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Notice

Effective October 1, 1987, a revised vocabulary has been used to index Comptroller General decisions and other legal documents. The new vocabulary used three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, N.W. 20548, or by calling (202) 275-6241.

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Contents

Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States.* The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d.) Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71.) In addition, decisions, on the validity of contract awards pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector; whether the decision modifies, clarifies, or overrules the findings of prior published decisions; and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894–1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General which do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974, and Civilian Personnel Law decisions whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

Table of Decision Numbers

Cite Decisions as 67 Comp. Gen.—

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

List of Claimants, etc.

Tables of Statutes, etc.

United States Statutes

For use only as supplement to U.S. Code citations

United States Code

See also U.S. Statutes at Large

Published Decisions of the Comptrollers General

Decisions of the Court

April 1988

B-227941.3, April 1, 1988

Procurement

Bid Protests

■ GAO Procedures

■■ Preparation Costs

Where legislation passed subsequent to a General Accounting Office decision sustaining a protest has the effect of rendering moot the recommendation for corrective action—reinstating the protester as the low responsible bidder for Office of Management and Budget Circular (A-76) cost comparison purposes—the protester is entitled to award of costs of pursuing the protest, including reasonable attorneys' fees, but not bid preparation costs.

Matter of: Fischer and Porter Company

Fischer and Porter Company (F&P) requests that we modify our decision in *Fischer and Porter Co.*, B-227941.2, Nov. 25, 1987, 87-2 CPD ¶ 518, to allow reimbursement for the costs of pursuing the protest, including attorneys' fees and bid and proposal preparation costs, pursuant to 4 C.F.R. § 21.6(d) and (e) (1987).

We sustained F&P's protest in our original decision, *Fischer and Porter Co.*, B-227941, Oct. 28, 1987, 87-2 CPD ¶ 410, and recommended that the United States Army Corps of Engineers reinstate F&P as the low responsible offeror for the purposes of the Office of Management and Budget Circular No. A-76 cost comparison, because we had found F&P to have been improperly determined to be nonresponsible. We denied F&P's claim for costs in B-227941.2, *supra,* because the relief granted F&P—the opportunity to secure contract award upon a successful A-76 cost comparison—was a sufficient remedy within the intent of our regulations.

F&P contends that because there is no longer any opportunity to obtain the contract award because of legislation passed subsequent to our decision, it is entitled to the award of costs.

The Continuing Resolution for Fiscal Year 1988, Pub. L. 100-202, § 8128, Dec. 22, 1987, 101 Stat. 1329, eliminated funding for continuing the cost comparison study through the following language:

None of the funds available for programs administered by the Assistant Secretary of the Army for Civil Works in this or any other Act hereafter are available to continue, initiate, review, complete, or approve A-76 studies on contracting out for any reservoir area in the State of Mississippi administered by the Corps of Engineers unless specified in appropriation bills.

As a consequence, the solicitation has been canceled and our recommendation for corrective action has become moot.

Accordingly, since F&P no longer has an opportunity to obtain the award, the firm is entitled to recover its bid protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). However, the award of bid and proposal preparation costs is not appropriate. We have allowed such costs when a bidder has been deprived of a contract it should have received. *See The Departments of the Army and the Air Force, National Guard Bureau—Reconsideration,* B-224838.2, June 1, 1987, 66 Comp. Gen. 499 87-1 CPD ¶ 547. Here, in light of the legislation that was enacted prior to completion of the cost comparison study, we cannot conclude that F&P was improperly denied a contract to which it was entitled.

The protester should file its claim directly with the Corps of Engineers. If the parties are unable to reach an agreement within a reasonable time, this Office will determine the amount. 4 C.F.R. § 21.6(f).

B-229059.2, B-229059.3, April 12, 1988

Procurement

Bid Protests
■ GAO Procedures
■■ GAO Decisions
■■■ Reconsideration

Requests for reconsideration of merits of prior decision are denied because requests do not show that initial decision contained errors of fact or of law or that information not previously considered exists that would warrant its reversal or modification.

Procurement

Bid Protests
■ GAO Decisions
■■ Recommendations
■■■ Modification

Recommendation in initial decision that protester's proposal be reevaluated as if protester offered no separate price for mistaken subline item is modified to state that price negotiations be reopened between protester and initial awardee.

Matter of: Department of the Air Force; GTE Telecom Marketing Corporation—Request for Reconsideration

The Department of the Air Force and GTE Telecom Marketing Corporation request reconsideration of our decision in *Centel Business Systems,* B-229059, Dec. 24, 1987, 67 Comp. Gen. 156, 87-2 CPD ¶ 629, in which we sustained Centel's protest of the Air Force's award of a contract to GTE under request for proposals (RFP) No. F11624-87-R-0016 for a 120 month lease (with an option to purchase) of a telecommunications system at Grissom Air Force Base. We deny the

requests to reconsider the merits of our decision but we modify our recommendation.

The solicitation included line items for a basic telecommunications system consisting of installation and monthly maintenance and expanded services consisting of additional equipment and services not provided in the first year under the basic system. In response to RFP amendment 0003, which added under the expanded services three subline items (SLINs) for the repair of accidently cut buried telephone cables, Centel submitted revised price pages which included a unit price of $2.90 and an extended price of $58,000 ($2.90 x 20,000 estimated quantity) on all three SLINs. Since one of the amended SLINs, 0014AH, for maintenance of repaired cable cuts, was a recurring monthly charge, Centel's entry in that SLIN added $58,000 for every month remaining in the contract after a cut cable was repaired. For evaluation purposes, Centel's entry in SLIN 0014AH increased its total price by $3,479,365 for the projected life of the system. Centel protested that its entry of $2.90 in SLIN 0014AH was an obvious mistake that contracting officials should have noticed and pointed out so the firm could correct the mistake in discussions. The protester argued that it had intended to offer "NSP" or not separately priced for maintenance of cut cables and $2.90 for the other two new SLINs in amendment 0003 but a computer operator erroneously inserted $2.90 in all three SLINs.

Although the Air Force acknowledged that Centel's insertion of $2.90 for cable cut maintenance must have been an error, the agency argued in its report on the protest that because of the complex nature of the RFP's pricing schedule, which provided for the insertion of 5,000 prices, it had no reason to believe prior to award that Centel's response to amendment 0003 and a subsequent best and final offer (BAFO) contained errors.

We sustained Centel's protest based on our finding that a clear discrepancy existed in the firm's pricing for cut cable maintenance which should have led the Air Force to suspect an error in Centel's response to the amendment and the subsequent BAFO. We stated that the agency missed the error because it failed to comprehend the impact of the solicitation's evaluation scheme on the $2.90 unit price inserted by Centel for cut cable maintenance and because it failed to analyze the BAFO prices on any basis other than a "bottom line" determination as to which firm offered the lowest overall prices. We concluded that, in the absence of error, it was highly unlikely that Centel would have offered a separate price for cut cable maintenance. Thus, we recommended that Centel's offer be evaluated as if it did not offer a separate price for cut cable maintenance and if under those circumstances the firm's proposal is evaluated as low, the GTE contract should be terminated.

