Decisions of The Comptroller General of the United States

VOLUME 65 Pages 177 to 263

JANUARY 1986

UNITED STATES
GENERAL ACCOUNTING OFFICE

1986

PCN 45300134700

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1986

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

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Cite Decisions as 65 Comp. Gen.—.

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[B-217478]

Property—Public—Damage, Loss, etc.—Accountability of Civilian and Military Personnel—Evidence

The Forest Service assessed a claim against one of its forest rangers to recover $1,475.15 (plus interest) for unauthorized expenditures which he directed his staff to make in order to expand and improve the building which serves as headquarters for the Jemez District of the Santa Fe National Forest. Pursuant to General Accounting Office (GAO)'s settlement authority under 31 U.S.C. 3702 (1982), and the agency's regulations which provide for assessing financial liability against Forest Service employees, GAO finds that the legal basis of the claim has not been adequately established. Therefore, collection should be terminated.

Matter of: Walter C. Stephenson, Jan. 2, 1986:

We have been asked to review the determination of the United States Forest Service, Department of Agriculture, concerning a debt asserted against Mr. Walter C. Stephenson, Forest Ranger for the Jemez District of the Santa Fe National Forest. In accordance with its interpretation of its regulations, the Forest Service determined that Mr. Stephenson should reimburse the Government for some unauthorized expenditures of public funds. Prior to rendering this decision, we obtained the comments of both Mr. Stephenson and the Forest Service. For the reasons given below, we find that the Forest Service has not adequately established the legal basis for this claim, and its collection should be terminated.

BACKGROUND

In August and September of 1982, Mr. Stephenson, as Jemez District Forest Ranger, instructed his staff to take steps and expend funds necessary to accomplish the laying of a concrete slab which eventually would be used to support a structural addition to the building in which he and his staff worked. According to the record submitted by the Forest Service, Mr. Stephenson authorized work and expenditures, based upon his mistaken interpretation of applicable Forest Service regulations.[1] In the view of the Forest Service, the actions taken by Mr. Stephenson and his staff violated a number of Forest Service procurement regulations which, among

[1] Mr. Stephenson was relying upon his interpretation of section 6516.31 of the Forest Service Manual (FSM) (ID No. 133, June 17, 1982), which provides:

> Minor, unforeseen construction and acquisition of buildings and other facilities may be financed from the benefiting operating and research funds under the following conditions:
>
> 1. The need was unforeseen at the time of budget preparation,
> 2. The work is of a higher priority than work foregone,
> 3. Standards fully protect the resources, and
> 4. The total project is estimated to be less than $50,000.

Mr. Stephenson maintains that the work he ordered fell under the category of "minor, unforeseen construction." Among other things, he argues that the concrete slab (estimated to cost approximately $8,000) may be considered to be a project separate and distinct from the eventual construction of the structural addition to the building (estimated to cost about $50,000).

other things, required him to obtain official approval before undertaking a construction project of this kind and amount.[2]

On or about September 9, 1982, the work and expenditures authorized by Mr. Stephenson came to the attention of higher officials in the Forest Service. Mr. Stephenson and his staff were immediately ordered to suspend work on the project, pending investigation of its propriety. In an apparent coincidence, on the next day, September 10, 1985, regional officials of the Forest Service issued a notice intended to clarify the regulation which Mr. Stephenson had misinterpreted.[3] That notice stated that "[s]ome situations which have come to our attention recently indicate that regional direction may not be clear" concerning the need to obtain approval for work of the kind and amount ordered by Mr. Stephenson. According to the notice, "confusion and misunderstandings" had occurred. Forest Service officials were advised that if work had already been undertaken "without the required approval," approval should be sought as soon as possible.[4]

On October 15, 1982, the Santa Fe National Forest Supervisor filed a 10-page report concerning the Stephenson incident. Among the findings in that report were the following:

It is believed that the intent of the District Ranger [Stephenson] was to solve a problem of lack of office space the best way he could and as legally as possible. There is no doubt but what he was wrong in the approach he took.

* * * * * * *

The District Ranger exercised poor judgment in not seeking advice as to how to proceed in this project, and must be held responsible for proceeding without proper approvals from both engineering and fiscal. It appears that Ranger Stephenson committed an error (FSM 6507.2) e.g. '. . . unintentional human errors, miscalculations, misjudgments, misinterpretations, etc.'. It is felt that he should receive punishment commensurate with this offense. [Mr. Stephenson] has had an exemplary career with the Forest Service since 1969. There is no record of wrong-doing during his career. The wrong-doing committed in this case relates to misinterpretation of policy and management direction. There has been no effort to cover up what was

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[2] Forest Service bases its position upon the provisions of a regional regulation (Region 3, PBMI, FY 1982) which states:

> Projects estimated to cost $50,000 or more must be financed from C&LA [Construction and Land Acquisition] funds and must be approved in advance by the Regional Forester. Minor construction projects (including renovation of or additions to a building) unforeseen at the time of budget presentation and estimated to cost less than $50,000 can be financed from benefiting funds, providing Regional Forester's approval has been obtained and documented in the financial plan records * * *.

Forest Service maintains that the work authorized by Mr. Stephenson does not qualify as "minor, unforeseen construction" because, in its view, it is not feasible to treat the concrete slab and the eventual structural addition (which together are estimated to cost approximately $60,000) as separate projects. In any event, the regulation cited by Forest Service requires that approval be obtained for such work, regardless of its size.

[3] Based on notations in the notice itself, it would appear that the notice, although dated September 10, was originally drafted on or before September 2, 1985, *i.e.*, before Mr. Stephenson's unauthorized work was discovered by higher authorities. This notice clearly indicates that Mr. Stephenson was not alone in his misinterpretation of Forest Service regulations.

[4] Regional Forester M. J. Hassell, "6520 Financial Management" Letter, Sept. 10, 1982.

happening or hide any facts. Supplies were purchased and labor expended for a structure that is and will become government property. Because of these mitigating circumstances it is believed that a letter of reprimand should be levied against Mr. Stephenson.

All of this action does not negate the need for expansion of [Mr. Stephenson's] Jemez Office. * * * As soon as approval would be received completion of the slab [and the office expansion] to the approved design should be allowed so as to take advantage of the effort already expended.[5]

This initial report was incorporated without criticism or dispute into the Forest Service's final decision of August 29, 1984.[6] However, despite the finding in the incorporated initial report that Mr. Stephenson had committed an *"unintentional human error,"* the agency's final decision on the matter concluded that he should be held financially liable for the "non-salvageable" portion of the work he improperly authorized.[7] To support this conclusion, the final decision cited section 6507.32 of the Forest Service Manual (FSM) (FSM 4/81 AMEND 199) which states that "when instructions are *deliberately violated*, the individual shall be held financially liable when the willful act causes a pecuniary loss to the Government.[8]

Consequently, on September 28, 1984, Mr. Stephenson was billed by the Forest Service for $1,475.15 to cover "non-salvageable costs connected with the Jemez Ranger Office Addition (9/17/82)." Finally, we note that the Forest Service has now determined that the project that Mr. Stephenson attempted to initiate without the proper authority is, in fact, necessary and appropriate, and is scheduled for completion in the near future.

GAO JURISDICTION AND SCOPE OF REVIEW

The General Accounting Office is authorized to review this matter under its general authority to settle "all claims of or against the United States Government." 31 U.S.C. § 3702(a) (1982).

In Government employee liability cases resulting from loss or damage to Government property, our Office engages in a narrow review of agency actions. We determine, first, whether the agency asserting a claim against its employee has statutory authority to do so, or is acting under appropriate administrative regulations. *See, e.g.*, 25 Comp. Gen. 299 (1945); B-208108, July 8, 1983.

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[5] Santa Fe National Forest Supervisor James L. Perry, "1450 Investigations" Letter to Regional Forester, R-3, Oct. 15, 1982. The record also contains a number of other official documents which reached the same or similar conclusions. *E.g.*, Santa Fe National Forest Supervisor Maynard T. Rost, "6500 Finance and Accounting" Letter, Apr. 5, 1984.

[6] Director of Fiscal and Accounting Management, R-3, Arvin L. White, "6500 Finance and Accounting" Letter, Aug. 1, 1984 (approved by Director of Fiscal and Accounting Management, WO, C. E. Tipton, Aug. 29, 1984) at 1. (We note that prior to the issuance of this final decision, in June 1983, Mr. Stephenson was suspended without pay for 2 weeks as punishment for his failure to comply with Forest Service regulations in this matter. This suspension cost Mr. Stephenson approximately $1,320 in lost salary.)

[7] *Id.* at 5 [Italic supplied.]

[8] *Id.* at 4 [Italic supplied.]

Our Office then asks whether the agency followed the regulations in the individual case. As we stated in B-208108, July 8, 1983:

> If an agency has held an employee liable consistent with its regulations—for example, by finding him negligent—we will not substitute our judgment for that of the investigating authority, and will overturn the finding only if we conclude that it lacks a rational basis.

See also B-212502, July 12, 1984. *Cf.* 54 Comp. Gen. 310, 312 (1974); 57 Comp. Gen. 347, 350 (1978).

DISCUSSION

1. Does Forest Service have sufficient regulations?

The Forest Service clearly has administrative regulations that satisfy the requirements of our previous decisions, as discussed above. The Forest Service Manual (FSM) provides that:

> [i]ndividuals will be held financially liable for their willful or unauthorized acts which result in monetary or other personal gain to which they are not entitled under the regulations. Also, when instructions are deliberately violated, the individual shall be held financially liable when the willful act causes a pecuniary loss to the Government. FSM, § 6507.32 (FSM 4/81 AMEND 199).

At the same time, however, the FSM also provides for:

> • • • another category of actions that are unintentional human errors, miscalculations, misjudgments, misinterpretations, etc. These result from employees not being fully and adequately advised, not fully knowledgeable of the subject or specific regulations concerning their action, • • • or other actions that may result from human error and are not intentional. Employees should be advised and/or assisted concerning how these types of errors can be corrected. • • • FSM, § 6507.2 (FSM 4/81 AMEND 199)

The FSM states that "[e]rrors as described in FSM 6507.2 are not to be administered under [section 6507.32]." FSM, § 6507 (FSM 4/81 AMEND 199). In view of this last provision, it would appear that the FSM does not authorize the assessment of pecuniary liability against Forest Service employees for errors of the kind described in section 6507.2

2. Has Forest Service followed those regulations?

Our review of the record leads us to conclude that the Forest Service did not properly apply its regulations in this case.

There is no contention that Mr. Stephenson profited financially from his actions. Therefore, in order to hold Mr. Stephenson liable (pursuant to FSM, § 6507.32) for the costs incurred by the Government, the agency must conclude that his actions constituted a "deliberate violation" of the applicable regulations. Giving this phrase its plain and ordinary meaning, we find that the words "deliberate violation of instructions" refer to actions willfully taken, either with full awareness that they were not consistent with the applicable orders and regulations of the agency, or with complete and reckless disregard of whether they were consistent.

As we noted earlier, the Santa Fe National Forest Supervisor investigated the incident and, on October 15, 1982, filed a lengthy and detailed report. In that report, the Supervisor concluded that Mr. Stephenson had "exercised poor judgment" and had committed

an error of the type covered by FSM, § 6507.2 ("unintentional human errors, miscalculations, misjudgments, misinterpretations, etc."). There is no suggestion in this report of any "deliberate violation" by Mr. Stephenson. Consistent with his findings, the Supervisor recommended issuance of a letter of reprimand.

The Forest Service continued to review the matter and issued its final decision on August 29, 1984. The final decision quoted at length from the Santa Fe National Forest Supervisor's October 1982 report, but stopped short (literally in the middle of a sentence) of the conclusion in that report that Mr. Stephenson's error had been an unintentional one within the scope of FSM, § 6507.2. The final decision then went on to quote various regulations, including FSM, § 6507.32 but not 6507.2, and without further discussion, determined Mr. Stephenson to be liable in the amount of $1,475.15. The final decision contained no support for its conclusion, nor did it make any attempt to refute the contrary findings and recommendations of the Santa Fe Supervisor's report upon which it heavily relied.

When we wrote to the Forest Service in response to Mr. Stephenson's appeal, the Forest Service replied that:

> In view of all the procurement, fiscal, and engineering instructions and/or regulations that were violated, this evidence appears sufficient to support a conclusion of deliberate action. It is also relevant to note that Mr. Stephenson could have easily obtained technical advice from the Forest Service Supervisor's Office employees regarding the propriety of the construction project he was initiating. In view of the ultimate size and permanency of the project, it appears reasonable to expect that such technical advice should have been requested and followed. Since it apparently was not, this too indicates deliberate action.

We do not agree that the mere number of rules violated is evidence sufficient to find a "deliberate violation." In the absence of other evidence to corroborate such a conclusion, it seems more likely that those violations resulted from ignorance, judgmental error, improper training and supervision, or simple negligence. The same may be said of the other factors cited by the Forest Service. In view of the factual record and investigative reports compiled by the Forest Service in this matter, we think that the Forest Service's comments amount to after-the-fact justifications, and we do not accord them much weight.

The record compiled by the agency is certainly sufficient to permit the Forest Service to conclude (as it has) that Mr. Stephenson exercised "poor judgment" and should have sought additional guidance from his superiors. However, the record does not establish either a willfull intent to circumvent the applicable regulations, or a motive for Mr. Stephenson to do so. To the contrary, there is ample evidence that Mr. Stephenson was simply attempting to carry out his official duties, and remedy a problem (the existence of which is now acknowledged by his agency) in an expeditious, though procedurally improper, fashion. His actions do not appear to have been intentional, willful violations of the governing regula-

tions; but rather "unintentional human errors, miscalculations, misjudgments, [and] misinterpretations * * *," as is noted in the agency's record. The fact that regional officials felt it necessary to simultaneously issue a clarification of the regulation which Mr. Stephenson misinterpreted (as well as the admissions contained in that notice to the effect that other Forest Service employees had similarly misinterpreted it), before they had become aware of Mr. Stephenson's actions, lends credence to the conclusion that his actions were "unintentional" and resulted from an honest misinterpretation of the Forest Service regulations.

For these reasons, it seems more reasonable to conclude on the record presented that Mr. Stephenson's actions fall within the scope of FSM, § 6507.02, rather than FSM, § 6507.32—the former of which does not afford a basis for assessing pecuniary liability for losses suffered by the Government. FSM, § 6507.

CONCLUSION

In view of the foregoing, we find that the Forest Service has not properly applied its regulations in this case, and has not adequately established a legal basis for the debt it has asserted against Mr. Stephenson. The Forest Service should therefore terminate its efforts to collect its claim for $1,475.15 (plus interest and all other related charges) in connection with the Jemez Ranger Office Addition. *See* FSM, §§ 6507.35a, 6507.6 (FSM 4/81 AMEND 199); 4 C.F.R. § 104.3(d) (1985).

[B-218994]

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

On official airline travel the employee's return flight was overbooked, he voluntarily vacated his seat, and he took the next scheduled flight. Airline company issued a Miscellaneous Charge Order (MCO) to the employee to be used on a standby basis within 1 year. Claimant was later authorized official travel from Rockville to San Francisco, Cal. He used the MCO (determined by GAO to belong to employee) to purchase an airline ticket for a personal side trip from San Francisco to Ft. Lauderdale, Fla. His return trip to Baltimore was included in the segment paid by the MCO. Employee may not be reimbursed for the cost of the unused portion of the official airline ticket since the government has no obligation for the cost of the return travel as no travel expenses were incurred.

Matter of: Joel R. Zaientz—Reimbursement for Unused Portion of Airline Ticket Purchased by the Government, Jan. 2, 1986:

This decision is in response to a request by Mr. Walter W. Pleines, Director, Division of Finance, OFR, Social Security Administration (SSA), Department of Health and Human Services, for an advance decision. The issue is whether the reclaim travel voucher in the amount of $166, submitted by Mr. Joel R. Zaientz, an employee of the agency, representing the unused portion of an airline

ticket purchased by the government, may be certified for payment. For the reasons stated later, Mr. Zaientz is not entitled to reimbursement for the unused portion of the airline ticket, and therefore, the reclaim travel voucher may not be certified for payment.

Mr. Zaientz was authorized to perform official airline travel from Rockville, Maryland, to Jackson, Mississippi, and return, in August 1983. Upon arrival at the gate for his return flight, Mr. Zaientz voluntarily vacated his seat on the flight, which was overbooked, and took the next scheduled flight to Baltimore, Maryland. The airline company issued a Miscellaneous Charge Order (MCO) to Mr. Zaientz, valued at $350, to be used, on a standby basis, within 1 year.

In its settlement action dated June 19, 1984, our Claims Group determined that, based upon the decisions of this office, Mr. Zaientz should be allowed to keep the MCO, valued at $350, for voluntarily vacating his reserved seat on the overbooked airplane. See *William J. Gournay,* 60 Comp. Gen. 9 (1980); *Charles E. Armer,* 59 Comp. Gen. 203 (1980); *William R. Stover,* B-199417, October 10, 1980; *Edmundo Rede, Jr.,* B-196145, January 14, 1980.

On June 3, 1984, Mr. Zaientz performed official travel from Rockville to Denver, Colorado, and San Francisco, California. He had been instructed by SSA not to use the MCO until a decision as to its ownership had been rendered by this Office. However, on June 6, 1984, after completing his temporary duty assignment, Mr. Zaientz used the MCO to purchase a ticket from the airline company for a personal side trip from San Francisco to Ft. Lauderdale, Florida. His return trip from official travel to Baltimore on June 12, 1984, was included as a segment paid by the MCO.

In submitting his travel voucher, Mr. Zaientz attached the unused portion of his official ticket for the return segment of the San Francisco trip and noted thereon that, "Return trip to BWI at no cost to Government (used free complimentary ticket by Delta Airlines on earlier business trip)." On his reclaim travel voucher, Mr. Zaientz is reclaiming the sum of $166 representing the portion of his original government-issued airline ticket which was not used for his return travel from San Francisco to Baltimore.

Mr. Zaientz contends that the MCO was issued to him personally for use on a standby basis. He states that had he not taken the initiative of trying to save the government money by using the MCO prior to its expiration date, August 11, 1984, it would have been completely wasted since he had no official travel again until December 1984. He feels that equity and good conscience dictate that his reclaim for $166 for the San Francisco-Baltimore segment of his trip, paid for by the MCO, is completely justified.

The SSA contends that, although Mr. Zaientz did return to Baltimore on the ticket purchased with the MCO, he used the ticket primarily for his personal trip to Ft. Lauderdale. The agency also

states that it has no authority to reimburse a traveler when no out-of-pocket expenses are incurred.

The purpose of the issuance, the government, of the original airline ticket to Mr. Zaientz was to relieve him from the payment of the expenses of this official travel from Baltimore to San Francisco, and return, to perform official government business. While it is true that Mr. Zaientz used the MCO issued to him personally to pay, not only for his personal trip to Ft. Lauderdale, but also for his return trip to Baltimore, the fact remains that he did not personally incur or pay for any expenses of travel in returning to Baltimore. It follows that since no travel expenses were incurred by Mr. Zaientz for his return trip to Baltimore, the government has no obligation to reimburse him for the cost of the return travel. Compare *Bob McHenry*, B-184092, September 29, 1975, and *Gerald K. Colmer*, B-173758, October 8, 1971.

Accordingly, the reclaim travel voucher in the amount of $166, wherein Mr. Zaientz claims reimbursement for the unused portion of an airline ticket purchased by the government, may not be certified for payment.

[B-220032.2]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Request for Conference—Denied

Request for reconsideration based on the allegation that our Office's denial of a bid protest conference request resulted in an erroneous decision predicated on inadequate facts is denied where the request was submitted with the protester's comments on the agency report, making the scheduling of a conference within 5 days after the report's receipt, in accordance with General Accounting Office (GAO) Bid Protest Regulations, a practical impossibility, and where the protester had full opportunity to present its position in writing.

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

Request for reconsideration of the balance of the original protest is denied where the protester raises no new facts or legal arguments which were not considered during the pendency of the original protest and where the protester fails to show an error of law or fact with regard to those issues.

Matter of: H.L. Carpenter Company—Reconsideration, Jan. 2, 1986:

H.L. Carpenter Company (Carpenter) requests reconsideration of our decision in *H.L. Carpenter Co.*, B-220032, Nov. 21, 1985, 85-2 C.P.D. ¶ ___ Carpenter complains that we improperly denied its request for a bid protest conference which it submitted in its comments on the agency report, resulting in the exclusion of relevant facts from consideration in our initial decision. Further, Carpenter states that we failed to consider applicable facts and law on the

balance of issues in its protest, resulting in our dismissal of one of its issues and our denial of the remainder. We deny the request.

Carpenter's original protest contained many allegations that the estimated quantities, workload requirements and other provisions of a solicitation, issued by the Department of the Army for the operation of furniture repair facilities at Fort Bragg, North Carolina, were vague, ambiguous and/or misleading. Carpenter also complained that job descriptions in the solicitation bore little resemblance to the classification of employees in the Department of Labor Rate Wage Determination. After a review of the Army's report and Carpenter's comments, we concluded that the Army's assessment of its minimum needs was reasonable and that the Army's estimated workload requirements were based on the best information available at the time of the issuance of the solicitation. We also stated that our Office does not review wage rate determinations.

By letter of December 12, 1985, Carpenter complains that we violated our regulations by denying as untimely Carpenter's request for a bid protest conference, which the firm submitted with its comments on the Army's report. The effect of this denial, Carpenter states, was to exclude relevant facts, which resulted in an erroneous decision. Carpenter argues that because it submitted the request within what it considered 5 working days after receipt of the agency report, the request for a conference was timely.

We find no merit in Carpenter's position, which evidences confusion as to the difference between our time limit for scheduling a conference and the time for protesters to request a conference. As we advised Carpenter in our October 16 denial of its conference request, conferences are held within 5 working days of the date that agency reports are received. Bid Protest Regulations, 4 C.F.R. § 21.5(b) (1985). Though the exact time for requesting a conference is not stated expressly in our regulations, our regulations do state that conference requests "should be made at the earliest possible time in the protest proceeding." 4 C.F.R. § 21.5(a). This language, when read in conjunction with the other language in the subsection on conferences, indicates that, as a practical matter, conference requests must be filed prior to the submission of comments on the agency report. Requests filed with comments, like Carpenter's request, would make scheduling conferences within the regulation's timeframe impossible, delay the resolution of the protest, and run afoul of 4 C.F.R. § 21.5(c), which states that comments on the agency report will not be considered if a conference is held.

In any case, bid protests to our Office ultimately are decided on the basis of the written record. *See* 4 C.F.R. § 21.3. A conference only provides a forum for an oral interchange between parties, and this interchange does not become part of the record unless submitted in writing within 5 days of the conference. *See* 4 C.F.R. § 21.5(c), (e). Carpenter had a clear opportunity to submit any facts it had

regarding this solicitation in its protest and comments on the agency report. Thus, any omission of facts known at the time of the protest was due to Carpenter's failure to make full use of this opportunity, and not from the absence of a conference.

With regard to the balance of Carpenter's request, our regulations require that a request for reconsideration contain a detailed statement of the factual and legal grounds upon which reversal or modification is warranted and that it specify errors of law made or information not considered previously. 4 C.F.R. § 21.12(a). Information not considered previously refers to information that was overlooked by our Office or information to which the protester did not have access when the initial protest was pending. *Tritan Corp.—Reconsideration*, B-216994.2, Feb. 4, 1985, 85-1 C.P.D. ¶ 136.

Carpenter's request merely restates the grounds of its initial protest, which we addressed in our decision. For instance, Carpenter seeks to have us consider its same arguments with regard to workload requirements and the identification of service items and ordering offices. Our Office, however, will not reconsider a decision, based on the protester's reiteration of arguments already addressed. *See Tritan Corp.—Reconsideration*, B-216994.2, *supra; Ginter Welding Inc.—Reconsideration*, B-218894.2, July 16, 1985, 85-2 C.P.D. ¶ 54.

The request for reconsideration is denied.

[B-217227]

Bids—Mistakes—Correction—Denial—Acceptance of Contracts at Initial Bid Price

Where low bid for the supply of grocery bags is 18 to 23 percent less than the second low bid on various items for which the low bidder alleges its bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis of the bid as originally submitted since under the circumstances there is not adverse effect on the competitive bidding system.

Matter of: Duro Paper Bag Manufacturing Co., Jan. 3, 1986:

Duro Paper Bag Manufacturing Co. (Duro) protests the award to Trinity Paper and Plastics Corporation (Trinity) of certain items of a solicitation issued by the General Services Administration (GSA) Office of Federal Supply and Services, Region 5, under invitation for bids (IFB) 5FCG-34A-84-070. The procurement was for paper grocery bags, to be provided under a 6-month term contract. Duro contends that GSA's award of the contract items to Trinity was improper because after bid opening Trinity claimed that it made a mistake in its bid on the subject items and subsequently, when market conditions allegedly were more favorable, revoked its claim of error with the knowledge that it was the low bidder. We deny the protest.

Background

At the time of bid opening on June 5, 1984, it was determined that of the nine bids received, Trinity was the apparent low bidder on items 6, 9, and 11 (among others not pertinent to this case), and that Duro was the next low bidder on these items. The agency's comparison of the two lowest bids on the three items, however, revealed price differentials between Trinity's bid and Duro's bid of 14.20 percent of item 6 ($2.16 per unit [1]), 13.18 percent on item 9 ($1.95 per unit), and 22.54 percent on item 11 ($4.00). A further comparison by the agency of Trinity's prices on these three items with the then-current contract prices showed that Trinity's prices were lower by 15.37 percent, 17.2 percent, and 22.54 percent, respectively. In accordance with the agency's procedure whenever price differential exceed 10 percent, the contracting officer requested, by mailgram dated July 3, 1984, that Trinity verify its bid.

