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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, NW, Washington, D.C. 20548, or by calling (202) 275-6241.

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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.

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B-228038, December 2, 1987

Procurement

Sealed Bidding
■ Invitations for Bids
■■ Amendments
■■■ Acknowledgment
■■■■ Responsiveness

Responsiveness must be determined from the face of the bid. Therefore, bidder's failure to acknowledge a material amendment to a solicitation which also extended the bid opening date may not be waived where the bid contains only the previous bid opening date. The mere submission of the bid on the amended bid opening date is not sufficient to show that the bidder intended to be bound by the terms of the amendment. Previous cases inconsistent herewith, B-194496, Jan. 17, 1980; B-208877, May 17, 1983; and B-212465, Oct. 19, 1983; will no longer be followed.

Matter of: C Construction Company, Inc.

C Construction Company, Inc. protests the award of a contract to J.W. Cook, Inc. by the Naval Facilities Engineering Command (Navy) under invitation for bids (IFB) No. N62470-87-B-7107, issued for the construction of a high school for military dependents at Camp LeJeune, North Carolina. The protester argues that the Navy should have rejected Cook's bid on the ground that Cook failed to acknowledge a material amendment to the solicitation and thus submitted a nonresponsive bid.

We sustain the protest.

The solicitation as originally issued called for bid opening on June 25, 1987, and was subject to a total of four amendments. Amendment No. 00ed specifications to the solicitation but left the bid opening date unchanged. Amendment No. 0002 changed the bid opening date from June 25 to July 2, and corrected a typographical error contained in the solicitation. Amendment No. 0003 added additional specifications and drawings to the solicitation but left the bid opening date unchanged. Finally, amendment No. 0004 called for additional work under the solicitation and extended the bid opening date from July 2, to July 7. Cook's failure to acknowledge amendment No. 0004 is the subject of this protest.

According to the agency, the additional work called for by amendment No. 0004 will result in increased costs of $57,794. The protester states that amendment No. 0004 caused it to add some $85,000 to its total bid. The difference between Cook's bid and C Construction's bid is $43,000.

At bid opening on July 7, Cook submitted its bid which failed to acknowledge amendment No. 0004. Additionally, Cook's bid and bid bond bore the earlier bid opening date of July 2, and the envelope which contained its bid bore the original bid opening date of June 25. According to the protester, Cook's failure to acknowledge amendment No. 0004, coupled with the lack of any indication whatsoever on the face of Cook's bid that the firm in fact received the amendment renders the bid nonresponsive. The protester argues that Cook could have simply learned about the extended bid opening date from suppliers or subcontractors or other sources within the construction community.

The agency, on the other hand, while agreeing that the amendment was material, argues that the fact that Cook submitted its bid on the extended bid opening date is, by itself, sufficient to show that the firm constructively acknowledged amendment No. 0004 and, thus, that Cook submitted a responsive bid.

As a general rule, a bidder's failure to acknowledge a material amendment renders the bid nonresponsive, thus requiring that the agency reject the bid. This rule is premised upon two facts. First, that acceptance of a bid when an amendment has not been acknowledged affords the bidder the opportunity to decide, after bid opening, whether to furnish extraneous evidence showing that it had considered the amendment in formulating its price or to avoid award by remaining silent. Second, if such a bid were accepted, the bidder would not be legally bound to perform in accordance with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. *See generally N.B. Kenney Co., Inc.,* 65 Comp. Gen. 265 (1986), 86-1 CPD ¶ 124, and cases cited therein.

However, an amendment may be constructively acknowledged where the bid itself includes one of the essential items appearing only in the amendment. Thus, we have found that a bidder's failure to acknowledge an amendment could be waived when, for example, the bid included a price for an item that was added by amendment, 34 Comp. Gen. 581 (1955), or a price for quantities reduced by an amendment. *Nuclear Research Corp. et al.,* B-200793, B-200793.2, June 2, 1981, 81-1 CPD ¶ 437. We also have found constructive acknowledgment when the bidder agreed to use materials other than those required by the original solicitation, *W.A. Apple Mfg., Inc.,* B-183791, Sept. 23, 1975, 75-2 CPD ¶ 170, *aff'd on reconsideration,* Mar. 2, 1976, 76-1 CPD ¶ 143, or when the bid included an acceptance period that was different from that imposed by the original solicitation. *Shelby-Skipwith, Inc.,* B-193676, May 11, 1979, 79-1 CPD ¶ 336.

These decisions, in our opinion, are consistent with the regulatory provision that permits a bidder's failure to acknowledge an amendment to be waived as a minor informality or irregularity if the bid "clearly indicates that the bidder received the amendment." Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405(d)(1) (1986). In permitting constructive acknowledgment, only the bidder's failure to acknowledge the amendment is waived, not the bidder's compliance with the amended solicitation. *Shelby-Skipwith, Inc., supra.*

In this connection, a number of our previous decisions have allowed acceptance of a bid which did not acknowledge a material amendment where the bid itself reflected an extended bid opening date provided for in the amendment (or a date subsequent to the original bid opening date) and the bid was in fact submitted on the extended date. *Inscom Electronics Corp.*, 53 Comp. Gen. 569 (1974), 74-1 CPD ¶ 56; *American Monorail, Inc.*, B-181226, July 31, 1974, 74-2 CPD ¶ 69; *S. Livingston & Son, Inc.*, B-183548, July 2, 1975, 75-2 CPD ¶ 7; *Aetna Ambulance Service, Inc., G&L Ambulance Service,* B-190187, Mar. 31, 1978, 78-1 CPD ¶ 258.

One of these cases, *Aetna Ambulance Service, Inc., G&L Ambulance Service, supra,* was later cited as authority to extend the above stated rule to hold that the mere submission of a bid on the extended bid opening date was itself sufficient to charge the bidder with constructive knowledge of the amendment. *See Arrowhead Linen Service,* B-194496, Jan. 17, 1980, 80-1 CPD ¶ 54 (no discussion of whether bid reflected extended bid opening date). Subsequently, the broad language contained in *Arrowhead Linen Service, supra,* was followed in two other cases (relied upon by the Navy in this case), which stated that the mere submission of a bid on an extended bid opening date is sufficient, without more, to charge the bidder with constructive knowledge of an amendment. *Lear Siegler, Inc.*, B-212465, Oct. 19, 1983, 83-2 CPD ¶ 465; *Law Brothers Contracting Corp.*, B-208877, May 17, 1983, 83-1 CPD ¶ 521 (denied because time of submission could not be established).

In our opinion, it is axiomatic that the responsiveness of a bid must be determined from the face of the bid at bid opening. Consequently, where, as here, the bid itself does not establish its responsiveness, we think that submission of the bid on the extended bid opening date, without more, is not sufficient to show that the bidder agreed to comply with the terms of the amendment. While the bidder might have been aware of the existence of the amendment, this does not show that the bidder agreed to the terms of the amendment. FAR § 14.405(d)(1) (1985).

