the current year and will avoid annual startup and teardown costs. The Air Force believes that any risk of service loss due to political upheaval is speculative. The agency reports that the service has been performed by contractors for approximately the past 8 years without delays due to political instability. Also, according to the Air Force, inflation in the affected business has been predictable in the past, and the countrywide inflation rates cited by Rampart are not necessarily reflective of the weather-collecting business. The agency maintains that both these factors can be incorporated into bids without undue risk.

Regarding the startup period, the Air Force has confirmed with an international communications company that 90 days are required to establish the network necessary to perform the contract. However, the agency offers two reasons why it is not required to provide this full period. First, the Air Force suggests that companies not already in the weather-data-gathering business are not responsible, and that it is reasonable for the government "to use a start-up date that would prevent unresponsible bidders from being eligible under the contract." In the past, only airline companies which have established communications networks encompassing major South American cities have provided this service to the Air Force. According to the agency, there are two bidders other than Rampart that have not questioned the reasonableness of a 30-day startup period. Second, the Air Force argues that a 3-month lapse in obtaining weather data would be unacceptable because of the importance of the service. The agency emphasizes that the weather data is critical to meet the requirements of the Department of Defense and other federal agencies.

Where a protester challenges specifications as unduly restrictive of competition and provides some support for that proposition, the

procuring agency must establish *prima facie* support for its contention that the restrictions it imposes are reasonably related to its needs. *Cleaver Brooks,* B-213000, June 29, 1984, 84-2 CPD ¶ 1. If it does so, the burden shifts to the protester to show that the restrictions are clearly unreasonable. *Id.* This is so because contracting officials are familiar with the conditions under which supplies, equipment, or services have been used in the past and will be used in the future and, thus, are in the best position to know the government's actual needs.

We find that the Air Force has a reasonable basis for including options in the procurement, but the agency has not justified its 30-day startup period limitation.

The FAR provides that, subject to specified limitations, contracting officers may include options in contracts when such action is in the government's interest. FAR, 48 C.F.R. § 17.202(a). Here, the agency anticipates the need for services beyond the current year and wishes to benefit from the price advantages of continuous service. The agency reports it has received uninterrupted service for the past 8 years. In light of this fact, we do not believe that Rampart's concern with political instability establishes that bidders assume an undue risk. With respect to varying inflation rates in certain South American countries, subcontract prices in United States currency or United States currency equivalents should be relatively stable and predictable irrespective of local currency fluctuations. The protester's bare statement that South American governments are hesitant to enter long-term contracts because of a sensitivity to monetary fluctuations does not make the option requirement unreasonable.

Agencies are not obligated to eliminate all risk from a procurement. *Talley Support Services, Inc.,* B-209232, June 27, 1983, 83-2 CPD ¶ 22. Bidders are expected to exercise business judgment and take attendant risks into account when developing their bids. Mere disagreement with the agency's judgment that risks are reasonably calculable is not sufficient to carry the protester's burden of proof. See *The Trane Co.,* B-216449, Mar. 13, 1985, 85-1 CPD ¶ 306. Here, Rampart has not shown that the requirements complained of are clearly unreasonable, and we deny the firm's protest on this basis.

We find, however, that the Air Force has failed to establish a reasonable basis for its approximately 30-day startup limitation, which apparently limits competition to two airline companies having established communication networks in South America. We find the requirement to be unduly restrictive. As noted above, the agency acknowledges that international communications companies require 90 days to establish communication circuits. The agency's only explanations for the necessity of lesser time here are that any interruption in service would be unacceptable and that the restriction keeps nonresponsible companies from bidding.

Agencies may restrict competition to the extent necessary to satisfy the minimum needs of the government. *Informatics, Inc.,* B-

190203, Mar. 20, 1978, 78-1 CPD ¶ 215, *aff'd on reconsideration,* 57 Comp. Gen. 615 (1978), 78-2 CPD ¶ 82 (2-month startup period found to be unreasonable); 10 U.S.C.A. § 2305(a)(1)(B)(ii) (West Supp. 1985). The Competition in Contracting Act of 1984 requires agencies to use "full and open" competitive procedures, and places particular emphasis on the importance of using advanced procurement planning to open the procurement process to all capable contractors. 10 U.S.C.A. §§ 2301(a), 2305(a)(1)(A); H.R. Rep. No. 861, 98th Cong., 2d Sess. (1984). Agencies may not justify the use of noncompetitive procedures on the basis of a lack of advanced planning. 10 U.S.C.A. 2304(f)(5).

We have no reason to question the Air Force's statement that it needs a continuous supply of weather data. However, by entering into a 90-day contract extension with the incumbent, the agency established that an interruption would not have occurred if the solicitation has provided a longer startup period as requested by the protester. Moreover, such an extension would have been unnecessary if the procurement had been planned with the need for a 90-day period in mind.

With regard to possible nonresponsible bidders, we are aware of no authority, either in statute or regulation, that permits an agency to impose restrictive performance requirements in order to exclude firms believed to have insufficient financial capacity or business experience. These matters are properly addressed in the contracting officer's responsibility determination. FAR, 48 C.F.R. § 9.104-1.

We find the Air Force has failed to satisfy its threshold requirement of establishing that the approximately 30 days available to the low bidder before performance commencement is required by its minimum needs. We are recommending that the Air Force revise the IFB to permit bidding on the basis of a 90-day startup period.

The protest is sustained in part and denied in part.

[B-218228.3]

Bids—Mistakes—Correction—Obvious Error

Where a bid's consistent pricing pattern is discernible, General Accounting Office (GAO) will allow correction of the omission of an option price for one item added by amendment in order to prevent an obvious clerical error of omission from being converted to a matter of responsiveness, since it is clear that the bidder intended to obligate itself to provide the item.

Matter of: United Food Services, Inc., Dec. 30, 1985:

United Food Services, Inc. protests the award of a contract to Colbar, Inc. under invitation for bids (IFB) No. DABT23-85-B-0019, issued by the Department of the Army for full food and dining services at Fort Knox, Kentucky. The solicitation was for the base period from April 1 to September 30, 1985 with four 1-year options.

The Army rejected United's bid as nonresponsive because the firm omitted option year prices for one of the three dining facilities that Amendment No. 2 added to the facilities originally listed in the IFB.

We sustain the protest.