In their reconsideration requests, the Air Force and GTE generally argue that because of the complex nature of the solicitation's pricing schedule contracting officials had no reason to know before award that Centel's response to amendment 0003 and its BAFO contained errors. In this respect, they maintain that the error could not be detected without the use of a complex computer program to analyze Centel's total price. Thus, they contend that the contracting officer,

in evaluating Centel's proposal, did not have either actual or constructive notice of the alleged mistake and that our decision placed a burden on contracting officials that is unreasonable and unprecedented. Finally, GTE and the Air Force maintain that the remedy recommended in our decision was inappropriate.

The established standard for reconsideration is that a requesting party must show that our prior decision contains either errors of fact or law or information not previously considered that warrants reversal or modification of the decision. *See* Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1987); *I.T.S. Corp.—Request for Reconsideration,* B-228919.2, Feb. 2, 1988, 88-1 CPD ¶ 101. Repetition of arguments made during the original protest or mere disagreement with our decision does not meet this standard. *Id.*

After careful review of the record and the reconsideration requests, we conclude that GTE and the Air Force have, in essence, repeated arguments made in the submissions filed under the initial protest. Although we did not specifically address every contention raised by the interested party, GTE, in those submissions, we carefully considered all the arguments in reaching our decision. We think that no useful purpose would be served by a point-by-point rebuttal of those arguments.[1] Further, although it is clear that both the Air Force and GTE disagree with our decision, we do not find that their arguments reveal a significant legal or factual error in the decision. Thus, we decline to reconsider the merits of our initial decision. *See Systems Research and Applications Corp.—Reconsideration,* B-225574.3, June 23, 1987, 87-1 CPD ¶ 620.

The Air Force and GTE also request that we modify the remedy in our decision. They argue that since Centel did not submit work papers or other relevant documents to show that it intended to insert "NSP" as a price in SLIN 0014AH, we should not have recommended that the Air Force evaluate the firm's proposal on that basis. GTE also argues that it "has incurred substantial start-up and standby costs which are allocable to this contract and must be reimbursed." Thus, GTE maintains that because of these costs it would not be in the government's best interests to terminate the contract and reaward to Centel.

Our initial recommendation was based on the conclusion that Centel did not intend to submit a unit price for cable cut maintenance since, as we explained, even an extremely low unit price, when extended, would dwarf Centel's $116,000 total charge for cable repair. We also noted that none of the other offerors submitted a separate price for the maintenance of cut cable. On further reflection we now conclude that it is plausible that the firm could have intended to offer a fractional amount (*i.e.* $.001) for maintenance of cut cables. Such an amount, when extended, could have resulted in a price for cut cable maintenance significantly less than the firm's evaluated price of $3,479,365, while still making Centel's total price higher than GTE's.

Thus, we believe our original recommendation was inappropriate and we now recommend that the Air Force reopen price negotiations with Centel and GTE.

[1] We did respond to all the arguments raised by the Air Force.

Although to reopen negotiations at this juncture could create an auction situation, in our view, the importance of correcting the error through further negotiations overrides any harmful effect on the integrity of the competitive procurement system. *American Management Systems, Inc.*, B-215283, Aug. 20, 1984, 84-2 CPD ¶ 199. If Centel's proposal is evaluated as low, the Air Force should terminate the existing contract for the convenience of the government and make award to Centel if it is otherwise eligible for award. [2]

Accordingly, we deny both requests to reconsider the merits of our initial decision but we modify the remedy.

B-228078.2, April 18, 1988

Procurement

Socio-Economic Policies
■ Small Businesses
■■ Competency Certification
■■■ Bad Faith
■■■■ Allegation Substantiation

Procurement

Socio-Economic Policies
■ Small Businesses
■■ Responsibility
■■■ Competency Certification
■■■■ GAO Review

Where Small Business Administration (SBA) has declined to exercise its certificate of competency (COC) jurisdiction because protester is a manufacturer offering a foreign item, we will review the contracting officer's initial determination of nonresponsibility to determine whether it was unreasonable or made in bad faith.

Procurement

Contractor Qualification
■ Responsibility
■■ Contracting Officer Findings
■■■ Negative Determination
■■■■ Criteria

The provisions of a settlement agreement between the agency and the protester with regard to its contract performance for products it manufactured do not substantially affect the issue of protester's responsibility to supply imported goods which require no manufacturing.

[2] Based on the current record, we do not agree with GTE's contention that termination of its contract would not be in the government's best interests because of costs it has incurred under the contract. Since the protest was filed on September 4, within 10 days of the August 26 award, in accordance with 31 U.S.C. § 3553(d)(1) (Supp. III 1985), performance of the contract was suspended. Although GTE says that it incurred unspecified costs under the contract, the Air Force provides no support for this contention and, in fact, does not argue that termination would be improper because of costs incurred by GTE.

Procurement

Socio-Economic Policies
■ Small Businesses
■■ Competency Certification
■■■ Effects

While the reasons underlying Small Business Administration's decision to issue certificates of competency (COCs) to the protester to supply manufactured products may constitute information bearing on protester's responsibility to supply products imported in final form, which the agency must consider in its reevaluation of the protester's responsibility, the issuance of the COCs, standing alone, does not compel a finding that the protester is responsible.

Procurement

Socio-Economic Policies
■ Small Businesses
■■ Responsibility
■■■ Negative Determination
■■■■ Reconsideration

Where preaward financial survey conducted approximately 5 months before award contains numerous informational deficiencies and a concurrently prepared plant facilities report contains negative information only with respect to products protester manufactured, the contracting agency should reevaluate its determination that protester was not responsible to supply products which require no manufacturing.

Matter of: SPM Manufacturing Corporation

SPM Manufacturing Corporation protests the award of a fixed-price annual requirements contract for black linoleum desk pads to Sainberg & Company, Inc., under invitation for bids (IFB) No. 2FY-EAL-A-A4993-S, issued by the General Services Administration (GSA) for various office supplies. The protester objects to GSA's determination that it is not a responsible firm to supply the commodity in question.

We sustain the protest.

Bids were opened on April 28, 1987. SPM was the apparent low bidder to supply an estimated 9,636 black linoleum desk pads at an evaluated price of $41,800.44; Sainberg was the apparent second-low bidder at $45,855.86. SPM was also the apparent low bidder on two other commodities under the IFB: an estimated 132,560 paperboard desk pads at $177,701.60; and an estimated 61,420 blotter desk pads at $439,897.34. In June, GSA concluded two preaward surveys with respect to SPM's overall responsibility to supply all three commodities. On the basis of the surveys, the contracting officer found SPM to be nonresponsible and forwarded the matter to the Small Business Administration (SBA) for certificate of competency (COC) proceedings. SBA denied SPM's application for a COC with respect to all three commodities on July 30. SPM protested the denial of a COC to our Office.