Indeed, we have endorsed this line of reasoning (that the bid must evidence on its face an intent to be bound by the terms of an amendment) in previous decisions. Thus, for example, in *Pioneer Fluid Power Co.— Reconsideration,* B-214779.2, Mar. 22, 1985, 85-1 CPD ¶ 332, we concluded that the bidder's notation of an extended bid opening date on an unsigned standard form 19-B submitted with its bid was insufficient evidence of the bidder's intent to be bound by the amendment in light of the fact that the signed cover sheet of its bid bore an earlier superseded bid opening date. Similarly, in *Kinross Manufacturing Corp.*, 65 Comp. Gen. 160 (1985), 85-2 CPD ¶ 716, we held that the bidder's handwritten insertion of the new bid opening date, along with the notation that it had been advised of the extended bid opening date by an agency official, indicated that the bidder's knowledge of the amendment was limited to the new bid opening date. Simply stated, if a bidder's handwritten insertion of the extended bid opening date may not be sufficient to constructively acknowledge the amendment, we fail to see how a bid with no indication whatsoever of the extended

bid opening date or of any other material terms of the amendment clearly indicates the bidder's intent to be bound by the amendment.

Accordingly, since Cook's bid does not establish either receipt of the amendment, or Cook's intent to be bound by its terms, we think the bid was nonresponsive. To the extent that the rule stated in our decisions in *Arrowhead Linen Service, supra, Lear Siegler, Inc., supra,* and *Law Brothers Contracting Corp., supra,* (that the mere submission of a bid on the bid opening date indicates the bidder's intent to be bound to the terms of the amendment) are inconsistent with this decision, the prior cases will no longer be followed.

Consequently, we think that the Navy improperly accepted Cook's bid and the protest is sustained. We recognize that the Navy relied upon the cases of *Arrowhead Linen Service, supra, Lear Siegler, Inc., supra,* and *Law Brothers Contracting Corp., supra,* in concluding that acceptance of Cook's bid was proper. Under circumstances such as these, we would ordinarily only apply a newly stated rule prospectively. We are informed however, that performance of the contract awarded to Cook has been suspended pending our decision in this case. Accordingly, by separate letter of today to the Secretary of the Navy, we are recommending that the contract awarded to Cook be terminated for the convenience of the government and award be made to C Construction, if otherwise proper.

The protest is sustained.

B-228045, B-229609, December 3, 1987

Procurement

Contractor Qualification
■ Approved Sources
■■ Qualification
■■■ Standards

Where the contracting agency's stock of certain aircraft spare parts was projected to be depleted during the procurement lead time and the agency lacked the technical data to develop competitive specifications or precise qualification requirements that the protester could have met in the short time available, the agency properly awarded a sole-source contract to the only available qualified source; the agency was not required to delay the procurement in order to develop and advise the protester of precise qualification requirements.

Procurement

Noncompetitive Negotiation
■ Contract Awards
■■ Sole Sources
■■■ Propriety

Where the contracting agency properly determined that only one qualified source could meet its needs within the required timeframe, the fact that the qualified source submitted a late quotation had no adverse effect on the protester, and acceptance of the quotation thus was unobjectionable, since the protester could not have received the award in any event.

Matter of: Kitco, Inc.

Kitco, Inc. protests the Department of the Air Force's award of a sole-source contract, No. F09603-87-C-1842, to Parker Hannifin Corporation, O-Seal Division, to supply spare seal plates for C-130 aircraft. The intended award was synopsized in the *Commerce Business Daily* (CBD), with a standard note explaining that other potential sources might be considered if, as pertains here, the source submitted either: 1) evidence of having satisfactorily produced the required part for the government or the prime equipment manufacturer; or 2) engineering data sufficient to demonstrate the acceptability of the part. Kitco submitted a quotation along with a data package, and contends that the Air Force failed to give its material fair consideration and lacked an adequate basis for the sole-source award to Parker Hannifin. Kitco also challenges a second solicitation covering part of this requirement. We deny the protests.

The Warner Robins Air Logistics Center issued a purchase request for quantities of seal plates in 1986. The seal plates, according to Parker Hannifin (which manufactured them for the prime equipment manufacturer), provide a seal for certain propeller assemblies and align two sets of gear segments. The Air Force describes the seal plates as high intensity items for which the agency has a high monthly replacement rate. The purchase request limited sources to Parker Hannifin and the prime equipment manufacturer, Hamilton Standard, unless other sources could demonstrate the acceptability of their items. The justification for using noncompetitive procedures stated that there is only one responsible source and no other type of property will meet the agency's needs. *See* 10 U.S.C. § 2304(c)(1) (Supp. III 1985). The justification explained that the design data for the seal plates is proprietary to Hamilton Standard.

The Air Force issued the current solicitation request to Hamilton Standard and Parker Hannifin on January 22, 1987, requesting quotations for alternative quantities of seal plates (from 2627 to 7445 units). The solicitation request contained the "Restrictive Acquisition Method Code" clause which, like the CBD, stated that quotations from other sources would be considered if the offeror submitted prior to, or with, its quotation either: 1) evidence of having satisfactorily produced the item for the government or the prime equipment manufacturer, or 2) engineering data sufficient to show acceptability of the part. The solicitation request asked for replies no later than February 23.

Kitco submitted its quotation and data package on February 23. The quotation proposed to supply Kitco's own part, which Kitco was in the process of developing based on reverse engineering Hamilton Standard's part. (Although Kitco also alternatively proposed to supply Hamilton Standard's part, which it alleges the Air Force failed to consider, nothing in the record indicates that Kitco ever submitted the required evidence of having produced the item for Hamilton Standard; thus it appears Kitco really only pursued qualifying as a new manufacturer of an alternate part.)

The Air Force, in March 1987, initially rejected Kitco's proposed part because the agency lacked Hamilton Standard's drawings depicting the latest configura-

tion of the part, and thus lacked adequate data to evaluate Kitco's proposed part. Kitco then advised the agency that it was in the process of producing prototypes that could be evaluated and tested. The agency refused to commit itself to testing until it could ascertain that Kitco's design conformed to Hamilton Standard's. The agency further indicated that any testing would need to include tests for form, fit and function, possibly including flight testing. While working on the prototypes, Kitco continued its attempts to gain approval of its part based only on technical data.

On April 20, the Air Force obtained authorization from Hamilton Standard to use its latest drawings to evaluate Kitco's data package. In using those drawings to evaluate a revised data package submitted by Kitco on April 27, the Air Force found that Kitco's design deviated from the drawings. Only after Kitco submitted its fifth revision, on July 23, did its drawings conform in all material respects to Hamilton Standard's drawings. In the meantime, Kitco completed its prototypes and had them tested by a firm allegedly authorized by Hamilton Standard and the government to overhaul and test the seal plates. The test revealed no obvious dimensional discrepancies and indicated that Kitco's alternate fit well and performed satisfactorily during a one-hour test run at full temperature and operating pressure; no long-term tests were performed. Kitco forwarded the test results to the Air Force on June 16.

The Air Force determined that the July 23 revisions to Kitco's data package were sufficient to demonstrate the acceptability of the design, but that further testing would be necessary to determine conclusively the acceptability of the actual item. In this regard, the agency decided that imposing a requirement for first article testing (the format of which would have to be developed) would be sufficient to protect the government's interests, and thus granted formal approval of Kitco's alternate on August 7.

The Air Force proceeded with a sole-source award to Parker Hannifin on July 31 for the maximum quantity, 7,445 of the seal plates. A second justification for using noncompetitive procedures, issued July 29, cited an unusual and compelling urgency, *see* 10 U.S.C. § 2304(c)(2), because the Air Force's stock was projected to be depleted within the lead time for delivery and the agency lacked sufficient data to permit other sources to compete. The contract price was $169.00 per seal plate, which was $28.51 higher than Kitco's approximate average unit price.

After Kitco filed its protest, the Air Force reviewed the urgency of the requirement for seal plates and determined that only 2,800 seal plates were urgently required, while the remaining items could be acquired under a separate competitive procurement with a first article testing requirement for a new source. The Air Force therefore partially terminated Parker Hannifin's contract, reducing the quantity by 4,645 units.