The Army issued the solicitation on January 17, 1985 and received 10 bids at opening on February 26. When United, the third-low bidder, learned of its apparently inadvertent omission and the Army's proposed rejection of its bid, it requested permission to correct the bid. Because of problems encountered in the evaluation of bids, the Army extended the contract of the incumbent, Colbar, for 6 months beginning April 1. On August 20, the Army told United that it was rejecting its bid, rather than allowing correction. By this time, the two lowest bidders had withdrawn following mistake claims, and the Army had found not only United but also the fourth, fifth, and sixth-low bidders nonresponsive for various reasons. In United's case, the rejection was based on failure to provide option year prices for services in Building No. 1485, Group III, one of the dining facilities added by amendment. The Army awarded a contract to Colbar, the seventh-low bidder, on September 6, after determining that urgent and compelling circumstances necessitated this action.

The IFB, at section M-1, required bidders to include prices for each line item in the bid schedule and warned that failure to do so would result in rejection of the bid as nonresponsive. The IFB further provided that award would be made to the responsive, responsible bidder whose total price, including options, was low. Amendment No. 2 added three dining facilities to the 120 already on the bid schedule and provided a form for the bidder to fill in unit and extended prices for each year for each of the additional buildings. The amendment also revised the meal adjustment clause for all years.

United's bid was complete for the dining facilities listed in the original bid schedule. In addition, United acknowledged Amendment No. 2 and submitted prices for both base and option years for two of the additional buildings. However, it did so by interlineating each of the new line items on the original bid schedule, rather than using the separate form that the Army had provided with the amendment. United also revised the meal adjustment clause to reflect the amendment. However, with respect to the third additional building, No. 1485, Group III, United inserted a base year price only; it failed to interlineate either unit or extended prices for the 4 option years. United now offers to perform the option year services at either its intended price for the option years or at the price which it bid for the base period for the building in question. Alternatively, it offers to perform the contract at the original bid price, *i.e.*, without charge for the option years for the building in question.

United argues that its omission is a mistake in bid, correctable as an obvious clerical error, and that both its mistake and its intended price are ascertainable from its pattern of pricing. United further asserts that even if the amount of the intended bid cannot be clearly proven for the purpose of bid correction, its mistake should be waived, since, if waived, its intended bid would be 11%, or $7,219,163 lower than that of the awardee ($62,921,598 as compared to $70,140,761), and if corrected, its intended bid would be 10.5 percent, or $6,754,615 lower than that of the awardee ($63,386,146 as compared to $70,140,761).

Finally, United alleges that the award to Colbar violates applicable statutes and regulations, since the record does not show the required urgent and compelling circumstance which significantly affect the interest of the United States. The protester also requests bid preparation and protest prosecution costs.

As the Army points out, a bid generally must be rejected as nonresponsive if, as submitted, it does not include a price for every item requested by the IFB. Further, a nonresponsive bid may not be corrected under the mistake in bid procedures after bid opening. *E.H. Morrill Co.,* 63 Comp. Gen. 348 (1984), 84-1 C.P.D ¶ 508; 52 Comp. Gen. 604 (1973). This rule, which applies to option items if they are evaluated, reflects the legal principle that a bidder who has failed to submit a price for an item generally cannot be said to be obligated to provide that item. *Id.; Goodway Graphics of Virginia, Inc.,* B-193193, Apr. 3, 1979, 79-1 CPD ¶ 230. A bidder's subsequent offer not to charge for the omitted item does not make the bid responsive. See *Farrell Construction Co.,* 57 Comp. Gen. 597 (1978), 78-2 CPD ¶ 45.

Our Office, however, recognizes a limited exception under which a bidder may be permitted to correct an omitted price. This exception, which applies where the bid, as submitted, indicates the possibility of error, the exact nature of the error, and the intended bid price, is based on the premise that where there is a consistent pattern of pricing in the bid itself that establishes both the error and the intended price, to hold that bid nonresponsive would be to convert an obvious clerical error of omission to a matter of responsiveness. *See* 52 Comp. Gen. 604, *supra,* in which our Office permitted correction of an option price omission where the bidder had submitted identical prices for the base quantity and three of four option quantities.

We have not permitted bidders to insert an omitted option price where the option work was added by amendment to a solicitation that did not include options. *E.H. Morrill Co., supra.* Nor have we allowed correction where all option prices were omitted from the bid. *Ainslie Corp.,* B-190878, May 4, 1978, 78-1 CPD ¶ 340. However, we have permitted bidders to insert an omitted line item or option price where the bidder had bid on an identical item elsewhere in the IFB, *Telex Communications, Inc. et al.,* B-212385 *et*

al., Jan. 30, 1984, 84-1 CPD ¶ 127; where option prices were identical to the base prices for other items, *International Signal and Control Corp. et al.*, B-192960, Dec. 14, 1978, 78-2 CPD ¶ 416; and where identical prices were inserted for the base period and the second option year, *Con-Chen Enterprises*, B-187795, Oct. 12, 1977, 77-2 CPD ¶ 284. In these cases, the evidence of error and the intent to bid on an omitted line item or an omitted option quantity were clear from the face of the bid, and a reasonable, clear bidding pattern could be established. Moreover, a pattern of pricing may be ascertained by comparing the base and option prices for certain line items and applying that pattern by analogy to different line items where a base price was inserted but option prices were omitted. *Consolidated Technologies, Inc.*, B-205298, Apr. 23, 1982, 82-1 CPD ¶ 375.

Here, although United omitted option year prices for one of the dining facilities in Group III, our review of the firm's base and option year prices for buildings in that category shows a pattern of pricing. The firm's unit prices are identical for all 4 option years, and the increase in unit prices for these years over prices for the base year for all Group III buildings is between $4 and $8. United's base year unit price for Building No. 1485 was $321. It therefore appears that its intended unit price for the option year would be between $325 and $329.

This analysis of the omission of the option price for Building No. 1485 establishes the existence and nature of United's error. While United's intended price cannot be precisely determined, it is within an extremely narrow range. Where it is clear that the intended bid would have been the lowest, even though the amount of the intended bid cannot be clearly proven for the purpose of bid correction, we have permitted an exception to the rule that a bidder is not free to waive a mistake claim after bid opening and to stand on its original bid price. *Bruce Andersen Co., Inc.*, 61 Comp. Gen. 30 (1981), 81-2 C.P.D. ¶ 310. Whether the intended bid would have been the lowest may be ascertained by reference to reasonable estimates of omitted costs. *Id.*

Applying the rule so as to allow United to waive its mistake claim and stand on its original bid price results in a total evaluated price of $62,921,598. The next-low responsive bid, that of the awardee, was $70,140,761. Thus, as noted above, the awardee's bid is 11 percent, or $7,219,163 more than United's bid.