On November 5, while the first protest was pending, SPM and GSA concluded a settlement agreement regarding various cases, unrelated to the procurement at

issue in the protest, which were then before the General Services Board of Contract Appeals (GSBCA) and the U.S. District Court. As part of the settlement, GSA agreed that there were no quality control system deficiencies at SPM with regard to the contracts covered by the settlement as of the effective date of the agreement. As a result of its review of that settlement agreement and other matters, SBA concluded that there was "no longer a factual basis" to support GSA's determination that SPM was nonresponsible in connection with the procurement at issue in the protest. Accordingly, on November 10, SBA requested GSA to reevaluate its determination. SPM then withdrew its protest (B-228078).

On November 13, GSA responded to the SBA request by reaffirming its determination that SPM was nonresponsible. On December 14, SBA issued COCs with respect to SPM's ability to supply two of the items involved in the protest, the paperboard and blotter desk pads. Accordingly, SPM was awarded a contract for those commodities. With respect to the third item, black linoleum desk pads, however, SBA declined to exercise its COC jurisdiction, finding that SPM was a nonmanufacturer proposing to provide imported items and was, therefore, ineligible for COC consideration.[1] GSA then awarded the black linoleum desk pad contract to Sainberg on December 14, and SPM filed this protest 4 days later.

Initially, the agency argues that SPM's challenges to GSA's determination of nonresponsibility are untimely because they are, in effect, challenges to its June 1987 preaward surveys which were made available to the protester in September 1987. We disagree. SPM's protest concerns GSA's affirmation of its nonresponsibility determination on November 13, following SBA's request that GSA reassess SPM's responsibility. SBA's review of GSA's determination was not completed until December 14. Since the protest was filed 4 days later, it clearly is timely. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987).

We will not question a contracting officer's determination of nonresponsibility unless the protester can show bad faith on the agency's part or the lack of a reasonable basis for the determination. *Brussels Steel America, Inc.,* B-225556 *et al.,* Apr. 16, 1987, 87-1 CPD ¶ 415. A determination of nonresponsibility is not necessarily impaired if only one aspect of a firm's capability may have been incorrectly evaluated. *See Southwest Marine, Inc.,* B-225559, B-225559.2, Apr. 22, 1987, 87-1 CPD ¶ 431. However, a nonresponsibility determination will not be found to be reasonable where it is based primarily on unreasonable or unsupported conclusions in preaward surveys. *R.J. Crowley, Inc.,* B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220.

As a preliminary matter, the protester here argues that GSA is required to find that it is responsible to supply imported pads in light of SBA's COC determination regarding the two much larger contracts for manufactured pads. We disagree. While the underlying reasons for SBA's action may constitute information bearing on SPM's responsibility which GSA now should consider, we recog-

[1] In such circumstances, we will review a contracting officer's determination of nonresponsibility even though a small business is involved. *See Wallace & Wallace, Inc., et al.—Reconsideration,* B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142.

nize that the evaluation process is inherently judgmental and that two evaluators may reach opposite conclusions as to a firm's responsibility without either acting unreasonably or in bad faith. *Alan Scott Industries*, B-225210.2, Feb. 12, 1987, 87-1 CPD ¶ 155. For the reasons set forth below, however, we believe that GSA's determination of nonresponsibility was primarily based on unsupported and unreasonable conclusions reached during the preaward survey.[2]

Many of the problems in this case stem from the fact that, until December 14, when the SBA elected to treat the three commodities for which SPM was the apparent low bidder as separate and distinct matters, issues concerning the protester's ability to supply black linoleum desk pads were consolidated with, and to a considerable degree subsumed by, issues concerning its ability to supply paperboard and blotter desk pads. Unlike the paperboard and blotter desk pads, which are manufactured products consisting of several pieces requiring skilled fabrication to meet detailed dimensional requirements, the black linoleum desk pads are of unitary construction and are imported in final form from European suppliers. At SPM, they are merely unboxed, checked for hardness, and then repackaged for shipment to GSA. Thus, findings with respect to SPM's ability to perform proper fabricating and exercise proper quality control on products it manufactures (and with respect to consequent delivery problems for such products) have little or no bearing on SPM's ability to simply import, repackage, and ship black linoleum desk pads.

GSA's initial evaluation of SPM's responsibility, concluded approximately 5 months prior to award, cites a number of deficiencies. The financial survey criticized the firm's cash and debt situation, but noted that this conclusion was based in part on a possibly misdated balance sheet. Apparently no attempt was made by GSA evaluators to obtain clarification of the date. The financial survey also questioned the firm's compliance with loan and bond covenants, but noted that GSA had yet to obtain a letter from SPM's bank on the matter—a letter that the evaluators characterized as "crucial in this case." We note that the minutes of SBA's first COC Committee meeting in the matter of SPM (made available to GSA during the first protest) indicate that bank letters dated July 9, 1987, expressed "strong support for not only the two contracts in question, but also for overall operations" at SPM. The financial survey also questioned the status of SPM's trade accounts, but noted that written trade surveys could not be obtained because of incomplete street addresses. Again, apparently no further attempt was made by the GSA evaluators to obtain the addresses in question.

Moreover, when, approximately 5 months after the initial financial survey was performed, SBA requested that GSA reexamine its nonresponsibility determination, GSA should have attempted to resolve the questions raised in the survey and obtain current information regarding SPM's financial status. *See* Federal

[2] In reaching this conclusion, we are not persuaded by the protester's argument that the provisions of its settlement agreement with GSA are determinative of its responsibility to supply black linoleum desk pads. That agreement mostly involves commodities other than linoleum desk pads. In addition, the agreement does not address SPM's financial capacity.

Acquisition Regulation (FAR), § 9.105-1(b)(3); 51 Comp. Gen. 588 (1972). There is no indication in the record that GSA did so. Rather, the November 13, 1987, "re-evaluation" reiterates its initial findings with respect to SPM's allegedly precarious financial condition and suggests that this condition may be exacerbated by the settlement agreement which requires the firm to pay the government $105,000 in monthly installments over 1 year. Since, as discussed above, GSA's initial financial survey of SPM was at best incomplete, and GSA later made no effort to obtain more current information on SPM, we cannot conclude that the payments required under the settlement agreement, standing alone, are sufficient to call SPM's financial status into question.

The plant facility survey likewise contains little support for GSA's conclusion that SPM could not satisfactorily supply black linoleum desk pads. Its negative recommendations are almost exclusively predicated on problems with SPM's manufactured goods, including poor workmanship and the lack of an adequate quality control system, both of which allegedly resulted in delivery problems. No delivery problems involving black linoleum desk pads are mentioned. Our review of the entire record discloses that, while SPM was delinquent with respect to a partial order involving 242 of the pads in question in November 1986, there is nothing further to support a conclusion that its ability to perform concerning black linoleum pads was impaired.