Kitco basically contends that the Air Force failed to make reasonable efforts to attain approval of Kitco's proposed part, and thus violated the statutory mandate that agencies seek offers from as many potential sources as practicable

under the circumstances, even when an agency's need for the items is urgent. 10 U.S.C. § 2304(e). Kitco complains that the agency also failed to provide the firm prompt notice of the precise requirements for approval and an opportunity to have its part tested which, the protester argues, was required by 10 U.S.C. § 2319 .[1] Lastly, Kitco maintains that Parker Hannifin's quotation should not have been considered because it was submitted after the February 23 due date specified in the solicitation request for replies.

The Air Force asserts that it acted diligently to approve Kitco as an available source, and points out that while Hamilton Standard's proprietary rights to the technical data for the part limited what the agency properly could do, it nevertheless worked with Kitco for 5 months, and considered five revisions of Kitco's drawings, in an effort to obtain an acceptable design. The Air Force takes the position that it had no obligation to prepare precise qualification requirements (including possible testing requirements), to provide them to Kitco, or to give Kitco an opportunity to submit its part to any testing requirements, until Kitco submitted a verifiably acceptable design. The Air Force states that, after Kitco achieved a design that conformed with Hamilton Standard's drawings for the part, there was insufficient time to develop necessary testing requirements and subject Kitco's part to the tests without jeopardizing the agency's ability to maintain its stock of the seal plates after April 1988. It is the Air Force's position, therefore, that Parker Hannifin was the only acceptable source available late in July 1987, when the Air Force awarded the contract. The Air Force essentially concedes it initially awarded Parker Hannifin a quantity greatly exceeding the agency's urgent needs, and already has taken corrective action in this regard.

We believe the Air Force has acted properly. When the Air Force issued the solicitation request, it lacked available data to develop competitive specifications or alternative sources aside from Hamilton Standard (the prime equipment manufacturer) and Parker-Hannifin (which manufactured the seal plates for Hamilton Standard). The protester itself was only in the early stages of developing an alternative part. The agency therefore properly determined that, in essence, only one responsible source (or its supplier) could meet the agency's needs. *See C&S Antennas, Inc.*, B-224549, Feb. 13, 1987, 66 Comp. Gen. 254, 87-1 CPD ¶ 161. We believe the agency fulfilled the requirement to maximize competition by giving notice of the intended sole-source procurement in the CBD (including a statement that all responsible sources may submit an offer), *see* 41 U.S.C. § 416, and by not excluding potential sources for not being on a qualified manufacturers or products list. *See* 10 U.S.C. § 2319.

[1] This provision states that no potential offeror may be denied the opportunity to compete solely because it is not on a qualified bidders list, qualified manufacturers list or qualified products list, or has not been identified as meeting a "qualification requirement"—defined as a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract. The provision also imposes obligations on the part of an agency establishing qualification requirements, such as providing any offeror, upon request, a written list of the precise requirements and a prompt opportunity to demonstrate its ability to meet the qualification requirements.

The mere fact that the CBD notice and the solicitation request referred to the only known source as an approved source and stated that the Air Force would consider proposed alternates did not mean that the agency was obligated to have in place precise qualification requirements to assure that Kitco and other firms could qualify in time to receive this contract. Under 10 U.S.C. § 2319(c)(5), an agency need not delay a proposed award in order to specify qualification requirements or to provide potential offerors an opportunity to meet them. While it is clear that where, through advance planning, an agency can devise prequalification requirements or first article testing requirements that will foster and permit competition, the agency must do so, *see Pacific Sky Supply Inc.*, B-227113, Aug. 24, 1987, 87-2 CPD ¶ 198, we think it is entirely reasonable, depending on the circumstances, for an agency to delay developing such requirements until it actually receives a proposed alternate and the necessary technical data to evaluate it. *See Pacific Sky Supply Inc.*, B-227113, *supra; B&H Aircraft Co., Inc.*, B-222565 *et al.*, Aug. 4, 1986, 86-2 CPD ¶ 143; *TeQcom, Inc.*, B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700.

The record here fails to establish that the Air Force reasonably could have developed precise prequalification requirements or first article testing requirements in sufficient time for Kitco to compete. The Air Force was not even able to obtain the technical data from Hamilton Standard necessary to evaluate Kitco's proposed alternate until approximately 1 month after Kitco submitted its proposal, and, in any event, the agency was not at liberty to disclose the data in the manner of specifications or precise qualification requirements. When Kitco finally submitted acceptable drawings, the agency reasonably determined that testing was necessary. We previously have held that testing requirements may be necessary to assure that items with no proven reliability do not contain latent weaknesses relative to the qualified part. *See Pacific Sky Supply, Inc.*, B-227113, *supra*.

As for the Air Force's failure to develop testing standards in time for Kitco to compete, Kitco did not develop a prototype for testing or submit short-term testing data to show that its part might function satisfactorily until mid-June 1987, leaving the agency without reasonable time to develop full testing require ments. Moreover, when Kitco submitted its test data, its drawings contained a discrepancy from Hamilton Standard's drawings indicating a problem with the part such that testing reasonably did not appear appropriate. Because the Air Force needed to make an award by July to prevent the depletion of its stock, the agency properly proceeded on an urgent and compelling basis to award a sole-source contract to the only known qualified source capable and willing to provide the seal plates. *See Pacific Sky Supply, Inc.*, B-225420, Feb. 24, 1987, 87-1 CPD ¶ 206.

When the Air Force later recognized that the contract awarded to Parker Hannifin included quantities of seal plates for which there was ample time to permit Kitco to compete on the basis of a first article testing requirement, the Air Force properly terminated that portion of the contract to allow Kitco an

opportunity to compete. *See Factech Corp.*, B-225989, Mar. 26, 1987, 87-1 CPD ¶ 350.

Given that the Air Force properly determined that Parker Hannifin was the only qualified source that could meet the agency's needs within the required timeframe, the fact that Parker Hannifin's quotation was submitted after the advertised due date had no adverse effect on the protester, and its acceptance therefore was unobjectionable; Kitco could not have received the award in any event.

Finally, Kitco protests the issuance of RFP No. F09603-87-R-1438, to procure the terminated portion of the contract for seal plates. Although Kitco can compete under this solicitation (which has a first article testing requirement for new sources), Kitco basically contends that the solicitation is improper because Kitco should have received the award under the prior solicitation. This position is without merit since we have already held that Kitco was not qualified for an award under the solicitation request.

The protests are denied.

B-228071, December 3, 1987

Procurement

Socio-Economic Policies
■ Small Business 8(a) Subcontracting
■■ Contract Awards
■■■ Administrative Discretion

Contracting officer's determination not to agree to award of a section 8(a) contract to a firm proposed for debarment by the Department of Labor is within the agency's broad discretion in section 8(a) contracting and, therefore, is legally unobjectionable, where the agency did not violate applicable regulations, and there is no showing of fraud or bad faith on the part of government officials.

Matter of: Salazar Construction Company

Salazar Construction Company protests the Department of the Navy's refusal to award the firm a contract under invitation for bids (IFB) No. N62467-87-B-9018, which was set aside for award under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982 and Supp. III 1985).[1] The IFB covered the relocation of the installation post office at the Naval Air Station, Corpus Christi, Texas. We deny the protest.