By letter dated July 9, 1984, Trinity responded to the contracting officer, stating:

> Reviewing your telegram request [for verification of the bid] . . . we are enclosing a copy of Stone Container Corporation price increase which was not taken into consideration with our costing department on the above offer.
>
> As paper going into the finished product of paper sack accounts for 75% of our total cost; this increase in paper which was not taken in consideration of our [May 24] quotation accounts for this tremendous difference we believe between our quotation and the next low bidder.
>
> Therefore, we would like to withdraw our bid quotation for item numbers 6, 9, . . . and 11.

Enclosed with Trinity's letter was a single sheet of paper bearing Stone Container Corporation's letterhead and containing a price list, dated March 23, 1984, entitled "New Prices Effective 5/1/84", and consisting of a list of prices, on a per ton basis, of various kinds of kraft paper.

On July 13, the contracting officer acknowledged Trinity's "allegation of a mistake" and advised Trinity that it must provide additional evidence of its claimed mistake since "the Federal Acquisition Regulation precludes any correction or withdrawal of a bid unless the alleged mistake is supported by clear and convincing evidence." This letter was followed by another letter to Trinity, dated July 18, in which the contracting officer requested that Trinity verify its prices on other items in the solicitation that required the same bag, but differing only in quantities and destinations. In explanation of this request, the contracting officer stated that if Trinity's prices on the subject items were in error due to its failure to consider a recent increase in the price of paper, it would appear that its other prices for the same item were also mistaken.[2]

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[1] For these items, one unit is a bale consisting of 400 bags. The solicitation listed estimated 6-month requirement quantities for the three items, respectively, as 73,906 bales, 16,786 bales, and 14,375 bales.

[2] These items had not been included in the contracting officer's initial request that Trinity verify its bid because they were within GSA's 10 percent price differential guideline.

On July 19, Trinity's Vice President for Sales replied to the contracting officer's July 13 letter, stating:

> Our cost sheets are done manually, and basically these are scratched out and handed to me, and therefore, [we] do not have any additional substantiation [as] you requested . . . other than what we [previously] supplied. . . .

Then by letter dated July 23, Trinity wrote to the contracting officer:

> "Reviewing your July 18, 1984 letter on [Solicitation 5FCG-34A-84-070], our quotation offer date of May 24, 1984 pricing will remain as originally quoted."

When contacted by GSA concerning this letter, Trinity stated that it wished to honor its bid prices on all items it had bid and reiterated that no bid preparation documentation was available. Counsel in GSA's regional office then contacted Trinity and asked that it submit evidence which would substantiate that its prices were mistaken as to those items for which it had asked that its bid be withdrawn. According to GSA, Trinity at first agreed to submit the old price list that it initially claimed to have used in error and to restructure its bid with and without the mistake it earlier claimed, but later indicated to the agency that it would not provide documentation to support its previous allegations of mistake in its bid.

Upon being advised that Trinity was awarded items 6, 9, and 11, Duro protested to GSA, contending that after initially claiming an error in its bid, Trinity was permitted to take advantage of the time extensions for award requested by GSA to observe the price decline in the paper market as a result of which Trinity decided to waive its claim of error. Duro requested that it be awarded the contract for the contested items or, alternatively, that those items be resolicited to correct the procedural improprieties which had occurred.

The agency denied Duro's protest, stating that Trinity did not submit clear and convincing evidence to prove its initial allegations of mistake in bid and that since there was no evidence of mistake, there was no basis to permit withdrawal of its bid. As a basis for its determination, GSA cited section 14.406-3(g)(5) of the Federal Acquisition Regulation (FAR), which provides:

> Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless (i) the amount of the bid is so far out of line with the amounts of other bids received, or with the amounts estimated by the agency or determined by the contracting officer to be reasonable, or (ii) there are other indications or error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders.

GSA maintains that Trinity's bid prices were not so low as to have been obviously in error and that since there were no other indications of error in Trinity's bid, the contracting officials were required by the regulation to consider Trinity's original bid as submitted.

Essentially, the protester argues two general points as the bases of its protest. First, it contends that the GSA afforded Trinity an

unfair advantage by improperly allowing Trinity to waive its post-bid opening claim of mistake after it had been apprised of the percentage difference between its bid and the next low bid and had the opportunity to review changed market conditions. Secondly, Duro contends that GSA misinterpreted and misapplied the FAR. More specifically, the protester contends that after Trinity claimed a mistake in bid and was then allowed to waive its claim of error, it was in a position to elect either to stand by or to withdraw its bid, depending upon which action was to its advantage, and that for GSA to consider Trinity's bid under these conditions was contrary to the principles of the competitive bidding system.

Duro maintains that the provisions of FAR, 48 C.F.R. § 14.406-3(g)(5), do not apply to the circumstances of this case where the bidder first claims a mistake in bid and then attempts to recant or waive its claim of mistake. The protester further contends that the regulation applies only in cases where a bidder fails or refuses to furnish any evidence in support of a suspected or alleged mistake. Duro expresses the view that since Trinity provided as evidence of its mistake a copy of the price list which, it said, represented a price increase not taken into consideration by its costing department, the FAR provision does not apply here. The protester also contends that even if the regulation is applicable in this case, it would preclude consideration of Trinity's original (erroneous) bid because the substantial difference between Trinity's bid, the next low bid, and the then current prices on the items in question clearly indicate that Trinity's bid prices were in error so that it was unfair to other bidders for GSA to consider the contested items of that bid.

Discussion

The mistake in bid rules, permitting relief for certain mistakes made in the calculation and submission of bids, are premised on the basis of two principles: that it would be unfair for the government to take advantage of what it knows or should know is an error by the bidder, and that the government should not automatically be deprived of an advantageous offer solely because the bidder made a mistake. *See* Shnitzer, Government Contract Bidding 449 (1976). Because mistake in bid situations arise in the period after bid opening, however, when bid prices have been exposed and market conditions may have changed, the rules also reflect a paramount concern with protecting the integrity of the competitive bidding system. *Panoramic Studios*, B-200664, Aug. 17, 1981, 81-2 C.P.D. ¶ 144. These rules, for example, require a bidder alleging mistake in its bid to meet a high standard of proof before correction of the bid will be allowed. FAR, 48 C.F.R. § 14.406-3(a). Similarly, where it is reasonably clear that a mistake has been made, the bid cannot be accepted, even if the bidder verifies the bid price,

denies the existence of a mistake, or seeks to waive an admitted mistake, unless it is clear that the bid both as submitted and intended would remain low. *Panoramic Studios, supra*, and cases cited therein. On the other hand, a bidder is not permitted to avoid the consequences of the firm bid rule (requiring a bid to be available for acceptance for a specified period) merely by alleging that there is an error in its bid; rather, there must be some evidence of the mistake. *Murphy Brothers, Inc.—Reconsideration*, 58 Comp. Gen. 185 (1978), 78-2 C.P.D. ¶ 440; B-164388, July 29, 1968.

Under the rules applicable to this procurement, the agency could permit withdrawal if the evidence "reasonably support[ed]" the existence of a mistake; if the evidence did not, the agency could decide not to permit withdrawal. FAP, 48 C.F.R. § 14.406-3(c), (d).

Here, the only documentation furnished by Trinity in support of its allegation of mistake was a one-page price list for kraft paper which it states it overlooked in arriving at its price for grocery bags. Not furnished was the price list it actually used or any worksheets which would show how the cost of kraft paper was factored into Trinity's bid price. Under these circumstances, as GSA points out, there is nothing to show which price list actually was used by Trinity in the preparation of its bid; nothing which explains the relationship of the price list to the calculation of the price submitted; and nothing which explains why the failure to use the price list would result in a mistake in some, but not all, of the items solicited. GSA states that "in the absence of any evidence showing the relation of [the price list furnished by Trinity] to the bid preparation process, there is, in effect, no proof of mistake at all."

We have long recognized that agencies must in the first instance evaluate the adequacy of evidence supporting the possibility of mistake, and that the determinations made by the agencies are not subject to objection unless there is no reasonable basis for the decision. See, *e.g.*, 53 Comp. Gen. 232 (1973). Here, the only evidence in support of the possibility of mistake consists of the price list submitted by Trinity and the bids of Trinity and Duro which reflect that Trinity's bids on the three items involved are 13, 14, and 23 percent below Duro's. We agree with GSA that the price list, by itself, does not reasonably establish that Trinity made a mistake, and we do not think that Trinity's bid prices, while below Duro's, are so out of line as to by themselves indicate that Trinity's bid prices are mistaken. *Compare* 37 Comp. Gen. 579 (1958), where the amount of the bid and other factors strongly indicated that the low bidder, who refused to provide documentary evidence of mistake, had made a mistake and likely would not be the low bidder if the mistake were corrected.

Since we agree with the agency that there is no credible evidence of a mistake here, we further agree that Trinity could not have withdrawn its bid under the FAR, 48 C.F.R. §§ 14.406-3(c) and 14.406-3(g)(5).

Duro argues, of course, that notwithstanding those FAR provisions the protection of the competitive bidding system requires the rejection of Trinity's bid because Trinity first alleged mistake and then, instead of supporting the allegation, stood by its original bid. As Duro points out, we have required the rejection of a bid where the bidder first claimed a mistake and then sought to take the contract at the bid price. See, *e.g.*, 52 Comp. Gen. 706 (1973). In those cases, however, it generally was clear, either from discrepancies between bids or from information provided by the bidder, that a mistake indeed had been made; those cases usually involved the bidder's seeking to remain in contention for award when bid correction was denied. Here, however, there is no meaningful evidence that a mistake has been made and in the absence of such evidence Trinity was bound by the submission of its bid and the agency could not properly reject the bid. That being so, Trinity in fact did not have the opportunity to get mistake in bid relief considered by the agency (since there was no evidence of mistake) and then to have the bid as submitted remain in contention when that relief was not provided. Since it is that opportunity that must be guarded against, we fail to see how acceptance of Trinity's bid under the circumstances here would be detrimental to the bidding system.

The protest is denied.

[220157]

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

Where protest is against alleged impropriety in solicitation and was filed prior to closing date for receipt of initial proposals, protest is timely and for consideration.

Contracts—Negotiation—Requests for Proposals—Specifications—Minimum Needs—Overstated

Contracting agency's burden of providing rational support for restriction that engine rebuilding services be provided by the manufacturer or its authorized affiliates has not been met where the agency has not shown that the capabilities to provide the services are limited to those sources. An agency must use advance planning and market research to prepare specifications that achieve full and open competition and include restrictions only to the extent necessary to meet its needs.

Contracts—Protests—Allegations—Unsubstantiated

Protest that restriction for rebuilding truck engines to engine's manufacturer and its authorized affiliates unduly restricts competition lacks merit where the protester was extended an opportunity to submit and explanation of its capabilities at the planning stages of the procurement, but declined to do so.

Contracts—Protests—Interested Party Requirement—Protester Not in Line for Award

Where the protester is ineligible for award under a solicitation for engine rebuilding services, General Accounting Office (GAO) need not consider protest of the solicitation's requirement that the contractor use a specific brand of parts.

Matter of: Engine & Generator Rebuilders, Jan. 13, 1986:

Engine & Generator Rebuilders (EGR) protests any award under the Army Tank-Automotive Command's request for proposals (RFP) No. DAAE07-85-R-J453 for the rebuilding/reconditioning of certain Cummins Engine Company (Cummins) diesel engines in 5 ton trucks that are essential to the Army's mobility. The RFP limits competition to Cummins, its authorized dealers, distributors and subsidiaries and required the use of Cummins' parts. EGR protests that these limitations unduly restrict competition and preclude EGR from consideration for the contract.

We deny the protest.

As a preliminary matter, the contracting agency believes that the EGR protest should be dismissed as untimely because our Bid Protest Regulations require protests to be filed within 10 working days after the basis is known or should have been known, whichever is earlier. The agency states that before the RFP was issued on August 1, 1985, the contracting officer discussed restricting the procurement to Cummins and its authorized affiliates with the protester, and also had a synopsis of the intended procurement, including the restrictions, published in the Commerce Business Daily (CBD). EGR did not file its protest with our Office until August 30.

The cited provision of our Bid Protest Regulations applies only in cases other than those covered by section 21.2(a)(1), which states that protests based upon alleged solicitation improprieties apparent prior to the closing date for the receipt of initial proposals must be filed prior to the closing date for the receipt of initial proposals. The EGR protest is based upon such as impropriety and was filed prior to the closing date, October 31, 1985. The protest therefore is timely.

When a protester challenges specifications as being unduly restrictive, the contracting agency must make a *prima facie* showing that the restriction is needed to meet its actual needs. If it does so, the burden shifts to the protester to show that the requirement is clearly unreasonable. *Superior Boiler Works, Inc.*, B-216472, Mar. 25, 1985, 85-1 CPD ¶ 342. We will not upset an agency's decision as to its needs and the best method of accommodating them absent a clear showing that the decision was arbitrary or unreasonable, since officials of the contracting agency are most familiar with the conditions under which supplies or services will be used. *ASC Pacific Inc.*, B-217188, May 3, 1985, 85-1 CPD ¶ 497.

The Army basically asserts that the restriction to Cummins and its authorized affiliates is necessary to assure quality and reliability since the Army lacks detailed rebuilding/reconditioning instructions as well as reliable testing and inspection procedures. The Army explains that while it is in the process of developing a Depot "Maintenance Work Directive" including detailed specifications, apparently based on Cummins' published manuals and its training

programs, more time is needed to complete the directive, as the sections regarding inspection criteria and quality standards need refinement. In their absence, the Army maintains, it must rely on Cummins' good reputation and specialized quality assurance procedures to assure that the rebuilt engines will be acceptable. Cummins and its authorized dealers have provided these services in the past.

The RFP provides for the acceptance of the rebuilt engines based on a certificate of conformance executed by the contractor in lieu of a government inspection. A certificate of conformance may be used in circumstances where because of the contractor's reputation or past performance, it is likely that the furnished items will be acceptable and any defective work would be replaced, corrected or repaired without contest. Federal Acquisition Regulation (FAR), 48 CFR § 46.504 (1984).

Regarding necessary repairs, the Army states that Cummins provides an extensive warranty and maintains a worldwide network of service facilities that honors the warranty. The Army considers the worldwide network an important consideration since many of the trucks are located in Europe.

The Army states, and the protester does not refute, that during the contracting officer's conversation with the protester, the contracting officer requested that EGR submit an explanation of the firm's capabilities for evaluation by the Army's technical personnel. The protester never did so. Without such a submission, the Army maintains, it has no way of ascertaining whether any firm besides Cummins and its affiliates can meet the agency's needs. Additionally, the Army notes that there are many Cummins' affiliates capable of competing under the RFP as issued. Restricting the contract to these sources therefore does not deprive the government of the benefits of competition.

We believe the Army's explanation fails to support its position that the restriction to Cummins and its affiliates is necessary to meet the agency's needs, and does not indicate why the Army could not satisfy its needs by requiring that any diesel engine rebuilding source demonstrate its capabilities to perform the services. In this regard, we see no reason why the RFP could not require offerors to demonstrate a previous record of satisfactorily meeting similar requirements and providing warranty protection, either as a matter of responsibility or under listed technical evaluation criteria as a matter of technical acceptability.

We note that EGR states, without disagreement from the Army, that the Cummins engine is rebuilt in the normal course of business by others than those permitted to submit proposals and with the same standards of workmanship. Regarding the Army's lack of rebuilding/reconditioning directive, EGR asserts that the latest published Cummins service and shop manuals, with which the RFP requires compliance, are available to any interested offeror. The

protester states that under circumstances similar to this procurement, the Department of the Navy referenced another engine manufacturer's manuals in the solicitation without restricting competition to the manufacturer. Additionally, the protester alleges that the Army has a technical manual for engines that contains two chapters on engine overhaul and the engine system. The protester also contends that it can match the scope of Cummins' warranty coverage, but does admit that it would be unable to service the engines in Europe. EGR states it could pay to have the work done there or transport the engines to the United States where it could do the work.

In preparing for the procurement of supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 10 U.S.C.A. § 2305(a)(1)(A) (West Supp. 1985). A solicitation may include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law. 10 U.S.C.A. § 2305(a)(1)(B)(ii). To develop specifications that achieve full and open competition, the agency should use advance procurement planning and market research. 10 U.S.C.A. § 2305(a)(1)(A)(ii).

The Army did not advise the extent to which it used advanced planning and market research in determining how to meet its needs. In the absence of any indication that the Army engaged in the planning and research activities required by law and that such activities warranted the restriction to Cummins and affiliates, we must conclude that the restriction is not justified. It is undisputed, however, that before the restriction was imposed, the protester was extended the opportunity to demonstrate its ability to provide the needed rebuilding services at the planning stages of the procurement, and declined to do so. Since the protester was in fact given an opportunity to show that it could meet the Army's needs but declined to do so, we deny the protest. (No other firm has protested the restriction to Cummins and its affiliates in response to the RFP or the CBD synopsis notifying the procurement community of the intended procurement.) In light of this record, however, we are recommending by separate letter that the Secretary of the Army take appropriate action to insure that full and open competition is achieved on future procurements.

Since EGR is ineligible for award under the current RFP, we need not consider its objection to the RFP's requirement that the contractor provide Cummins' parts.

Accordingly, the protest is denied.

[B-220521]

Contracts—Negotiation—Awards—Initial Proposal Basis—Propriety

Although an award properly may be made on the basis of initial proposals without discussions in certain circumstances, under the Competition in Contracting Act the award must result in the lowest overall cost to the government and, in fact, must have been made in the absence of any discussions. Thus, where the agency awards a contract to a higher-priced offeror and also holds price discussions, the award is not made on an initial proposal basis consistent with the statutory and regulatory requirements.

Contracts—Negotiation—Offers or Proposals—Discussion With All Offerors Requirement—"Meaningful" Discussions

Since, as a general rule, contracting agencies must hold discussions with all responsible offerors for a negotiated procurement whose proposals are within the competitive range, an agency acts improperly by not conducting technical discussions and by requesting best and final offers expressly limited to revisions in price proposals only where overall technical considerations were assigned much greater weight than price in the evaluation scheme and the deficiencies noted in the initial technical proposals were suitable for correction through discussion.

Matter of: Sperry Corporation, Jan. 13, 1986:

Sperry Corporation protests the award of a contract to AAI Corporation under request for proposals (RFP) No. F41608-85-R-4352, issued by the Department of the Air Force. The procurement is for the acquisition of standardized automatic test equipment for testing the radar, avionics, and electro-optical systems for the B-52 bomber. Sperry essentially complains that the award was improper due to the Air Force's failure to conduct technical discussions during the source selection process. We sustain the protest.

Background

The RFP contemplated the award of a firm-fixed-price contract with options and provided that the award would be made to the offeror obtaining the highest total weighted score as the result of the price and technical evaluations. The evaluation criteria to be utilized in the source selection process were listed in the RFP as follows, in descending order of importance: (1) technical approach; (2) price; (3) probability/manufacturing capability; (4) life cycle cost management; (5) logistics supportability; and (6) management. (Although not announced in the RFP, the Air Force assigned respective weights of 30, 20, 19, 16, 10, and 5 percent to these criteria.)

Nine proposals were submitted in response to the RFP, and Sperry's initial technical proposal received the fifth highest technical point score. AAI's proposal received the second highest technical point score. Sperry's initial proposed price was the lowest and was significantly lower then AAI's in comparison.

Subsequent to this initial evaluation, the Air Force determined that the funds available were insufficient to award the contract as originally contemplated. Accordingly, the Air Force decided to re-

designate certain items in the RFP as option items instead of "initial buy" items. An amendment was issued to this effect, and discussions were then held to give the offerors the opportunity to restructure their price proposals in order to effect these changes. Best and final offers were requested specifically limited to revisions in the price proposals; the Air Force advised all offerors that the technical proposals had been evaluated and rated as originally submitted, and that it did not plan to hold any technical discussions.

Upon reevaluation, Sperry's best and final price remained low, and was lower than AAI's by some 17 percent. Accordingly, Sperry received the maximum possible weighted score for price, but since price was only weighted 20 percent, this advantage did not offset the firm's relatively low combined weighted technical score (technical approach, logistics supportability, etc.). In terms of total weighted score, Sperry was fourth highest among the offerors. Although AAI's best and final price was higher than Sperry's, it was not the highest, and, therefore, the firm was able to obtain the highest total weighted score:

	AAI	Harris	Boeing	Sperry	Westinghouse
Combined Weighted Tech. Score	74.61	76.40	71.11	67.12	70.93
Weighted Price Score	16.60	12.60	16.40	20.00	8.40
Total Weighted Score	91.21	89.00	87.51	87.12	79.33

Accordingly, the Air Force awarded the contract to AAI pursuant to the RFP's established evaluation and source selection scheme which provided that the award would be made to the offeror with the highest weighted score.

Sperry protests the award on the principal ground that the agency's failure to conduct technical, as well as price, discussions was a clear violation of the Federal Acquisition Regulation (FAR), which provides, with limited exceptions, that the contracting agency shall conduct written or oral discussions with all responsible offerors for a negotiated procurement who submit proposals within the competitive range. FAR, 48 C.F.R. § 15.610(b) (1984). Sperry argues that since its proposal was determined to be technically acceptable by the Air Force's evaluators and, hence, within the competitive range,[1] the agency's failure to afford the firm the opportunity to

[1] Generally, offers that are technically unacceptable as submitted and would require major revisions to become acceptable are not for inclusion in the competitive range. *Ameriko Maintenance Co., Inc.*, B-216406, Mar. 1, 1985, 85-1 CPD ¶ 255.

submit a revised technical proposal was inherently prejudicial with regard to the firm's competitive standing among the offerors. We believe the protest has merit.

Analysis

At the outset. we note that the Air Force argues that the award is not subject to challenge because it was consistent with the RFP's established evaluation and source selection scheme. In this regard, it is well-settled that where, as here, an RFP contains a precise numerical formula including cost/price and states that award will be made to the highest point scored offeror, then the award must be made to the offeror obtaining the highest total score as the result of the cost/price and technical evaluations unless the source selection authority determines that the difference among technical scores does not, in actuality, represent any significant difference in technical merit. *Harrison Systems Ltd.*, 63 Comp. Gen. 379 (1984), 84-1 CPD ¶ 572. Since the record in this case establishes that the Air Force determined that the five top-scoring technical proposals were not in fact essentially equal, the Air Force's argument that the award was unobjectionable is valid to this limited extent.

However, the real issue involved in this matter is not whether the source selection decision was consistent with the scheme set forth in the RFP, but whether the Air Force acted properly in using only the initial technical scores in formulating the overall competitive ranking among the offerors.

The Air Force asserts that it was proper not to conduct technical discussions where its evaluators determined that the government could accept any of the five top-scoring initial technical proposals without the need for such discussions, since all of the proposals, although not essentially equal, were technically acceptable. As the underlying basis for this assertion, the Air Force relies upon the FAR, 48 C.F.R. § 52.215-16, as incorporated into the RFP, which provides at paragraph (c) that the government may award a contract on the basis of initial offers received, without discussions. We believe that the Air Force's reliance is misplaced.

FAR, 48 C.F.R. § 52.215-16(c), reflects the major exception to the general requirements that an agency must conduct written or oral discussions with all responsible offerors whose proposals are within the competitive range. In this regard, FAR § 15.610(a)(3) (Federal Acquisition Circular 84-5, Apr. 1, 1985) provides that discussions are not required when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience that acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government at a fair and reasonable price, provided that the solicitation

advised offerors of this possibility and that no discussions are in fact held.[2]

In the present matter, we believe that this exception allowing for award on the basis of initial proposals is inapplicable and in any event would have been improper since the award to AAI has not resulted in the lowest overall cost to the government. In fact, the award to AAI was not made on the basis of initial proposals without discussions since the agency held price discussions and requested best and final offers to allow for price revisions. See *Decision Sciences Corp.*, B-196100, May 23, 1980, 80-1 CPD ¶ 357. The exception allowing for award on an initial proposal basis is always conditioned by the complete absence of any written or oral discussions with any offeror. FAR § 15.610(a)(3)(ii) (FAC 84-5); see also *Technical Services Corp.*, 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152.

Accordingly, we believe the only matter for resolution is whether the Air Force properly limited its request for best and final offers to revisions in the price proposals only without also affording the offerors the opportunity to submit revised technical proposals as well. Generally, this Office considers that discussions have taken place if an offeror is given the opportunity to revise its initial proposal, either in terms of price or technical approach; *The Aerial Image Corp., Comcorps*, B-219174, Sept. 23, 1985, 85-2 CPD ¶ 319, and we have held in this regard that an agency's decision not to engage in technical discussions is unobjectionable where a proposal contains no technical uncertainties. *Weinschel Engineering Co., Inc.*, B-217202, May 21, 1985, 64 Comp. Gen. ——, 85-1 CPD ¶ 574; *Information Management, Inc.*, B-212358, Jan. 17, 1984, 84-1 CPD ¶ 76. Therefore, the Air Force's decision to request best and final offers on the basis of price revisions alone would not be subject to question if in fact the initial technical proposals contained no uncertainties or deficiencies. We believe this is not the case.