In several instances the plant facility survey actually lends support to the protester's contention that it is responsible to supply black linoleum desk pads. GSA found, for example, that SPM's monthly capacity for supplying the commodity was one million (well in excess of the government's yearly needs), and that SPM had no commercial commitments whatsoever to supply the commodity. Accordingly, we see no basis for GSA's assertion that production under government contracts may suffer seasonally as the attentions of SPM's skilled labor and quality control officials turn to commercial customers. Further, contrary to GSA's assertion that production of all desk pads is heavily dependent on skilled labor, the pads imported in final form require none. Finally, in June 1987, GSA found that SPM already had a 3-4 months supply of the fully fabricated imported pads on hand.

Since the record demonstrates that GSA's determination that SPM was not responsible to supply it with black linoleum desk pads was primarily based on unsupported conclusions reached during the preaward survey, the protest is sustained. In view of our finding, we need not discuss the other basis upon which SPM objected to the nonresponsibility determination, bad faith on the part of GSA officials. We recommend that GSA promptly conduct another analysis of SPM's responsibility in accordance with the considerations set out in this decision and using current information. If that analysis results in an affirmative determination of responsibility, the present contract should be terminated and an award made to SPM. In addition, we find that SPM is entitled to its costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

Procurement

Bid Protests
■ GAO Procedures
■■ Pending Litigation
■■■ GAO Review

Request for reconsideration is denied where the issue raised in the protest could be affected by suit in the District Court filed by the protester and where the Court has not expressed interest in a General Accounting Office decision.

Matter of: Meisel Rohrbau GmbH & Co. KG—Request for Reconsideration

Meisel Rohrbau GmbH & Co. KG requests reconsideration of our dismissal of its protest regarding the cancellation of request for proposals (RFP) No. DAJA76-87-R-0729 issued by the Department of the Army for the replacement of long distance heating lines at the Army installation in Giessen, Germany. We previously dismissed the protest pursuant to our Bid Protest Regulations which state that we will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction, unless the court requests a decision by the General Accounting Office (GAO). 4 C.F.R. § 21.3(f)(11) (1988).

We deny the request for reconsideration.

The Army had originally solicited for brand name or equal steel conduit pipe and repair of heating lines under RFP No. DAJA76-86-R-0320. Meisel protested the award under that solicitation, but before resolution of the protest, the Army terminated the contract on grounds that the technical evaluation of the "equal" offers received had been improperly conducted which made any award under the RFP improper. We denied Meisel's protest that the Army should have reinstated the original solicitation, reevaluated all proposals and made an award under the original RFP, rather than resoliciting the requirement. *Meisel Rohrbau GmbH & Co. KG,* B-225549, B-225549.2, Apr. 16, 1987, 66 Comp. Gen. 383, 87-1 CPD ¶ 414. Meisel then filed an action for injunctive and declaratory relief in the United States District Court for the District of Columbia, requesting that the Court reinstate the original solicitation and enjoin the issuance of a new solicitation. The Court declined to issue a preliminary injunction and the request for a permanent injunction is pending.

The Army issued the current RFP-0729 on August 14, 1987. This procurement was also the subject of a protest filed by Meisel with our Office on September 10, 1987, in which Meisel protested that the solicitation did not provide for a 30-day proposal preparation period and that no sole-source justification had been done for the type of pipe specified, for which there were no "equals." The Army opened offers on September 28, 1987, but did not make an award while the protest was pending, in compliance with 4 C.F.R. § 21.4(a) and 31 U.S.C. § 3553(c)(1) (Supp. III 1985).

On September 24, 1987, Meisel filed an amended complaint for injunctive and declaratory relief in the District Court. Count III alleged that the terms of RFP-0729 were restrictive of competition and constituted a sole-source procurement. More importantly, however, the protester sought "an injunction requiring defendants to stay the resolicitation efforts under RFP-0729 and any pending contract award action based upon the requirements for the government needs set forth in RFP-0320 or RFP-0729, pending the Court's resolution of the claims set forth herein."

Meanwhile, the appropriations act under which the contract was to have been funded expired on September 30, 1987, during the pendency of the protest. Since those funds were no longer available and since the Army determined that no funds from the current fiscal year were available for the contract, the Army canceled the solicitation. Accordingly, we dismissed Meisel's protest on October 13, 1987. Meisel then protested the cancellation which we dismissed by notice on February 10, 1988, stating that we do not consider protests that are before a court unless the court requests our decision.

The protester now argues that its protest against the cancellation of RFP-0729 has never been (or is not now) the subject of any judicial proceeding and is therefore properly before GAO. We disagree. Although the issue of the propriety of the cancellation is not the precise issue before the Court, our review of the cancellation of RFP-0729 is dependent upon the District Court's disposition of the matter before it. If the Court agrees with Meisel and issues an injunction reinstating RFP-0320, a decision by our Office would be academic. Moreover, Meisel's protest against the cancellation of RFP-0729 directly contradicts the fact that it has requested the District Court to reinstate RFP-0320. We will not review the propriety of the cancellation of RFP-0729 while there are claims pending in the District Court which directly impact the propriety of RFP-0729, the follow-on solicitation, and where the Court has not expressed an interest in our opinion. *See* 4 C.F.R. § 21.3(f)(11).

The request for reconsideration is denied.

B-230190, B-230192, April 19, 1988

Procurement

Socio-Economic Policies

■ Disadvantaged Business Set-Asides

■■ Use

■■■ Administrative Discretion

Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of DOD Authorization Act, which directs that five percent of contract funds are to be made available for contracts with small disadvantaged businesses.

Socio-Economic Policies

■ Disadvantaged Business Set-Asides

■■ Use

■■■ Administrative Discretion

It is not legally objectionable for solicitations issued after June 1, 1987, but prior to March 21, 1988, to be set aside for small disadvantaged business (SDB) concerns even though the product or service in question has been previously acquired successfully under a small business set-aside. Such solicitations are consistent with the interim rule implementing the Department of Defense SDB set-aside program in effect at the time those solicitations were issued; a subsequent interim rule, which does provide an exclusion from the SDB set-aside program for those procurements which have been previously set aside for small businesses, applies only to solicitations issued on or after March 21, 1988.

Matter of: Logistical Support, Inc.

Logistical Support, Inc. protests the terms of two solicitations, one of which was issued by the Air Force and one by the Army.[1] Both solicitations were issued as 100-percent small disadvantaged business (SDB) set-asides. The protester, a non-disadvantaged small business, argues that the solicitations should be amended or canceled and the requirements resolicited to allow competition by all small businesses since these same requirements have been previously acquired successfully under small business set-aside contracts.

We deny the protests.

Both solicitations were issued as total set-asides for small disadvantaged business (SDBs) pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.501-70 and 219.502-72, 52 Fed. Reg. 16,263, 16,266 (1987). This special category of set-aside was authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986), which establishes a Department of Defense (DOD) goal of awards to SDBs of five percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988, and 1989. Section 1207(e) directs the Secretary of Defense to "exercise his utmost authority, resourcefulness and diligence" to attain the five percent goal and permits the use of less than full and open competitive procedures to do so, provided that contract prices do not exceed fair market value by more than ten percent.