Considering the difference of approximately $7,000,000 between United's bid and awardee's bid, we believe it is reasonable to assume that United would have been the lowest bidder if either a corrected bid or its original bid were allowed. United would have had to have bid $5,000 per day per option year for Building No. 1485, Group III (in contrast to a base year unit price of $321 per day for that building) in order to be upset as the lowest bidder. We believe it is unreasonable for the Army to conclude that United would have priced the 4 option years at a rate that much higher

than the rate for the option years applied to the other buildings in Group III. Therefore, the rule that prevents an obvious clerical error or omission from being converted to a matter of responsiveness is applicable here, since United has otherwise acknowledged Amendment No. 2, and since it is clear that the firm intended to obligate itself to provide the services in question. We sustain the protest on this basis.

Accordingly, we are recommending that the Army terminate Colbar's contract and make award to United allowing United to waive its mistake claim for the omitted option years for Building No. 1485, Group III. In view of this recommendation, we need not consider whether the Army should have extended Colbar's existing contract pending resolution of the protest or whether, as United contends, urgent and compelling circumstances did not exist, so that the Army improperly proceeded with award and approved performance of Colbar's new contract. Further, United is not entitled to bid preparation or protest prosecution costs. *See* 4 C.F.R. § 21.6(e) (1985).

We sustain the protest.

[B-218897]

Travel Expenses—Air Travel—Constructive Cost Reimbursement—No Expenses Incurred

An employee who used a free airline ticket issued because of her husband's membership in an airline's frequent travelers club for travel on Government business may not be reimbursed the constructive cost of the airline ticket since she has not demonstrated that she paid for that ticket or had a legal obligation to do so. Thus it is concluded that she acquired the transportation at no direct personal expense.

Matter of: Martha C. Biernaski, Dec. 31, 1985:

The Farm Credit Administration has requested an advance decision concerning the propriety of payment of the contructive cost of airfare to Mrs. Martha (Marilyn) C. Biernaski.[1] Mrs. Biernaski may not be reimbursed the constructive expense incurred in attending the conference since she acquired the airline ticket in question at no direct personal expense.

Mrs. Biernaski, a former employee of the Farm Credit Administration, was issued a Government Travel Request and purchased an airline ticket to attend a conference in San Diego, California. However, she did not use that ticket[2] but instead used a ticket issued to her husband as a member of the Frequent Travelers Club of Eastern Airlines. She claims reimbursement of the constructive cost that the Farm Credit Administration would have paid had she not used the ticket obtained by her husband for travel to attend

[1] This decision is issued in response to a request from Victor L. Summers, Chief, Budget and Accounts Section, Administrative Division, Farm Credit Administration.

[2] The coach ticket that was procured with the Government Travel Request was returned to the airline and the cost of it was refunded to the Farm Credit Administration.

the conference in San Diego, California. Mrs. Biernaski has based her claim on the fact that the Farm Credit Administration informed her that she could use whatever means of transportation she wished and they would reimburse her on an actual or constructive basis.

Apparently Mrs. Biernaski was not aware that when the Government reimburses an employee for travel expenses on a constructive basis only actual costs incurred by the employee may be reimbursed and that reimbursement is limited to the constructive amount it would have cost had the Government procured the transportation directly.

When informed that reimbursement on a constructive basis required the employee to present evidence of expenses actually incurred, Mrs. Biernaski submitted a letter from her husband's consulting firm indicating that she had agreed to pay $600 for use of the free ticket. The letter indicates that no payment had been received by the consulting firm, but that it was expected.

As to the travel of civilian employees of the Government, 5 U.S.C. § 5706 provides that "only actual and necessary travel expenses may be allowed * * *." Implementing regulations contained in paragraph 1-2.1, Federal Travel Regulations, FPMR 101-7, *incorp. by ref.* 41 C.F.R. § 101-7.003 (1983), provide that, "Transportation expenses which the Government may pay either direct or by reimbursement include fares * * * and other expenses."

Under these provisions of statute and regulation, civilian employees may not be allowed gratuitous payments, but they may be allowed reimbursement of travel expenses necessarily incurred by them is complying with travel requirements imposed upon them by the Government. See, for example, *Bornhoft* v. *United States,* 137 Ct. Cl. 134 (1956); and *Captain Dene B. Stratton, USN,* 56 Comp. Gen. 321 (1977).

Although Mrs. Biernaski claims that she owes her husband's consulting firm $600 for the free airline ticket issued to him by Eastern Airlines, there is no evidence that a legal obligation has arisen or that payment has been made. In that connection we note particularly that the free ticket was issued because Mr. Biernaski was a member of the Frequent Travelers Club; that it was not issued to his consulting firm; and that it has not been demonstrated to be the subject of a legal obligation for payment. Since we are unable to conclude that Mrs. Biernaski incurred any ascertainable personal expenses for the ticket in question her claim should be disallowed.

[B-220602]

Bids—Invitation for Bids—Defective—Evaluation Procedures

Protest is sustained where Invitation for Bids (IFB's) flawed evaluation scheme makes it impossible to determine which bid represents the lowest cost to the government.

Matter of: T.R. Ltd., Dec. 31, 1985:

T.R. Ltd., trading as Raley's Emergency Road Service and Henry's Wrecker Service (Raley), protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 3-6-12, issued by the United States Department of the Interior, National Park Service (Interior), for towing and wrecker services.

We sustain the protest.

The IFB's specifications required the contractor to provide all labor, materials and equipment for towing, wrecker and miscellaneous servicing of parked or disabled United States Park Police (USPP) and civilian vehicles on a first priority basis. Assistance for private motorists was to be at the expense of the motorists, and assistance directed by the USPP for a disabled USPP vehicle was to be at the expense of the government at rates in accordance with the IFB's Rate Schedule.

The Bid Schedule contained three bid items.[1] Bidders were instructed that "Bids may be submitted on Items 1 and 2, or as an alternate bid on Item 3 with a credit to the government." Items 1 and 2 required bids for services on an hourly rate basis for a base year and 2 option years. Item 3, captioned "ALTERNATE BID," required the contractor to specify a monthly rate it would pay the government for the right to be the first contractor called to service disabled or impounded vehicles.

Attached to the Bid Schedule was a Rate Schedule on which bidders were instructed to submit rates which would be charged distressed motorists for services customarily accomplished by a commercial towing company. The Rate Schedule stated that "The contractor shall provide to the contracting officer prior to award a schedule of the rates which will be charged distressed motorist." The Rate Schedule also provided that "these rates shall be incorporated in the contract and will remain in effect for the life of the contract or unless otherwise changed by the contracting officer." At the bottom of the Rate Schedule was a legend: "PLEASE RETURN WITH BID."