The essential purpose of discussions is to furnish offerors with information concerning deficiencies in their proposals and to give them an opportunity for revision. *Technical Services Corp.*, B-216408.2, June 5, 1985, 85-1 CPD ¶ 640. Although agencies are not obligated to conduct all-encompassing discussions, that is, to discuss all inferior or inadequate aspects of a proposal, agencies still gener-

[2] The regulatory provision that award on the basis of initial proposals result in the lowest overall cost to the government reflects an express statutory requirement of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175. *See* 10 U.S.C.A. § 2305(b)(4)(A)(ii) (West Supp. 1985), as added by section 2723(b) of the CICA, which specifically provides that an agency may award a contract without discussions "when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States." The previous statutory language did not require that the award result in the lowest overall cost to the government. See 10 U.S.C. § 2304(g) (1982); *Shapell Government Housing, Inc.*, 55 Comp. Gen. 839 (1976), 76-1 CPD ¶ 161; *Frank E. Basil, Inc.; Jet Services, Inc.*, B-208133, Jan. 25, 1983, 83-1 CPD ¶ 91.

ally must lead offerors into the areas of their proposals which require amplification. *Id.; Dynalectron Corp.—Pac Ord, Inc.*, B-217472, Mar. 18, 1985, 85-1 CPD ¶ 321. This is the essence of the long-standing requirement that meaningful discussions be held. See *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74-2 CPD ¶ 137. One purpose of meaningful discussions is to advise offerors within the competitive range of informational deficiencies in their proposals so that they can be given an opportunity to satisfy the government's requirements. FAR, 48 C.F.R. § 15.610(b).

In this regard, our examination of the source selection documents shows that both the AAI and Sperry initial technical proposals (the only proposals that have been furnished as part of the agency's administrative report), although determined to be technically acceptable, nonetheless contained certain informational deficiencies or omissions which should have been resolved through technical discussions, since the discussions would not have resulted in technical leveling or technical transfusion.

We note that AAI's proposal, which in fact was selected for the award, was evaluated as deficient in several areas for either not containing the requested information or failing to discuss fully all elements. Accordingly, AAI's proposal received few or no technical evaluation points in these areas out of the total number of points possible. The same holds true with regard to the evaluation of Sperry's proposal, which was perceived to have omissions or deficiencies in numerous areas. Most strikingly, Sperry received no points in two specific subcriteria areas out of a respective 10 and 20 possible points because the firm had not provided adequate information in its proposal and had failed to state its intent to comply with a requirement. Consequently, although it is impossible to ascertain what the competitive ranking of offerors would have been if the firms had been given the opportunity to submit revised technical, as well as price, proposals, we conclude that the omissions and deficiencies noted by the evaluators[3] were, in large part, suitable for correction, thus mandating that technical discussions be held. See *Decision Sciences Corp.*, B-196100, supra.

With regard to Sperry's initial technical proposal, we cannot find that the proposal was deficient to the extent that, even if discussions had been held to allow for the correction of individual deficiencies, the firm had no chance of being selected for the award. See Marvin Engineering Co., Inc., B-214889, July 3, 1984, 84-2 CPD ¶ 15. Although Sperry ranked fifth in terms of initial technical proposals, there was only a difference of 7.49 weighted technical points between its proposal and AAI's and its best and final price was substantially lower. Hence, considering the RFP's stated basis for

[3] We do not expressly identify the omissions and noted deficiencies in the proposals because of our following recommendation that discussions be reopened. Moreover, such identification would be inconsistent with our *in camera* review of the source selection documents as requested by the Air Force.

award, we believe that Sperry conceivably might have been able to obtain the highest total weighted score (given the 80 percent weight assigned to overall technical factors) if the firm had been afforded the opportunity to submit a revised technical proposal.

Although we sustain the protest, we note that the Air Force has advised this Office that a preaward survey to establish Sperry's responsibility as a prospective contractor has resulted in a recommendation that no award be made to the firm because of certain concerns regarding the adequacy of the firm's software quality assurance plan.

Nonetheless, by separate letter of today, we are recommending to the Secretary of the Air Force that negotiations be reopened with all competitive range offerors to allow for the submission of new best and final offers encompasing both technical and price revisions. If AAI is not in line for award as a result of these negotiations, we further recommend the present contract with AAI be terminated for the convenience of the government.

The protest is sustained.

[B-220005.2]

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

Subsequent protest to General Accounting Office (GAO) which was not filed within 10 working days of actual knowledge of initial adverse agency action is dismissed as untimely. Earlier receipt by GAO of information copy of letter which was addressed to the contracting officer and did not include a clear indication of a desire for a decision by GAO did not constitute a protest to GAO.

Matter of: Tri-Count Corrugated, Inc., Jan. 14, 1986:

Tri-County Corrugated, Inc. (Tri-County), protests any award to American Refuse Services, Inc. (American), or World Refuse Service, Inc. (World), under invitation for bids No. N62467-85-B-5903, issued by the Department of the Navy for solid waste collection and disposal services at the Naval Training Center Complex in Orlando, Florida. We dismiss the protest as untimely.

By letter addressed to the contracting officer and dated August 21, 1985, Tri-County protested that American and World had failed to arrive at their bid prices independently, thus violating the solicitation's certificate of independent price determination. In particular, Tri-County alleged that the president of American was the vice-president of World and pointed out that the bids submitted by the two firms were precisely $40,000 apart.

In letters addressed to our Office and dated August 22 and August 23, Tri-County enclosed the August 21 letter to the contracting officer and indicated that "we hereby officially file with your office this protest."

Subsequently, on August 30, we dismissed the protest to our Office, holding that:

[I]f Tri-County means to suggest that the two firms acted jointly in preparing their proposals, then we note that collusive bidding is a matter for the determination of the contracting officer who, if he perceives evidence of collusion, is expected to report the situation to the Attorney General. Federal Acquisition Regulation, §§ 3.103 and 3.303, 48 C.F.R. §§ 3.103 and 3.303 (1984). Further, whether a bidder in line for award may have engaged in collusive bidding is to be considered in the contracting officer's determination of responsibility. Our Office will not consider a challenge to an affirmative determination of responsibility where, as here, there has been no showing of possible fraud or bad faith. See *DelRocco & Sons, Inc.*, B-218314, Mar. 22, 1985, 85-1 C.P.D. ¶ 339.

Tri-County Corrugated, Inc., B-220005, Aug. 30, 1985, 85-2 C.P.D. ¶ 257.

On November 15, we received from Tri-County an information copy of a letter dated November 8 and addressed to the contracting officer. This letter informed the contracting officer that Tri-County had received a notice that the contracting officer had denied the protest to the agency and advised the contracting officer that Tri-County "intends to administratively appeal the denial of its bid protest." Since we did not consider this letter to constitute a protest to our Office, we took no action.

On November 27, we received a letter from Tri-County, addressed to our Office, which indicated that "a memorandum in support of the bid protest filed November 8, 1985, with your office" was enclosed. This letter included a copy of Tri-County's November 8 letter to the contracting officer and a memorandum concerning the "APPEAL FROM THE DECISION OF THE CONTRACTING OFFICER" which was "BEFORE THE COMPTROLLER GENERAL OF THE UNITED STATES."

Tri-County apparently believes that it filed a protest with our Office concerning the contracting officer's denial of its agency-level protest when it sent us a copy of the November 8 letter addressed to the contracting officer. We disagree. Since the November 8 letter was not addressed to our Office and did not include a clear indication that Tri-County desired a decision by our Office, that letter did not constitute a protest to this Office. 4 C.F.R. § 21.1(c) (1985); see also *Canberra Industries, Inc.*, B-213812, Mar. 15, 1984, 84-1 C.P.D. ¶ 310; *cf. Container Products Corporation*, B-218556, June 26, 1985, 64 Comp. Gen. 641, 85-1 C.P.D. ¶ 727. In addition, we note that Tri-County knew at least as early as November 8 of the Navy's denial of its agency-level protest. It was not until November 27 that we received from Tri-County correspondence indicating its belief that the matter was before us for decision. Even if we construe this correspondence as a "protest," since it was not filed with our Office within 10 working days after receipt of actual knowledge of the initial adverse agency action, it is untimely. 4 C.F.R. § 21.2(a)(3).

In any event, as indicated previously, on August 30, 1985, we dismissed the identical protest to our Office and no timely appeal was perfected pursuant to section 21.12 of our Bid Protest Regulations, 4 C.F.R. § 21.12.

The protest is dismissed.

[B-219619.2]

Bids—Mistakes—Correction—Intended Bid Price—Established in Bid

Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid. Contracting officer did not lack a reasonable basis for determining that—in view of the consistency between the correct mathematical total of the items, the intermediate subtotals of the items and the individual item prices—the bidder intended its bid price to be the correct mathematical total rather than the stated total of the items.

Bids—Mistakes—Verification—Propriety

Protest that it was improper for the contracting officer to receive bidder's advice concerning possible mistake in bid prior to determining the intended bid or for the contracting officer to advise protester of the apparent mistake prior to requesting verification from the bidder is denied. Since the contracting officer suspected a mistake in bid, he was required to request from the bidder a verification of the bid, calling attention to the suspected mistake. Even if he first informed the protester of the apparent mistake, it has not been shown how this prejudiced the protester.

Matter of: OTKM Construction Incorporated—Request for Reconsideration, Jan. 16, 1986:

OTKM Construction Incorporated (OTKM) requests reconsideration of our decision in *OTKM Construction Inc.*, B-219619, Sept. 5, 1985, 64 Comp. Gen. ____, 85-2 C.P.D. ¶ 273, wherein we denied its protest against the determination by the Forest Service, U.S. Department of Agriculture, to permit correction of the bid submitted by Marvin L. Cole, General Contractor, Inc. (Cole), in response to invitation for bids No. R6-85-27C for the construction of the Mount St. Helens Visitor Center in the Gifford Pinchot National Forest, Washington. We affirm our prior decision.

The solicitation schedule included 33 items divided among five groups. For some items bidders were to enter unit and extended prices based upon the estimated quantity involved; other items were bid upon a lump sum or "each" basis. At the foot of each of the five groups of items a blank was provided for the entry of a subtotal and at the bottom of the last page of the four-page schedule was another blank for "TOTAL ALL ITEMS—BUILDING, SITE, SEWERAGE AND ROAD."

Of the six bids received, OTKM submitted the apparent low bid of $2,924,409.90, while Cole submitted the apparent second low bid of $2,953,350.

Upon examining Cole's bid, the Forest Service noted that the unit prices were properly extended, except for the rounding off of some item prices and a $1 error in one extension. The subtotals of all five groups also were the correct mathematical totals of the item prices. The only discrepancy was between the amount Cole entered for "TOTAL ALL ITEMS"—$2,953,350—and the correct mathematical total of the subtotals for the five groups—

$2,890,987—a difference of $62,363. In view of the consistency of the rest of the bid, contracting officials determined that Cole had made an apparent clerical error in calculating the stated total bid price for all items. Accordingly, they determined that Cole's bid was subject to correction to reflect an intended bid price of $2,890,985.16, which is the correct mathematical total of all the items when the extended prices are not rounded off. When contacted to verify its bid price, Cole confirmed that the mistake occurred in adding the item prices rather than in calculating the item prices themselves.

OTKM, however, then protested to the Forest Service against permitting correction of Cole's bid and making award to Cole. When the agency denied that protest, OTKM filed a protest with our Office.

As we indicated in our prior decision, where the bid contains a price discrepancy, and the bid would be low on the basis of one price but not the other, correction is not allowed unless the asserted correct bid is the only reasonable interpretation ascertainable from the bid itself or on the basis of logic and experience. The bid cannot be corrected if the discrepancy cannot be resolved without resort to evidence that is extraneous to the bid and has been under the control of the bidder. See *Frontier Contracting Co., Inc.*, B-214260.2, July 11, 1984, 84-2 C.P.D. ¶ 40; *Harvey A. Nichols Co.*, B-214449, June 5, 1984, 84-1 C.P.D. ¶ 597.

We noted that not only were the unit prices in Cole's bid generally properly extended, but, most significantly, the subtotal for each group of items was the correct mathematical total of the item prices in that group. Given this internal consistency in Cole's bid, we were unwilling to question the Forest Service's determination that the only reasonable interpretation of the discrepancy was that Cole had intended its bid price to be the correct mathematical total of the item prices rather than the stated total entered at the bottom of the last page of the schedule. Moreover, we also found that the nature of all but $5 of the discrepancy—a sum which we considered to be *de minimis*—could be determined without benefit of advice from the bidder.

In its request for reconsideration, OTKM argues that our prior decision is inconsistent with the decisions of the court in *McCarty Corp*, v. *United States*, 499 F.2d 633 (Ct. Cl. 1974) and in *Armstrong & Armstrong, Inc.* v. *United States*, 356 F. Supp. 515 (E.D. Wash. 1973), *aff'd* 514 F.2d 402 (9th Cir. 1975). We disagree, since we consider the facts in these cases to be distinguishable from the circumstances here.

In both *McCarty* and *Armstrong* there existed a discrepancy between the stated total of the item prices and the correct, mathematical total of the items. In neither case, however, was there any internal consistency or other indication in the bid suggesting that either the stated total or the correct mathematical total of the item

prices was more likely to be the intended bid price. There was no indication in *McCarty* that the item prices were other than lump sum prices, while in *Armstrong* the schedule included lump sum items as well as items whose price was based upon stated unit and extended prices, *Armstrong*, 356 F. Supp. 514, 516. Since, therefore, it was unclear whether the mistake was in one or more of the individual item prices or in the stated total of the item prices, the intended bid price could not be ascertained from the face of the bid and the court held that the agency had acted improperly in permitting correction so as to displace the otherwise low bidder. *Mc Carty*, 499 F. Supp. 633, 638; *Armstrong*, 514 F.2d 402, 403.

By contrast, here the items were divided into five groups and the subtotal for each group of items in Cole's bid was the correct, mathematical total of the item prices in that group. Given this consistency between the individual item prices and the subtotals for each group, we do not believe that the Forest Service lacked a reasonable basis for concluding that the only reasonable interpretation of the discrepancy was that the mistake was in the stated total of the item prices and that Cole had intended its bid price to be the correct mathematical total of the item prices.

OTKM also argues that in our prior decision we ignored several irregularities in Cole's verification of its intended bid prices. OTKM first claims that the contracting officer had received the advice of Cole prior to making a determination as to the bid intended and then claims that the contracting officer advised OTKM of the apparent mistake in Cole's bid and of the bid price apparently intended prior to requesting verification from Cole. In addition, OTKM points out that Cole, in its July 23, 1985 written verification of its intended bid, listed its intended bid price as totaling $2,890,897, rather than $2,890,985.16, the correct, mathematical total of all items when the extended prices are not rounded off.

The fact that the contracting officer may have contacted Cole to request verification of its intended bid price does not establish that Cole's input was necessary for determining the intended bid. See *Harvey A. Nichols Co.*, B-214449, June 5, 1984, 84-1 C.P.D. ¶ 597 at 4. Rather, the Federal Acquisition Regulation (FAR), 48 C.F.R. pts. 1-53 (1984), requires that

> where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall require from the bidder a verification of the bid, calling attention to the suspected mistake. [Italic supplied.]

48 C.F.R. § 14.406-1; see 48 C.F.R. § 14.406-3(g)(1)(iv). We note that the failure of a contracting officer to draw the bidder's attention to the mistake suspected and the basis for the suspicion may result in an inadequate verification request and, therefore, in an award which does not result in a binding contract. *See Ziegler Steel Service Corp.*, B-195719, Jan. 14, 1980, 80-1 C.P.D. ¶ 40; *Y.T. Huang and Associates Inc.*, B-192169, Dec. 22, 1978, 78-2 C.P.D. ¶ 430.

If, on the other hand, the contracting officer first informed, OTKM of the mistake which was apparent on the face of Cole's bid prior to requesting verification from Cole, then we fail to see how this action, however unusual, prejudiced OTKM.

We also do not see how the minor mistake in Cole's written verification of its intended bid price prevents correction here. Since Cole apparently had previously verified that it had intended a bid price of $2,890,987, the total of all the items after Cole had rounded off the extended prices, and since the mistaken figure of $2,890,897 was entered as the total of a column of figures—representing the sums of the item prices on each page of the schedule—which in fact totaled $2,890,987, we consider Cole merely to have made an insignificant transposition error in entering its intended bid price in the written verification.

OTKM's remaining arguments in its request for reconsideration are mere restatements of its previous contentions that under our caselaw Cole should not have been permitted to correct its bid and that Cole's bid should have been rejected as nonresponsive. We remain unconvinced by these arguments.

OTKM has failed to demonstrate any error of law or fact warranting reversal or modification of our prior decision. See *Ross Bicycles, Inc.—Request for Reconsideration*, B-219485.2, July 31, 1985, 85-2 C.P.D. ¶ 110. Accordingly, our prior decision is affirmed.

[B-220049]

Contracts—Protests—Procedures—Contracting Agency Requirements

Procuring agency's delay in providing portions of the procurement record relevant to a protest issue is inconsistent with its obligation under the Competition in Contracting Act of 1984 to submit a complete report to the General Accounting Office, including all relevant documents. The General Accounting Office will not consider the untimely submission since to do so would delay resolution of the protest.

Contracts—Negotiation—Offers or Proposals—Discussion With All Offerors Requirement—"Meaningful" Discussions

Procuring agency's failure to alert offerors during discussions to the fact that their estimated levels of effort and offered prices are considered unreasonably high does not meet its obligation to conduct meaningful discussions with all offerors within the competitive range. Such discussions with only one of the offerors would also be improper.

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

The General Accounting Office will not review an allegation that an offeror is not responsible because proposed key personnel may be committed to work on another contract, since this allegation does not fall within the exception under which affirmative determinations of responsibility are reviewed.

Contracts—Negotiation—Offers or Proposals—Prices—Unprofitable

Acceptance of a below-cost offer for a fixed-price contract is not itself grounds for protest, and the procuring agency, not the General Accounting Office, is responsible for ensuring that losses from a below-cost offer are not recovered during contract performance.

General Accounting Office—Recommendations—Contracts—Procurement Deficiencies—Correction

The Competition in Contracting Act requires the General Accounting Office to disregard the costs of contract termination and recompetition in making recommendations where it determines that an award was not in accord with applicable statutes and regulations after the procuring agency determines that continued performance is in the government's best interest although the protest was filed within 10 days of award.

Matter of: Price Waterhouse, Jan. 16, 1986:

Price Waterhouse protests the award of a contract to Arthur Young & Company under solicitation No. A-85-9, issued by the Department of the Treasury. Price Waterhouse contends that because of the substantial difference in proposed prices, either the two firms did not compete on an equal basis or Arthur Young submitted a below-cost proposal. The firm also alleges that Treasury misled it during discussions and provided Arthur Young with access to information that was not disclosed to Price Waterhouse.

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

Background

In September 1984, Treasury contracted with Price Waterhouse to establish detailed specifications and a logical design for a department-wide payroll system. The system was to be based on an Army payroll system that Price Waterhouse had recently designed, with additions and deletions necessary to meet requirements of the Treasury. The Treasury solicitation in question here, issued on April 10, 1985, sought offers to design, develop, and implement the new payroll system based upon the work previously performed by Price Waterhouse.

The solicitation provides that in evaluating proposals for the new system, cost will be given a weight of 50 percent, with a maximum score of 100 out of 200 possible points. The solicitation contemplates a fixed-price incentive contract and states that each offeror's proposed target cost and ceiling price are to be given equal weight in scoring the cost factor.[1] The other evaluation factors and their respective weights and possible points are as follows: plan of accomplishment (19 percent or 38 points), corporate experience and

[1] A fixed-price incentive contract provides for a variable profit for the contractor if its costs fall above or below its target cost, based upon a sharing formula. This potential increase or decrease in profit is intended to provide an incentive for effective contract management. The final price is limited by an agreed price ceiling. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.403 (1984).

capacity (12 percent or 24 points), qualifications of professional staff (12 percent or 24 points), and qualifications of project manager (7 percent or 14 points).

Treasury received four proposals but found only those of Arthur Young and Price Waterhouse to be technically acceptable. Both firms' estimated levels of effort—how many staff members and hours would be required to perform the work—were greatly in excess of the government's estimates. (Treasury further states that its estimates were based upon the effort that will be necessary for a contractor less familiar with the payroll system than either of these two offerors.) Arthur Young offered a ceiling price of approximately $6.3 million, and Price Waterhouse offered a ceiling price of approximately $7.4 million.

Treasury conducted a "fact finding" session with each offeror to discuss assumptions in their proposals and, on August 9, requested them to submit best and final offers by August 20. In the interim, Treasury reopened a reading room that it had previously established for potential offerors. The reading room had been opened initially because of the volume of applicable standards and procedures, including the specifications for the Army payroll system and summaries of additions and deletions to that system prepared by Price Waterhouse. Price Waterhouse's contract to establish detailed specifications for the Treasury system had not been completed when offers were first submitted. Consequently, to the material previously available in the reading room the agency added detailed analyses of the required modifications to the Army payroll system that had been submitted by Price Waterhouse through August 13. (Previously, only one-page summaries of the modifications had been available, and the number of modifications had been reduced from 157 to 111 after the reading room had been closed with submission of initial offers.)

Only Arthur Young was notified of the reopening of the reading room; Treasury states that since Price Waterhouse had prepared all of the additional information, the agency did not consider it necessary to invite that firm.

In its best and final offer, Arthur Young decreased its target cost and ceiling price by more than 45 percent each, while the protester increased its price slightly. Arthur Young's final technical score was slightly lower than that of Price Waterhouse; its cost score was substantially higher (100 points versus less than 50 points). This difference in cost scores resulted primarily from a difference in the offerors' estimated levels of effort. At the contracting officer's request, the evaluators reviewed the sufficiency of Arthur Young's revised estimated level of effort for each task. They concluded that the firm's revised estimates were achievable and that Price Waterhouse had "grossly overestimated" the necessary levels of effort and, consequently, had greatly overpriced the work. Treasury an-

nounced its intention to award a contract to Arthur Young on September 3; this protest followed.

Price Waterhouse's Protest

Price Waterhouse contends that the more than 100 percent difference between the two offerors' prices, as well as other factors, establish either that Arthur Young and Price Waterhouse did not compete on a common basis or that Arthur Young bid well below cost. If the latter is true, the protester argues that the opportunities for change orders and follow-on contracts at artificially high prices are so great that acceptance of the offer would undermine the integrity of the procurement system.

The protester learned from the administrative report that it was considered to have "grossly overestimated" much of the level of effort required, and that Treasury recognized this early in the procurement, before the fact finding sessions. Price Waterhouse also learned from the report that Treasury had reopened an augmented reading room but had informed only Arthur Young. As a result, during a conference at our Office on October 21, Price Waterhouse presented two additional bases of protest: (1) that Treasury's failure to indicate during discussions that the firm had overestimated the level of effort required and its "instructions" to increase the firm's efforts in some areas clearly prejudiced Price Waterhouse; and (2) that while the reading room materials had been prepared by Price Waterhouse, the firm was prejudiced by not knowing which documents Treasury deemed material.

GAO Analysis

A threshold issue involves Treasury's request that we not consider Price Waterhouse's protest concerning the scope of discussions because the agency has not had a full opportunity to respond. As noted above, the matter was expressly raised by Price Waterhouse at the conference, when our Office asked agency officials in attendance to provide those portions of the procurement record concerning the subjects discussed with both offerors. The agency thus had an opportunity to address the issue in its postconference comments. On November 13, following an oral request, the agency was given another opportunity to supplement the record specifically with respect to the protester's written contentions about Treasury's discussions with the offerors and the agency's obligations in that regard. Treasury declined to do so on grounds that it would be inappropriate to provide any information without a finding by us that the issues had been raised in a timely manner by the protester and a written explanation from our Office of the issues being considered.

On January 15, 87 working days after Price Waterhouse filed its protest, the agency provided an affidavit regarding subjects discussed with the offerors and a letter dated August 2 from Arthur Young to Treasury answering questions asked during the firm's

fact finding session. Treasury does not indicate whether there are other documents in its possession relevant to the subject matter of discussions. As required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §3555(a) (West Supp. 1985), our Bid Protest Regulations provide that a protest decision may not be delayed by the failure of a party to meet filing time limits. 4 C.F.R. §21.3(g) (1985). Failure to comply with prescribed time limits may result in resolution of a protest without consideration of the untimely submission. *Id.* In this case, consideration of Treasury's new evidence, including any response by Price Waterhouse, would clearly delay resolution of the protest. Consequently, we have not considered the January 15 filing.

Moreover, we believe that Treasury's delay in providing documents in its possession concerning discussions conducted in this procurement is inconsistent with its obligation to submit a "complete report (including all relevant documents)" under CICA, 31 U.S.C.A. §3553(b)(2). Our Bid Protest Regulations provide that we will dismiss protests that are untimely on their face without requiring an agency report. 4 C.F.R. §21.3(f) (1985). On November 13, our Office advised Treasury that the issues raised at the conference by Price Waterhouse did not appear untimely on their face, and, thus, were not suitable for dismissal at that time. Since the issues were raised less than 10 days after the protester received the agency report filed in our Office on October 15, we find that they are timely. *See* 4 C.F.R. §21.2(a)(2). In any event, even if the new issues had been untimely, we believe that the discussion record was relevant to the original protest issue—that the two offerors did not compete on an equal basis—and should have been provided in the initial agency report. In our view, Treasury had a reasonable opportunity to consider and respond in a timely manner to Price Waterhouse's claim that discussions were inadequate, and we will consider the protest issue.