To implement this statutory mandate, DOD's Defense Acquisition Regulatory (DAR) Council drafted an interim rule which amended various DFARS provisions and established the procedures for conducting SDB procurements. The interim rule was published on May 4, 1987, and was made effective for all DOD solicitations issued on or after June 1. 52 Fed. Reg. 16,263. Both solicitations at issue here were issued after June 1, 1987 but before March 21, 1988.

[1] Although the protests involve solicitations issued by different agencies, we have considered them in a single decision since they raise essentially the same issues. The protest and solicitation numbers are as follows: B-230190, request for proposals (RFP) No. F05604-88-R-0027, issued by the Air Force; and B-230192, invitation for bids (IFB) No. DAKF10-88-B-0015, issued by the Army.

After issuing the interim rule and reviewing public comments, the DAR Council prepared draft revisions to the rule. On February 19, 1988, the DAR Council published a second interim rule. See 53 Fed. Reg. 5,114 (1988). This rule became effective on March 21, and carries a 30-day comment period. Among other changes, the February 19 rule provides that SDB set-asides will not be conducted when a product or service has been previously acquired successfully by the contracting office on the basis of a small business set-aside under Federal Acquisition Regulation (FAR) § 19.501(g). 53 Fed. Reg. 5,123.

Logistical objects to the inclusion of the subject solicitations within the initial SDB set-aside rule. While the protester concedes that the initial rule was in effect when the solicitations were issued, it argues that the program is being implemented through the initial rule in a manner that is in violation of the Authorization Act which established the program in that DOD allegedly is concentrating the SDB set-asides in standard industrial classification industry group number 5812, relating primarily to the retail sale of food and drinks for on-premise or immediate consumption. Logistical, a nondisadvantaged small business in this industry, contends that it was not the intention of Congress in establishing the SDB program for it to be so concentrated in one industry in order to meet DOD's goal for SDB participation of five percent of the dollar value of total DOD contracts awarded for fiscal years 1987, 1988, and 1989. Logistical suggests that the goal of five percent SDB participation is to be applied individually to each standard industrial classification group for all contracts awarded by DOD.

We find the protester's arguments to be without merit. In a recent case, *Techplan Corp., American Maintenance Co.,* B-228396.3, B-229608, March 28, 1988, 67 Comp. Gen. 357, 88-1 CPD ¶ 312, we ruled that the SDB set-aside program as contained in the initial May 4 interim rule was, at the time it was issued, a legally permissible implementation of the 1987 Authorization Act requirements. We noted in *Techplan* that it was left to the Secretary of Defense to "exercise his utmost authority, resourcefulness and diligence" to develop a program that would meet the rather difficult-to-reconcile goals of increasing SDB participation while also presumably increasing overall small business participation. We also found nothing in the Authorization Act that required DOD to maintain particular requirements as set-asides for nondisadvantaged small businesses in attempting to meet the five percent goal of SDB participation. Logistical's argument that Congress intended to have the five percent goal be applied to each industry group is, thus, unsupported.

Logistical argues further in its comments on the agency reports that the second interim rule, which amended the first interim rule to provide, among other changes, for an exclusion from the SDB program for procurements which have been previously set aside for small businesses, should now apply to these procurements and require that they be amended or canceled and the requirements resolicited to allow competition by all small businesses.

We disagree. The February 19 Federal Register notice for the second interim rule indicates that the new rule was to be effective on March 21. We ruled in

Techplan that the reasonable interpretation of the rule was that it applied only to solicitations issued on or after March 21. Since the solicitations at issue here were issued after June 1, 1987 but before March 21, 1988, they are covered by the first interim rule, which does not contain an exclusion for procurements which have been previously set aside for small businesses and which we have found to have been a legally permissible implementation of the 1987 Defense Authorization Act requirements.

The protests are denied.

B-230769, April 19, 1988

Procurement

Bid Protests
■ Subcontracts
■■ GAO Review

Protest of a subcontract awarded by an Indian tribe for the construction of a school under the Indian Self-Determination and Education Assistance Act is dismissed because the subcontract was not "by or for" the government.

Matter of: Poitra Construction Company

Poitra Construction Company protests the award of a subcontract by the Turtle Mountain Band of Chippewa Indians (the Tribe), under the Department of the Interior, Bureau of Indian Affairs (BIA) project No. W56-651/A61, to John T. Jones Construction Company for construction of Turtle Mountain Community Middle School. The Tribe received a contract from BIA for the school construction under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.* (Supp. III 1985). Poitra contends that the tribe improperly allowed Jones to increase the price for an alternate bid after bid opening, and to revise its list of certified Indian subcontractors in violation of the solicitation's 30 percent certified local Indian subcontracting requirement.

The agency's position is that we should not consider this protest because it involves the award of a subcontract by a government prime contractor and that the circumstances under which we consider such protests do not exist here. We agree. Because the contract was not awarded by or for a federal agency, we dismiss the protest.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(1) (Supp. III 1985), this Office has jurisdiction to decide protests involving contract solicitations and awards by federal agencies. We have interpreted this provision as authorizing us to decide protests of subcontract solicitations and awards only when the subcontract is "by or for the government." 4 C.F.R. § 21.3(f)(10) (1988). Basically, a subcontract is considered to be by or for the government when the prime contractor principally provides large scale management services to the government and, as a result, generally has an ongoing purchasing responsibil-

ity. In effect, the prime contractor acts as a middleman between the government and the contractor. *American Nuclear Corp.,* B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503. Such circumstances may exist where the prime contractor operates and manages a government facility, *Westinghouse Electric Corp.,* B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145, otherwise provides large-scale management services, *Union Natural Gas Co.,* B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44, serves as an agency's construction manager, *CE Air Preheater Co., Inc.,* B-194119, Sept. 14, 1979, 792 CPD ¶ 197, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. *University of Michigan, et al.,* B-225756, B-225756.2, June 30, 1987, 66 Comp. Gen. 538 87-1 CPD ¶ 643. Except in these limited circumstances, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered to be by or for the government. *See, e.g., Rhode & Schwartz-Polarad, Inc.—Reconsideration,* B-219108.2, July 8, 1985, 85-2 CPD ¶ 33.

We do not believe this case falls within any of the above limited circumstances. First, the construction project is for a limited purpose and does not entail ongoing purchasing responsibilities. *See Technical Engineering,* B-230263, Mar. 30, 1988, 88-1 CPD ¶ 323. Second, the Tribe's contract with BIA and the selection procedures for the subcontractor indicate that the Tribe is not acting as a mere conduit. Unlike the circumstances in *University of Michigan, et al.,* B-225756, *et al., supra,* where the prime contract provided for selection of a subcontractor by government employees, and the subcontractor's first task was to discuss its training program with government representatives, the Tribe's contract with BIA does not provide for government selection of a subcontractor. Furthermore, the BIA contract with the Tribe states that "there will be no submittals, transmissions of information, or data, or communications between the Government and the subcontractors except through Turtle Mountain." Because the subcontract with Jones is not by or for the government, Poitra's protest of that award is dismissed.