Three bids were received. Raley bid on all three items. One bidder bid only on item 3. The third bidder inserted zero on items 1 and 2 and prices for items 3. Raley offered the highest rate on item 3, but was rejected as nonresponsive because it did not insert a fixed price on the Rate Schedule for "5 gallons of fuel and start." (Raley inserted "station rates".) The contracting officer also concluded that Raley's pricing of all three items on the Bid Schedule made it impossible to determine if Raley intended to be reimbursed by the government for its services, if it intended to show a credit to the government, or if it intended to subtract the sum of items 1 and 2 from item 3 and credit the government with that difference. The contract was awarded to AnA, Inc., the bidder offering to pay the second highest monthly rate.

[1] The IFB's Bid Schedule and Rate Schedule are set forth in an appendix to this decision.

Raley protests that it set forth without ambiguity the exact amount it would pay for the right to be designated towing company. According to Raley, the Rate Schedule cannot be considered part of the contractor's bid because the solicitation does not require that the Rate Schedule be submitted with the bid, but rather prior to award. Raley contends it should have been allowed to submit a definite price figure for gasoline after bids were opened and prior to award.

It is unnecessary to decide the merits of Raley's protest because, upon our review of the solicitation, we find the solicitation to have been defective for not assuring the most favorable cost to the government. The method used by Interior to evaluate bid prices under item 3 was deficient in its failure to consider charges to the government for services rendered to disabled USPP vehicles. Our Office has consistently held that award in a sealed-bid procurement must be based on the most favorable cost to the government. See *Summerville Ambulance, Inc.*, B-217049, July 1, 1985, 85-2 C.P.D. ¶ 4; *Go Leasing, Inc., et al.*, B-209202, *et al.*, Apr. 14, 1983, 83-1 C.P.D. ¶ 405. Moreover, we have stated that the lowest bidder must be measured by the total work to be awarded. 50 Comp. Gen. 583 (1971); *Square Deal Trucking Co. Inc.*, B-183695, Oct. 2, 1975, 75-2 C.P.D. ¶ 206. Here, item 3 requested a lump-sum price from the contractor for the privilege of being the first contractor called to provide the specified services. Interior evaluated bids only by comparing rates which bidders offered to pay the government on item 3. Yet the specifications provided that assistance for a disabled USPP vehicle would be at the expense of the government, at rates in accordance with the Rate Schedule. If only the lump-sum prices on item 3 are evaluated, it is impossible to determine which bid results in the lowest cost to the government, since a bid offering a high price on item 3 might not be as advantageous as a bid offering a lower price but charging less for servicing government vehicles.

Since there was no assurance that any selection based only on prices offered under item 3 would result in the lowest contract cost to the government, we recommend that Interior resolicit this requirement using an evaluation scheme accounting for charges to the government for services rendered to disabled USPP vehicles. We recognize that for the safety of park visitors, the convenience of the motoring public, and assistance with law enforcement functions, it is critical that the USPP retain an uninterrupted contract crane service. We therefore recommend that the existing contract with AnA, Inc., not be terminated for the convenience of the government until Interior receives an acceptable bid under the resolicitation.

The protest is sustained.

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Overtime

Irregular, Unscheduled

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The minimum 2-hour credit for unscheduled overtime work performed by Federal employees under the "call-back" overtime provisions of 5 U.S.C. 5542(b)(1) is for the purposes of assuring adequate compensation to recalled employees for the particular inconveniences involved in their having to prepare for work and travel back to their work stations. Hence, the minimum 2-hour credit is not available on every occasion an employee performs unscheduled overtime work, notwithstanding that generally all unscheduled work inherently involves a certain amount of personal inconvenience, and employees who are called upon to perform unscheduled overtime work entirely within their homes are therefore ineligible for the statutory 2-hour minimum work credit 49

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Saturday, Sunday, and Holidays
When Federal government offices are closed because of a legal holiday and government business is not expected to be conducted, payments falling due on the legal holiday may be made the following day, including payments that are decreased by prompt payment discounts. Where government offices are open, on Inauguration Day or local holidays, payments must be made on the holiday if due 53
In-House Performance *v.* Contracting Out
Cost Comparison
Adequate Documentation Requirement
Neither government nor bidders are required to base their costs on historical data alone since both may rely on the experience and expertise of their employees and managers to determine the least costly method of performing the statement of work 41
Agency In-House-Estimate Basis
Government is not bound to utilize historical cost data for materials where estimate of additional savings generated by switch to new procurement method is not found unreasonable 41
Miller Act. (*See* BONDS, Miller Act coverage)
Modification
Change Orders
Within Scope of Contract
A contractor was issued a change order so that 5-inch vinyl siding was to be used as opposed to 6-inch vinyl siding called for in the specifications. We do no view this change as being substantial so as to be beyond the scope of the contract 130
Propriety
The Environmental Protection Agency may not modify a level of effort contract to accommodate a non-severable task extending beyond the original contract period of performance. Since the period of performance is an essential part of a level of effort contract, any change in that term would substantially change the contract such that the contract for which competition was held and the contract to be performed are essentially different. Accordingly, such a contract could not be extended by contract modification 153

CONTRACTS—Continued Page

Modification—Continued

Beyond Scope of Contract

Subject to GAO Review

Where a contract for visitor reservation services has expired, the contractual relationship which existed is terminated and the issuance of an amendment 4 months after the expiration date to retroactivity extend and modify the contract as if it had not expired amounts to a contract award without competition, contrary to the requirements of the Competition in Contracting Act. A protest challenging the amendment is sustained, therefore, and General Accounting Office (GAO) recommends that a competitive procurement for the requirement be conducted 25

National emergency authority. (*See* **CONTRACTS, Negotiation, National emergency authority)**

Negotiated procurements. (*See* **CONTRACTS, Negotiation)**

Negotiation

Conflict of Interest Prohibitions

Organizational

Statements by two procurement officials that a consultant to an offeror learned the relative standing and strengths and weaknesses of competing proposals while he was employed by the government establish a reasonable basis for an agency's determination that the offeror probably received an unfair advantage in submitting its best and final offer. This determination, based on "hard facts" rather than suspicion or innuendo, justifies exclusion of the offeror's proposal from further consideration 104