The governing CICA provision, 41 U.S.C.A. §253b(d)(2) (West Supp. 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, and in order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result either in disclosure of one offeror's approach to another or in technical leveling. *The Advantech Corp.*, B-207793, Jan. 3, 1983, 83-1 CPD ¶3; *Ford Aerospace & Communications Corp.*, B-200672, Dec. 19, 1980, 80-2 CPD ¶439. Once discussions are opened with an offeror—and a request for best and final offers constitutes discussions, *Decision Sciences Corp.*, B-196100, May 23, 1980, 80-1 CPD ¶357—the agency must point out all deficiences in that offeror's proposal and not merely selected ones. *Checchi and Co.*, 56 Comp. Gen. 473 (1977), 77-1 CPD ¶232.

During discussions, agencies are prohibited from advising an offeror of its price standing relative to other offerors, Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(3) (1984), and are not required to point out that a proposed price is too high if the price is still below the government estimate. *University Research Corp.*, B-196266, Jan. 28, 1981, 81-1 CPD ¶ 50. On the other hand, discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable. See *Washington School of Psychiatry/The Metropolitan Educational Council for Staff Development*, B-192756, Mar. 14, 1979, 79-1 CPD ¶ 178.

Here, the only two technically acceptable offerors, both of whom Treasury believes have a clear, complete understanding of the work, proposed levels of effort substantially in excess of the agency's estimates. For some tasks the two firms projected levels of effort relatively close to those of Treasury, while for others and in total their estimates greatly exceeded those of the government. Moreover, Treasury believes that its estimates are accurate, and bases its conclusion that Price Waterhouse "grossly overestimated" and "grossly overbid" key portions of the work on those estimates.

The record for our consideration is incomplete, and therefore we cannot determine whether Treasury gave the protester any indication of this significant deficiency, which was apparently recognized early in the procurement.[2] The only other offeror also initially proposed levels of effort greatly in excess of the government estimates. In view of the substantial reduction in total estimated level of effort in Arthur Young's best and final offer, we cannot dismiss the possibility that Treasury did discuss this matter with Arthur Young.

In the context of the record before us, we conclude that the agency either did not discuss estimated levels of effort with the offerors or that it discussed the issue only with Arthur Young. We believe that neither approach would be proper. Failure to apprise the only two offerors in the competitive range that they proposed unreasonably high levels of effort would violate the requirement for meaningful discussions and, in this procurement for a fixed-price contract, would pose a risk that the government would procure for an unreasonably high price. Discussing the issue only with Arthur Young would not cure Treasury's failure to conduct mean-

[2] Copies of Treasury's request for Price Waterhouse's best and final offer, with attached summaries of the four items discussed during the fact finding session with the firm have been provided by the protester. From these it appears that the items discussed generally involve areas in which Treasury believed that Price Waterhouse had underestimated the scope of the project. The protester also submitted affidavits by those attending the Price Waterhouse/Treasury fact finding session on the protester's behalf, stating that Treasury never stated or implied that Price Waterhouse had overestimated necessary levels of effort or submitted a price proposal that the agency considered too high. As noted above, the agency declined to provide documents or other accounts of the nature of the fact finding sessions or other discussions with offerors until January 15. We have not considered Treasury's untimely submission in this decision.

ingful discussions with all offerors in the competitive range, but would raise an additional question, *i.e.*, whether the offerors were treated fairly and equally. Accordingly, we sustain Price Waterhouse's protest on this basis.

Price Waterhouse's other contentions regarding the propriety of Treasury's actions are largely not for our consideration. The firm argues that in finding Arthur Young to be responsible, Treasury may not have considered the fact that Arthur Young's personnel may have been proposed to work on another government contract. Our Office does not review protests against affirmative determinations of responsibility absent specific circumstances, and this allegation does not fall within the exceptions to the rule. *See* 4 C.F.R. 21.3(f)(5).

Price Waterhouse also claims that a below-cost offer should not be accepted by Treasury. A fixed-price incentive contract is subject only to limited adjustment based upon the contractor's cost experience during performance, and it places no obligation on the agency to pay more than the agreed ceiling price. See *ABA Electromechanical Systems, Inc.*, B-188735, Nov. 28, 1977, 77-2 CPD ¶411. There are a number of legitimate reasons why a firm might submit a below-cost offer, 50 Comp. Gen. 788 (1971), and such an offer does not in itself, provide grounds for rejection.

The protester argues that the incentive and opportunity for change orders and follow-on contracts at artificially high prices are so great in this procurement that acceptance of a below-cost offer would undermine the integrity of the procurement system. Contracting officers are required to take appropriate action to ensure that buying-in losses are not recovered through change order or follow-up contract pricing. FAR, 48 C.F.R. §3.501-2(b). The nature and extent of such actions are largely matters of contract administration, and not within the scope of our bid protest function. See *Columbia Loose-Leaf Corp.*, B-184645, Sept. 12, 1975, 75-2 CPD ¶147.

Finally, Price Waterhouse has not suggested specifically how it was prejudiced by not knowing what documents were placed in the reading room for Arthur Young's review before submission of best and final offers. Treasury has provided the protester with a list of those documents, and we expect that access to any additional documents will be provided to both firms.

On September 20, Treasury found that it was in the best interest of the government to proceed with Arthur Young's performance of the contract based on its projections of savings that will result from the new payroll system. Under CICA, 31 U.S.C.A. 3554(b)(2), when such a finding has been made and our Office determines that an award was not in accord with applicable statutes or regulations, we are required to make recommendations without regard to any cost or disruption from terminating, recompeting, or reawarding

the contract, although in this case performance has been underway for a relatively short period.

We therefore are recommending that the Treasury reinstate the request for proposals, conduct additional discussions with both offerors, and, if appropriate, terminate the current contract for the convenience of the government and reaward to Price Waterhouse.

We sustain the protest on grounds of failure to conduct meaningful negotiations and dismiss the remainder of the protester's contentions.

[B-221245.2]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Additional Evidence Submitted—Available but Not Previously Provided to GAO

Dismissal of a protest for failure to include a detailed statement of the protest grounds is affirmed where the protester furnished its details for the first time in its reconsideration request filed 1 month after the original deficient protest was filed.

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

A reconsideration request, filed 1 month after the original protest, is untimely if viewed as an entirely new protest where its sets forth the same grounds on which the original protest was based, since it was not filed in General Accounting Office (GAO) within 10 working days after the protest grounds were known.

Matter of: International Diamond Products Corp.—Reconsideration, Jan. 17, 1986:

International Diamond Products Corp. (IDP) requests reconsideration of our dismissal of its protest under Defense Logistics Agency (DLA) request for proposals (RFP) No. DLA400-85-R-9957. We affirm the dismissal.

IDP protested to our Office by mailgram received December 6, stating that an award to any other offeror would be improper and in bad faith "because it would be based on restrictive bidding and sole source procurement." The mailgram also stated that a detailed explanation of the protest bases would follow. No details were received by our Office, and we considered IDP's mailgram insufficient to satisfy the requirement of our Bid Protest Regulations that a protest include a detailed statement of the legal and factual grounds of protest. 4 C.F.R. § 21.1(c)(4) (1985). We therefore dismissed IDP's protest.

In its January 6 letter (received January 8) requesting reconsideration, IDP for the first time provides details of its December 6 protest and asks that we reconsider the protest since it concerns the "serious issue of free and open competition being stifled" in favor of a sole-source procurement.

IDP does not explain why it did not furnish details with its protest, and we see no reason why the details would not have been available at that time. Where a protester, when filing a complaint, has information necessary to explain the basis for its protest, we will not excuse the failure to furnish this information. We therefore will not reconsider our dismissal. See *Electro-Methods, Inc.—Reconsideration*, B-218180.2, Apr. 17, 1985, 85-1 C.P.D. ¶ 438.

To the extent IDP's reconsideration request could be viewed as a new protest, it is untimely. Under our Regulations, a protest must be filed no later than 10 working days after the basis of protest first was, or should have been, known. 4 C.F.R. § 21.2(a)(2). Even if we assume IDP's grounds for protest did not arise until December 6, the date we received the firm's mailgram, the reconsideration request was not submitted within 10 working days thereafter and, thus, could not be considered a timely protest.

Our Office will consider an untimely protest where it involves a matter of widespread interest or importance to the procurement community that previously has not been considered. *Griffin Galbraith*, B-218933, Sept. 19, 1985, 64 Comp. Gen. —, 85-2 C.P.D. ¶ 307. IDP's protest is based on DLA's alleged failure to enable IDP to gain government approval of its product, leading to a possible improper sole-source procurement. Although the resolution of this issue obviously would be of interest to IDP, we do not believe the procurement community as a while has a similar interest in the matter. In any event, we have decided protests concerning the government's failure to approve offered products, see e.g. *S.H.E. Corp.*, B-205417.2, Sept. 30, 1982, 82-2 C.P.D. ¶ 298, and alleged improper sole-source procurements. See e.g. *Bartlett Technologies Corp.* B-218786, Aug. 20, 1985, 85-2 C.P.D. ¶ 198.

Our decision is affirmed.

[B-219856]

Travel Expenses—Overseas Employees—Renewal Agreement Travel—Requirements

Federal employees who agree to perform consecutive overseas tours of duty are eligible for tour renewal travel for themselves and their dependents to the U.S. for a period of leave. An employee's dependents may properly perform tour renewal travel by accompanying the employee on a temporary duty assignment in the U.S. and the employee in that situtation may defer his own tour renewal travel for use during leave taken at a later date. Hence, the wife and son of a Defense Department employee stationed overseas were properly authorized tour renewal travel to accompany the employee when he performed a temporary duty assignment at Fort Meade, Md., notwithstanding that as a general rule Federal employees have no entitlement to the concurrent travel of their dependents on temporary duty assignments.

Travel Expenses—Overseas Employees—Renewal Agreement Travel—Requirements

Federal employees stationed overseas who are eligible for tour renewal travel to the U.S. for themselves and their dependents may elect to defer their own tour renewal

travel to some time subsequent to the time of their dependents' travel. An employee who defers personal tour renewal travel and is later unable to perform that travel has no obligation to refund the expenses of the tour renewal travel performed earlier by the dependents. A Defense Department employee who was apparently precluded by official action from exercising his own eligibility for deferred tour renewal travel is thus not liable to refund the expenses of the tour renewal travel performed earlier by his wife and son.

Matter of: Charles E. Potts, Jan. 21, 1986:

The question presented in this matter is whether a Federal employee stationed overseas was properly allowed the travel of his dependents at public expense when they accompanied him on a temporary duty assignment to the United States.[1] In the particular circumstances we conclude that the dependents' travel was properly authorized as overseas tour renewal travel, notwithstanding that as a general rule Federal employees have no entitlement to the concurrent travel of their dependents at public expense during temporary duty assignments.

Background

In 1983 Mr. Charles E. Potts, a civilian employee of the Department of Defense, received a written travel authorization for a permanent change-of-station transfer from Pearl Harbor, Hawaii, to Melbourne, Australia, with a 30-day temporary duty assignment en route at Fort Meade, Maryland. The documents authorized the transportation of his wife and son as his dependents, and indicated that the authorization was for the purpose of "Travel Between Official Stations" and also "Renewal Agreement Travel."

In conformity with this travel authorization, Mr. Potts traveled with his family by commercial airline from Honolulu, Hawaii, to Baltimore, Maryland, on July 15, 1983. They remained in the Baltimore area while Mr. Potts performed his 30-day temporary duty assignment at Fort Meade, and they then traveled on by commercial airline from Baltimore to Melbourne, Australia, on August 15, 1983. Mr. Potts obtained the airline tickets for this travel through the use of a Government Transportation Request issued in Hawaii on the basis of his travel authorization.

Finance and Accounting officials of the Department of Defense now question whether Mr. Potts' travel authorization was consistent with the governing provisions of statute and regulation with respect to the travel performed by his dependents. The officials note that as a general rule employees are not entitled to have their dependents accompany them at public expense on temporary duty assignments.[2] The officials indicate, however, that Mr. Potts was also

[1] This action is in response to a request for a decision received from Mr. Kenneth F. Chute, a Finance and Accounting Officer of the Department of Defense.

[2] See paragraph C7000, Volume 2 of the Joint Travel Regulations; and *Joseph Salm*, 58 Comp. Gen. 385 (1979).

eligible for overseas tour renewal travel at public expense for himself and his dependents to and from Fort Meade, Maryland, on the basis of his agreement to perform consecutive overseas tours of duty.[3] Nevertheless, they further note that regulations applicable to tour renewal travel of Department of Defense employees provide that dependents "cannot perform round trip travel under renewal agreement authority if the employee concerned does not perform authorized renewal agreement travel." [4] They question whether that provision of the regulations may have operated to preclude Mr. Potts' wife and son from traveling with him to Fort Meade at public expense, since his own travel to that place was for the purpose of performing official business on a temporary duty assignment rather than for the purpose of taking leave between consecutive overseas tours of duty.

Analysis and Conclusion

Subsection 5728(a) of title 5, United States Code, provides that an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his posts of duty outside the continental United States to the place of his actual residence at the time of transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States, and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty.[5]

We have expressed the view that under 5 U.S.C. § 5728(a) the payment of the transportation expenses of an employee's dependents from an overseas post of duty to the actual place of residence in the continental United States and return may generally not be allowed unless the employee himself returns to the continental United States for the purpose of taking leave.[6] Thus, as noted by the Defense Department officials, regulations that have been adopted to implement 5 U.S.C. § 5728(a) provide that dependents' eligibility for round-trip overseas tour renewal travel is contingent upon

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[3] The officials report that Fort Meade, Maryland, had been Mr. Potts' permanent duty station prior to his assignment to Hawaii, and that Fort Meade was consequently determined to be his "actual place of residence" in the continental United States for overseas tour renewal travel purposes.

[4] Paragraph C4156, Volume 2 of the Joint Travel Regulations.

[5] An amendment to 5 U.S.C. § 5728(a) enacted on September 8, 1982, had the effect of deleting entitlement to tour renewal travel for employees stationed in Hawaii, but the amending legislation contained a provision preserving the entitlement for employees who, like Mr. Potts, were then currently serving a tour of duty in Hawaii. Public Law 97-253, § 351, September 8, 1982, 96 Stat. 800.

[6] 46 Comp. Gen. 153, 155 (1966); 35 Comp. Gen. 101, 102 (1955).

the performance of renewal agreement travel by the sponsoring employee.[7]

We have also expressed the view, however, that 5 U.S.C. § 5728(a) is to be given a liberal construction to effectuate the beneficial congressional purpose for its enactment, and consistent with that principle we have held that an employee need not perform tour renewal travel at the same time as his dependents, but may instead elect to defer his own renewal agreement travel to a later date.[8] Moreover, we have specifically held that an employee's dependents may perform authorized tour renewal travel by accompanying the employee on a temporary duty assignment he is directed to perform in the continental United States between overseas tours of duty, and that the employee in that situation may then defer his own tour renewal travel for use in a subsequent trip by himself to the United States.[9] In addition, we have repeatedly and consistently held that an employee who defers his own tour renewal travel and is later precluded from performing that travel for reasons beyond his control has no obligation to refund the expenses of the tour renewal travel performed by his dependents at an earlier date.[10]

In the present case, therefore, our view is that Mr. Potts' wife and son were properly authorized tour renewal travel when they accompanied him on his temporary duty assignment at Fort Meade in July and August 1983, and that he remained eligible to perform his own tour renewal travel separately for the purpose of taking leave in the United States at a later date. Although there is no indication that he subsequently performed such leave travel, the records before us suggest that he was precluded from doing so because of official actions which were beyond his control. Hence, we conclude that he is not liable to refund any portion of the expenses of the travel performed by his wife and son in 1983 from Honolulu, Hawaii, to Fort Meade, Maryland, and thence to Melbourne, Australia.

The question presented is answered accordingly.

[B-219122]

Debt Collections—Waiver—Civilian Employees—Compensation Overpayments—Failure to Deduct Insurance Premiums

Section 8707(d) of Title 5, United States Code, grants an agency the authority to waive the collection of unpaid life insurance deductions, where it fails to withhold the proper amount, if the individual is without fault and recovery would be against equity and good conscience. This waiver authority is not subject to the $500 limit on

[7] Paragraph C4156, Volume 2 of the Joint Travel Regulations, cited above (footnote 4).

[8] See 55 Comp. Gen. 886, 889 (1976); and 46 Comp. Gen., *supra*, at 155.

[9] *Alan B. Carlson*, B-186310, February 16, 1977.

[10] See, e.g., *James I. Lucas*, B-186021, November 9, 1976; and B-166357, April 17, 1969.

agency authority in 5 U.S.C. 5584. However, this Office may also consider the waiver of erroneous underwithholding of insurance premiums under the broad waiver authority contained in 5 U.S.C. 5584.

Debt Collections—Waiver—Civilian Employees—Compensation Overpayments—Failure to Deduct Insurance Premiums

Employee received overpayments of pay because agency failed to deduct full insurance premiums from his pay. Employee is not held at fault for overpayments where premiums stated on leave and earnings statements did not appear unreasonable and employee was unaware that premiums should have been $200 higher per pay period. If the deduction appears reasonable on it face, we are aware of no reason to expect or require an employee to audit the amount shown. Overpayments are waived since the employee could not have been expected to question the correctness of this pay.

Matter of: Hollis W. Bowers—Waiver of Erroneous Overpayments—Insurance Premiums, January 22, 1986:

In this decision we hold that Mr. Hollis W. Bowers, an employee of the Nuclear Regulatory Commission (NRC), may be granted waiver of erroneous payments made to him as a result of his agency's underdeduction for Federal Employees Group Life Insurance (FEGLI) premiums. This decision overrules a denial of his application for waiver under 5 U.S.C. § 5584 made by our Claims Group on March 14, 1985.

BACKGROUND

Mr. Bowers was appointed to the position of Assistant Director for Investigations, Office of the Inspector and Auditor (GS-15), with NRC on October 18, 1982. He had previously worked for approximately 30 years with the Federal Government, retiring in 1970 at the GS-14 level. During Mr. Bowers' previous Federal service he had been covered by FEGLI. On October 18, 1982, during Mr. Bowers' orientation session for new NRC employees, he submitted an SF-2817, "Life Insurance Election," which indicated his election of standard coverage and additional coverage at five times the basic coverage. At this time Mr. Bowers was given a copy of the FEGLI Handbook (SF-2817A, FPM Supplement 870-1) which explains the insurance coverage available and the applicable rates. However, Mr. Bowers reports that the employee who conducted the orientation briefing did not highlight for him the relatively high cost of FEGLI for someone of Mr. Bowers' age who elects the maximum coverage available. Mr. Bowers received two Notification of Personnel Action Forms (SF-50s), one contemporaneous with his FEGLI election, and both stating that he was covered by the regular insurance and the additional insurance at five times his pay. Additionally, Mr. Bowers received 26 Earnings and Leave Statements with the correct FEGLI coverage code but with the incorrect withholding amount immediately prior to the correction of the amount withheld.

The first pay period for which Mr. Bowers was charged the correct FEGLI premium amount was pay period 23 of 1983, covering the period of October 16-30, 1983. On November 8, 1983, Mr. Bowers contacted an appropriate agency official to question the increase in his FEGLI payroll withholding for pay period 23 as shown on his Earnings and Leave Statement. Mr. Bowers was concerned that an error had been made since he had not changed his FEGLI coverage. Upon review, the agency discovered that Mr. Bowers had been charged the correct FEGLI amount for his elected coverage in pay 23, the pay period Mr. Bowers had questioned, but that he had been undercharged for the prior 26 pay periods. The agency's investigation determined that the cause of the error stemmed from a problem in the automated payroll system.

The NRC reports that the automated payroll system problem was corrected with the installation of a new operating system for the payroll computer. The agency reports that no inquiry or other action was initiated by Mr. Bowers to verify the correctness of his FEGLI withholding until pay period 23. On December 6, 1983, Mr. Bowers was billed for the overpayment caused by the underdeductions of life insurance premiums in the amount of $5,200, represented by the amount of underdeduction per pay period of $200 times the 26 pay periods involved. The correct biweekly cost of FEGLI for the total coverage elected by Mr. Bowers was $253.99.

By memorandum dated December 19, 1983, Mr. Bowers requested NRC to waive the erroneous overpayments of pay made to him as a result of the underwithholding of FEGLI premiums under the agency's waiver authority found in 5 U.S.C. §8707(d) (1982). The NRC, acting through its Director, Division of Accounting and Finance, Office of Resource Management, denied Mr. Bowers' request for waiver by memorandum dated February 28, 1984. In denying his request for waiver, the Director pointed out that our Office has held that it is incumbent upon an employee to verify the correctness of entries on Earnings and Leave Statements provided to the employee. The Director cited our decision *Willie Baca*, B-211932, October 20, 1983, where we sustained the denial of a waiver where an employee was furnished with Earnings and Leave Statements showing erroneous deductions resulting from an administrative error in computing the correct payroll deductions for the employee's life insurance.

By letter dated September 26, 1984, Mr. Bowers appealed the denial of his request for waiver by NRC to our Claims Group. Our Claims Group sustained the action of NRC in denying waiver by letter dated March 14, 1985, essentially agreeing with the rationale for denial set forth by the NRC.

ANALYSIS AND CONCLUSIONS

Waiver Jurisdiction

Mr. Bowers raises a question concerning the authority under which both the NRC and our Claims Group considered his request for waiver. Mr. Bowers has specifically and repeatedly requested that his request for waiver be considered pursuant to 5 U.S.C. § 8707(d), which provides that if "an agency fails to withhold the proper amount of life insurance deductions from an individual's salary . . ., the collection of unpaid deductions may be waived by the agency if, in the judgment of the agency, the individual is without fault and recovery would be against equity and good conscience." As Mr. Bowers has pointed out, section 8707(d), by its terms, does not have any waiver limitation amount such as exists in 5 U.S.C. § 5584(a), which limits an agency's waiver authority to amounts not in excess of $500.

Since Mr. Bowers' overpayments specifically resulted from NRC's failure to withhold the proper amount of life insurance deductions and exceeded $500, he questions the propriety of the NRC's and our Claims Group's denial of his waiver request under 5 U.S.C. § 5584 (1982). The NRC reports that it applied 5 U.S.C. § 5584 as a result of the regulation published by the Office of Personnel Management at 5 C.F.R. § 870.401(h)(2) (1984), which states that an agency will make its determination on the waiver of collection in accordance with 5 U.S.C. § 5584 when specifically considering the collection of unpaid life insurance premiums.

We have been informally advised by OPM, the agency which proposed the enactment of 5 U.S.C. § 8707(d), that it did not intend any change in the waiver authority, standards, or procedures by its enactment. It has attempted to clarify this by the promulgation of its rules found at 5 C.F.R. § 870.401(h). The OPM has advised that its primary purpose in proposing the enactment of 5 U.S.C. § 8707 was to make clear that if an agency waives the collection of unpaid insurance deductions from an individual's pay, the agency must submit an amount equal to the sum of the uncollected deductions, and any applicable agency contributions, to OPM for deposit in the Employees' Life Insurance Fund.

Our Claims Group did not consider Mr. Bowers' waiver request under 5 U.S.C. § 8707(d) as he had requested for the reason that section 8707(d) provides no authority for our Office to do so. However, the broad waiver authority provided our Office under 5 U.S.C. § 5584 has been consistently interpreted as encompassing the waiver of erroneous underwithholding of FEGLI premiums. See *Santo M. Lacagnina*, B-203459, December 8, 1981; and *Willie Baca*, B-211932, *supra*. We are not aware of anything in the legislative history of the Federal Employees Group Life Insurance Act of 1980, Public Law 96-427, 94 Stat. 1833, which added the provisions of 5 U.S.C. § 8707(d), to suggest that the Congress had any intent to de-

prive employees of their existing right to appeal waiver denials to our Office. We do not believe that 5 U.S.C. § 8707(d) should be interpreted as implicitly foreclosing our pre-existing waiver authority under 5 U.S.C. § 5584. We have been informally advised by OPM that it is in agreement with this view. Therefore, our Office retains concurrent jurisdiction under 5 U.S.C. § 5584 to consider waiver of FEGLI underwithholdings, notwithstanding 5 U.S.C. § 8707(d).

Merits of Waiver

In requesting that our Office reverse the Claims Group's denial of his waiver request, Mr. Bowers makes the following arguments:

> GAO relies on a judgmental observation that a reasonable and prudent employee of my grade [GS-15] and experience [30 years of Government service] must be held responsible for his actions . . . ; moreover, I'm perplexed as to how GAO establishes what the grade has to do with being reasonable and prudent.
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> . . . . . .
>
> I did the reasonable and prudent thing upon receipt of my first pay period statement of earnings and deductions. I examined it. I saw no reason to question the $53.99 FEGLI deduction and, moreover, when one considers the Federal contribution is 50% of that, the premium seems reasonable to me . . . . I've learned such a total premium is comparable with private insurance rates.
>
> . . . . . .
>
> I believe in light of all the circumstances in my situation and the provisions established by the Congress in 5 U.S.C. 8707(d) that on the basis of equity and good conscience, my appeal should be sustained.