The Small Business Administration (SBA) originally proposed Salazar for negotiations as the 8(a) contractor for this procurement. Before award was made, however, the Navy learned that Salazar had been proposed for debarment by

[1] Under the 8(a) program, the Small Business Administration enters into contracts with government agencies and arranges for performance by awarding subcontracts to socially and economically disadvantaged small business concerns.

the Department of Labor (DOL) for violations of the labor provisions of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982). Upon receiving this information, the Navy became concerned about Salazar and informed the SBA that it was rejecting Salazar as the 8(a) contractor and would withdraw the procurement from the 8(a) program unless the SBA nominated a different firm. The Navy also apparently expressed the view that it was precluded by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.406-3(c)(7) (1986), from awarding Salazar a contract while its debarment was pending. Without objection, the SBA proposed another 8(a) subcontractor, L&L Construction, for negotiations under the 8(a) program.

Contracting officers, in their discretion, are authorized to award section 8(a) contracts to the SBA based upon mutually agreeable terms and conditions. FAR, 48 C.F.R. § 19.801(b)(1); *Universal Canvas, Inc.*, B-226996, June 5, 1987, 87-1 CPD ¶ 576. It is clear from the Small Business Act that whether any particular contract should be awarded under section 8(a), at least insofar as we are concerned here, is solely within the discretion of the procurement officers of the government. No firm has a right to have the government satisfy a specific procurement need through the section 8(a) program or to receive the award of a contract through the section 8(a) program. *Sam Gonzales, Inc.—Reconsideration*, B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306. Accordingly, absent a showing of possible fraud or bad faith or a failure to comply with regulations, we have always viewed contracting agency decisions to award or not to award a contract through the section 8(a) program as legally unobjectionable and therefore not subject to review under our bid protest function. *RAI, Inc.*, B-222610, Aug. 5, 1986, 86-2 CPD ¶ 156.

Salazar protests that the Navy acted in bad faith by threatening to withdraw the procurement from the 8(a) program if SBA did not nominate another 8(a) concern, and that the Navy incorrectly interpreted (and thus failed to comply with) the FAR as precluding award to Salazar based on its pending debarment. Salazar argues that, since it had appealed the proposed debarment, the recommendation for debarment should not have been considered at all by the Navy in deciding whether to contract with Salazar for this 8(a) contract. We reject these arguments.

Section 9.406-3(c)(7) of the FAR provides that where an agency takes action to debar a firm, the agency will not contract with the firm pending a final debarment decision. We agree with the protester that this provision did not apply here to preclude contracting with Salazar, since a debarment under the Davis-Bacon Act renders a firm ineligible for government contracts only after inclusion of its name on the Comptroller General's debarred bidders list, not while the debarment is merely pending, as was the case here. *See* FAR, 48 C.F.R. §§ 9.403 and 9.405(b). While we agree, however, that the Navy was not precluded by regulation from contracting with Salazar, the Navy also was not required—by this or any other regulation—to contract with Salazar merely because the firm had been nominated by the SBA. Thus, the Navy's refusal to contract with

Salazar under the section 8(a) program did not constitute a violation of regulations.

To show that contracting agency officials acted in bad faith, the protester has the heavy burden of presenting irrefutable proof that these officials had a specific and malicious intent to injure the protester. *See Ernie Green Industries, Inc.*, B-222517, July 10, 1986, 86-2 CPD ¶ 54. Salazar has not met this burden. The record shows that the Navy's refusal to contract with Salazar was based on its interpretation of the FAR and an underlying unwillingness to contract with Salazar while its debarment was still pending. We see nothing improper in this motivation; we think it is well within the contracting agency's broad discretion not to contract under the 8(a) program with a firm that has been proposed for debarment.

Salazar has presented letter affidavits from a subcontractor stating that the contracting officer at the Naval Air Station has expressed personal animosity for Salazar; has stated that he will not contract with Salazar in the future; and has threatened to delay the subcontractor's professional engineering approval in the state if the firm continues performing work for Salazar. The contracting officer, in a responding affidavit, has categorically denied all of the subcontractor's allegations, asserting that he never stated he would not contract with Salazar, and explaining that, while he did withdraw his recommendation of the subcontractor for professional approval, he did so based on his view that a principal of the firm had been involved in an improper conflict-of-interest, not because of any involvement of the firm with Salazar.

The subcontractor's statements are unsupported by documentation in the record, and appear to have been solicited by Salazar for the purpose of this protest. Under these circumstances, the statements do not constitute the virtually irrefutable proof necessary to establish fraud or bad faith on the part of contracting officials.

The protest is denied.

B-228914, December 3, 1987

Procurement

Sealed Bidding
■ Bid Guarantees
■■ Responsiveness
■■■ Contractors
■■■■ Identification

Where corporation submits bid in assumed trade name registered prior to bid opening, official documentation of such registration submitted after bid opening, which existed and was publicly available prior to bid opening, adequately identified corporation as party that would be legally bound by bid; therefore, bid is responsive and award to corporation would be proper.

Matter of: Coonrod & Associates

Coonrod & Associates, by their agent Priscidon Enterprises, Inc., protests the pending award of a contract to Plano Bridge & Culvert for construction modernization of barracks at Fort Riley, Kansas, under invitation for bids (IFB) No. DACA41-87-B-1042, issued by the United States Army Corps of Engineers. Coonrod contends that Plano's bid should be rejected as nonresponsive, as the firm was not a legal entity that could be bound to perform a contract. We deny the protest.

The low bid was submitted in the name of Plano Bridge & Culvert, Fort Worth, Texas, and was signed by Don L. Hanson, as president. The bid indicated that the bidder was owned or controlled by a parent company, Hanson Construction Company of Washington, Iowa, and gave the parent company's (Hanson Construction's) employer identification number. The bid also indicated that the bidder operated as a firm incorporated under the laws of Iowa. Additionally, a bid bond was submitted in the name of Plano as the principal.

The protester initially complained that Plano is not an existing legal entity incorporated in Iowa, as stated in the bid, and is therefore ineligible to receive the award. The agency stated in its report, however, that Plano's parent company, Hanson Construction, is an Iowa corporation, and that Plano does not exist as a separate legal entity, but is an assumed trade name filed with the Office of the Secretary of the State of Texas on April 5, 1982, for the purpose of registering Hanson Construction's business operation in that state. After receiving this information, Coonrod altered its protest, now maintaining that Plano did not, as required by the state, file with the county in which it does business, and that the bidding entity therefore is nonexistent and cannot be bound to a contract. The protester recognizes that Hanson Construction is an existing Iowa corporation, but argues that award could not properly be made to Hanson because it was not the bidder. Accordingly, the protester maintains that the Plano bid should be rejected as nonresponsive.

The protester correctly argues that in general a contract cannot be awarded to any entity other than the one which submitted the bid. While this rule generally applies in situations where it is not clear from the face of the bid which of two or more legal entities is the bidder, it does not automatically prohibit an award in cases where, as here, a bidder merely uses a trade name instead of its formal corporate name in the bid. Where a trade name is used, but it is possible to identify the actual bidder with sufficient certainty that it would not be able to avoid the obligation of its bid, acceptance of the bid is proper. *Ebsco Interiors,* B-205526, Aug. 16, 1982, 82-2 CPD ¶ 130; *see also Moore Service, Inc.,* B-212054, Dec. 6, 1983, 83-2 CPD ¶ 648. Evidence existing and publicly available at the time of bid opening may be submitted after bid opening and prior to award to establish the bidder's use of the trade name. *See id; Jack B. Imperiale Fence Co. Inc.,* B-203261, Oct. 26, 1981, 81-2 CPD ¶ 339.