B-227272, April 22, 1988

Appropriations/Financial Management

Claims Against Government

■ **Claim Settlement**

■■ **Court Decisions**

■■■ **Effects**

Forest Service payment to the state of Oregon and cancellation of billing to the Douglas Fire Protection Association for fire suppression services are unaffected by a subsequent decision of a federal district court in an action brought by a private landowner, which made a different factual finding on the issue of liability. Subsequent court decision imposed no duty on government accounting officer to reopen settlements and reexamine them.

Accountable Officers
■ **Certifying Officers**
■■ **Liability**
■■■ **Payments**

Certifying officer is not liable for payment he originally certified because payment was not illegal, improper or fraudulent. At the time of certification, payment was based on a thorough joint investigation and final administrative decision.

Matter of: Forest Service Payment and Billing for Fire Suppression Service

An authorized certifying officer of the Forest Service, Department of Agriculture, has requested our views on the effect of a decision by the United States District Court for the District of Oregon on the Forest Service's prior payment to the Oregon State Department of Forestry, and billing to the state's fire protection contractor, the Douglas Forestry Protective Association, for fire suppression services, pursuant to a cooperative agreement between the Forest Service and Oregon. For the reasons discussed below, we find that the court's decision does not affect the propriety of the Forest Service's prior payment to the state of Oregon and that there is also no basis to pursue collection action against the Douglas Fire Protection Association. Further, the certifying officer would not incur any liability for the original payments.

Background

During 1982, the Forest Service was engaged in burning logging debris—commonly referred to as "slash"—in the Umpqua National Forest. On September 1, 1982, a wildfire broke out (Treehorn fire) in the general area of the slash burning operation, which spread to adjoining private lands. The fire caused extensive damage and required the expenditure of considerable fire fighting resources from both federal and state agencies, which are bound by a cooperative agreement to furnish reciprocal fire protection services. That agreement provides that fire suppression costs caused by escaped slash fires ignited at the direction and supervision of one of the parties are the responsibility of that party.

After the fire was extinguished, a joint investigation was conducted by U.S. Forest Service and state investigators. The state of Oregon concluded that the fire originated from the Forest Service's slash burning and that the cost of suppressing the fire was thereby the responsibility of the Forest Service. Accordingly, under the cooperative agreement, Oregon billed the Forest Service $215,528.89 for fire suppression costs.

On May 31, 1983, the Forest Service determined that the evidence showed the Treehorn fire started from an unknown cause at a point of origin quite some distance from the slash piles; it could find no conclusive evidence that the fire resulted from the slash burning. Oregon's claim for reimbursement was there-

fore denied. However, upon further investigation, the Forest Service reversed itself and concluded that "the most likely cause of the fire was from the Forest Service's slash burning." Letter from Jeff Shirmon, Regional Forester, to Mike Miller, State Forester, Sept. 15, 1983. This conclusion was based on additional evidence submitted by the state of Oregon, *i.e.,* photographs taken soon after the start of the fire, examination of on-ground evidence, and knowledge about probable fire behavior. On January 10, 1984, the Forest Service issued a final administrative decision reaffirming its finding and authorizing reimbursement to the state of Oregon. On February 27, 1984, the certifying officer certified payment to Oregon.

In another incident related to the Treehorn fire, the Douglas Fire Protection Association (Douglas), under the same cooperative agreement, requested Forest Service suppression action on private land in Douglas' jurisdiction. Douglas was billed $90,554 by the Forest Service. On January 10, 1984, however, the bill was canceled based on the Forest Service's determination that, under the cooperative agreement, it was responsible for the costs resulting from the fire.[1]

On October 31, 1986, in a subsequent action brought by a private landowner for damages caused by the Treehorn fire, the United States District Court for the District of Oregon made a factual finding that the Forest Service was not liable for the damage caused by the Treehorn fire to the plaintiff's land. *Rosenberg Lumber v. United States,* Civ. No. 84-73-BU (D. Ore. Oct. 31, 1986).

Discussion

First, in our opinion, the Forest Service has no duty or responsibility to attempt collection for the previous settlement. At the time of the decision to pay, there had been a joint state and federal investigation of the circumstances surrounding the Treehorn fire and independent reviews by outside fire behavior analysts. According to the Forest Service, a final administrative determination was made on the basis of the facts uncovered in the joint investigation. Even though some discrepancies remained, the Forest Service accepted full responsibility for the damage, in accordance with the cooperative agreement, and settled the claim.

Our Office has held that there is no duty on the part of accounting officers of the government to reopen settlements and examine them on the basis of subsequent court decisions that may require different action than that on which the prior settlements were made. *See Poloron Products, Inc.,* 54 Comp. Gen. 928 (1975); *See also Blazek v. United States,* 44 Ct. Cl. 188, 192 (1909). Here, the subsequent court decision in *Rosenberg Lumber* merely reached a different conclusion concerning liability for damage to private land caused by the Treehorn fire. This does not invalidate the Forest Service's prior determination of its responsibility to the parties under the terms of the cooperative agreement. Moreover, the presiding United States District Judge stated that he held for the United

[1] Although the Forest Service accepted responsibility for the costs associated with the fire, under the provisions of the cooperative agreement, it denied any negligence as to the cause of the fire.

States only because the plaintiff's evidence "just barely fails to reach the weight sufficient to preponderate." *Rosenberg Lumber, supra,* at 6.

Thus the "adverse" factual finding in the subsequent court decision is an insufficient basis on which either to support a collection action against the state of Oregon or a reinstatement of collection against Douglas.[2]

Second, the certifying officer is not liable for the payment he originally certified because the payment was not illegal, improper or fraudulent. Section 3528(a) of Title 31, United States Code (1982), states that a certifying official is responsible for the correctness of the information stated in the certificate, the voucher and the supporting documentation. He is also accountable for the amount of any "illegal, improper, or incorrect payment" certified by him.

In this case, at the time of certification, the certifying officer acted properly in certifying the payment. A number of thorough investigations had been made to determine the cause of the Treehorn fire. Also at the time of certification, the legal responsibility of the Forest Service was established by a final administrative decision, which determined that the most likely cause of the fire was the slash burning. This finding was later reaffirmed. No improper payment existed in relation to the facts as then ascertained. As we have already explained, the subsequent district court decision has no impact on the validity of the original payment. Under the circumstances, we conclude that the certification of payment was proper and the certifying officer would therefore incur no liability for the payment made to the state of Oregon.[3]

B-226692, April 29, 1988

Appropriations/Financial Management

Claims Against Government
■ Deposit Accounts
■■ Funds
■■■ Distribution
■■■■ Timber Sales

Deposits or credits established pursuant to contracts for the removal of timber from national forest land should not be included in annual distributions to states under 16 U.S.C. § 500, unless they are earned or offset by the corresponding removal of timber. This decision is based on both generally accepted and specifically applicable accounting principles and on analysis of 16 U.S.C. § 500.

[2] Since we have answered the question regarding collection responsibility in the negative, we do not reach the other submitted inquiry regarding method of collection.