Waiver of claims for overpayments to Federal employees of pay and allowances is authorized by 5 U.S.C. § 5584 (1982). That section provides that where collection of such a claim would be against equity and good conscience and not in the best interests of the United States, it may be waived in whole or part unless there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. Since there is no indication of fraud, misrepresentation, or lack of good faith on the part of the employee in this case, waiver hinges on whether Mr. Bowers is found to be at fault.

Fault, as used in the statute authorizing waiver, is considered to exist if it is determined that the concerned individual should have known that an error existed but failed to take action to have it corrected. See 4 C.F.R. § 91.5 (1985), and 56 Comp. Gen. 943 (1977). If an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review those documents for accuracy or otherwise fails to take corrective action he is not without fault and waiver will not be granted. *Jack A. Shepherd,* B-193831, July 20, 1979. Thus, if an employee is given a Standard Form 50 showing he has FEGLI coverage but his regular Earnings Statements show that the necessary insurance premium deductions are not being made, the employee has notice of an error and is ordinarily considered to be at least partially at fault if he fails to

take corrective action. *Rosalie L. Wong*, B-199262, March 10, 1981; *Annie E. Strom*, B-204680, February 23, 1982.

We do not believe that fault may be imputed to Mr. Bowers in this case. Although Mr. Bowers was given a copy of the FEGLI handbook which explains the coverage and the applicable rates, he states, without dispute, that the orientation briefing did not highlight the relatively high cost of optional insurance for his age at maximum coverage. When Mr. Bowers received his first Earnings and Leave Statement he examined it and found the $53.99 deduction to be reasonable. Considering his age and his belief (albeit erroneous) that the Government contributed 50% of the cost, citing 5 U.S.C. § 8708, he found no reason to question the deduction. We note that under the FEGLI prior to 1981, when Mr. Bowers had been previously employed by the Government, the coverages and costs were less and allocations favored older employees. Under these circumstances, the determinative question is whether the deduction for FEGLI shown on Mr. Bowers' Earnings and Leave Statement appeared reasonable. If the deduction appears reasonable on its face, we are aware of no reason to expect or require an employee to audit the amount shown. We have been informally advised by one major insurance company headquartered in the Washington, D.C., area that comparable insurance would have factored out to approximately $99 per pay period for someone of Mr. Bowers' age. We believe that for this and the other above reasons, it was reasonable for Mr. Bowers to believe the FEGLI deduction of $53.99 to be reasonable.

Further, the error was entirely the fault of the agency. As noted above, the agency's investigation determined that the cause of the error stemmed from a problem in the automated payroll system over which Mr. Bowers exercised no control. No one picked up the error and it would have continued to go undetected, except that about 1 year later, on November 8, 1983, Mr. Bowers questioned the increase in his FEGLI withholding for the prior pay period. The error was then discovered. We believe that it is significant that Mr. Bowers did question the increase in his FEGLI withholding, which represented the correct amount, as this at least suggests that he never really knew what his FEGLI coverage cost. We believe that the above facts clearly support a finding that Mr. Bowers was not at fault in accepting the overpayments. We find that collection action would be against equity and good conscience and not in the best interests of the United States.

Accordingly, the amount of $5,200 representing the underdeductions for FEGLI premiums is hereby waived.

[B-220588]

General Accounting Office—Jurisdiction—Contracts—Performance—Contract Administration Matter

Protest against agency actions during the protester's contract performance concerns contract administration and is for consideration by the procuring agency, not General Accounting Office (GAO)

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

Protest that agency improperly awarded a sole-source contract is dismissed as untimely since it was not filed within 10 days after the protester knew the protest basis.

Contracts—Negotiation—Requests for Proposals—Failure to Solicit

Protest against agency's failure to request an offer from the protester, whose contract had just expired, for a 5-month, emergency contract for essentially the same services is denied where the agency reasonably determined that, based on problems the protester had encountered in an aspect of performance that would be critical to the 5-month contract, the firm was not a potential source.

Contracts—Negotiation—Limitation on Negotiation—Propriety

Although the Competition in Contracting Act of 1984 authorizes an agency to use noncompetitive procurement procedures in situations of unusual or compelling urgency, the statute also requires the agency to solicit offers from as many potential sources as is practicable, and does not recognize a lack of advance planning as a legitimate justification for using such procedures.

Matter of: TMS Building Maintenance, Jan. 22, 1986:

TMS Building Maintenance protests sole-source contract awards by the Department of Energy (DOE) to Taylor Waites Company for janitorial services for DOE's Albuquerque office, to be performed in a number of buildings located in the secured area of a military reservation and in three unsecured buildings. TMS also protests certain actions taken by DOE while TMS was performing the janitorial services as the incumbent contractor. In addition, TMS requests reimbursement of the costs it incurred in pursuing this protest.

We dismiss the protest in part and deny it in part. We deny the request for costs.

TMS was the contractor for the janitorial services from October 1, 1982, through September 20, 1985. During TMS's contract performance, its contract was modified because one building was being renovated and did not require janitorial services. Also, according to DOE, TMS was having problems performing the balance of the contract. Specifically, TMS did not have a sufficient number of personnel with security clearances to provide services in the secured area. Consequently, when the renovations were completed, DOE did not permit TMS to resume work in the building; instead, on April 8,

1985, DOE awarded a contract to Waites on a sole-source basis to provide those services. The contract was modified on August 4 and September 4 to encompass additional buildings. Performance under Waites' contract initially ended on September 30 but, due to the present protest, subsequently was extended into October.

TMS first protests that any performance problems it experienced while it was the contractor were caused by DOE's unreasonable interference; that its contract did not require a specific number of personnel with security clearances; and that DOE improperly permitted Waites to perform some duties covered by TMS's contract while TMS still had the contract.

These allegations concern matters of contract administration, which is the responsibility of the contracting agency. See *Satellite Services, Inc.*, B-219679, Aug. 23, 1985, 85-2 C.P.D. ¶ 224. Disputes on such matters are to be reviewed pursuant to the contract's disputes provisions rather than under our Bid Protest Regulations, 4 C.F.R. part 21 (1985), which are reserved for considering whether the award or proposed award of a contract complies with statutory and other legal requirements. Consequently, we will not consider this basis of TMS's protest.

TMS next protests the April 8 award of a sole-source contract (lasting, as modified, into October 1985) to Waites for services in the renovated building in the secured area. We will not consider this issue, however. Under our Bid Protest Regulations, a protest like this one must be filed within 10 working days after the protester knows or should know the basis of the protest. 4 C.F.R. § 21.2(a)(2). From the comments submitted by TMS, it is apparent that TMS knew Waites was performing under that contract as early as August 1985. Since TMS did not submit its protest until September 26, this issue is untimely.

Finally, TMS protests that in October DOE awarded another sole-source contract to Waites; TMS argues that the agency at least should have solicited an offer from TMS.

DOE responds that as TMS's contract was expiring at the end of September the agency was considering whether to complete preparation of the materials needed for a competitive procurement to secure the services for the following period, or to contract for the services through the Small Business Administration (SBA) under the 8(a) program. The janitorial services, however, were needed immediately to avoid adversely affecting the health and safety of employees, and to avoid the immediate closing of the cafeteria and health unit. DOE therefore decided to award an interim, 5-month contract to cover the period from when TMS's contract expired until a competitive or 8(a) award could be made.

As to DOE's decision not to solicit an offer from TMS for that period, the agency explains that the contractor's employees will be performing services in an area where they inadvertently may view restricted information and, consequently, the contractor has to

have a sufficient number of personnel with DOE security clearances, which are obtained only after a full field investigation and take 6 to 8 months to process. The agency asserts that having a sufficient number of personnel with security clearances also was a requirement of TMS's contract and that, as stated above, TMS did not meet its obligations in that regard. Because TMS did not have enough personnel with security clearances, DOE argues that award of the 5-month contract to Waites, the only known source able to begin performance right away, was proper.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use noncompetitive procedures to procure goods or services where the agency's need is of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 41 U.S.C.A. § 253(c)(2) (West Supp. 1985). This authority, however, is limited by the CICA provisions at 41 U.S.C.A. § 253(e), which requires agencies, nevertheless, to request offers from as many potential sources as practicable, and at 41 U.S.C.A. § 253(f)(5)(A), which states that a lack of advance planning does not justify the use of such procedures. Further, before using noncompetitive procedures, an agency must execute a written justification for doing so, which is to include a description of efforts made to ensure that officers are solicited from as many sources as is practicable, and a description of any market survey conducted or a statement of the reasons why a market survey was not conducted. 41 U.S.C.A. § 253(f)(3).

We see no basis to object to DOE's decision that TMS could not meet the agency's needs when DOE awarded the contract to Waites in October. The record shows that DOE had issued a cure notice to TMS and had contemplated terminating TMS's contract, which already had been modified a number of times to decrease the secured area in which TMS provided service; as stated above, TMS had been unable to provide an adequate number of personnel with the necessary clearances. DOE did not pursue termination, however, only because the contract was to expire in 2 months and because TMS agreed to correct the deficiencies in its performance. The record further shows that during an August 30 meeting, TMS stated that it could provide only two full-time and three part-time employees with security clearances, which DOE found unacceptable for more than limited work. Notably, while TMS disputes the reasons for its performance problems, and whether its contract required the number of cleared employees that DOE was requesting, the firm does not deny that problems existed. Given these factors, we cannot conclude that DOE unreasonably determined that TMS was not an available source to perform the services. We therefore deny TMS's protest against DOE's failure to solicit and offer from the firm for the 5-month contract.

Nevertheless, we point out that the fact that TMS could not perform does not in itself justify DOE's decision to award a sole-source contract to Waites without giving any other possible contractors a chance to compete. Although the janitorial services may have been needed immediately and the successful contractor had to employ a number of cleared personnel, DOE has not explained why it found that Waites was the only available source with a sufficient number of cleared personnel to perform the contract. As stated above, an agency must solicit proposals from as many firms as is practicable even when using CICA's noncompetitive procedures.

Furthermore, and as also stated above, an agency may not use a lack of advance planning to justify the use of noncompetitive procedures. DOE, obviously aware that TMS's contract would expire in September, knew as early as April 1985 that TMS was having performance problems because the company did not have the necessary number of cleared personnel. At that time, DOE also knew that the successor contractor would have to have cleared personnel and that it would take 6 to 8 months to obtain security clearances. Yet it does not appear that DOE took any steps before September to plan for the use of competitive procedures to secure the required services after TMS' contract was completed. There is no evidence in the record that DOE attempted to contact other potential sources, and DOE did not conduct a market survey only because, according to the agency, a 1981 cost comparison showed that it would be cheaper to contract for the services than to have government personnel perform them. The purpose of a market survey, however, is not to determine the cost benefits of contracting for services but, in accordance with the principle that agency's should achieve maximum competition, to determine if there are other qualified sources capable of meeting the government's needs.

Accordingly, although we have denied this protest, by separate letter we are bringing the matter of the sole-source award's propriety to the attention of the Secretary of DOE. In this respect, this procurement deficiency does not warrant terminating Waites' contract at this time, since the services must be provided continuously; the contract was awarded to Waites for only 5 months; and when the contract expires DOE plans to procure the services competitively or to contract with the SBA under the 8(a) program.

Finally, TMS requests that it be paid the costs of pursuing its protest. A protester is entitled to such costs only where the contracting agency has unreasonably excluded the protester from the procurement. 4 C.F.R. § 21.6(e). Since we have concluded that TMS was not unreasonably excluded here, the firm is not entitled to the claimed reimbursement.

The protest is dismissed in part and denied in part.

[B-217628]

Printing and Binding—Purchases From Other Public Printer—Propriety

The Pension Benefit Guaranty Corporation (PBGC) may not be regarded as exempt from the Government-wide statutory requirements (44 U.S.C. 501, 1701) to satisfy its printing and distribution needs from the Government Printing Office because the statutes and legislative history which created PBGC clearly indicate that Congress intended that, after the first 270 days of the corporation's existence, it would be subject to those requirements.

Printing and Binding—Purchases from Other than Public Printer—Propriety

Agencies and establishments of the United States Government are required by 44 U.S.C. 502, 1701 to satisfy their printing and distribution requirements through the offices of the Government Printing Office (GPO) unless their enabling legislation confers some statutory exemption from those requirements. Those agencies and establishments which have previously been found exempt from those requirements have been given the statutory authority to determine the character and necessity of their accounts, "notwithstanding the provisions of any other law governing the expenditure of public funds." Since the statutes creating the Pension Benefit Guaranty Corporation (29 U.S.C. 1301 *et seq.*) do not contain such a provision, that corporation may not be regarded as exempt from the general requirement to use GPO to satisfy its printing and distribution needs.

Matter of: Pension Benefit Guaranty Corporation Printing and Distribution Requirements, Jan. 23, 1986:

The Executive Director of the Pension Benefit Guaranty Corporation (PBGC) has requested our opinion on whether PBGC is exempt from the provisions of 44 U.S.C. §§ 501 and 1701 (1982) which generally require Federal Government agencies and establishments to have their printing and distribution needs handled by the Government Printing Office (GPO). For the reasons given below, we find the PBGC is not exempt from those statutory requirements.

PBGC STATUTORY AUTHORITY

PBGC was established by title IV of the Employment Retirement Income Security Act of 1974 (ERISA) in order to administer a program of pension plan termination insurance.[1] Pub. L. No. 406, 93rd

[1] The law creating PBGC vests in it two fundamentally different duties. On one hand, PBGC is a "trustee" for the non-public funds of terminated pension plans. ERISA, § 4042, 29 U.S.C. § 1342. In this capacity, PBGC is serving primarily the interests of the participants and beneficiaries of the plan, in the same manner and to the same degree as would a nongovernmental party appointed to the same position.

On the other hand, PBGC also serves as an "insurer" using revolving funds which are appropriated public funds. ERISA § 4005(b)(2)(D), 29 U.S.C. § 1305(b)(2)(D). *Cf., e.g.*, 60 Comp. Gen. 323 (1981); 43 Comp. Gen. 759 (1964); B-193573, Dec. 19, 1979. *Cf. also National Treasury Employees Union* v. *FLRA*, No. 82-2176 (D.C. Cir. May 10, 1983) (unpublished opinion), *aff'g* 9 F.L.R.A. 82 (Case No. O-NG-230, Aug. 3, 1982). When acting in this other capacity, PBGC is serving primarily the interests of the United States.

This decision only addresses PBGC's activities in its capacity as insurer, and its use of public funds. This is because 44 U.S.C. §§ 501 and 1701 explicitly apply only

Cong., 2d Sess., 88 Stat. 829, 1003 *et seq., codified in,* 29 U.S.C. § 1301 *et seq.* (1982). PBGC is one of the wholly owned Government corporations listed in the Government Corporation Control Act, as amended. 31 U.S.C. § 9101(3)(I) (1982). Among other things, PBGC is authorized:

> • • • to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary and incidental to the conduct of its business • • •. 29 U.S.C. § 1302(b)(8).

In addition, the act which created PBGC expressly granted PBGC certain additional powers which were characterized as "temporary authority for [PBGC's] initial period." ERISA, § 4004, 88 Stat. 1008-9 ("catchline" of section). That additional "temporary authority" provided that:

> In addition to its other powers under this title, for only the first 270 days after the date of enactment of this act the corporation [PBGC] may—
> (1) contract for printing without regard to the provisions of chapter 5 of title 44, United States Code, • • •. ERISA, § 4004(f)(1), 88 Stat. 1009; 29 U.S.C. § 1304 note.

GPO Printing and Distribution Requirements

Pursuant to 44 U.S.C. §§ 501 and 1701, each executive department, independent office, and establishment of the Federal Government is required (with certain exceptions not relevant here) to obtain its printing and distribution services from GPO. In a number of previous cases, however, this Office has ruled that some Federal agencies and establishments are exempt from these requirements.[2]

PBGC thinks it should also be regarded as being exempt from the requirement to use GPO printing and distribution services. PBGC argues that given its broad authority under 29 U.S.C. § 1302(b)(8), the "temporary initial authority" granted PBGC in its enabling legislation should not be read as "constituting an affirmative application" of the GPO printing and distribution requirements to PBGC. PBGC also argues that its authority under 29 U.S.C. § 1302(b)(8) is as broad as the authority which has been conferred upon the agencies and establishments that GAO previously found to be exempt. We disagree with both of these arguments.

DISCUSSION

The first basis upon which we disagree with PBGC's analysis concerns the provisions of § 4004(f) of ERISA, as quoted above. The plain language of that section clearly shows that Congress contemplated that (except for the initial 270 days of PBGC's existence)

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to (a) printing work undertaken "for" (i.e., primarily in the interests of) the Government, and (b) to distribution services reimbursed with "[m]oney appropriated by any Act • • •," respectively.

[2] *E.g.*, 14 Comp. Gen. 698 (1935) (Federal Home Loan Bank Board); A-49652, June 28, 1933 (Home Owners' Loan Corporation); A-60495, Oct. 4, 1938 (Federal Savings and Loan Insurance Corporation) (modifying 14 Comp. Gen. 695 (1935)); B-156202, Mar. 9, 1965 (Federal Housing Authority); B-114829, July 8, 1975 (United States Postal Service); B-209585, Jan. 26, 1983 (Tennessee Valley Authority).

PBGC was and would be subject to the GPO printing requirements. See, e.g., *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); 38 Comp. Gen. 812, 813 (1959) (plain meaning rule of statutory construction). That this language accurately reflects the intent of Congress may be seen in the House Conference Report which states that PBGC "is also to have special temporary powers during the first 270 days after enactment to * * * contract for printing without regard to the provisions to chapter 5 of title 44 United States Code * * *." H.R. Rep. No. 1280, 93rd Cong., 2d Sess. 382 (1974) (House Conference Report). The interpretation of section 4004(f) of ERISA that PBGC urges upon us would render otherwise clear language and legislative history meaningless and absurd. This would violate the established presumption against interpreting statutes in a way which renders them ineffective. E.g., 62 Comp. Gen. 55, 56-57 (1982), citing *FTC* v. *Manager, Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975). Thus, we find that the language and legislative history of section 4004(f) of ERISA clearly show that Congress meant PBGC to be subject to the GPO printing requirements after an initial start-up period of 270 days. (This interpretation was evidently shared as well by the congressional codifiers of title 29 of the United States Code. They dropped subsection (f) of section 1304 from the Code completely, presumably because it was executed. See Note following 29 U.S.C. § 1304.)

Second, even if we could disregard the provisions of section 4004(f) of ERISA, it is our opinion that the authority granted PBGC is not as broad as that granted to the other establishments and agencies which this Office has previously determined to be exempt from the GPO printing and distribution requirements. Under its statutes, PBGC is authorized to "enter into contracts, to execute instruments, and to incur liabilities, and do any and all other acts and things that may be necessary or incidental" to the conduct of its business and responsibilities under law. 29 U.S.C. § 1302(b)(8). The statutes creating each of the organizations that we have previously found exempt not only give them that authority, but also provide that they may determine the character and necessity of their own accounts "notwithstanding the provisions of any other law governing the expenditure of public funds." [3] This statutory authority was present in all of our decisions exempting organizations from GPO's printing and distribution requirements.[4] In B-209585, Jan. 26, 1983 (which established an exemption for the Tennessee Valley Authority (TVA)), we noted that our previous cases had turned on the agency's authority to "determine its necessary expenditures without regard to any other provision of law governing the expenditure of public funds." That decision went on to quote

[3] *See, e.g.*, Pub. L. No. 43, § 4(j), 48 Stat. at 132 (HOLC); Pub. L. No. 43, § 6, 48 Stat. at 143 (FHLBB); Pub. L. No. 76, § 22, 49 Stat. at 298 (FSLIC); 39 U.S.C. §§ 401(3), 410(a), 2008(c) (USPS); 12 U.S.C. § 1702 (FHA); 16 U.S.C. § 831h(b) (TVA).

[4] See the cases and statutes cited previously in footnotes 2 and 3, respectively.

TVA's enabling legislation as authorizing TVA to "make such expenditures and enter into such contracts * * * as it may deem necessary * * *." 16 U.S.C. § 831h(b). The decision then concluded that TVA has authority that is "certainly as broad" as that granted the other exempt agencies and establishments. Although B-209585 did not spell out that TVA may determine the character and necessity of its own accounts "notwithstanding the provisions of any other law governing the expenditure of public funds," that authority, in fact, is present in TVA's enabling legislation. *Id.*

It was the existence of this specific statutory authority to determine the propriety of their expenditures and obligations, *notwithstanding the provisions of any other laws governing the expenditure of public funds*, that enabled us to conclude that TVA and those other agencies and establishments were exempt from the otherwise strict statutory requirements to use GPO printing and distribution services. PBGC does not have this authority.[5] In the absence of more specific statutes that override them (such as the provisions noted above), Government-wide statutory requirements and prohibitions must be obeyed. *Cf.* 24 Comp. Gen. 339, 341 (1944) ("The decisions of this office [cannot] overcome [a] statutory prohibition * * * except when specifically authorized by law."). Consequently, we may not conclude that the provisions of 29 U.S.C. § 1302(b)(8) create a statutory exemption from the GPO printing and distributing requirements for PBGC.

Moreover, the provisions of 44 U.S.C. §§ 501 and 1701 already enumerate a number of exceptions which do not include a general exemption for PBGC. In this regard, the Supreme Court has ruled that "[w]here Congress expressly enumerates certain exceptions to a general prohibition [or requirement], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-17 (1980), citing *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1941). *See also* 55 Comp. Gen. 1077, 1078 (1976). For this reason, we may not imply the existence of an additional exception covering PBGC.

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[5] In two of our previous cases (63 Comp. Gen. 1 (1983) and B-194274.2, May 8, 1979) we determined that GAO did not have the authority to consider bid protests involving PBGC procurements because we assumed that PBGC, like most other wholly owned Government corporations, had the authority to determine the character and necessity of its own expenditures, notwithstanding the provisions of other laws governing the expenditure of public funds.

As indicated above, however, PBGC does not in fact have that authority. Were we to reconsider those two cases now in light of the findings of this case, we would have to overrule them due to our erroneous assumption regarding PBGC's authority. At the same time, however, we note that the holdings of those two cases have already been effectively mooted as a result of the passage of the Competition in Contracting Act of 1984, 31 U.S.C.A. §§ 3551-56 (1985 Supp.). *See, e.g.*, B-218441, Aug. 8, 1985. Accordingly, our decisions in 63 Comp. Gen. 1 and B-194274.2, *supra*, are hereby modified to be consistent with our decisions in this case and in B-218441, *supra*.

CONCLUSION

In summary, we find that the statutes creating PBGC did not confer upon it sufficient authority to constitute (or permit the inference of) an exemption from the requirements of 44 U.S.C. §§ 501, 1701. We also find that the Congress, as shown in the language and history of section 4004(f) of ERISA, exempted the PBGC from these requirements only for the first 270 days of the corporation's existence.

[B-220644]

Contracts–Negotiation–Offers or Proposals Evaluation–Technical Acceptability–Administrative Determination

Contracting agencies enjoy a reasonable degree of discretion in determining the acceptability of submitted technical proposals, and General Accounting Office (GAO) therefore will not substitute its judgment for that of the agency by making an independent determination unless the agency's action is clearly shown to be arbitrary or in violation of procurement statutes or regulations.

Contracts–Negotiation–Requests for Proposals Specifications–Conformability of Equipment, etc. Offered–Administrative Determination

The term "state-of-the-art" may be narrowly applied as a solicitation requirement to mean only that each offeror's product be its latest design, rather than to mean adherence to an industry-wide technological standard, so long as the end result is not the submission of offers with such differing levels of technology that competition on a materially similar baseline is effectively precluded.

Contracts–Protests–General Accounting Office Function–Free and Full Competition Objective

A protester's presumable interest as a beneficiary of more restrictive specifications is not protectible under General Accounting Office (GAO) bid protest function, which is rather to ensure that the statutory requirements for full and open competition have been met.

Matter of: APEC Technology Limited, Jan. 23, 1986:

APEC Technology Limited protests the award of a contract to Teletronix Information Systems under request for proposals (RFP) No. SSA-RFP-85-0250, issued by the Social Security Administration (SSA), Department of Health and Human Services. The procurement is for the acquisition of telephone response units (TRUs) for use in SSA's Boston, Chicago, and Miami field offices. APEC essentially complains that Teletronix's offered equipment is technically noncompliant with certain material requirements of the solicitation. We deny the protest.

Background

The TRUs being acquired allow callers to access prerecorded informational messages and in certain applications to leave messages. The RFP contemplated the award of a firm-fixed-price contract and provided that the award would be made to that responsi-

ble offeror whose proposal was technically acceptable and which offered the lowest present value cost to the government over the 1-year contract period. Price proposals were allowed on the basis of either lease, purchase, or lease with/purchase option plans. Of the 64 firms originally solicited, only APEC and Teletronic submitted proposals by the July 22, 1985, closing date.

At principal issue in this case, the RFP provided that the offered TRUs were to be "state-of-the-art" equipment "of the latest design and in current production." The specifications also required at paragraph C.2(b) that the TRUs have the capability to store a minimum of 50 prerecorded messages from 3 to 5 minutes in length; and at paragraph C.2(e) required the capability to transmit "any message to any caller within an average time of 10 seconds from the time of selection." Moreover, paragraph C.2(g) required that the equipment provide a caller voice messaging feature so that callers would be able to access certain predesignated messages and subsequently record a message. Paragraph C.5 required that the equipment provide printed management information which would cumulatively show: (a) the total number of calls received by the TRU; (b) the total number of times each particular prerecorded message was accessed; and (c) the total number of calls that disconnected before any particular message was received in it entirely.