The record here sufficiently identifies Plano as essentially the same entity as Hanson Construction so that the bid submitted by Plano would legally bind

Hanson. Evidence existing at the time of bid opening and publicly available, in the form of the Assumed Name Certificate filed in Texas, indicates that Plano is simply a trade name for Hanson Construction. The Small Business Administration confirmed this, and the fact that Plano is not a separate legal entity, in a September 11, 1987, small business size determination. Moreover, the bid identified the bidder as an Iowa corporation, further indicating that Hanson Construction was the underlying bidding entity. As for the fact that the bid was submitted in the name of Plano, we have recognized that a corporation can carry on business under a name other than its legal name without affecting its legal obligation. *See Las Piedras Construction Corp.*, B-208555.2, Dec. 27, 1982, 82-2 CPD ¶ 579. Under these circumstances, the fact that Plano may not have made certain filings with Texas state offices is irrelevant. The bid is responsive and properly may be accepted for award.

The protest is denied.

B-129650, December 4, 1987

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■■ Permanent/Indefinite Appropriation
■■■ Travel Expenses

Balancing of congressional travel clearing account on the books of the Department of the Treasury Financial Management Service where clearing account was not reimbursed with funds appropriated to the Congress for that purpose by charging permanent appropriation enacted after travel expenses were incurred is authorized by 2 U.S.C. § 102a, which provides that unpaid obligations which are more than 2 fiscal years old and which are chargeable to withdrawn unexpended balances of congressional accounts are to be liquidated with current appropriations for the same purpose.

Matter of: Department of Treasury—Disposition of Congressional Travel Account Balance

The Director of the Finance Division, Financial Management Service, Department of the Treasury (Service) has requested this Office to grant it "write-off authority" for some $339,821.80 in account 20A1510, Congressional Travel. The amount represents travel expenses incurred for congressional travel in foreign countries between May 1977 and September 1978, which have been on the Service's books since that time. As explained below, we conclude that the amount in question may be charged to the permanent indefinite appropriation for congressional foreign travel established under 22 U.S.C. § 1754(b).

In May 1977, we issued a decision (B-129650, May 11, 1977) to the Department of the Treasury which held that there was no authority for the then current practice of financing congressional foreign travel expenses by using dollars from Treasury miscellaneous receipts or from the Commodity Credit Corporation revolving fund to purchase foreign currencies. As a result of that decision, the

Service terminated the unauthorized practice and established new procedures for funding congressional foreign travel expenses, effective as of May 27, 1977.

Under the new procedures, congressional travel costs were to be charged initially to a clearing account on the books of the Service (20A1510). Costs were then subsequently to be cleared through reimbursements from funds appropriated to the Congress, leaving a zero balance.

This procedure was followed until September 1978, when the Congress enacted the International Security Assistance Act of 1978. That Act established a permanent indefinite appropriation to finance congressional travel, thereby ending the use of the Service's clearing account procedure. The permanent appropriation is found at 22 U.S.C. § 1754(b)(1)(C).

However, a balance remains in account 20A1510 for the period of May 1977 through September 1978, for several reasons. The Service could not identify outstanding charges for billing purposes because the necessary supporting documentation was lacking, amounts stated on supporting documents did not match amounts charged to the clearing account, travel reports did not agree with amounts charged to account 20A1510, or amounts stated on supporting documents were listed in foreign currency with no dollar equivalent given.

The Service and the State Department have been trying to resolve the outstanding balance without success. After concluding that all other means of resolution were exhausted, the Service, with the State Department's concurrence, referred the matter to us.

Although the question was framed in terms of "writing off" the balance, the issue as we see it, at least in the first instance, is the availability of the permanent appropriation established by 22 U.S.C. § 1754(b)(1)(C). Only if there is no appropriation against which the balance can properly be charged would the concept of "writing off" come into play.

In this case, it was originally contemplated that, during the approximately 15 months prior to enactment of the permanent appropriation that the clearing account was in operation, balances representing congressional foreign travel during that period would be cleared by reimbursements from funds appropriated to the Congress for that purpose. However, this could not be accomplished for the reasons noted above. Ordinarily, an appropriation (including a permanent appropriation) may not be charged with an obligation incurred prior to its enactment. All of the expenditures reflected in the clearing account balance occurred prior to enactment of the permanent appropriation.

However, there is a statute that provides the key to resolving this problem. Under 2 U.S.C. § 102a, unpaid obligations which are more than 2 fiscal years old and which are chargeable to withdrawn unexpended balances of congressional accounts are to be liquidated "from any appropriations for the same general purpose, which, at the time of payment, are available for disbursement." This statute clearly permits liquidation of prior year obligations of congressional accounts from funds currently available for the same purpose. The perma-

nent appropriation established by 22 U.S.C. § 1754(b) has, since September 1978, been available to fund congressional foreign travel, in place of the congressional appropriations used when the outstanding balance which is the subject of Treasury's request arose. Accordingly, liquidating that balance by means of a charge to the permanent appropriation is authorized by 2 U.S.C. § 102a.

The permanent appropriation is carried on Treasury's books in the form of two accounts: 00X0188(01), Congressional Use of Foreign Currency-Senate, and 00X0488(01), Congressional Use of Foreign Currency-House of Representatives. The balance should be charged to these accounts in equal amounts unless information available to the Treasury Department supports some other allocation.

B-228871, December 7, 1987

Procurement

Sealed Bidding
■ Ambiguous Bids
■■ Determination Criteria

In a firm, fixed-price requirements contract, bid was not ambiguous, and agency's rejection of it as nonresponsive was improper where bidder inserted in its bid a notation providing for a discount to the government, and where, even without the discount, bidder is lowest, responsible bidder.

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Determination Criteria

To be responsive, a bid must represent an unequivocal offer to provide the product or service as specified in the invitation for bids, so that acceptance of the bid will bind the contractor to meet the government's needs in all significant respects.

Matter of: Rusty's Services

Rusty's Services protests the rejection of its apparent low bid as nonresponsive and the award to Geisman Seeding Service (Geisman), under invitation for bids (IFB) No. DAKF06-87-B-0083, issued by the Department of the Army. The contract is for fertilizing, seeding and mulching designated areas located within the geographical boundaries of the Pinon Canyon Maneuver Site, Fort Carson, Colorado. Performance of the contract has been suspended pending our decision on the protest.

We sustain the protest.

The IFB contemplates the award of a firm, fixed-price requirements contract. The terms of the contract comprise a base 1-year contract with two 1-year options. Schedules I, II, and III, which represent the base year and the two 1-year options, respectively, contain five line items each. The solicitation provided an

estimate of the acreage covered under each line item and required a unit and total price for each line item. The aggregate price for schedules I, II, and III constitutes the total price of the bid upon which award was based. In schedule III of the protester's bid, an asterisk was placed next to each line item price. The asterisks referred to a note at the bottom of schedule III which read:

> If RUSTY'S SERVICES is awarded this contract the second one year option (schedule III) will be performed in the quantities stated above (or plus 10 percent) at no cost to the government—via an escrow established by a deduction of $20,611.45 from the final settlement from schedule II.

Rusty's total aggregate bid for schedules I, II, and III was $349,640, as compared to Geisman's bid of $476,291, approximately a $73,000 difference (not including Rusty's offered discount). However, the contracting officer determined that the notation qualified Rusty's bid price, making it ambiguous. We find that the agency's rejection of Rusty's bid was improper.