[3] In any event, the certifying officer could not be held liable at this point in time because his account in this matter must be regarded as settled under 31 U.S.C. § 3526(c) (1984). According to the Forest Service Accounting Operations Division, all accounts were probably substantially completed in the last weeks of March 1984. Therefore, the certifying officer's account must be regarded as settled by operation of law as of the end of March 1987. *See generally* 62 Comp. Gen. 499, 501-02 (1983).

Matter of: Timber Deposits or Credits—Inclusion in Annual Payments to States Pursuant to 16 U.S.C. § 500

The Secretary of Agriculture requested our decision concerning whether deposits or credits established pursuant to contracts for the removal of timber from national forests may be included in the computation of annual 25 percent payments to states under 16 U.S.C. § 500 prior to those deposits or credits actually being earned or offset by the removal of timber.[1] In addition, in the event that we answer in the negative, the Secretary asked if we would object to a phasing-in of accounting changes to accommodate such a ruling. As discussed in more detail below, we conclude that deposits made by or credits granted to prospective purchasers of timber from national forests should not be included in annual payments to states until those deposits or credits are earned or offset by the corresponding removal of timber. The Forest Service has not given us information that would provide a basis for concluding that we have no objection to incremental implementation of the changes.

Background

Since 1908, at the end of each fiscal year, the federal government has paid 25 percent of all "moneys received" during that year from resource utilization in each national forest to the state government in which that national forest is situated. Act of May 23, 1908, ch. 192, 35 Stat. 260, classified to 16 U.S.C. § 500 (1982). The Forest Service has traditionally interpreted "moneys received" to include deposits made by or credits granted to purchasers of timber prior to the removal of that timber. For example, the standard Forest Service timber sale contract requires the purchaser to make cash deposits or to establish purchaser credits in advance of cutting timber. The Forest Service has routinely included such receipts in annual distributions to the states pursuant to 16 U.S.C. § 500. Since 1976, Congress has expressly included collections for reforestation and timber stand improvement under the Knutson Vandenberg Act (Act of June 9, 1930, ch. 416, 46 Stat. 527, classified in pertinent part to 16 U.S.C. § 576b), and earned or allowed purchaser road credits in the annual distribution to the states. National Forest Management Act, Pub. L. No. 94-588, § 16, 90 Stat. 2961 (1976), amending 16 U.S.C. § 500. At the end of each fiscal year, the Forest Service includes these advance deposits and the value of the credits in annual distributions to the states even if they have not yet been "earned" or "offset" by the corresponding removal of timber by purchasers.

However, an audit report of the Inspector General of the Department of Agriculture (USDA) recommended that the Forest Service exclude advance deposits or credits from annual distributions to the states. Citing the GAO Policy and Procedures Manual for Guidance of Federal Agencies (GAO-PPM), the Inspector General maintained that deposit fund accounts are properly considered liabil-

[1] After consulting the Office of the General Counsel of the Department of Agriculture, we consolidated and rephrased the questions submitted in the Secretary's original request.

ities and the funds held therein remain the property of the depositors until earned. The report concluded that advance deposits or credits should not be counted in the annual distribution to the states until they are earned by the federal government.

The request asked us to comment on the Inspector General's report, and points out that should the Forest Service implement this recommendation, the adjustment would result in a one-time reduction in the amount distributed to local governments for the first year. For that reason, in the event that we conclude that advance deposits should no longer be included in annual distributions to local governments, we were asked to advise on the possibility of "phasing in" any accounting changes over a period of time.

Analysis

The Comptroller General has promulgated accounting principles and standards applicable to federal agencies in title 2 of the General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies. GAO-PPM, tit. 2 and appendix I (TS No. 2-24, October 31, 1984). Appendix I stipulates that an advance or prepayment made to the government in contemplation of the later delivery of goods (such as in the situation where a prospective purchaser of timber leaves a deposit or accumulates credits with the Forest Service prior to removing trees) shall be recorded as a liability, until that payment is earned. 2 GAO-PPM, appendix I, A30.04.

In addition, the Secretary of the Treasury has established a coordinated system of accounting and financial reporting relating to the financial operation of the federal government. 31 U.S.C. § 3513 (1982). Consistent with the GAO-PPM, this system stipulates that a deposit from an outside source for whom the government is acting as a custodian shall be classified as a deposit fund, liability account. Treas. Financial Manual, vol. 1, § 2-1560.10 (T.L. No. 382).

Thus, pursuant to accounting procedures generally followed by federal agencies, an advance deposit made by a prospective purchaser of timber from national forest land is to be accounted for as a liability. The GAO-PPM further defines "liability" as a present obligation to others which will be settled by the future transfer or use of assets at: (1) a specified or determinable date; (2) at the time of a specific event; or (3) on demand. 2 GAO-PPM, appendix I, at 7. This is consistent with generally accepted accounting principles used by the private sector as well. Financial Accounting Standards Board, Concept Statement 6, Elements of Financial Statements, 13-17 (1985).

Because an unearned deposit or credit represents a liability, it should not be expended until "earned" or "offset," in this case by the removal of timber. Meanwhile, assuming the prospective purchaser has no outstanding obligations to the federal government (*See* 45 Comp. Gen. 504, 505 (1966)), the depositor maintains the right to demand a refund of the deposit up until the time timber is removed.

For these reasons, we agree with the Inspector General of USDA that, because deposit funds have not yet been earned by the government, the government should not "spend" the funds by including them in annual distributions to the states.

One could argue that 16 U.S.C. § 500, read literally, allows unearned deposits to be included in annual distributions to the states. It expressly requires that 25 percent of all "moneys received" during a fiscal year from resource utilization in a national forest shall, at the end of that year, be paid to the states in which that forest is located. Taken literally, "moneys received" encompasses all funds in the government's hands and therefore implies that unearned deposits should be included in annual distributions. However, the term "moneys received" cannot be construed without reference to the accounting principles discussed above.

The legislative history of a comparatively recent amendment to 16 U.S.C. § 500 provides additional support for this position. The National Forest Management Act of 1976, included "all amounts earned or allowed" as purchaser credits through the construction of roads by prospective purchasers as "moneys received" for purposes of annual distributions to the states. The amendment is not without ambiguity, but Senate Report No. 94-893 explicitly stated that the collections would not be included for distribution until set off against the value of timber removed from a national forest, as follows:

> . . . Under the amendment, the earned or allowed purchaser credits *used through set-off against the value of timber* . . . will be included in 'money received,' and States will receive twenty-five percent of that amount. . . . S. Rep. No. 893, 94th Cong., 2d Sess. 24 (1976) [Italic supplied.]

Thus, Congress intended purchaser credits to be earned before including them in annual distributions, and there is no reason to assume that cash deposits were to be treated any differently.

Therefore, based on both generally accepted accounting principles and specially applicable federal accounting principles and standards and on our analysis of 16 U.S.C. § 500, we agree with the recommendation of the Inspector General of USDA that the Forest Service should not include advance deposits or credits in annual distributions to the states until they have been earned or offset by the corresponding removal of trees.