On July 27, subsequent to the proposal closing date, APEC sent a letter to the contracting office which alleged that the TRUs offered by Teletronix would fail to meet certain mandatory specifications due to the fact that the Teletronix equipment utilized cassette tapes to store the prerecorded messages. APEC emphasized that its own equipment utilized the newer disk system technology, and the firm asserted that such disk systems were more appropriate to meet SSA's particular requirements.

SSA determined from its initial price evaluation that APEC's offer was low for the Chicago location and that Teletronix's offer was low for the Boston and Miami locations. (There were somewhat varying equipment requirements among these three locations, for example, the Miami location did not require the caller voice messaging feature.)

SSA then conducted a technical evaluation and determined that both proposals were technically unacceptable but susceptible to being made acceptable through discussions. Accordingly, SSA held oral discussions with both firms pointing out the areas of proposal deficiency and subsequently issued a written request for best and final offers. SSA's request for best and final offers included amendment 0001 to the RFP, which specifically changed paragraph C.2(e) so that the 10-second message accessing requirement now applied only to the minimum 50 messages to be stored in the system and not to "any message" to be stored, as formerly required. The amendment also added a requirement that the TRUs were to be installed "in a manner that complies with all applicable building and

electrical codes" and further provided that the government would no longer consider lease with/purchase option plans in evaluating the price proposals.

Although Teletronix's price remained unchanged in its best and final offer, APEC reduced its guaranteed equipment "Buy Back" offer for each location, thus increasing both its lease and purchase plan prices.[1] Accordingly, the firm's offer for the Chicago location was no longer low. Upon evaluation of the revised technical proposals, SSA's project officer determined that both proposals were technically acceptable. However, the contracting officer disagreed with this determination since the project officer had based his finding on the responses made by the firms during the oral discussions, and the firms' written responses in their best and final offers did not reflect full compliance with the specifications.

The contracting officer felt that neither APEC nor Teletronix had demonstrated that its equipment met the requirement of paragraph C.5(c) that the printed management information provide the total number of calls that disconnected before each particular prerecorded message was received in its entirety, since both firms appeared to be providing only the total combined number of disconnects for all system messages without distinction. Moreover, the contracting officer determined that Teletronix had not sufficiently demonstrated that its equipment conformed to the amended requirement of paragraph C.2(e) that the TRUs be able to transmit any of the minimum 50 prerecorded messages within an average time of 10 seconds from the time of selection. Further, the contracting officer questioned whether Teletronix's equipment met the requirement of paragraph C.2(g) for caller voice messaging, since he felt that the specification reasonably could be interpreted as requiring a single recording mechanism, and Teletronix's equipment in fact utilized multiple recorders. Finally, the contracting officer determined that Teletronix had not shown that its equipment met the requirements of paragraph C.5 (a) and (b) that the system's printed management information show both the total number of calls received by the TRU and the total number of times each prerecorded message was accessed.

At this point, SSA considered clarifying the caller voice messaging specification to indicate that a single recorder mechanism was not necessary. (APEC had interpreted the specification as requiring a single mechanism in its July 27 letter.) However, SSA determined that a clarification was not in order because it felt that both firms could meet the requirement under either interpretation. SSA then determined to amend the RFP by deleting the requirement at paragraph C.5(c) for the system's printed management information

[1] The record is somewhat unclear as to why APEC made this pricing change. Although the firm indicates that it reduced its "Buy Back" offer as the result of agency advice, the firm apparently is not alleging any impropriety on the agency's part in this matter.

to provide the total number of disconnects for each particular message because neither firm appeared to understand the requirement and, in any event, SSA concluded that the requirement exceeded its actual minimum needs.

Because of time constraints, SSA did not issue a written amendment deleting paragraph C.5(c), but informed both offerors of the change orally. SSA requested the submission of a second round of best and final offers, and the offerors were asked to acknowledge the deletion and to state whether there were any changes from their original best and final offers. Additionally, Teletronix was specifically asked to describe how its system would comply with the caller voice messaging requirement and to provide a sample management information printout. Teletronix satisfied SSA's concerns in its revised best and final offer, and its proposal therefore was deemed to be technically acceptable. Accordingly, since Teletronix offered the lowest evaluated price for all three locations (on a purchase basis), the firm was awarded the contract. Performance has been suspended pending our resolution of the protest.

APEC argues that Teletronix's equipment is technically noncompliant with certain specifications because the equipment utilizes cassette tapes as a recording medium which represent an older technology. Therefore, APEC asserts that the TRUs offered by Teletronix are unacceptable because they are not "state-of-the-art" equipment as called for in section "C" of the RFP. APEC contends that Teletronix's equipment cannot meet the average 10-second message accessing requirement because of the corollary requirement that the TRUs be able to store a minimum of 50 prerecorded messages. APEC notes that the original requirement at paragraph C.2(e) for average 10-second message accessing for "any message" was amended to refer only to "any of the 50 messages"; it is APEC's apparent view that Teletronix's equipment cannot provide 10-second message accessing if more than 50 messages are to be recorded on its cassette tape system, which APEC believes was clearly contemplated by the RFP. APEC contends that paragraph C.2(e) was specifically modified for the sole competitive benefit of Teletronix as APEC states that its own disk system can provide 10-second message accessing for up to 100 messages.

Moreover, APEC asserts that it was improper for SSA to amend the RFP at the last moment to delete the requirement at paragraph C.5(c) for the system's printed management information to provide the total number of disconnects for each specific message. APEC asserts that such action worked to its prejudice because its equipment was fully compliant with the requirement. APEC also notes that SSA failed to issue a written amendment concerning the deletion of paragraph C.5(c).

Finally, APEC complains that it was specifically asked to verify that its equipment had Underwriters' Laboratories (UL) approval, but that the same verification was not demanded of Teletronix.

APEC notes that the RFP was amended to specify that offerors' equipment had to comply with all applicable building and electrical codes for the particular locations, but did not require UL approval. Accordingly, APEC believes that an initial requirement for UL approval was waived in Teletronix's sole favor.

Analysis

Contracting agencies enjoy a reasonable degree of discretion in determining the acceptability of submitted technical proposals, and this Office therefore will not substitute its judgment for that of the agency by making an independent determination unless the agency's action is shown to be arbitrary or in violation of procurement statutes or regulations. *Rack Engineering Co.*, B-214988, Sept. 10, 1984, 84-2 CPD ¶ 272. The protester clearly bears the burden to show that the agency's technical evaluation was unreasonable. *Magnavox Advanced Products and Systems Co.*, B-215426, Feb. 6, 1985, 85-1 CPD ¶ 146. We do not believe that APEC has met that burden here.

On the issue of whether Teletronix's utilization of a cassette tape system meets the requirement for "state-of-the art" technology, APEC, although not disputing that the Teletronix equipment represents the firm's latest design, strenuously urges that tape systems are a six-year-old technology that has been superseded by disk systems. Therefore, in APEC's view, the utilization of obsolete technology, even though in a firm's latest design, cannot be properly constructed as compliance with a "state-of-the-art" requirement. We do not agree.

The common definition of the term "state-of-the-art" is "the scientific and technical level attained [in a particular industry] at a given time." See *The Random House College Dictionary*, 1980 Revised Edition, p. 1282. However, this Office has recognized that the standard may be more narrowly applied to mean only that *each* offeror's equipment represent its latest design, rather than to mean adherence to an industry-wide technological standard, so long as the end result is not the submission of offers with such differing levels of technology that competition on a materially similar baseline is effectively precluded. *Honeywell Information Systems, Inc.*, B-191212, July 14, 1978, 78-2 CPD ¶ 39. Moreover, we believe that the phrase "the TRU shall be of the latest design and in current production" can only be read to refer to an individual offeror's equipment. Thus, even though the Teletronix equipment may utilize an older technology as a recording medium (in any event, we do not decide that cassette tape systems are technologically obsolete as APEC seemingly urges), the record would have to show clearly that competition between the two firms was fundamentally unequal before SSA's more narrow application of the "state-of-the-art" standard could be considered objectionable. *Id.*

In our view, the record makes no such showing. As SSA explains, the agency only required that the equipment offered by a particular offeror be the firm's latest TRU model in current production and states that the RFP was specifically written so that TRUs with disk, tape on other recording mediums meeting the mandatory performance specifications would be acceptable. Furthermore, SSA emphasizes that the basis for award was the lowest evaluated price for equipment meeting the mandatory specifications. Therefore, there was a complete absence of any indication in the RFP that the government was willing to pay a premium for equipment reflecting the latest industry-wide technological advance. Since it is undisputed that the Teletronix equipment was the firm's latest model, we therefore reject APEC's assertion that it failed to meet the "state-of-the-art" requirement set forth in section "C," and we find nothing objectionable in SSA's desire to maximize competition by developing specifications that were not restricted to only one recording medium. Cf. *University Research Corp.*, 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210 (award improper where better solicitation draftsmanship could have achieved a more extensive competition).

In essence, we believe APEC is actually asserting that the RFP should have been limited to offers to furnish only disk system TRUs since, in the firm's view, only that newer technology is appropriate to satisfy SSA's needs. However, we have consistently refused to countenance such challenges to an agency's broadening of the competition. See *Ricwil, Inc., et al.*, B-214625, *et al.*, Oct. 17, 1984, 84-2 CPD ¶ 415. In this regard, the purpose of our role in resolving bid protests is to ensure that the statutory requirements for full and open competition have been met; thus, a protester's presumable interest as a beneficiary of more restrictive specifications is not protectible under our bid protest function. *Ray Service Co.*, B-217218, May 22, 1985, 64 Comp. Gen. 528, 85-1 CPD ¶ 582. APEC has made no showing that SSA acted fraudulently or in bad faith in broadening the competition to allow for more than one recording medium that met its needs. *Id.*

To the extent APEC contends that the Teletronix equipment, by utilizing a cassette tape system, is noncompliant with certain specifications, it is clear from the record that the agency conducted a thorough evaluation of the two offers and ultimately determined that both TRU systems were acceptable. We believe this is a classic example of a procurement in which there may be more than one means of meeting an agency's performance specifications. See *A.B. Dick Co.*, B-207194.2, Nov. 29, 1982, 82-2 CPD ¶ 478. Thus, for example, although SSA originally expressed doubt that Teletronix's tape-based equipment would be able to transmit the minimum 50 recorded messages within an average time of 10 seconds from the time of selection as required by the amended paragraph C.2(e), the evaluation documents show that Teletronix, through an operational test, demonstrated this capability to the agency's satisfaction. As

Teletronix explains, its system "stacks" the most frequently accessed messages around a "home position" on four different track levels, thus drastically reducing the time needed to transmit a message after a caller has made his selection. Similarly, in its revised best and final offer, Teletronix explained that its equipment, although using multiple recorders, would be able to meet the requirement of paragraph C.2(g) for caller voice messaging since each of the four track levels is in continuous operation and can record messages without interrupting the message-transmitting function. APEC has not shown that SSA's determinations of technical acceptability on these points were arbitrary or otherwise in violation of the procurement statutes or regulations. *Rack Engineering Co.*, B-214988, *supra*.

Although we understand APEC's concern that paragraph C.2(e) was amended so that the 10-second accessing requirement now applied only to the minimum 50 recorded messages and not to any additional messages that might be later stored in the system, we fail to find any indication in the record that this was done with the express purpose of waiving a material requirement for Teletronix's sole competitive benefit. See *A.B. Dick Co.*, B-207194.2, *supra*. Rather, it is a general rule of federal procurement that specifications should be drafted in such a manner that competition is maximized, unless a restrictive requirement is necessary to meet the government's legitimate minimum needs. See *Hydro-Dredge Corp.*, B-215873, Feb. 4, 1985, 85-1 CPD ¶ 132. Consequently, even though SSA has not expressly stated in the record why it deleted paragraph C.2(e), we must presume that SSA concluded, after initial discussions, that the 10-second message accessing requirement for more than the minimum 50 messages was in excess of its actual needs, and that continued insistence on the requirement would only serve to restrict the competition unduly. Absent evidence of favoritism, fraud, or intentional misconduct by government officials, we will not question an agency's decision to relax solicitation requirements and thus enhance competition. *Eastern Marine, Inc.*, B-213945, Mar. 23, 1984, 84-1 CPD ¶ 343. No such evidence is present here.

Similarly, it is apparent that SSA deleted the requirement at paragraph C.5(c) for the system's printed management information to provide the total number of disconnects for each particular message because the requirement was unnecessary for its essential management information purposes. SSA's evaluators determined that neither proposal, even after revisions, reflected an understanding of the feature and, although APEC asserts that its equipment in fact has the capability to meet the specification, this does not establish any impropriety in the agency's decision to delete paragraph C.5(c). See *Eastern Marine, Inc.*, B-213945, *supra*. Thus, SSA determined that the requirement was in excess of its actual minimum needs, and we will not question such a determination absent

a clear showing that it has no reasonable basis. *Frequency Electronics, Inc.*, B-204483, Apr. 5, 1982, 82-1 CPD ¶ 303. APEC has made no showing that SSA's determination in this regard was unreasonable.

To the extent APEC asserts that SSA acted improperly by not issuing a written amendment concerning the deletion of paragraph C.5(c), we have held that the failure to issue a written amendment does not constitute a material procurement impropriety where all offerors were informed of the agency's changed requirements during discussions and were given the opportunity to submit revised proposals reflecting those changes. *Decilog, Inc.*, B-206901, Apr. 5, 1983, 83-1 CPD ¶ 356. Here, since both APEC and Teletronix were orally advised that paragraph C.5(c) was being deleted, and the firms were asked to acknowledge the deletion in their revised best and final offers, SSA's failure to confirm the change in writing was only a minor informality which worked no competitive prejudice.

With regard to APEC's assertion that SSA waived the requirement for UL approval in Teletronix's favor, the record establishes that SSA initially asked both firms for verification of such approval, but subsequently decided to amend the RFP to require that the offered equipment comply with all applicable building and electrical codes. Apparently, SSA determined that mere verification of UL approval was not sufficient to demonstrate that the offered equipment would be acceptable for operational use in every location, especially since the agency had specific concerns about equipment compliance at the Chicago site due to past difficulties in meeting the city's codes. Clearly, SSA's actions in this matter were reasonable, and we fail to see how APEC was harmed thereby. In any event, the record in fact establishes that the power module for the Teletronix equipment has UL approval.

The protest is denied.

[B-220197]

Officers and Employees—New Appointments—Relocation Expense Reimbursement and Allowances

There is no indication in the statutes or regulations governing the relocation of Federal appointees of any intent to deprive reimbursement of expenses incurred in undertaking an authorized move that is interrupted by the appointee's death, and those expenses are allowable to the extent that they do not exceed the reimbursement that would have been payable if the appointee had not died. Hence, reimbursement may be allowed for the expenses of a household goods shipment initiated by a physician newly appointed to a position with the Veterans Administration in furtherance of an authorized move, notwithstanding that he died while the goods were in transit, and the shipment was then recalled.

Officers and Employees—New Appointments—Relocation Expense Reimbursement and Allowances

A person newly appointed to the Federal service who has not yet entered on duty does not have the status of a Federal "employee." Consequently, relocation allowances credited to the account of a deceased Veterans Administration appointee are payable to his estate in the manner prescribed for deceased public creditors generally, and may not instead be paid directly to his survivors in the manner otherwise specifically prescribed by statute for settling the accounts of deceased employees.

Matter of: Michael Longo, M.D., Jan. 24, 1986:

The question presented here is whether payment may be allowed in the case of a physician newly appointed to a position in the Federal service for expense incurred in undertaking an authorized household goods shipment that was not completed because of his death.[1] In the circumstances, we conclude that payment may issue to his estate.

Background

In April 1985 Dr. Michael Longo was appointed to the position of staff physician at the Veterans Administration Medical Center, Bay Pines, Florida. At the time he and his wife resided in Farmington Hills, Michigan. On May 13, 1985, the Veterans Administration provided him with a written authorization to make the move from Michigan to Florida at Government expense. This included authority for the transportation of up to 18,000 pounds of household goods using the commuted rate system. Generally, under that system, an individual selects and pays a commercial mover, and obtains reimbursement from the Government based on prescribed schedules of commuted rates.[2]

Dr. Longo arranged to have his household goods loaded for transport by a commercial mover on June 28, 1985. He died 2 days later. The truck carrying the households goods was still in Michigan, and his widow had the shipment returned to their residence in Farmington Hills. The mover presented her with a bill in the amount of $4,840.33.

The concerned Veterans Administration finance officer questions whether reimbursement of transportation expenses may be allowed in these circumstances and, if so, whether payment may be made directly either to Mrs. Longo or to the commercial carrier.

Reimbursement of Expenses

There is no indication in the status or regulations governing the relocation of Federal appointees and employees of any intent to deprive reimbursement of expenses incurred in undertaking an au-

[1] This action is in response to a request for an advance decision from Mr. Conrad R. Hoffman, Director, Office of Budget and Finance, Veterans Administration (VA file reference 074C1:8–5–4).

[2] See Federal Travel Regulations, para. 2-8-3, *incorp. by ref.*, 41 C.F.R. § 101-7.003.

thorized move that is interrupted by the death of the appointee or employee.

In the present case, the household goods shipment was undertaken by Dr. Longo as the result of the Veterans Administration's prior authorization of his move from Michigan to Florida at Government expense under the authority of 5 U.S.C. § 5723. Although the household goods shipment was recalled because of his death, we do not find that this may serve as a basis for disallowing reimbursement of the expenses involved, provided they do not exceed the amount that would have been payable had the shipment been completed. Although Dr. Longo did not become an employee of the Veterans Administration, the travel and transportation allowances otherwise applicable may be paid because travel expenses of new appointees may be paid whether or not the new appointee has been appointed at the time travel is performed. 5 U.S.C. § 5723(c).

Payment to Estate

As indicated, under the commuted rate system there is no direct contractual relationship between the Government and the commercial carrier, and the Government incurs no direct obligation to pay the carrier for services rendered. Rather, the individual involved incurs the obligation to pay for those services, and that individual may then seek reimbursement from the Government at prescribed rates. Hence, in this case the allowable transportation expenses may not be paid to the commercial carrier and are instead to be credited to Dr. Longo's account.

Unpaid pay and allowances, including relocation allowances, which are credited to the account of a deceased Federal employee are by specific provision of statute and regulation made payable directly to the employee's surviving spouse in the absence of a contrary beneficiary designation.[3] In this case, however, Dr. Longo did not enter on duty with the Veterans Administration following his appointment to the Federal service, so that he does not have the status of a deceased Federal "employee" for the purpose of these provisions of statute and regulation.[4] Consequently, payment may not issue directly to his widow, and should instead be made to his estate in the manner prescribed for deceased public creditors generally.[5]

[3] See 5 U.S.C. §§ 5581-5583 and 4 C.F.R. Part 33.

[4] See 5 U.S.C. § 2105. See also 54 Comp. Gen. 1028, 1030 (1975); 45 Comp. Gen. 660 (1966); and *Rodgers D. O'Neill*, B-205972, May 25, 1982.

[5] See 31 U.S.C. § 3702 and 4 C.F.R. Part 35.

[B-220804]

General Accounting Office—Jurisdiction—Contracts—Nonappropriated Fund Activities

Although a procurement is for a nonappropriated fund activity, when it is conducted by the Air Force, a federal agency, the General Accounting Office has jurisdiction under the Competition in Contracting Act of 1984 to decide a bid protest concerning an alleged violation of the procurement statutes and regulations.

Bids—Responsiveness—Pricing Response—Minor Deviations From IFB Requirements

Bids based on a price per square foot, rather than per linear foot as required by the solicitation, is responsive when the intended price per linear foot is apparent from the face of the bid, the bid commits the contractor to perform the exact thing called for in the solicitation at a fixed price, and no other bidder is prejudiced by the agency's waiver of this defect as a minor irregularity.

Matter of: Artisan Builders, Jan. 24, 1986:

Artisan Builders protests the award of a contract to Concrete Finishing, Inc., under invitation for bids (IFB) No. F02600-85-B-0044, issued August 12, 1985, by Williams Air Force Base, Arizona. Artisan believes that the Air Force should have rejected the awardee's bid for the construction of concrete paths for golf carts at the base golf course because the bid was on the basis of square feet, rather than linear feet as required by the IFB.

We deny the protest.

One of three line items in the base bid schedule called for unit and extended prices for 12,040 linear feet of concrete paths with a uniform width of 6 feet. At bid opening on September 17, Concrete Finishing was the apparent low bidder with a total base bid of $105,948. Artisan was second low bidder at $143,623.20.

Initially, the contracting officer indicated to those present at the bid opening that there might be a problem with Concrete Finishing's bid because its unit price for the item in question was a price per square foot. However, upon review, the Air Force determined that bidding on a per-square-foot basis was a common industry practice and that the price per linear foot could be determined simply by multiplying Concrete Finishing's unit price per square foot by six. The contracting officer therefore found the bid responsive and awarded Concrete Finishing the contract. Artisan alleges that it was the low responsible bidder and seeks termination of the protested contract.

The threshold issue, raised by the Air Force, is whether our Office has jurisdiction to consider this protest, since the base golf course is a nonappropriated fund activity. Under section 2741 of the Competition in Contracting Act of 1984 (CICA), our Office decides bid protests concerning alleged violations of the procurement statutes and regulations by federal agencies. 31 U.S.C.A. § 3552 (West Supp. 1985). While our Bid Protest Regulations provide that we will not consider protests of procurements *by* nonappropriated

fund activities, 4 C.F.R. § 21.3(f)(8) (1985), we have held that the authority of our Office to decide bid protests is based on whether the procurement is conducted *by* a federal agency and is not dependent on whether appropriated funds are involved. See *T.V. Travel, Inc. et al.,—Request for Reconsideration,* B-218198.6 *et al.,* Dec. 10, 1985, 65 Comp. Gen. ____, 85-2 CPD ¶ ____. Therefore, since this procurement was conducted by the base contracting office at Williams Air Force Base and since Artisan alleges that the Air Force, a federal agency, violated the procurement statutes and regulations, we have jurisdiction.

As for the merits of the protest, we do not believe Concrete Finishing's submission of unit prices on a per-square-foot basis is fatal to its bid, since the intended price per linear foot can be determined from the face of the bid itself. First, as the Air Force indicates, given the uniform 6-foot width of the concrete path, the firm's price per square foot, $1.45, can be converted to a price per linear foot simply by multiplying by six—for a total of $8.70 per linear foot. The firm's extended price for the line item in question is $104,748, which, when divided by the 12,040 linear feet specified in the IFB, yields a unit price of $8.70. This method of calculating a bidder's intended unit price is legally permissible, and it permitted the Air Force to evaluate all bidders on a common basis. See *Aqua Marine Constructors,* B-212790, Oct. 20, 1983, 83-2 CPD ¶ 471.

In summary, although Concrete Finishing failed to bid in the precise manner requested by the IFB, there is no doubt that the firm has committed itself to perform the exact work required at a fixed price. See *Werres Corp.,* B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243. In our opinion, Concrete Finishing's failure to bid on a per linear foot basis is a matter of form rather than of substance, a minor irregularity that has not prejudiced the other bidders, and it therefore can be waived by the contracting agency. *See* Federal Acquisition Regulation, 48 C.F.R. § 14.405 (1984). Accordingly, we agree with the Air Force that the bid is responsive.

Artisan further complains that the contracting officer misled it both at the bid opening and later regarding the nonresponsiveness of Concrete Finishing's bid, preventing an earlier protest on the matter. The contracting officer denies this allegation and, since Artisan was able to file a protest in time to stop performance of the contract until our Office rendered a decision, we fail to see how the protester was prejudiced in any way, even if we assume that its allegation is correct.

The protest is denied.

[B-221114]

Contracts—Negotiation—Justification

Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the basis for award reasonably includes technical considerations in addition to price-related factors.

Matter of: Essex Electro Engineers, Inc., Jan. 27, 1986:

Essex Electro Engineers, Inc., protests the terms of solicitation No. DAAK70-85-R-0344, a small business set-aside, issued by the Army Belvoir Research and Development Center, Fort Belvoir, Virginia, for generator sets and associated items. Essex principally contends that the Army improperly failed to apply sealed bidding procedures to the procurement, which instead requests proposals under negotiated procedures. Essex also contests the propriety of the solicitation's evaluation and award selection criteria and alleges that the solicitation's quality assurance provisions lack adequate specificity to permit full and open competition.

We deny the protest.

The solicitation requested technical proposals and price for 24 electric generator sets. These generator sets are transportable and are driven by a gas turbine engine; they require supporting equipment, various systems, and other devices for proper operation. The solicitation states that award will be made on the basis of the overall lowest price among those proposals found technically acceptable as to stated technical criteria. Further, the solicitation expressly provides that evaluation will involve "the contractor's capability to interpret, perform, and satisfactorily complete the engineering, manufacturing, quality assurance and management requirements of the proposed contract." In this connection, the solicitation lists the following major evaluation criteria: 1) Technical Approach; 2) Scientific and Technical Personnel; 3) Manufacturing; 4) Organization and Management; and 5) Quality Assurance.

Essex essentially argues that under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C.A. § 2304 (West Supp. 1985), and under the implementing regulations, sealed bidding is still the "preferred" and "first in order" method of procurement. Essex cites Federal Acquisition Regulation (FAR), § 6.401 (Federal Acquisition Circular (FAC) 84-5, Dec. 20, 1984, effective for solicitations issued after Mar. 31, 1985), which provides:

> (a) Sealed bids . . . Contracting officers *shall* solicit sealed bids if—
> (1) Time permits the solicitation, submission, and evaluation of sealed bids;
> (2) The award will be made on the basis of price and other price-related factors;
> (3) It is *not necessary* to conduct discussions with the responding offerors about their bids; and
> (4) There is a reasonable expectation of receiving more than one sealed bid. [Italic Supplied.]