In order to be responsive, a bid as submitted must represent an unequivocal offer to provide the product or service as specified in the IFB, so that its acceptance will bind the contractor to meet the government's needs in all significant respects. *Hirt Telecom Co.*, B-222746, July 28, 1986, 86-2 CPD ¶ 121. Here, Rusty's submitted unit prices for each of the 15 line items listed in the schedule, as well as a total aggregate price for schedules I, II, and III, as required by the IFB. The prices offered were unequivocally firm and bound Rusty's to the terms of the contract. Rusty's offered discount for schedule III was neither a qualification of the bid nor a deviation from the IFB's requirement of a firm price offer. The Army argues that the phrase, ". . . (or plus 10 percent). . ." of the notation is subject to various interpretations. However, it is important to reiterate that the notation refers solely to a discount and does not affect the firm, fixed-price status of Rusty's offer.

The Army distinguishes the instant case from *Sierra Engineering Co.*, B-185265, May 26, 1976, 55 Comp. Gen. 1146 76-1 CPD ¶ 342, in which we held that a bid containing an ambiguous price term is acceptable where the bid would be low under any interpretation and where, as a result thereof, no prejudice could inure to other bidders. The Army contends that unlike the *Sierra* bid, which was responsive under either interpretation, Rusty's price, under one interpretation, is not responsive to the requirement of a firm, fixed price. The Army further contends that Rusty's bid was a contingent discount and did not establish a specific price reduction. We do not agree that the contingency renders the bid nonresponsive.

The only reasonable interpretation of the bid as a whole is that Rusty's intended to be bound by its firm offer. The only effect the "contingency" could have would be to further reduce Rusty's bid price, not increase it. Therefore, the contingency is irrelevant in the evaluation of the bid and Rusty's is the low bidder entitled to the award.

We, therefore, recommend that the contract awarded to Geisman be terminated and that the award be made to Rusty's if the firm is found to be responsible. 4 C.F.R. § 21.6(a) (1987).

The protest is sustained.

B-224027.5, December 8, 1987

Procurement

Competitive Negotiation
■ Discussion Reopening
■■ Competitive System Integrity
■■■ GAO Decisions
■■■■ Recommendations

Procurement

Competitive Negotiation
■ Discussion Reopening
■■ Propriety
■■■ Best/Final Offers
■■■■ Competitive Ranges

Agency did not abuse its discretion by requesting best and final offers after reopening negotiations pursuant to recommendation by the General Accounting Office.

Procurement

Bid Protests
■ GAO Procedures
■■ Protest Timeliness
■■■ 10-Day Rule

Allegation first raised in comments on the agency report is untimely where not filed within 10 working days of when the basis for the allegation was known or should have been known; separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of Bid Protest Regulations.

Matter of: OMNI International Distributors, Inc.

OMNI International Distributors, Inc., (OMNI) protests the award of a contract to Climb High Inc. under request for proposals (RFP) No. DAKF31-86-R-0138, issued by the Department of the Army for ski bindings. We deny the protest.

In June 1986, the Army issued solicitations for various kinds of ski equipment, including ski bindings. When the contract for ski bindings was awarded to OMNI, two other offerors, East Norco Joint Venture and Ramer Products Ltd., protested the rejection of their proposals as technically unacceptable. In *East Norco Joint Venture, et al.*, B-224022, *et al.*, Jan. 5, 1987, 87-1 CPD ¶ 6, *aff'd, Department of the Army, et al.*, B-224022.2, *et al.*, Apr. 9, 1987, 87-1 CPD ¶ 389, we sustained the protests on the basis that the Army had acted improperly by requesting samples from OMNI while evaluating Ramer and Norco on the basis of previously-purchased bindings that Ramer's proposal indicated had been specifically modified in critical areas. We recommended that the agency "extend to

Ramer and Norco the same opportunity it afforded OMNI of submitting samples of the bindings that they are proposing . . . . If appropriate, the Army should terminate the protested contract and award a new one."

The Army thereupon solicited samples from, and opened negotiations with, all of the original offerors, including those, such as Climb High, whose initial proposals had previously been found technically unacceptable. As a result of discussions, the agency determined that its previous evaluation of Climb High's proposal was in error. After receipt of best and final offers (BAFOs), the agency terminated its contract with OMNI for the convenience of the government and made award to Climb High on August 18. OMNI then filed this protest with our Office.

Noting that our recommendation for corrective action did not specifically call for the Army to request a round of BAFOs, OMNI contends that the agency's request created an impermissible auction under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d) (1986), because the prices initially offered by OMNI and several of the other offerors, but not Climb High, had been disclosed during the prior bid protests. Further, OMNI claims that it was unaware that the agency had requested a BAFO from Climb High, since that firm's initial proposal had been found technically unacceptable; had it known of Climb High's participation in the reopened negotiations, OMNI states, it would have offered a different BAFO.

The details of implementing one of our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. *Furuno U.S.A., Inc.—Request for Reconsideration,* B-221814.2, June 10, 1986, 86-1 CPD ¶ 540. Here, the Army's reopening of discussions to review offerors' bid samples was consistent with our recommendation and well within the agency's discretion. Where such discussions are held, offerors must be afforded an opportunity to submit revised proposals. *See* FAR, 48 C.F.R. § 15.610(c)(5). *See Pan Am Support Services, Inc.—Request for Reconsideration,* B-225964.2, May 14, 1987, 66 Comp. Gen. 457, 87-1 CPD ¶ 512; *Roy F. Weston, Inc.—Request for Reconsideration,* B-221863.3, Sept. 29, 1986, 86-2 CPD ¶ 364. In any case, possible prejudice to OMNI from the exposure of its original offer was ameliorated by the passage of time (approximately 1 year) between the submission of the original offer, July 1986, and the new closing date for receipt of BAFOs, July 20, 1987. As for OMNI's claim that it was unaware that Climb High had been included in the competitive range for purposes of the new BAFOs, this provides no basis for questioning the award, since the procurement regulations generally prohibit an agency from disclosing the identity of other offerors. FAR, 48 C.F.R. § 15.413.

In comments on the agency report filed on October 19 and additional comments filed on November 12, OMNI alleged for the first time that: (1) the Army acted improperly in considering for award an offeror—Climb High—whose initial proposal originally had been found to be technically unacceptable; (2) Climb High's proposed ski bindings failed to conform to certain mandatory solicitation requirements concerning the release mechanism for separating the boot from the

ski in the event of an accident; and (3) the agency improperly failed to consider the cost of terminating OMNI's contract when evaluating BAFOs.

Our Bid Protest Regulations require that protests be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1987). New and independent grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements. *Universal Shipping Co., Inc.*, B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424. We stated in our prior decisions that all of the proposals except those of OMNI and another offeror (other than Climb High) had been found to be technically unacceptable. In its initial August 26 protest of the award to Climb High, OMNI alleged that the ski bindings offered by Climb High did not meet a mandatory specification; although subsequently abandoned, this allegation indicates that OMNI was aware of the ski bindings being offered by Climb High, and thus of the basis for an allegation that they did not meet other specifications, no later than the filing of its initial protest. Likewise, since OMNI had not filed a claim for termination costs when award was made to Climb High, OMNI knew or should have known when it filed its initial protest that the agency had not considered termination costs in evaluating BAFOs. Accordingly, these additional grounds of protest, first raised more than 10 working days after OMNI knew or should have known the basis for them, are untimely.

The protest is denied.