As to the subsidiary question regarding the possible incremental implementation of these accounting changes, the Forest Service has not given us any information concerning the magnitude or impact of the changes, nor has it described a plan for phasing them in. We therefore have no basis on which to conclude that we have no objection to incremental implementation of the changes.

B-229297, April 29, 1988

Civilian Personnel

Relocation
■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Personal Convenience

Defense Logistics Agency's refusal to grant a transferred employee relocation expenses was not clearly erroneous, arbitrary or capricious where the employee initiated the transfer to a lateral position with no greater promotion potential. Under these circumstances, the agency properly determined that the transfer was primarily for the convenience of the employee, thereby precluding entitlement to relocation expenses.

Matter of: Julia R. Lovorn—Relocation Expenses

This decision is in response to an appeal submitted by Julia R. Lovorn of our Claims Group's settlement of September 23, 1987, denying her claim for reimbursement of relocation expenses incurred when she transferred from an attorney position at a Defense Logistics Agency (DLA) field activity in Dayton, Ohio, to an attorney position at a DLA regional office in Dallas, Texas. Since Ms. Lovorn sought the transfer to Dallas and the position to which she transferred was the same grade as the position she left with no more promotion potential, DLA determined that the transfer was primarily for Ms. Lovorn's convenience. We affirm the denial of the claim since the agency's determination was not clearly erroneous, arbitrary or capricious.

Background

The claimant in this case, Ms. Julia R. Lovorn, held an attorney position at DLA, Dayton, Ohio. Through an informal recruitment message, she learned of a vacancy in the DLA's regional office in Dallas, Texas. The position was a GS-13 position, the same grade held by Ms. Lovorn in Dayton. The DLA report states that, following Ms. Lovorn's expression of interest, the Dallas regional office made no further effort to recruit candidates from other sources, such as issuing a formal job opportunity announcement. The Dallas office decided to offer the position to Ms. Lovorn based on the results of her interview and the fact that she was an experienced DLA attorney who could perform the duties of the position with little or no additional training. Ms. Lovorn was notified of her tentative selection, prompting her to request payment for permanent-change-of-station (PCS) relocation expenses.

Because of significant resource and funding limitations during fiscal year 1986, the DLA regional office in Dallas used a program resourcing advisory committee to make recommendations to the Installation Commander concerning the prioritization of filling administrative support positions, such as attorneys, and the justifiability of all requests for lateral PCS moves. The committee recommended against approval of PCS relocation expense reimbursement for Ms. Lo-

vorn's transfer since the request was for a lateral move to a position with no known promotion potential. Instead, the committee recommended filling the position without a PCS expenditure. The Commander accepted the committee's recommendations. In a report to us the Commander states:

> The lack of available funding was a consideration in my decision not to authorize [reimbursement for] Ms. Lovorn's PCS move. However, central to my decision was my determination that filling the position was not so essential that if the position were left unfilled that accomplishment of the region's mission would be severely impaired.

When Ms. Lovorn was notified that her selection for the position had been approved but that PCS reimbursement was not justified at the time, she decided to delay her move to see if the decision not to authorize PCS reimbursement would be changed. When it appeared that no change in the decision would be forthcoming, Ms. Lovorn decided to transfer at her own expense. Once in Dallas, she submitted her claim for reimbursement of PCS relocation expenses, which was denied by DLA.

Analysis

Reimbursement of an employee's travel and relocation expenses following a PCS move is conditioned upon a determination that the transfer is in the interest of the government and not primarily for the convenience or benefit of the employee, or at the employee's request. *See* Federal Travel Regulations (FTR), para. 2-1.3 (Supp. 10, Mar. 13, 1984). We offered the following guidance concerning this determination in *Dante P. Fontanella,* B-184251, July 30, 1975:

> Generally . . . if an employee has taken the initiative in obtaining a transfer to a position in another location, an agency usually considers such transfer as being made for the convenience of the employee or at his request, whereas, if the agency recruits or requests an employee to transfer to a different location it will regard such transfer as being in the interest of the Government. Of course, if an agency orders the transfer and the employee has no discretion in the matter, the employee is entitled to reimbursement of moving expenses.

In applying the FTR provisions and our guidance to cases involving claims for PCS relocation expenses, we have recognized that the determination of whether a transfer is in the interest of the government or primarily for the convenience of the employee is a matter within the discretion of the employing agency. *Eugene R. Platt,* 59 Comp. Gen. 699 (1980); *Julie-Anna T. Tom,* B-206011, May 3, 1982. We will not overturn an agency's determination unless it is arbitrary, capricious or clearly erroneous under the facts of the case. *John J. Hertzke,* B-205958, July 13, 1982.

In this case, we conclude that the agency's decision to deny Ms. Lovorn relocation expenses was not clearly erroneous, arbitrary or capricious. As a general rule, we have denied relocation expenses where the transfers in question were lateral transfers to positions without greater promotion potential. *See, e.g., Jack C. Stoller,* B-144304, Sept. 19, 1979. This is the case even where the transfer is the result of a vacancy announcement. *James Trenkelbach,* B-219047, Apr. 24, 1986; *Norman C. Girard,* B-199943, Aug. 4, 1981.

In Ms. Lovorn's appeal she states that the agency cannot base a decision to deny reimbursement on budget constraints. Ms. Lovorn's statement is correct if it has been found that the transfer actually was in the interest of the government. *See David C. Goodyear,* 56 Comp. Gen. 709 (1977). This is not the case here. As discussed previously, DLA determined that Ms. Lovorn's transfer was primarily for her convenience based on circumstances that have been recognized in our decisions as supporting such a determination. In view of this, we have no reason to question the Installation Commander's statement that budgetary considerations were not central to his determination.

Appropriations/Financial Management

Civilian Personnel

Procurement

Bid Protests
■ GAO Decisions
■■ Recommendations
■■■ Modification

Recommendation in initial decision that protester's proposal be reevaluated as if protester offered no separate price for mistaken subline item is modified to state that price negotiations be reopened between protester and initial awardee.

372

■ GAO Procedures
■■ GAO Decisions
■■■ Reconsideration

Requests for reconsideration of merits of prior decision are denied because requests do not show that initial decision contained errors of fact or of law or that information not previously considered exists that would warrant its reversal or modification.

372

■ GAO Procedures
■■ Pending Litigation
■■■ GAO Review

Request for reconsideration is denied where the issue raised in the protest could be affected by suit in the District Court filed by the protester and where the Court has not expressed interest in a General Accounting Office decision.

380

■ GAO Procedures
■■ Preparation Costs

Where legislation passed subsequent to a General Accounting Office decision sustaining a protest has the effect of rendering moot the recommendation for corrective action—reinstating the protester as the low responsible bidder for Office of Management and Budget Circular (A-76) cost comparison purposes—the protester is entitled to award of costs of pursuing the protest, including reasonable attorneys' fees, but not bid preparation costs.

371

■ Subcontracts
■■ GAO Review

Protest of a subcontract awarded by an Indian tribe for the construction of a school under the Indian Self-Determination and Education Assistance Act is dismissed because the subcontract was not "by or for" the government.

384