Essex maintains that this regulation applies here. Specifically, Essex contends that the Army has complete and detailed specifications; that its requirements are not unique or complex; and that

similar procurements have in the past been the subject of sealed bidding procedures. According to Essex, the Army's sole justification for using negotiation procedures is its unfounded belief that there is a "possibility" that discussions "may be necessary" during the course of this procurement.

In response, the Army states that this solicitation, for the first time, allows offerors to propose either of two alternate engines, manufactured by "Allison" or "Teledyne," and that offerors are required to provide extensive integrated logistics support (ILS) data concerning the chosen engine. Further, government drawings are not available for the Teledyne engine so that offerors in the procurement must supply these drawings and data. Because this procurement is set aside for small business, the Army states that the contracting officer followed the recommendation of his technical personnel to negotiate the procurement so that discussions, if necessary, concerning the scope, nature and extent of the ILS requirements could be undertaken with small business firms.

We do not think that the Army acted improperly. While CICA eliminates the statutory preference for formally advertised procurements ("sealed bids"), the provisions of the FAR, quoted above, do provide specific criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals. See *United Food Services, Inc.*, B-217211, Sept. 24, 1985, 85-2 CPD ¶ 326. However, we do not agree that the circumstances here mandate the use of sealed bids. The use of sealed bids is restricted to circumstances where the award will be made on the basis of price and other price-related factors. FAR, § 6.401. Clearly, the basis for award here is not restricted to price-related factors alone. The Army, in addition to requesting prices, also seeks technical proposals containing specific technical data. In this regard, the protester argues that the data the Army seeks for evaluation purposes is not so complex that it cannot be obtained during a preaward survey as part of a responsibility determination under sealed bidding procedures.

We disagree. First, the general rule is that the determination of the government's minimum needs and the best method of accommodating those needs is primarily the responsibility of the contracting agencies. This rule recognizes that, since government procurement officials are the ones most familiar with the conditions under which supplies, equipment, or services have been used in the past and how they are to be used in the future, they are generally in the best position to know the government's actual needs. See *Frequency Electronics, Inc.*, B-204483, Apr. 5, 1982, 82-1 CPD ¶ 303. As to the decision to negotiate the procurement, we will not question the judgment of the agency which determined that the technical data regarding the new engine is sufficiently important to warrant discussions and a negotiated procurement unless the determination is shown to be unreasonable. Such a determination essen-

tially involves the exercise of a business judgment by the contracting officer which, on this record, has not been shown to be unreasonable.

Second, we reject the protester's argument concerning the use of a preaward survey as a substitute for negotiations, since a preaward survey conducted after or aside from the actual competition would not accomplish the Army's purpose. A preaward survey, as part of the agency's investigation of an offeror's responsibility, focuses on the firm's ability to perform as required and involves matters like financial resources, experience, facilities and performance record, but does not include negotiation of the terms of the contract to be executed. In contrast, the focus of the negotiation process is to develop, through discussions if necessary, the contractual terms themselves, such as a promised method of production, and, thereby, to define and frame the terms of a firm's offer. See *Saxon Corp.*, B-216148, Jan. 23, 1985, 85-1 CPD ¶ 87. Thus, elimination by an agency of a small business proposal, during the evaluation process, even for traditional responsibility matters such as "understanding" of the scope of work, does not generally have to be referred to the Small Business Administration as a nonresponsibility determination. See *Tri-States Services Company*, B-218733.2, Aug. 20, 1985, 85-2 CPD ¶ 196. Accordingly this basis for protest is denied.

Two minor issues remain.

The protester alleges that the solicitation's evaluation criteria are not appropriate for a sealed bid procurement and that, in any event, the relative importance of the evaluation factors is not stated with sufficient specificity. We have already found that the procurement was properly negotiated so that the present solicitation's evaluation scheme is not intended to be appropriate for sealed bid procurements. Moreover, as stated previously, the solicitation simply and clearly provides that award will be made on the basis of overall lowest price among those proposals found technically acceptable as to stated technical criteria. In short, we have reviewed this evaluation scheme and find the solicitation criteria for evaluation and award to be simple, straightforward and complete. Accordingly, this basis for protest is also denied.

Finally, the protester argues that the solicitation is indefinite in that it provides that the awardee must comply with a "Quality Program Requirement" (MIL-Q-9858A) that is "in effect on the contract date." The protester states that it is patently unfair to require firms to submit offers without a full knowledge of the particular specification revision that is applicable. In this respect, we note that the FAR specifically provides for incorporation in a solicitation of specifications "in effect on the contract date." *See* FAR, 48 C.F.R. § 52.246-11 (1984). In fact, however, the solicitation incorporates a baseline quality contract requirement, that is, MIL-Q-9858A, dated Dec. 16, 1963, as amended Mar. 8, 1985. It is this revi-

sion that an offeror must propose and the quality contract program under it must be in place by the time of award. There is no evidence in the record that a new revision is anticipated, and we have been informally advised that, in fact, no revisions are in process.

The protest is denied.

[B-216550]

Agriculture Department—Price Support Programs—Deficiency Payments

Section 120 of the Omnibus Budget Reconciliation Act of 1982 provided that any debts that might result from advice deficiency payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs were to be repaid to the U.S. on or before Sept. 30, 1984. However, that provision would not preclude the Department of Agriculture from exercising appropriate discretion to select the best means to collect those debts, including temporary suspension of collection until an administrative offset could be accomplished, pursuant to the Federal Claims Collection Act of 1966, as amended, and the Federal Claims Collection Standards.

Federal Claims Collection Act of 1966—Debt Collection—Administrative Responsibility

The decision of the Department of Agriculture to defer the collection of debts arising from excessive advance payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs was not adequately supported by findings and other evidence that complies with the requirements of the Federal Claims Collection Standards.

Federal Claims Collection Act of 1966—Debt Collection—Administrative Responsibility

The provisions of section 102.2(e) of the Federal Claims Collection Standards do not excuse agencies that collect debts by administrative offset from the need to sent written notices to debtors of amounts owed to the U.S. including all the information required by other applicable regulatory provisions.

Federal Claims Collection Act of 1966—Debt Collection—Administrative Responsibility

Before it may temporarily suspend the collection of debts pursuant to section 104.2(b)(2) of the Federal Claims Collection Standards, an agency must properly conclude *both* that the debtor is presently financially unable to pay the debt, but that his future prospect justify giving him more time, and that future collection can be effected through administrative offset or that the temporary suspension of collection is likely to enhance his ability to pay.

Interest—Debts Owned United States—Notice Effect

Farmers who signed Department of Agriculture form "ASCS-477" in order to participate in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs entered into contracts that obligated them to comply with and be bound by agency regulations providing for the assessment of interest (without the need for further notice before interest could accrue) on delinquent debts arising under those programs. Consequently, interest should be assessed and collected (pursuant to the agency's regulations and the Federal Claims Collection Standards) on debts arising under those programs, regardless of the fact that Agriculture has not individually notified each debtor that interest be paid on those debts.

Matter of: USDA Collection of Excess Advance Deficiency Payments on 1983 Corn and Grain Sorghum Crops, Jan. 29, 1986:

The Inspector General of the United States Department of Agriculture (USDA) has requested our opinion on the propriety of USDA's decision to defer the collection of some debts which were made due on September 30, 1984, by section 120 of the Omnibus Budget Reconciliation Act of 1982 (OBRA), Pub. L. No. 97-253, 96 Stat. 763, 768 (7 U.S.C. § 1445b-2(c) (1982)). The debts arose as a result of what turned out to be overpayments made in advance in 1982 to corn and grain sorghum farmers participating in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs. The Inspector General also asks whether the decision to defer the collection of some of the debts was in compliance with the Federal Claims Collection Standards requiring agencies to take timely, aggressive action to collect debts owned to the United States and to assess interest on past due debts. We requested, received and considered the views of USDA on the questions raised.

For the reasons givens below, we find that the decision by USDA to defer the collection of the debts from farmers who agreed to participate in the 1984 program did not violate section 120 of OBRA. However, we also find that USDA's method of collecting these deferred debts was inconsistent with the Federal Claims Collection Standards (FCCS). Furthermore these debts were governed by contracts in which USDA's debtors agreed to make payment by a specified date, and to pay interest on any amounts not paid by that date.

BACKGROUND

Under the Agricultural Act of 1949, as amended, 7 U.S.C. §§ 1421 *et seq.* (1982), USDA (through the Commodity Credit Corporation (CCC) and the Agricultural Stabilization and Conservation Service (ASCS)) administers a variety of programs designed to provide price supports and other assistance to the agricultural sector. Farmers who participate in those programs and comply with the regulations governing them may receive Federal assistance, including loans and direct cash payments. 7 U.S.C. ch. 35A (1982). Among the programs administered by USDA under this authority are the Feed Grain, Rice, Upland Cotton and Wheat Programs for crop years 1982-85. 7 C.F.R. pt. 713 (1984).[1] Farmers who participate in these programs may be eligible to receive "deficiency payments," which are direct cash awards made when the national average

[1] USDA did not formally prescribe regulations to implement these programs until Jan. 14, 1983. 48 Fed. Reg. 1679 (1983). (Those regulations were not codified in the Code of Federal Regulations (C.F.R.) until the 1984 edition.) USDA began implementing these programs before the regulations had been promulgated.

market price for a given agricultural commodity falls below a "target" price established by law. 7 C.F.R. §§713.1(a), 713.106, 713.108. Normally, deficiency payments are calculated and paid part way through the marketing year for each particular commodity, i.e., several months after harvest. *E.g.*, S. Rep. No. 504, 97th Cong., 2d Sess. 84 (1982). Deficiency payments to corn and grain sorghum farmers are normally paid "as soon as practicable" after April 1, for the previous year's crop. 7 C.F.R. §713.108(d)(3).

Section 120 of OBRA required USDA to make estimated deficiency payments in advance of the normal payment dates to farmers who participated in the 1983 crop programs. However, if USDA later determined that the advance payments exceeded the amount of the actual deficiency payments that were due, the participating farmers were required to refund the excess amounts to USDA. By statute, those refunds were due at the end of the marketing year for each particular crop. For 1983 corn and grain sorghum crops, the due date was September 30, 1984. 7 C.F.R. §§713.3(h)(3), 713.104(d).

In November 1983, USDA determined that the national average market price for the 1983 crops of corn and grain sorghum would probably exceed the established "target"prices. Consequently, farmers who received advance deficiency payments for those crops would owe USDA refunds for the full amounts of the advances paid. USDA informed its local offices of these facts, and directed them to advise the indebted farmers of their liability and that refunds would be due and payable on October 1, 1984. The local offices were also directed to remind farmers about the assessment of interest on past due debts arising from the failure to comply with applicable regulations. The local offices were not specifically instructed, however, concerning interest assessments on debts arising from the excessive advance payments. USDA/ASCS Notice No. PA-932 (Nov. 8, 1983).

In March 1984, USDA substantially revised its instructions to its local offices concerning the collection of these debts. It instructed county offices not to issue any further demand letters for repayment of overpayments of advance deficiency payments for corn and grain sorghum and to notify farmers who received demand letters that the demand for refund was being deferred and any late payment charge previously determined would not apply. Existing claims were to be canceled. Instructions on how to reestablish them were to be issued later. After October 1, 1984, any unrefunded advance deficiency overpayments were to be set off against other payments earned by farmers. County offices were also instructed to notify farmers that if they chose to participate in the 1984 crop program, collection of the debts would be deferred until the date the final deficiency payment was determined for the 1984 crop program. For corn and grain sorghum, this date was April 1, 1985. USDA/ASCS Notice No. PA-951 (Mar. 9, 1984).

In August 1984, USDA again revised its instructions to its local offices concerning these debts.[2] As before, local offices were prohibited from demanding payments, assessing interest, or taking any action other than offset (when and if available) to collect the advance deficiency payments owed by those farmers who signed up for the 1984 crop year programs. This revision provided guidance on reestablishing claims and added that local offices were to take all normal, necessary and appropriate actions to recover the advance payments owed by those farmers who chose not to participate in the 1984 programs. The revision specifically directed local offices to send demand notices and assess interest against nonparticipating farmers on October 1, 1984. USDA/ASCS Notice No. PA-978 (Aug. 21, 1984).

In summary, USDA divided the debts which arose from the 1983 crop advance deficiency payments into two classes: debts owed by farmers who did not participate in the 1984 crop programs, and debts owed by farmers who did participate in the 1984 program. Regarding the first class, USDA initiated prompt, aggressive activities designed to collect these debts as soon as possible. On those debts, demand notices were issued on the first day the debts were past due according to section 120 of OBRA, as were interest assessments; offsets were taken whenever available; and local offices were advised to take all normal debt collection steps. Regarding the second class, however, for 7 months after the debts became past due under section 120, USDA restricted its collection activities to offset when, if ever, it might be available. No demand letters were sent and no interest was assessed until April 1985.

DISCUSSION

1. *Was USDA authorized to defer collection of debts made due by statute on September 30, 1984?*

Section 120 of OBRA only sets the date on which the refunds owed by farmers who received overpayments of deficiency payments by way of advances became due and payable. It does not preclude USDA from exercising its authority and discretion (pursuant to other applicable laws and regulations) to choose the methods and tools which it reasonably determines are best suited to collect those debts after they become due. In this regard, we note that the FCCS, which implement the Federal Claims Collection Act of 1966, as amended, 31 U.S.C. ch. 37, specifically authorize agencies to defer collection of the full amount of a debt by entering into a voluntary installment repayment agreement (4 C.F.R. §102.11), collecting the debt in installments by administrative setoff (4 C.F.R.

[2] USDA did issue several other revisions which did not substantially alter the provisions relevant to this case. *E.g.*, USDA/ASCS Notice No. PA-957 (Apr. 7, 1984); USDA/ASCS Notice No. PA-980 (Sept. 17, 1984). Since those other revisions made no relevant changes, they will not be described here.

§§ 102.3, 102.4), and suspending collection activity (4 C.F.R. § 104.2). In our opinion, section 120 did not repeal by implication or otherwise limit USDA's preexisting authority to exercise sound discretion under 31 U.S.C. ch. 37 and the FCCS to determine what methods and collection schedule are best suited to recover those debts. *Cf.* 64 Comp. Gen. 142, 145-46 (1984) (implied repeal not favored). Thus in certain situations, USDA was authorized to defer until a later date the collection of debts that section 120 of OBRA made due on September 30, 1984.

2. *Was USDA's handling of debts owed by participants in the 1984 crop program consistent with the FCCS?* [3]

USDA maintains that under its regulations and the FCCS, it may assess interest only on "delinquent debts," which are defined by those regulations as payments that are "overdue in accordance with the terms of an arrangement for payment as provided for in the contract, agreement or notification of indebtedness * * *." *See* 7 CFR § 1403.2(d); FCCS, 4 CFR § 101.2(b). Thus USDA argues that these debts were not technically "delinquent" since USDA did not issue demands which specified a date by which payment would be past due, and that it was under no obligation to send demand letters earlier than it did. We disagree.

The FCCS require agencies to take "aggressive action on a timely basis with effective follow-up" to collect debts owed the United States. 4 CFR § 102.1. Section 102. of the FCCS prescribes the use of prompt, appropriate, written demands. 4 CFR § 102.2.[4] That section provides, as USDA has noted, that "[t]he availability of funds for offset and the agency's determination to pursue it releases the agency from the necessity of further compliance with paragraphs (a), (b) and (c) of [section 102.2]." 4 CFR § 102.2(e). However, section 102.2(e) also provides that "[i]f, either prior to the initiation of, or at any time during, or after completion of the demand cycle, an agency determines to pursue offset, then the procedures specified in § 102.3, § 102.4, or 5 U.S.C. § 5514, as appropriate, should be followed." *Id.* As was explained in the Supplementary Information Statement that accompanied the publication of the revised FCCS in the *Federal Register*,[5] this section does not eliminate the need to

[3] That the FCCS apply to USDA, CCC and ASCS is clear. *See e.g.*, 7 CFR § 1.52 (1984) (the FCCS "are applicable to and controlling on" USDA.); CCC Docket No. CZ 161a, § B(II)(A)(2) (Rev. 4, Jan. 13, 1971) (the FCCS "shall be applicable to all claims by CCC regardless of amount."); ASCS Handbook No. 58-FI, "Managing CCC and ASCS Claims," pt. 1, para. 7, at 2 (Rev. 5, Amend. 1, March 10, 1983) ("Authority for managing ASCS and CCC claims is mandated by [the] Federal Claims Collection Standards. * * *").

[4] The regulations of ASCS, for example, adopt the position that written demands should be made "as soon as it is known that a payment is owed to ASCS or CCC." ASCS Handbook, No. 58-FI, *supra*, para. 77.

[5] 49 Fed. Reg. 8889, 8890 (1984) ("We emphasize that offset, while obviating the need to comply with the specific demand requirements of § 102.2, still requires written notification. The first step in any offset, administrative or salary, must be a written notification advising the debtor of the agency's intent to use offset. Thus,

inform the debtor of the nature and amount of his debt, the date the debt is due, the financial consequences of making late payment, and the agency's intention to collect by means of offset unless the debtor works out other satisfactory arrangements. (The notice would also inform the debtor of his statutory right to contest the existence or amount of the debt.) The provisions of section 102.2(e) were intended not to facilitate delays in collection, but rather to create an equitable yet efficient short-cut in the debt collection process.[6] Consequently, the provisions of section 102.2(e) do not permit agencies to avoid the requirement for prompt aggressive action by simply choosing not to send any notice of the debt at all and thereby avoid establishment of a due date.

We must also disagree with USDA's implicit conclusion[7] that these debts are not created and governed by *contracts* which prescribe a payment due date. In order to participate in, and receive the benefits of the 1983 crop year deficiency programs, farmers were required to sign a form ASCS-477.[8] 7 CFR § 713.50(b)(2)(i). That form obligated those farmers to comply with applicable regulations (7 CFR pt. 713) which specify that refunds of excess advance payments are due by the end of the marketing year—in this case. September 30, 1984 (7 CFR §§ 713.104(d)(1), 713.3(h)(3))—and that payments not timely made would be subject to "late payment charges" specified in the regulations. Consequently, it is our opinion that, even though demand notices were not sent, farmers who participated in the 1983 corn and grain sorghum crops program did enter into contracts that specified the date on which payment was due, and that refunds not paid on or before September 30, 1984, constituted delinquent debts under those contracts, the FCCS, and the regulations of USDA, CCC, and ASCS. *See* FCCS, 4 CFR § 101.2(b); 7 CFR § 1402(d).

The fact that the governing statute, regulations, and contracts specified September 30, 1984, as the date on which these debts were due and payable is not dispositive, however. The regulations provide two bases on which an agency might delay collection of the

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eliminating the need to comply with § 102.2 does not eliminate the need for written notice.").

[6] *See* 49 Fed. Reg. at 8890 ("[D]eviation from the demand cycle of § 102.2 in offset cases does not violate any rights of the debtor. [At the same time, however,] the collection action in such cases need not be anywhere near as detailed as it would be if offset potential did not exist.").

[7] In arguing from the applicable regulations that interest may only be assessed on payments that are past due under the terms of a demand letter, USDA overlooks that portion of these regulations which provides that debts are also "delinquent" if payment is past due under the terms of a contract or agreement. 7 CFR § 1403.2(d); 4 CFR § 101.2(b).

[8] The form ASCS-477, entitled "Notice of Intention to Participate and Application for Payment," provides that, in return for the benefits to be received under the program. the farmer agrees to "comply with the regulations governing the applicable program and payment limitations [and that] overpayments not repaid by the required date will be subject to late payment charges according to regulations (7 CFR 1403)."

full amount of a debt. The first basis involves the use of installment repayment agreements. 4 CFR § 102.11. Under the FCCS, debts are normally to be collected in "one lump sum." 4 CFR § 102.11(a). However, "if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments." *Id.* Agencies which enter into such arrangements are required to obtain financial statements and enforceable written agreements, as well as assess interest on the debt. *Id.* Since USDA did not take these steps and does not cite this authority, it does not appear that USDA's activities either were intended to (or actually do) fall within the scope of this authority.

The second basis involves suspension of the collection of debts based upon one or more of three different grounds, 4 C.F.R. § 104.2 Two of those grounds, the inability to locate the debtor, and the pendency of a request for waiver or administrative review (4 CFR §§ 104.2(a), 104.2(c)), do not seem to be applicable here. The third ground involves the financial condition of the debtor and is addressed in 4 CFR § 104.2(b), which provides:

(b) *Financial condition of debtor.* Collection action may also be suspended temporarily on a claim when the debtor owns no substantial equity in realty or personal property and is unable to make payments on the Government's claim or effect a compromise at the time but the debtor's future prospects justify retention of the claim for periodic review and action, *and;*

(1) The applicable statute of limitations has been tolled or started running a new; or

(2) Future collection can be effected by offest, notwithstanding the statue of limitations, with due regard to the 10-year limitation prescribed by 31 U.S.C. 3716(c)(1); or

(3) The debtor agrees to pay interest on the amount of the debt on which collection action will be temporarily suspended, and such temporary suspension is likely to enhance the debtor's ability to fully pay the principal amount of the debt with interest at a later date. [Italic supplied.]

USDA maintains that its decision to seek possible future opportunities to collect these debts through administrative offset enabled it to defer other collection activities against its debtors. However, the "catchline" of section 104.2(b) and its use of the conjunction "and" clearly shows that although the availability of future offset activity is relevant to suspension of collection under section 104.2(b), it *must* be tied to an appropriate evaluation of the financial condition of the debtor (or appropriate class of debtors). It is not clear to us that USDA attempted to apply these criteria in its handling of these debts, nor does USDA cite them in support of its policies in this case.

Instead, USDA states that its decision to collect this class of debts exclusively through the use of administrative offset (and thereby defer for 7 months the use of other appropriate collection activities) "served several policy purposes" including: (1) increasing the level of participation in the 1984 crop programs; (2) providing farmers with funds to repay their debts; and (3) taking advantage of legislative changes which resulted in 1985 crop program advance pay-

ments in October 1985—thus facilitating collection of some of the amounts owed through offset.[9]

It is not clear to us how the reasons offered by USDA to justify its collection policies reflect application of the criteria governing suspension of collection under the FCCS. Certainly, to the extent that USDA could and did legitimately anticipate that offset would be available shortly after, or at any time during the delinquency of these debts, USDA could and should have used administrative offset to collect those debts, to the extent feasible. However, once the specific opportunity for taking offset was gone, USDA should have employed the various other means available to it under the FCCS to promptly and aggressively collect the remaining balances. 4 C.F.R. § 102.1.

Finally, we agree with the Inspector General that the interest assessment policies followed here by USDA, and its constituent agencies, CCC and ASCS, are not entirely consistent with the FCCS. *Compare* 7 C.F.R. §§ 713.103(e), 713.104(d)(2), 1403.1 to 1403.6 *with* 4 C.F.R. § 102.13. We assume that at least some of the inconsistencies may be attributed to the fact that USDA's regulations generally predate enactment of 31 U.S.C. § 3717 and the most recent revision of the FCCS.[10] However, we need not evaluate the propriety of these inconsistencies in order to resolve the Inspector General's questions because, as was pointed out above, these debts are governed by contracts which explicitly fix the interest policies applicable to them.

The governing contracts, as quoted above, specifically provide that in return for the payments and other benefits available under

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[9] The second and third reasons offered by USDA are not particularly useful in supporting its position. First, as the FCCS point out, offset generally should not be taken against "advance" payments. Frequently, taking offset against advance payments tends to substantially interfere with or defeat the purposes of the program payments against which offset would be taken. 4 C.F.R. § 102.3(a).

Second, it is difficult to see how the legislation to which USDA here refers actually served as a basis for the decision (made in March 1984) to restrict USDA's collection activities to offset. That statute conditioned the making of advance payments for the 1985 programs upon a determination by USDA that the quantity of surplus corn on hand on September 30, 1985, would probably exceed a designated amount. Pub. L. No. 98-258, 98 Stat. 130, 132-33, § 202 (1984), *to be codified in* 7 U.S.C. § 1444d(e).

The USDA's Preliminary Regulatory Impact Analysis concerning the 1985 programs (which was issued on May 11, 1984) did not even speculate concerning the determination required by Pub. L. No. 98-258. It wasn't until September 14, 1984 (when the Final Regulatory Impact Analysis for the 1985 program was issued) that USDA made the findings necessary under that act to authorize advance payments for the 1985 programs. *Compare* USDA Preliminary Regulatory Impact Analysis (1985 Feed Grain Program) (May 11, 1984) with USDA Final Regulatory Impact Analysis (1985 Feed Grain Program) Sept. 14, 1984) (*incorp. by ref. in* 50 Fed. Reg. 1892 (Sept. 14, 1984)). Thus, it seems unlikely that USDA's March 1984 decision to rely solely upon offset was significantly motivated by anticipation of advance payments pursuant to the provisions of Pub. L. No. 98-258.