National Emergency Authority

Competition Consideration

In procurements conducted under provisions of the Competition in Contracting Act of 1984 pertaining to mobilization base producers, 10 U.S.C.A. 2304(b)(1)(B), 2304(c)(3), the usual concern for obtaining full and free competition is subject to the needs of industrial mobilization. Agencies properly may exclude a particular source or restrict a procurement to predetermined sources in order to create or maintain their readiness to produce critical supplies in case of a national emergency or to achieve industrial mobilization 59

Restrictions on Negotiation

Agency's refusal to accept protester as an approved mobilization base producer, so that it can compete in a procurement restricted to such producers, is proper, since the solicitation to be issued is to support the existing mobilization base and there is no need to expand this base. There is no legal requirement at all qualified firms be accepted as mobilization base producers without regard to whether the agency's anticipated needs will be sufficient to support additional producers 59

CONTRACTS—Continued Page

Negotiation—Continued

Offers or Proposals

Best and Final

Ambiguous

Clarification Propriety

When protester, claiming that its price was erroneously evaluated, as shown by cost and pricing data submitted with initial proposal, does not submit additional cost and pricing data during several rounds of best and final offers, it is not possible without reopening discussions to determine exactly what price the protester intended to offer in its final submission. Since this would result in the use of prohibited auction techniques, the proposed award to an allegedly higher priced offeror is not subject to objection 62

Mistakes

Correction

Where, before award, a protester points out that its best and final offer may have been erroneously evaluated and argues that cost and pricing data submitted with its initial proposal clearly establishes what price it intended to offer, the protester is in effect claiming a mistake in its proposal and the contracting agency should follow the regulatory procedures applicable to such claims 62

Discussion With All Offerors Requirement

Exceptions

Offers Not Within Competitive Range

Even where discussions are conducted with the sole remaining offeror in the competitive range, no discussions need be held with the protester, who had previously been determined in the competitive range, in a case where the protester's offer proposing an agency employee as a major consultant is rejected because of a potential conflict of interest and the agency reasonably determines that the employee was a primary factor in the protester's high ranking and is integral to the protester's proposal, which cannot readily be changed through negotiations 87

Evaluation

Administrative Discretion

Evaluation of 37 proposals by a 26-person technical panel where only four of the evaluators read and rated each proposal is not an abuse of agency discretion 109

Best and final. (*See.* **CONTRACTS, Negotiation, Offers or proposals, Best and final, Evaluation**)

Brand Name or Equal

Salient Characteristics—Satisfaction of Requirement

In a brand name or equal procurement, the contracting agency improperly found the awardee's product technically acceptable where it failed to comply with two salient characteristics in the request for proposals. Specifically, the awardee's product (1) did not comply with the requirement for an "impendance meter," where the product offered a device which only measured, but did not register, the data being monitored; and (2) did not comply with the requirement for "digital filtering,—"where the product offered only one of various

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Evaluation—Continued
Brand Name or Equal—Continued
Salient Characteristics—Satisfaction of Requirement—Continued
techniques ("digital smoothing") necessary to provide the full range of capabilities contemplated by digital filtering 145
Cost Realism Analysis
Reasonableness
An offerors' proposed cost as adjusted for cost realism cannot be said to be unreasonable where it is virtually identical to the government's original estimate and apparently would be in line with other offerors' proposed costs if those costs were also to be adjusted for cost realism 34
Criteria
Application of Criteria
Evaluation of awardee's proposal under rating plan used to evaluate proposals in three areas, where it was apparently not downgraded, appears to be improper, when the proposal fails to address two areas and in the third area proposes less than the optimum staffing preference indicated in rating plan and solicitation evaluation criteria. Protest is therefore sustained and it is recommended that proposals in the competitive range be rescored and award made to highest rated offeror 109
Rejection
An agency may reject an offer, which proposes a social government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist. Because of the longstanding policy against contracting with government employees, the agency has a reasonable basis for application of this restrictive policy to the protester's offer, even though notice of this policy was not given in statute, regulation or the Request for Proposal (RFP) 87
Proposed Technical Approach Insufficiently Proven
Where protester's initial proposal is found technically unacceptable although capable of being made acceptable, but protester fails to submit a timely response to agency's request for clarification, agency's subsequent exclusion of protester from negotiations with remaining offeror is proper, since without additional information, protester's proposal was technically unacceptable 125
Propriety
Agency is not required to refer to the Small Business Administration its determination to exclude an offeror's proposal because of the likelihood of an impropriety or conflict of interest in preparation of the proposal where there is no question as to the offeror's capability to perform or any other traditional element of responsibility 104
Protests
Generally. (*See* CONTRACTS, Protests)

CONTRACTS—Continued Page
Negotiation—Continued
Requests for Proposals
Specifications
Quantity Estimates
Best Available Information Requirement
Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs or result from fraud or bad faith 92
Restrictive
Undue Restriction Not Established
Protest that solicitation requirement for timely performance of services notwithstanding variations in the workload is unduly burdensome because the provision for an adjustment in the delivery schedule in the event of saturation does not define when an adjustment is required is denied. The protester neither alleges nor shows that the general requirement for timely performance notwithstanding variations in the workload is not part of the agency's requirements; GAO is aware of no requirement that agencies set forth in their solicitation the precise basis for adjustments; and nothing in the provision interferes with the contractor's right to seek relief under the disputes clause in the solicitation 92
Clause in solicitation for audiovisual services which imposes liability on contractor for the costs reasonably incurred by the government—the cost of reshooting the film—as a result of the loss of exposed film is not unduly burdensome. Although the agency failed to place a definite limit on the potential liability of the contractor, the Federal Acquisition Regulation, 48 C.F.R. 45.103(a) (1984), generally provides that contractors are responsible and liable for government property in their possession, and the solicitation included estimates of the agency's annual requirements for different types of audiovisual productions and required offerors to propose specific cost for the most frequently used elements in audiovisual productions 92
GAO is aware of no basis upon which to object to provisions in solicitation for audiovisual services, for adjusting downward the price for a particular audiovisual production in the event that the contractor utilizes fewer personnel than the number which it proposed to use when negotiating the price for that production and which formed the basis of the agreed price 92
Payments
Conflicting Claims
Assignee/Surety *v.* Government
As there was no formal takeover agreement between the performing surety and the contracting Federal agency providing therefore, the surety's priority over the Government to unexpended contract balances for satisfying its performance bond obligations would not include unpaid earnings due the contractor that accrued prior to the surety taking over performance of the defaulted contract 29