B-228428.2, December 10, 1987

Procurement

Bid Protests

■ GAO Procedures

■■ Agency Notification

Dismissal of protest for failure to furnish contracting agency with a protest copy within 1 day of filing is affirmed since requirement is not satisfied by fact that protester had filed an agency-level protest and orally notified agency that agency-level protest and General Accounting Office protest were the same.

Matter of: Vaisala Inc.—Request for Reconsideration

Vaisala Inc. requests reconsideration of our October 27, 1987, dismissal of its protest of the requirements contained in request for proposals (RFP) No. N00140-87-R-5095, issued by the Navy Regional Contracting Center (NRCC), Philadelphia. We dismissed the protest because Vaisala failed to furnish the designated contracting agency personnel with a copy of its protest within 1 day after that protest was filed with our Office as required by our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1987).

We affirm our dismissal.

Vaisala originally filed its protest with NRCC by letter of September 17. NRCC denied this protest by letter of September 24. Vaisala then filed its protest, apparently based on the same grounds, with our Office on October 6. However, Vaisala did not file a copy of this protest with NRCC. On the basis of these facts, we dismissed the protest.

Vaisala requests reconsideration on the basis that its failure to provide NRCC with a copy of the protest filed with our Office did not prejudice NRCC in the preparation of its report since that protest was identical to the one originally filed with NRCC. Further, the protester states that after it filed its protest with our Office, it advised legal counsel at NRCC that its two protests were identical.

We require a protester to furnish a copy of its protest to the contracting officer within 1 day of its filing with us so that the contracting agency has an adequate opportunity to prepare its report. *Gilbert-Tucker Associates, Inc.—Request for Reconsideration,* B-220731.2, Nov. 12, 1985, 85-2 CPD ¶ 541. Even though Vaisala contends that it raised the same issues in its protest to our Office as it had in its previous protest to the agency,[1] the agency-level protest cannot be considered to have satisfied the requirement in 4 C.F.R. § 21.1(d) since without a copy of the protest to our Office the agency cannot know whether its administrative report in response to the protest must address the same or different issues as those raised before it. *Trinity Machinery & Associates, Inc.—Request for Reconsideration,* B-221653.2, May 15, 1986, 86-1 CPD ¶ 465. Regarding Vaisala's contention that it had orally informed NRCC of the bases of its protest to our Office, NRCC advises us that Vaisala did not inform it of the protest grounds until 10 days after the protest was filed with our Office. In any event, even if the oral notice were timely, we do not believe that such an oral representation is a reliable or adequate substitute for the requirement for actual receipt of a protest copy by the contracting activity within 1 day of filing the protest. *See Canvas & Leather Bag Co. Inc.,* B-227889.2, July 24, 1987, 87-2 CPD ¶ 89.

Our dismissal is affirmed.

B-156287, December 11, 1987

Civilian Personnel

Leaves of Absence

■ Administrative Leave

■■ Use

■■■ Administrative Discretion

This Office would not object to Department of Housing and Urban Development exercising administrative discretion in authorizing short periods of administrative leave for employee to participate in research project at Public Health Service, National Institutes of Health (NIH). Although it is generally not within the discretion of an agency to grant administrative leave for a lengthy period of

[1] The protester has not provided us a copy of its September 17 protest to the agency.

time, each agency has the responsibility for determining situations in which administrative leave will be granted for brief absences.

Matter of: Department of Housing and Urban Development Employee—Administrative Leave

The Director, Personnel Systems and Payroll Division, U.S. Department of Housing and Urban Development (HUD), requests our opinion on whether an employee of HUD may be granted administrative leave by the agency to participate approximately 3 days a month in a cancer research effort being conducted by the National Cancer Institute of the Public Health Service, National Institutes of Health (NIH). We find that the granting of brief periods of administrative leave each month to this federal employee is consistent with the available guidance for granting administrative leave to employees.

Dr. Peter A. Thompson, the employee's attending physician with the National Cancer Institute, reports that the employee is engaged in a scientific protocol being run by the National Cancer Institute to investigate breast cancer in men. This is a very rare clinical entity and the employee's consent to participate in this study is, according to Dr. Thompson, "a great service to the scientific community in general and to other patients with male breast cancer specifically." As a result, on behalf of the National Cancer Institute, Dr. Thompson concludes that the brief periods of time each month spent by the employee in the therapeutic trial should not be charged against him as sick leave but rather considered part of a cooperative effort between HUD and the NIH. In addition, the employee's immediate supervisor has determined that the employee's performance would benefit from his participation in the protocol and therefore recommends that the employee be granted short periods of administrative leave, anticipated to be about 3 days a month during the next year's phase of treatment. However, the agency is concerned that a decision of this Office, B-156287, June 26, 1974, precludes granting administrative leave to employees participating in a voluntary humanitarian project sponsored by a nonprofit organization. As a result, the agency requests a determination regarding the appropriateness of granting administrative leave to the employee, and also asks whether administrative leave in this case may be granted retroactively.

There is no general statutory authority for what is referred to as administrative leave, that is, an excused absence from duty without loss of pay and without charge to other paid leave. Nevertheless, it has been recognized that, in the absence of specific statutory authority, the head of an agency may, in certain situations, excuse an employee for brief periods of time without a charge to leave or loss of pay. Some of the more common situations in which agencies generally excuse absence without a charge to leave are discussed in the Federal Personnel Manual (FPM) Supplement 990-2, Book 630, Subchapter S11. *See also* 5 C.F.R. § 610.304 (1986), which provides certain standards for excused absences by administrative order for government employees paid at a daily, hourly or piece work rate. None of the examples, however, in either FPM Supplement or 5 C.F.R. § 610.305 is applicable here.

Each agency has the responsibility for determining situations in which administrative leave will be granted. 54 Comp. Gen. 706 (1975); 53 Comp. Gen. 582 (1974). However, our decisions and OPM's guidelines limit an agency's discretion to grant administrative leave to situations involving brief absences. *Elmer DeRitter, Jr.*, 61 Comp. Gen. 652 (1982). Where absences are for a lengthy period of time, a grant of administrative leave is not appropriate unless the absence is in connection with furthering a function of the agency. 63 Comp. Gen. 542, 544 (1984); *DeRitter, supra*, 61 Comp. Gen. at 653. Thus, in the absence of statutory authority, we would not approve a proposal under which absences would be granted for extended periods of time. *See also* 44 Comp. Gen. 333 (1964); 53 Comp. Gen. 1054 (1974); and *Frederick W. Merkle, Jr.*, B-200015, Nov. 17, 1980. In the case cited by the agency here, B-156287, June 26, 1974, we held that an employee could not be granted 6 weeks administrative leave for the purpose of engaging in voluntary humanitarian work for a privately supported organization. Although we noted that absence from duty for the purpose of working voluntarily for a private relief organization was not one of the circumstances covered by existing authorities, our conclusion in that case was based on a finding that a single period as long as 6 weeks could not be considered a "brief period" within the meaning of all available guidance for reviewing administrative leave requests.

The record in this employee's case demonstrates that his unfortunate affliction makes him uniquely situated to participate for brief periods in a therapeutic trial that both his agency, HUD, and the NIH readily agree is a humanitarian effort to advance the health sciences. As a result, we believe that the HUD's decision to allow the employee to participate in a NIH therapeutic trial for 3 days a month in a cancer research effort being run by the National Cancer Institute is consistent with the broad framework of decisions of this Office and the FPM Supplement addressing the discretionary agency review of administrative leave requests. The briefness of the period of administrative leave each month distinguishes the employee's case from our earlier decision in B-156287, June 26, 1974. Accordingly, we hold that the employee may be granted administrative leave in the circumstances of this case.