[10] *E.g.*, 7 C.F.R. pt. 1403 (1984) (source: 47 Fed. Reg. 37075 (Aug. 25, 1982)). Note: section 3717 was originally enacted on October 25, 1982 (Pub. L. No. 97-365, § 11, 96 Stat. 1749, 1755-56), and the FCCS were most recently revised on March 9, 1984 (49 Fed. Reg. 8889 (1984)).

these programs, the farmers agree to repay past due overpayments with interest and to be bound by and comply with the applicable USDA regulations. Since all of the necessary terms are specified in or ascertainable from these contracts and incorporated regulations, we conclude that USDA was legally entitled to interest on those advance payments or portions thereof that remained unpaid as of October 1, 1984. USDA's failure to issue demand letters to its debtors pursuant to 31 U.S.C. § 3717 and the FCCS does not alter this conclusion, since the requirements of section 3717 and section 102.13 of the FCCS are not applicable to the extent that the governing contract explicitly fixed the applicable interest terms. 31 U.S.C. § 3717(g)(1); 4 C.F.R. § 102.13(i)(1)(iii). We are not aware of anything in the FCCS that would have authorized USDA or its agencies to waive those interest charges under these circumstances. *See* 4 C.F.R. § 102.13(g). *Cf.* 49 Fed. Reg. at 8893.

CONCLUSIONS

For the reasons given above, we find that USDA's policies concerning the collection of the debts arising from the advance deficiency payments made for 1983 corn and grain sorghum crops did not violate section 120 of OBRA. However, those policies were not consistent with the provisions of the FCCS, in that USDA failed to take timely, aggressive, and effective action to collect those debts owed to the United States by farmers who participated in the 1984 Feed Grain Programs. We also find that, despite its failure to send appropriate notices which advised those debtors of their liability for interest charges, USDA is legally entitled to, and should take, appropriate steps to recover interest assessments on those debts pursuant to the governing contracts.

[B-217921]

Vehicles—Rental—Damage Claims

An Army officer was authorized to rent a car for use with another officer while on temporary duty. An accident occurred while the car was driven by the other officer. This officer, though not specifically authorized to rent a car on his travel order, was authorized to use that car for official business. Since the accident occurred while the driver was performing official business, payment may be made to the rental company for the deductible amount of damages required by the rental contract.

Matter of: Captain Kenneth R. Peterson, USA, Jan. 29, 1986:

An Army officer was authorized to rent a car for his use together with another member for transportation while on a temporary duty assignment. An accident occurred at the time the car was being driven at the temporary duty location by the Army officer whose orders did not authorize the car rental. We are asked whether a direct payment may be made by the Government to the car rental agency of the deductible amount required by the rental con-

tract for damage to the rented vehicle.[1] We conclude that payment may be made since the officer was authorized to use the rental vehicle for official travel and since it may be determined that he was using the car for official travel when the damage occurred.

Captain Kenneth R. Peterson and Captain Kaleo L. Elia, Headquarters, Combined Army Training Activity, Fort Leavenworth, Kansas, were ordered to perform temporary duty at Fort Monroe, Virginia, to attend a meeting. Captain Peterson was authorized a rental car on his travel orders for his use together with Captain Elia for transportation at the temporary duty location while on the assignment.

Captain Peterson rented a car from Budget Rent A Car on November 27, 1984. He declined to purchase "Collision Damage Waiver" coverage to provide accident collision insurance coverage for the first $1,000 of loss or damage.

The rental car was driven by Captain Peterson for the initial travel required. However, on the morning of November 28, Captain Elia drove from his quarters intending to go to a drug store to obtain needed medication. While en route he was involved in a traffic accident. Captain Elia was cleared of all charges in connection with the accident.

Captain Peterson paid the usual rental charges and has been reimbursed. Budget Rent A Car submitted the claim for the deductible amount, the amount Captain Peterson became contractually obligated to pay for the loss through collison damage to the rental car in the maximum amount of $1,000.

The submission states that most commands minimize the use of rental cars by requiring that travelers share the car when a group travels to a temporary duty point. Normally, only one person is authorized a rental car even though other members of the group may have a requirement to use the rental car in conducting official business.

In accordance with para. 1-3.2c of the Federal Travel Regulations, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984), para. M4405-1c of the Joint Travel Regulations, Volume 1, provides that extra collision insurance, "Collision Damage Waiver," will not be purchased but that a member may be reimbursed up to the deductible amount as contained in the rental contract for personal funds paid to rental car agencies for damage sustained by an automobile properly rented, and damaged in the performance of official business. Such deductible amount may also be paid directly to the car rental company.

It is clear that Captain Elia was authorized by the Army to drive the rental car although the cost of the rental was authorized on

[1]Major T.A. Stout, Finance and Accounting Officer, Fort Leavenworth, Kansas, submitted this request for a decision and it has been assigned PDTATAC control number 85-6 by the Per Diem, Travel and Transportation Allowance Committee.

Captain Peterson's orders. We find no specific requirement in law or regulation that a specific authorization be included in an individual's travel orders to use a Government controlled vehicle on official business. Accordingly, Captain Elia could drive the rental car on official business.

Captain Elia was driving the rented car from his lodgings to go to a drug store to obtain required medication at the time the accident occurred. We find that, by analogy to the rule applicable to the use of Government owned or leased vehicles, this travel was travel for official purposes. Even though certain travel which is primarily for the sustenance, health or comfort of the traveler may not be considered official travel for purpose of reimbursement on a mileage basis or for payment of taxi fares, it is considered travel for official purposes when it merely involves the use of a Government controlled vehicle. The rule applicable to the use of a Government owned or leased vehicle is equally applicable to vehicles rented for official business. See 1 JTR para. M4406-1, which specifically provides that Government controlled vehicles may be driven on necessary trips to drug stores.

Under the rental contract Captain Peterson became liable for the payment of the deductible amount of $1,000 to Budget Rent A Car because the automobile was damaged in the performance of official business. This amount would have been reimbursable to Captain Peterson if he had paid from personal funds. However, as provided by regulation the Government may pay the deductible amount directly to the car rental company. 1 JTR para. M4405-1c(2); B-162186, May 28, 1971.

Under the terms of the rental contract liability for the deductible amount of the damage to the rental car is established regardless of a question of negligence. However, as indicated in B-162186, supra, in appropriate circumstances the Government may find it advantageous to make claim against the negligent party to recoup the amount involved.

For the reasons stated the voucher payable to Budget Rent A Car submitted may be paid.

[B-220327]

Bids—Invitation for Bids—Amendments—Failure to Acknowledge—Waived as Minor Informality

A bidder's failure to acknowledge an amendment that adds two containers to each of five previously-scheduled deliveries of containers is not a material deviation requiring rejection of the bid as nonresponsive. Rather, it may be treated as a minor informality that may be cured after bid opening when the bidder has submitted a price for and is obligated to provide the correct total number of containers and the effect on price, if any, of the change made by the amendment is negligible.

Bids—Responsiveness—Pricing Response—Minor Deviations from IFB Requirements

Failure of the low bidder to bid on an option item added by amendment is not a material deviation requiring rejection of the bid as nonresponsive when the option price is not evaluated.

Matter of: Wirco, Inc., Jan. 29, 1986:

Wirco, Inc. protests the rejection of its low bid as nonresponsive to invitation for bids (IFB) No. N00024-85-B-6270, issued on June 28, 1985 by the Naval Sea Systems Command (NAVSEA). The solicitation was for a first article and various production quantities of torpedo shipping containers.

We sustain the protest.

The bid schedule included 16 different line items, some with subitems, covering base and option quantities of the containers, as well as progress reports, data, and warranties. Except for the first article, the Shipping Instruction Data Form (Attachment A) required all to be delivered at specified times to TRW in Cleveland, Ohio. Shipping, the IFB specifically stated, would be at government expense, normally on a government bill of lading.

At issue here is line item No. 0003AA, for which bidders were to submit unit and extended prices for 35 containers on an f.o.b. origin basis. However, the delivery schedule for this item called only for 5 shipments of 5 containers each, for a total of 25 containers. Amendment No. 0001, dated July 22, among other things corrected this discrepancy and increased the quantity for each shipment of this item to 7, for a total of 35.

NAVSEA rejected Wirco's low bid for failure to acknowledge receipt of the above-discussed amendment or to submit a delivery schedule. The agency awarded a contract to Yanke Container Corporation on September 10.

Wirco contends that its failure to acknowledge the amendment should not render its bid nonresponsive because the amendment was not material, but merely corrected an "obvious typographical error." The protester further contends that its omission of the delivery schedule should not render its bid nonresponsive because in signing Standard Form 33, Wirco agreed to provide the items at the prices set forth in its bid within the times specified in the delivery schedule.

NAVSEA maintains that, contrary to the protester's argument, correction of the delivery information was a material change that could have affected price. According to the agency, Wirco had no basis for assuming that the correct schedule was 5 deliveries of 7 containers each, since the 10 containers omitted from the original delivery schedule could have been required to be shipped either sooner or later and in various other combinations. The agency concludes that it therefore properly rejected Wirco's bid.

Generally, a bidder's failure to acknowledge the receipt of an amendment or to demonstrate clearly an obligation to perform the amendment's requirements renders the bid nonresponsive. *Lear Siegler, Inc.*, B-212465, Oct. 19, 1983, 83-2 CPD 465.[1] However, the failure of a bidder to acknowledge receipt of an amendment may be waived or allowed to be cured where the amendment had either no effect or merely a negligible effect on price, quantity, quality, or delivery. *Federal Acquisition Regulation (FAR)*, 48 C.F.R. § 14.405 (1984) *Gentex Corp.*, B-216724, Feb. 25, 1985, 85-1 CPD ¶ 231. No precise standard can be employed in determining whether a change required by an amendment is more than negligible, and the determination must be based on the facts of each case.

Although an amendment is material where it imposes legal obligations on the contractor that were not contained in the original solicitation, see *Reliable Building Maintenance, Inc.*, B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344, here Wirco bid on and was legally bound to provide the correct total number of containers, 35. While the NAVSEA theoretically could have required delivery either sooner or later and in various other combinations, thus arguably affecting price, here it did not do so. The amendment merely added 2 containers to each of the previously scheduled 5 deliveries to TRW. We are not convinced that such an addition would have more than a negligible effect on price,[2] and we agree with Wirco that the change was more in the nature of a typographical correction.

Thus, we find the facts here do not support rejection of Wirco's bid as nonresponsive, since Wirco committed itself to the total number of containers required. Rather, we believe Wirco should have been given the opportunity to cure the deficiency. Given the $41,631 difference between Wirco's and Yanke's bids (Wirco at $1,096,577 and Yanke at $1,138,208), a cure would not have been prejudicial to other bidders.

Remaining for resolution is whether Wirco's failure to bid on the line item added by the amendment rendered its bid nonresponsive. The agency has not questioned the acceptability of the bid on this basis. We note, however, that the item in question, No. 0016AE, is

[1] We note that Wirco correctly states that the failure to return part of the bid package, such as the delivery schedule, does not automatically render a bid nonresponsive where the omitted portion of the bid is incorporated into the bid by reference. See *Werres Corp.*, B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243. Under those circumstances, the submittal is in a form such that acceptance would create a valid and binding contract, requiring the bidder to perform in accord with all material terms and conditions of the IFB. Id. However, the rule is not applicable here because the amendment revised the delivery schedule.

[2] We note that the addition had no effect of transportation costs, because the bid terms were f.o.b. origin and the solicitation did not specify that these costs would be evaluated (although such evaluation is provided for in FAR, 48 C.F.R. § 47.305-3(f)(2)). Even if transportation costs had been evaluated, presumably those from Wirco's plant in Indiana to the Cleveland delivery point would be less than those from Yanke's plant in Idaho to the same delivery point.

a warranty provision applicable to item No. 0007, which in turn is an option item. Neither Wirco nor Yanke bid on the warranty provision.

We have held that where option prices are not included in the evaluation and where it is not specified that they may not exceed a particular ceiling, a bidder's failure to quote option prices is not a material deviation, and a bid should not be rejected as nonresponsive on this basis. 51 Comp. Gen. 528 (1972); *AMS Mfg., Inc.*, B-203589, Sept. 2, 1981, 81-2 CPD ¶ 195, *aff'd on reconsideration*, B-203589.2, Nov. 2, 1981, 81-2 CPD ¶ 371. Here, the solicitation did not provide for the evaluation of options or include a ceiling on option prices. Moreover, in determining the low and second-low bidder, NAVSEA considered only prices for base quantities. Wirco's failure to bid on the warranty provision is therefore not a material deviation that requires bid rejection. *See* 52 Comp. Gen. 614 (1973).

Performance has been delayed pending our decision. By letter of today to the Secretary of the Navy, we are therefore recommending that if Wirco is determined to be responsible and cures its failure to acknowledge the amendment, award should be made to it and the contract awarded to Yanke be terminated for the convenience of the government.

The protest is sustained.

[B-220087; B-220087.2]

Equipment—Automatic Data Processing Systems—Acquisitions, etc.—Brooks Act Applicability

An acquisition of materials, supplies and installation of a local area network (LAN) to be used to transmit information between computers is an acquisition of automatic data processing equipment within the meaning of the Federal Information Resources Management Regulation, 41 C.F.R. 201-2.001 (1985) and the Brooks Act, 40 U.S.C. 759 (1982). Where the General Services Administration has not issued a delegation of procurement authority, actions taken by an agency seeking to acquire materials, supplies and installation of an LAN are unauthorized.

Matter of: Plus Pendetur Corporation; Network Systems Corporation, Jan. 30, 1986:

Plus Pendetur Corporation and Network Systems Corporation protest the Navy's procurement of a local area network (LAN) under invitation for bids (IFB) No. N00024-85-B-6408. The basic portion of the solicitation is for the design of a broad-band cable system linking various data processing equipment belonging to the Naval Sea Systems Command (NAVSEA) and the Naval Air Systems Command (NAVAIR) at their Arlington, Virgina, Crystal City building complex. The solicitation also includes option items for materials and supplies for the installation of the system. The protesters raise various objections to the Navy's handling of the procurement. We need to reach only one of these complaints, an allegation asserted by Network Systems that the Navy does not have

contracting authority. We sustain the Network Systems' protest and dismiss Plus Pendetur's protest as premature.

The Brooks Act, 40 U.S.C. § 759 (1982), gives the General Services Administration (GSA) exclusive federal purchasing authority for all commercially-available general purpose automatic data processing equipment (ADPE). 40 U.S.C. § 759(b)(2); 47 Comp. Gen. 275, 277, 278 (1967). GSA may delegate this authority. 40 U.S.C. § 759(b)(2). GSA has implemented its authority by publishing regulations defining ADPE, which grant blanket delegations of procurement authority in certain circumstances, but which otherwise require that an agency seeking to purchase ADPE submit a documented Agency Procurement Request to GSA requesting a specific Delegation of Procurement Authority (DPA). Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. § 201-2.001 and Part 201-23 (1985). Absent a GSA-approved DPA, an agency lacks authority to acquire ADPE. *PRC Computer Center, Inc., et al.*, 55 Comp. Gen. 60, 67 (1975), 75-2 CPD ¶ 35.

In its initial report to our Office, the Navy asserts that no DPA is required because it is not buying ADPE. According to the Navy, it is merely acquiring a cable telecommunications system.[1] It admits it will use the system to link various computers and peripheral computer equipment. It argues, however, that ADPE embraces only general purpose, commercially-available, mass-produced automated processing devices, and does not encompass equipment such as telephones, telegraph, facsimile and similar items. In the Navy's view, a LAN is clearly not ADPE because it does not store, retrieve, collate or interpret data. Rather, according to the agency, it is a telecommunications facility, consisting of a network of cable and connectors as well as a control center monitoring system.

Network System strongly disagrees. It contends that ADPE as defined in the FIRMR includes not only commercially-available computers as such, but auxiliary equipment, as well as devices to control and transfer data or instructions to computers and data transmission and batch terminals. It points out that LANs are designated as ADPE for federal supply classification purposes (FSC Group 70). Moreover, the protester contends, the LAN includes network interface units, which do store, retrieve, interpret and manipulate data being transferred between equipment served by the LAN.

GSA, in a report filed at our request, supports Network Systems' position. In GSA's view, the items relating to the materials, supplies and installation of the LAN are within the purview of its exclusive authority under the Brooks Act and a DPA is required if the estimated value of the procurement exceeds the blanket DPA thresholds it has established. GSA asserts that the Navy's requirement is governed by the FIRMR, Part 201-2. It notes that the

[1] The apparent awardee, American Television Systems (ATS), joins in this view.

Navy's technical specifications include microcomputer systems and observes that data transmission and communications equipment, sensors and other devices designed for use with a configuration of ADPE are excluded from FSC Group 58, which relates to telecommunications equipment. Moreover, GSA says the Navy has previously requested and received DPAs for other LAN acquisitions. It cites two recent examples (GSA case numbers KMA-84-0036 and KMA-85-0349) involving the acquisition of broadband cable communications systems for the Navy Medical Treatment Facilities and the acquisition of a LAN for the Naval Military Personnel Command.

In rebuttal to the GSA report, the Navy reasserts its view that the LAN is a telecommunications system rather than ADPE. In the alternative, however, it argues that any DPA that is required need not be obtained until it is ready to exercise the options. The Navy cites no authority for this proposition, but maintains that it would not be appropriate to require otherwise because it could not estimate the value of the procurement, or, therefore, know whether the blanket delegation applies, until the design phase is completed.

In addressing the issues,[2] it is not necessary for us to decide whether, as the Navy suggests, the equipment to be acquired is capable of storing, retrieving, and collating data. We agree with Network Systems that the LAN is ADPE if it is being acquired as auxiliary, ancillary or other computer peripheral equipment. As Network Systems contends, GSA has interpreted the Brooks Act as applying to the acquisition of peripheral equipment. The FIRMR, 41 C.F.R. § 201-2.001, defines ADPE as consisting of general purpose, commercially-available, mass-produced automatic data processing devices (*i.e.*, components and the equipment systems configured from them), including auxiliary equipment (such as plotters, data conversion equipment, source data acquisition devices), devices used to control and transfer data and/or instructions to and from central processing units (including data transmission terminals, batch terminals, display terminals, modems, sensors, multiplexors, and concentrators), as well as general purpose mini- or microcomputers used to control, monitor, measure or direct equipment.[3]

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[2] We reject a threshold contention by the Navy and ATS that Network Systems is not an interested party because the procurement was set aside for small business and Network Systems does not meet the applicable size standards. The protester admits that it would not qualify as a small business under the present solicitation, but asserts that it would qualify under the appropriate standard if the requirement is procured as ADPE. This has not been rebutted and it thus appears that the protester has the requisite direct economic interest to assert that the requirement must be procured as ADPE.

[3] In asserting its view that the LAN is a telecommunications facility, the Navy concedes that the FIRMR contains procedures for the acquisition of telecommunications facilities, but contends that these procedures do not apply, citing an exemption in FIRMIR § 201-1.103(c)(3) that stems from the operation by GSA of public utility communications services under 40 U.S.C. § 295. We see no connection between the provisions cited and this case since we are not deciding whether the telecommunica-

Moreover, our Office has concurred both in GSA's interpretation of ADPE as including peripheral equipment intended to support computer systems and in its classification of equipment such as modems as ADPE. Modem, an abbreviation for modulator/demodulator, describes equipment which converts digital signals into analog signals and vice versa, and is used, for example, to connect computers through switched telephone networks. In *American Telephone and Telegraph Co.*, B-200989, Aug. 19, 1981, 60 Comp. Gen. 654 81-2 CPD ¶ 157, we examined a complaint by AT&T that modems and associated diagnostics being acquired by the Social Security Administration were wrongly classified as ADPE. Notwithstanding an earlier GSA classification of modems as telecommunications equipment [4] we agreed with GSA's later position that treatment of the procurement as an ADPE acquisition was appropriate.

Similarly, in *Timeplex, Inc., et al.* B-197346, *et al.*, Apr. 13, 1981, 81-1 CPD ¶ 280, we considered an Army award of a contract for low speed time division multiplexer/demultiplexers (LSTDMS), equipment designed to combine low speed digital data from a number of sources and to retransmit that data from a number of sources and to retransmit that data as a single, higher bandwidth stream of digital data. The LSTDMS were being acquired to replace analog frequency division multiplexers. Like the Navy in this case, the Army argued that LSTDMS were not computer systems, central processing units, or auxiliary or other peripheral equipment. Nevertheless, we held that GSA, which classified LSTDMS as ADPE by placing them on the Federal Supply Schedule as FSC Group 70 equipment, had acted properly, and we stated that the Army would be required to obtain procurement authority to acquire the commercially-available equipment.[5] In reaching our conclusion, we observed that APDE, as defined in Federal Procurement Regulations § 103.1102-1 (now FIRMR § 202-2.00), appeared to broadly embrace computer support equipment.

Applying these views to the facts of this case, we find that the LAN being acquired is computer support equipment and is ADPE subject to the Brooks Act. The solicitation calls for the design (and in the optional provisions, the furnishing of materials, supplies and

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tions provisions of the FIRMR apply, but rather, whether the ADP procurement provisions of the FIRMR apply to equipment of the type to be acquired.

[4] GSA's reclassification, now reflected in the FIRMR definition of ADPE, was, as our decision indicates, the result of an internal GSA reexamination of the scope of the Brooks Act and was consistent, we concluded, with the intent of the Congress that the Act be applied liberally so that it would not be rendered obsolete by rapid technical development in fields such as telecommunications. *American Telephone and Telegraph Co.*, *supra*, at p. 4.

[5] Noting, however, that there was uncertainty as to whether the Army's requirements, which included data encryption and other special capabilities, could be filled without modifying equipment to such an extent that it would lose its character as general purpose commercially available equipment, we applied our decision prospectively and recommended that the Army resolve this matter with GSA. It is not asserted here that the LAN is to be modified so that it might lose its general purpose character.

installation) of a LAN suitable for direct connection to approximately 2000 machines, including a variety of main-frame, mini- and microcomputers. In all, some 6000 pieces of computer equipment will be supported. Moreover, the IFB requires the use of specific access methods and support for certain Institute of Electrical and Electronics Engineers standards that define interface and protocol specifications for interconnection of computers.[6] Clearly, the LAN is being acquired as computer support equipment.

Further, we find that the Navy's contention that it is unable to determine whether the blanket DPA dollar limitations are exceeded, and that it will not have sufficient information to do so until the design phase is completed, is not well founded. Earlier, it asserted, in opposition to complaints by the protester, that the IFB was specific enough to permit bidders to bid on the option provisions. If there was sufficient information for offerors to bid intelligently, then surely there is enough information for the Navy to estimate the cost of its project. (Based on the bids received, the cost of exercising the options well exceeds the $2.5 million limit established by GSA for a blanket DPA in the FIRMR, 41 C.F.R. § 201-23.104-1(c)(1).

Even if the information were not available, however, we would not share the Navy's view that it would be appropriate to wait until completion of the design phase of its project before determining whether to obtain a DPA. As we read the FIRMR, Part 201-23, a DPA is required unless it can be determined that the dollar amount involved will not exceed the blanket DPA limits. See 41 C.F.R. § 2-1-23.104-1. The FIRMR procedure is based on the assumption that the request for procurement authority will follow completion of a procurement planning process that, among other things, should produce the data required to complete the request including an estimate of system, contract, or item life cost. *See* 41 C.F.R. § § 201-23.106-1(3), 201-23.106-2(b)(4). Armed with such information, an agency should know whether a blanket DPA applies. Alternatively, if an agency cannot determine that a blanket DPA applies, we think it must make a determination that a contemplated procurement is not subject to blanket coverage and initiate a request for procurement authority under 41 C.F.R. § 201-23.106.

Further, we find no basis in the FIRMR or the Brook Act for Navy's view that by including ADPE as option line items in a solicitation, it may avoid applying for a DPA until it is ready to exercise to options. The FIRMR clearly states that agencies shall comply with all of its provisions that are applicable *before* "initiating procurement action on a requirement," 41 C.F.R. § 201-23.103(b)(1); this includes obtaining a DPA. In our view, the Navy

[6] We note also that we have reviewed ATS' comments on the GSA report. We see nothing in the comments, which were received after the filing deadline, that would alter our finding that a DPA is required.

violated this requirement when it issued the IFB containing the option line items because it thereby initiated a procurement action for an ADPE requirement. We so conclude because although the basic portion of the contract calls only for design work that by itself would not require a DPA, it is very clear from the solicitation that the Navy was intending to acquire ADPE under this contract and in accordance with the design provided by the contractor. In this connection, we note that the Navy evaluated the option prices, something it properly would do only if anticipated, prior to issuing the solicitation, that it would exercise the options and thereby acquire the equipment covered by the option items. *See* Federal Acquisition Regulation, 48 C.F.R., §17.206 (1984). These option prices, we further point out, represent significantly more than 50 percent of the total price bid by the low responsive bidder. Clearly, the Navy cannot realistically assert that it was only buying design services here.

Since no DPA was obtained, we find that the Navy had no authority to conduct the procurement; it has no authority, therefore, to award the installation options. In the circumstances, we are recommending to the Navy that it now seek a DPA.

Since approval of a Navy application for procurement authority will require review of its proposed procurement action for compliance with the FIRMR, and since the Navy, which has not addressed the procurement planning and solicitation requirements set out in the FIRMR, may have to revise its solicitation before it can proceed, consideration of the remainder of the issues raised by both protesters appears to be premature. Plus Pendetur did not question the need for a DPA, and its protest is dismissed. Network Systems' protest is sustained.

By separate letter, we are bringing our recommendation to the attention of the Secretary of the Navy.

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