CONTRACTS—Continued Page
Payments—Continued
Conflicting Claims—Continued
Surety *v.* Government
As there was no formal takeover agreement between the performing surety and the contracting Federal agency providing therefore, the surety's priority over the Government to unexpended contract balances for satisfying its performance bond obligations would not include unpaid earnings due the contractor that accrued prior to the surety taking over performance of the defaulted contract 29
Surety *v.* Internal Revenue Service
The order of priority for the payment of remaining contract balances held by a contracting Federal agency are first, the surety on its performance bond, including taxes required to be paid under the bond, minus any liquidated damages owed the Government as provided in the contract; second, the IRS for the tax debt owed by the contractor; and, last, the surety on its payment bond 29
Protests
Allegations
Unsubstantiated
The fact that historical data contained in an IFB may have been inaccurate and thus not suitable alone as a basis for estimating performance costs is not a sustainable protest where it is not a shown that data provided was not the best objective data available at the time 41
Authority to Consider
Contract Administration Matters
Letter received from awardee after award concerns contract administration and does not constitute improper discussions 109
Housing and Urban Developing Department Procurements
Under the Competition in Contracting Act of 1984, the General Accounting Office's bid protest authority extends to procurements by the Department of Housing and Urban Development for management of properties acquired through insurance of mortgages or loans under the National Housing Act 66
Conflict in Statement of Protester and Contracting Agency
When the only evidence of the time that the bidder's representative arrived at the contracting office consists of a statement of the protester that the representative arrived prior to the bid opening time and a statement of the contracting agency that the representative arrived after that time, the protester has failed to sustain its burden of proving that the bid was not late 71
General Accounting Office Procedures
Constructive Notices
Protester's assertion that it was unaware of the requirement to file protest with General Accounting Office (GAO) within 10 working days after protester learned of adverse agency action on its protest initially filed with procuring agency is not a basis for consideration of the protest since the protester is charged with constructive notice of GAO's Bid Protest Regulations through their publication in the Federal Register 17

CONTRACTS—Continued Page

Protests—Continued

General Accounting Office Procedures—Continued

Reconsideration Requests

Eligible Party Requirement

A contract awardee adversely affected by a prior General Accounting Office (GAO) decision is not eligible to request reconsideration of that decision where the firm was notified of the original protest but chose not to exercise its right to comment on the issues raised in the protest 34

Error of Fact or Law

Not Established

Prior decision, which held that the agency's source selection improperly deviated from the solicitation's established evaluation scheme absent a compelling justification in the record to support the selection, is affirmed where the agency's request for reconsideration fails to establish convincingly that the prior decision contains errors of law or of fact which warrant its reversal or modification 34

Dismissal of protest is affirmed where request for reconsideration does not establish that the decision was based on error of law or fact. 132

Timeliness

Protester alleges that request for reconsideration was untimely because it relied on the caption on the first page of a decision of the Comptroller General of the United States and the caption provided an insufficient address for protester's courier to effectuate delivery. Nevertheless, dismissal of request for reconsideration is affirmed because protester did not use the address prescribed in our Bid Protest Regulations, 4 C.F.R. 21.1(b) 15

Timeliness of Comments on Agency's Report

General Accounting Office (GAO) will not consider a new protest of solicitation improprieties prior to bid opening where an earlier, essentially indentical protest was dismissed for failure to comment on the agency report 13

Failure of an agency simultaneously to furnish a copy of a protest report to the protester and the GAO does not warrant rejection of the report where the protester is not prejudiced by the agency's noncompliance with this procedural requirement 160

Timeliness of Protest

Adverse Agency Action Effect

Protest filed with General Accounting Office (GAO) before resolution of an initial protest filed with the contracting agency is timely under Bid Protest Regulations 160

Date Basis of Protest Made Known to Protester

Protest filed more than 10 working days after the protester was apprised that award was made to another bidder is untimely under GAO's Bid Protest Regulations 109

Issue regarding agency's technical evaluation of awardee's product first raised in protester's comments on agency report is timely, where protester first had access to awardee's proposal when the agency included it as part of the agency report; protester's comments were filed within 10 days after receiving the report; and agency and awardee had full opportunity to respond to the protester's allegation. 145

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
Timeliness of Protest—Continued
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date for Proposals
A protest of the use of an oral solicitation and of deficiencies in the oral solicitation should have been filed either prior to the time protester's proposal was submitted or within 10 days of receiving inquiries on its proposal from the agency 1
Protester's subsequent allegations that specific work-load estimates and specific deduction categories—relating to deductions for unsatisfactory performance from the payments to the contractor—are defective are untimely where not received by General Accounting Office (GAO) until after the closing date for receipt of initial proposals since GAO's Bid Protest Regulations require alleged improprieties apparent prior to the closing date to be filed prior to the closing date. 4 C.F.R. 21.2(a)(1) (1985). Although the protester in its initial protest, filed prior to the closing date, generally alleged that many of the approximately 200 workload estimates and many of the approximately 84 deduction categories were defective, such general allegations do not render subsequent specific allegations timely since our Bid Protest Regulations do not contemplate a piecemeal presentation or development of protest issues 127
Preparation
Costs
Compensable
Recovery of the costs of filing and pursuing a protest, including attorney's fees, and proposal preparation costs is appropriate where General Accounting Office (GAO) recommends that option to extend contract not be exercised since the protester does not thereby get an opportunity to compete for the basic contract period. Federal Properties of R.I., Inc., B-218192.2 May 7, 1985, 85-1 C.P.D. 508 and The Hamilton Tool Company, B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ——, distinguished 1
Protester is entitled to recover the costs of pursuing its protest, including attorneys' fees, where agency, in effect, made an improper sole-source award; GAO considers the incentive of recovering the costs of protesting an improper sole-source award to be consistent with the Competition in Contracting Act's broad purpose of increasing and enhancing competition on federal procurements 25
Protester is entitled to recover the cost of filing and maintaining its protest, including attorney's fees, as well as its proposal preparation costs, where protester was unreasonably excluded from the procurement but corrective action is not feasible in light of agency's decision not to suspend performance during pendency of the protest 145
Reconsideration. (*See* CONTRACTS, Protests, General Accounting Office procedures, Reconsideration requests)
What Constitutes Protest
Protest challenging agency's decision not to award a contract under a solicitation issued in accordance with the procedures set out in OMB Circular A-76 falls within the definition of protest in the Competition in Contracting Act since the act does not require that

CONTRACTS—Continued Page
Protests—Continued
What Constitutes Protest—Continued
an award be proposed at the time a protest is filed and a proposed award within the statutory definition is contemplated when a solicitation is issued for cost comparison purposes. Review of such a protest is consistent with congressional intent to strengthen existing General Accounting Office (GAO) bid protest function 41
Inquiries to a contracting agency by a congressional aide regarding rejection of a constituent's bid can reasonably be considered as a protest to the agency where the aide ostensibly represents the interests of the constituent and, while not expressly indicating an intent to protest, adequately conveys the constituent's dissatisfaction to the agency 160
Small Business Concerns
Awards
Prior to Resolution of Size Protest
Award to large business under small business set-aside is proper where contracting officer is unaware of SBA determination when it made the award and he has waited more than 10 business days from when SBA received a size protest of the awardee's status and where there has been no showing that the awardee's small business self certification is in bad faith or that contracting officer knew it was not a small business. However, GAO recommends that options not be exercised on large business awardee's contract 109
Responsibility Determination
The bidder, not the contracting officer, has the burden of proving the bidder's competency when applying to the Small Business Administration (SBA) for a Certificate of Competency (COC). General Accounting Office (GAO) will dismiss protests alleging that the contracting officer failed to forward to SBA for its COC determination information tending to show that a contractor is responsible where the contractor had the information, but did not provide it to the SBA when applying for a COC 132
Nonresponsibility Finding
Certificate of Competency Requirement
Protest that contracting officer failed to comply with Federal Acquisition Regulation 19.602-1(c)(2), by not including a letter from the protester with the agency referral to the Small Business Administration (SBA) for a certificate of competency (COC) determination is dismissed because the contracting officer is not required to refer to SBA information which does not support the contracting officer's determination that the prospective contractor is nonresponsible and because the burden is on the contractor to prove its competency to the SBA through its application for COC 74
Term
Time Extension
The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a

CONTRACTS—Continued Page
Term—Continued
Time Extension—Continued
work assignment which could not be performed until the next fiscal year would violate the bona fide need rule 153
Time extension
Term of contract. (*See* CONTRACT, Term, Time extension)
Transportation Services
Procurement Procedures
General Accounting Office (GAO) will consider protests of competitive selections of no cost, no fee travel management services contractors under GAO's bid protest authority under the Competition in Contracting Act since the selections are procurements of contracts for services 109
Competitive selections of no cost, no fee travel management contractors by the General Services Administration are subject to the procurement provisions of the Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act. These selections are not distinguishable from those noncompetitive business arrangements for substantially similar services that some agencies have with Scheduled Airline Ticket Offices (SATO's). Therefore, these SATO business arrangements are subject to applicable procurement laws. *Omega World Travel, Inc., Society of Travel Agents in Government, Inc.*, B-218025, B-218025.2, May 23, 1985, 64 Comp. Gen. 551, 85-1 C.P.D. 590 is overruled 109

EQUIPMENT
Automatic Data
Processing Systems
General Services Administration
Responsibility Under Brooks Act
When a Brooks Act procurement is the subject of a protest to the General Services Administration Board of Contract Appeals (GSBCA), General Accounting Office (GAO's) Bid Protest Regulations effectively provide for the dismissal of any protest to GAO involving that same procurement in deference to the binding effect of a GSBCA decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. The clear intent of the Competition in Contracting Act of 1984 is to provide for an election of mutually exclusive administrative forums to resolve challenges to Brooks Act procurements 72

FINES
Government Liability
Unless expressly waived by statute, a Federal agency is not liable for a civil fine or penalty by reason of sovereign immunity. Therefore, appropriated funds cannot be used to pay a penalty imposed by the Boston City Fire Department for answering false alarms resulting from a malfunction of a fire alarm system in a Veterans Administrion Medical Center 61

GENERAL ACCOUNTING OFFICE
Contracts
Protests. (*See* CONTRACTS, Protests)

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction
Bids
Protests generally. (*See* CONTRACTS, Protests)
Contracts
Protests generally. (*See* CONTRACTS, Protests)

GENERAL SERVICES ADMINISTRATION
Services for other agencies, etc.
Procurement
Automatic data processing systems. (*See* EQUIPMENT, Automatic data processing systems, Acquisition, etc.)

JOINT VENTURES
Status
Scheduled Airline Ticket Office proposed by Air Transport Association is a joint venture with capacity to contract with government..... 109
Proof of authority of person who executed proposal to bind the joint venture on a negotiated procurement may be furnished after receipt of proposals or best and final offers..... 130

MEALS
Furnishing
Airplane Travel
Absent specific statutory authority, a Federal agency may not provide meals at Government expense to its officers, employees, or others. This general prohibition extends to in-flight meals served on Government aircraft, although it does not apply to government personnel in travel status, for whom there is specific statutory authority to provide meals. Hence, the National Oceanic and Atmospheric Administration may not provide cost-free meals to those aboard its aircraft on extended flights engaged in weather research, except for Government personnel in travel status..... 16
Reimbursement
Expenses Incident to Official Duties
Employee was invited to speak at luncheon session of agency training program at her duty station, and she seeks reimbursement of cost of luncheon. Cost of luncheon may be paid under 5 U.S.C. 4110 since the record indicates that (1) the meal was incidental to the training program, (2) attendance at the meal was necessary for full participation in the meeting, and (3) the attendees were not free to take their meals elsewhere. *Gerald Goldberg, et al.*, B-198471, May 1, 1980..... 143

MILEAGE
Travel by Privately Owned Automobile
Between Residence and Temporary Duty Station
Army employee whose use of his privately owned vehicle was determined to be advantageous to the Government is entitled to mileage for travel on a daily basis between his place of abode and his alternate duty point under Volume 2 of the Joint Travel Regulations. Under para. C2153 Department of Defense components do not have discretion to limit the payment of mileage to the mileage amount by which his travel to the alternate duty site exceeds the employee's commute between his residence and his permanent duty station..... 127

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OFFICERS AND EMPLOYEES

Relocation expenses

Transferred employees

Real estate expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses**)

Transfers

Real Estate Expenses

Interim Financing Loans

Transferred employee sold residence at old duty station, received $5,000 cash and accepted a second mortgage from the purchaser. In order to obtain sufficient funds to purchase a residence at his new official station, employee later assigned his interest in and to 120 monthly installments under the second mortgage and received the sum of $12,000. The transaction entered into by the employee was an "interim personal financing loan." It was not a loan secured by the employee's interest in his old residence, and thus was not a part of the total financial package in the purchase of a residence at his new duty station. Hence, the costs incurred in securing assignment of the second mortgage are not reimbursable 157

Travel expenses. (*See* **TRAVEL EXPENSES, Transfers**)

Travel expenses. (*See* **TRAVEL EXPENSES**)

PAY

Retired

Annuity elections for dependents

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

Survivor Benefit Plan

Contribution Indebtedness

An Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when he retired in 1978, but he was later divorced whereupon SBP deductions from his retired pay ceased. He remarried in 1980 and his new spouse became automatically covered under the SBP a year later. However, he failed to advise the Air Force of the remarriage so retired pay SBP deductions were not reinstated. In Dec. 1983 he elected SBP coverage for his former spouse pursuant to their divorce settlement agreement, and he died in Apr. 1984. The delinquent SBP premiums should be collected from the former spouse's annuity notwithstanding that they covered a period when the current spouse was covered under the SBP rather than the former spouse 134

Election Status

A terminally ill retired officer made an irrevocable election of Survivor Benefit Plan (SBP) coverage in Dec. 1983 for his former spouse pursuant to a clause in his divorce settlement agreeing to do so. Such election precluded his current spouse from SBP coverage. In February 1984 an affidavit was received from him with a letter from his and his current spouse's attorney attempting to revoke the election on the basis that he was too ill to have understood the implications when he made the election and stating that he wanted his current spouse to be covered. The former spouse election was made in proper form, the member was never adjudicated incompetent, and the great

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Election Status—Continued
weight of medical and other evidence presented supports the former spouse's contention that he was mentally competent when he made the election. Thus, the election should be given effect 134
Remarriage of Member
Spouse's Annuity Eligibility
A retired Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when in 1980 he was divorced. In the divorce settlement he agreed to provide survivor benefit coverage for his former spouse should the law ever be changed to allow it. He remarried, and a year later (1981) his new spouse was automatically covered under the SBP. In Sept. 1983 Public Law 98-94 was enacted authorizing a person in this situation to elect SBP coverage for a former spouse. He did so in Dec. 1983 stating that the election was made pursuant to the divorce settlement. Such an election is irrevocable; thus, a later attempt to revoke it is ineffective and the former spouse is the beneficiary of the SBP annuity upon his death 134

PAYMENTS
Contracts. (*See* CONTRACTS, Payments)
Discount on contract payments. (*See* CONTRACTS, Discounts)

RETIREMENT
Civilian
Reemployed Annuitant
Annuity Deduction
Mandatory
A Civil Service annuitment claims entitlement to full compensation, in addition to his annuity, for temporary full-time duties allegedly performed following his retirement. Under the provisions of 5 U.S.C. 8344(a), the salary of a retired Civil Service annuitant must be reduced by the amount of his annuity during any period of actual employment. However, since the claimant states that he was not appointed to a position following retirement, which statement has been confirmed by the agency's personnel office, he is not entitled to any compensation, reduced or otherwise, for the period in question 21

SUBSISTENCE
Actual Expenses
Meals
Employee was authorized actual subsistence expenses to perform temporary duty in Washington, D.C. He incurred transportation expenses to obtain meals for distances ranging from 2 to 112 miles, roundtrip. Federal Travel Regulations (FTR) allow expenses of travel to obtain actual subsistence expenses, but such expenses must be necessarily and prudently incurred and reasonable in nature. Where the expenses claimed appear largely unnecessary and unreasonable, and the employee failed to provide additional justification, the agency acted properly in denying the employee's claim 10
Per diem
Actual expenses. (*See* SUBSISTENCE, Actual expenses)

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TELEPHONES

Long Distance Calls

Government Business Necessity

Certification Requirement

Statistical Sampling Use

Administrative certification by head of agency or designee that long distance telephone calls are necessary in the interest of the Government may be made on an estimate of the percentage of similar toll calls in the past that have been official calls provided the verification process provides reasonable assurance of accuracy and freedom from abuse 19

TRANSPORTATION

Bills of Lading

Government

Rate on Bill of Lading *v.* Applicable Rates

A "Deferred Service Requested" annotation on each of several Government Bills of Lading (GBL) satisfied an air carrier's Tender No. 17 requirement for application of relatively low deferred service rates. The carrier, however, applied higher rates published in Tender No. 14 applicable to regular air service allegedly because ambiguities in the GBL caused it to conclude that the shipper really did not desire deferred service. The General Services Administration's determination that deferred service rates (Tender No. 17) were applicable is sustained. The precise deferred service annotation on the GBL's required by Tender No. 17 was strong evidence of the shipper's intention to procure deferred service. If the carrier was confused by the shipper's actions it had a duty to clarify the shipper's intent 84

Household Effects

Pets

Status as Household Effects

The statute providing for the transportation, within prescribed weight limitations, of the "baggage and household effects" of transferred service members applies only to inanimate objects that can be packed, stored, and shipped by commercial carrier at standard costs computed on the basis of weight. Hence, the statute does not authorize the transportation of live animals, including household pets, since the transportation of live animals involves special handling and extraordinary cost that cannot be calculated on the basis of weight, and animals are fundamentally unlike the inanimate household furnishings and personal effects acceptable for shipment by commercial movers 122

Overcharges

Set-Off

A motor carrier that delivered a Government shipment and billed for the services contends that since another carrier picked up and transported the shipment before transferring it for further transportation and delivery, the transportation constituted a joint-line movement requiring the application of joint-line rates. The General Services Administration's audit determination, that the delivering carrier's lower single-line rates were applicable, is sustained because the record shows that the delivering carrier, having the necessary oper-

TRANSPORTATION—Continued Page
Overcharges—Continued
Set-Off—Continued
ating authority, agreed to transport the shipment from origin to destination at single-line rates. The fact that the billing carrier elected to allow another carrier to pick up the shipment is irrelevant 45

TRAVEL AGENCIES. (*See* TRANSPORTATION, Travel agencies)

TRAVEL EXPENSES
Air Travel
Constructive Cost
Reimbursement
No Expenses Incurred
An employee who used a free airline ticket issued because of her husband's membership in an airline's frequent travelers club for travel on Government business may not be reimbursed the constructive cost of the airline ticket since she has not demonstrated that she paid for that ticket or had a legal obligation to do so. Thus it is concluded that she acquired the transportation at no direct personal expense 171
Constructive Travel Costs
Actual Expenses Less
A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no additional expense. Since the record shows that no one-way airfare ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47
Mileage. (*See* MILEAGE)

VOUCHERS AND INVOICES
Certifications
Long Distance Telephone Calls
Administrative certification of long distance telephone calls under 31 U.S.C. 1348(b) does not carry with it financial responsibilities attendant to the certification of a voucher for payment, but may be relied on by certifying official who does certify voucher for payment. 63 Comp. Gen. 241 (1984); 57 Comp. Gen. 321 (1978) explained 19

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