Finally, since employing agencies are vested with a discretionary authority to determine the basis upon which an employee is officially excusable, either before or after his absence, without charge to his annual or sick leave, we find that the retroactive change from sick leave to administrative leave for the brief periods covering the employee's participation in the National Cancer Institute's therapeutic trial would be proper. 53 Comp. Gen. 582, *supra*.

Claims by Government
■ Property Damages
■■ Claim Settlement
■■■ Funds
■■■■ Use

Funds recovered from a contractor's insurance company in settlement of a claim by the government against the contractor for damage to government property may not be considered as a refund and credited to the agency's appropriations, but must be deposited into the Treasury.

Matter of: Defense Logistics Agency—Disposition of Funds Paid in Settlement of Contract Action

The Chief, Accounting and Finance Division, Defense Construction Supply Center, Defense Logistics Agency, Columbus, Ohio, has requested our decision on whether certain funds, which were paid by a contractor's insurance company in settlement of the government's claim for damages to its property caused by the contractor's negligent performance, may be used to fund three contracts to correct or repair the damage. We conclude that funds paid on behalf of a contractor to settle a claim by the government for damages may not be used to repair damages caused by the contractor. Funds recovered from damage claims must be deposited in the Treasury.

The Defense Construction Supply Center entered into a contract in the amount of $150,800 with Hatfield and J & L Electric of Columbus, Ohio, a joint venture, on September 30, 1985, for the installation of a 400 KVA uninterrupted power supply system to provide uninterrupted power to equipment installed in a computer center. During the installation, certain electrical connections were incorrectly made which caused extensive damage to some of the computer software and peripheral equipment. Contracts in the amount of $101,725 were entered into with three other contractors to repair the damage. The insurance company for the original contractor paid the government $114,934.14 to settle all claims associated with the negligent performance. The Disbursing Officer at the Supply Center deposited the proceeds of the settlement into his suspense fund pending a ruling from this Office on the proper disposition of the proceeds.

The general rule concerning the crediting of collections to appropriation and fund accounts is based on the requirements of 31 U.S.C. § 3302 (1982) and is set forth in title 7, section 12 of the GAO *Policy and Procedures Manual for Guidance of Federal Agencies,* and reads as follows:

12.1 CREDITING COLLECTIONS TO APPROPRIATION ACCOUNTS

The general rule with respect to collections from sources outside the Government is that all moneys received for the use of the United States shall be turned in to the Treasury as general fund receipts and can be withdrawn only in consequence of appropriations made by Law (art. 1, sec. 9, cl. 7 of the Constitution). Refunds, as defined in this section, are to be credited to appropriation accounts. How-

ever, other collections from outside sources can be credited to appropriation accounts only if specifically authorized by law.

* * * * *

Refunds are returns of advances, collections for overpayments made, adjustments for previous amounts disbursed, or recovery of erroneous disbursements from appropriation or fund accounts that are directly related to, and reductions of, previously recorded payments from the accounts.

Under the terms and conditions set forth in this rule, funds recovered by a government agency for damage to government property, unrelated to performance required by the contract, cannot be credited to the appropriation available to repair such property or other appropriation of the agency, but must be deposited in the Treasury as general fund receipts pursuant to the requirements of 31 U.S.C. § 3302 (1982) so as not to constitute an unlawful augmentation of that agency's appropriation.

On the other hand, the rule provides an exception for refunds which are described as adjustments for previous amounts disbursed. *See,* for example, 61 Comp. Gen. 537 (1982). This refund exception includes the situation where an agency terminates a contract for default. Under a termination for default clause contained in the standard government contract, the government can terminate the contract when the contractor's performance fails to satisfy critical requirements of the contract. The default clause provisions allow the government to repurchase the terminated performance and charge the defaulted contractor for any excess costs. This reprocurement arrangement became known as a replacement contract. 60 Comp. Gen. 591, 593 (1981).

In the instant case, the original contractor performed all the work required under the contract, but performed in a negligent manner which damaged the government's equipment. However, the Supply Center did not place the contractor in default, and terminate his contract. It merely lodged a claim against him to cover the cost of repairing the damage. The contractor completed his contract and his insurance company settled the negligence claim for $114,934.14.

In accordance with title 7, section 12 of the GAO *Policy and Procedures Manual for Guidance of Federal Agencies,* quoted above, funds received by an agency to settle a claim for damages to government property shall be turned in to the Treasury as general fund receipts. *See* 62 Comp. Gen. 678, 679 (1983). Such funds cannot be considered a refund so as to constitute an exception to this general rule, inasmuch as they do not represent the return of government funds previously disbursed. Accordingly, the entire settlement of $114,934.14 must be deposited in the Treasury as general fund receipts.

B-228387, December 11, 1987

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Determination Criteria

A bid that included suggestions as to possible alternative methods of accomplishing the results desired by the agency did not take exception to any solicitation requirements, and thus improperly was rejected as nonresponsive.

Procurement

Bid Protests

■ GAO Procedures

■ ■ Preparation Costs

Procurement

Sealed Bidding

■ Bids

■ ■ Preparation Costs

Where a bid protest is sustained based on agency's improper rejection of the protester's bid, and the contract in issue already has been performed, the protester is entitled to reimbursement of its bid preparation costs and costs of pursuing the protest, including attorneys' fees.

Matter of: Electric Service Corp.

Electric Service Corp. protests the rejection of its bid as nonresponsive by the Veterans Administration (VA) under invitation for bids (IFB) No. 455-81-87. The solicitation sought bids for cleaning, disinfecting, and chlorinating an underground water reservoir at a VA medical center in Puerto Rico. The VA determined Electric's bid to be nonresponsive because, in the agency's view, the firm had qualified its bid by proposing an alternate method of performing the work that was not in compliance with the IFB's specifications. In its administrative report on the protest, however, VA takes the position that it improperly rejected the bid. We agree that Electric's bid was responsive, and sustain the protest.

The IFB's specifications required that the interior surfaces of the reservoir be scrubbed with fiber floor scrub brushes or other approved tank cleaning brushes. Electric submitted a bid to perform the work for $2,000. The bid also included suggestions that the VA should remove debris from a manhole over the reservoir before beginning work in the reservoir itself and that, "if authorized by the government," the cleaning could be done more rapidly and efficiently with a water pressure machine than with brushes. Although Electric's was the low bid, the VA rejected it on the grounds that the suggestions in the bid constituted conditions that modified the requirements of the solicitation, and therefore rendered the bid nonresponsive. Award was made to the second low bidder at a price of $5,600.

Where a firm's bid does not take exception to any of the material requirements of the solicitation, acceptance of the firm's bid obligates it to perform in accordance with the specifications. *See Gemma Construction Co., Inc.*, B-219733, Nov. 21, 1985, 852 CPD ¶ 584, *aff'd, Nasuf Construction Corp.—Reconsideration*, B-219733.2, Mar. 19, 1986, 86-1 CPD ¶ 263. The position the VA takes in its report here is the correct one. There is nothing in Electric's bid that reasonably may be construed as an attempt to avoid any of the terms of the solicitation; the firm's suggestions as to alternative procedures clearly were only advisory.

Although the VA determined that Electric's bid was responsive, it nevertheless permitted the awardee to continue performance,[1] and performance of the contract now has been completed. Although we can make no meaningful recommendation concerning the award, we find that Electric is entitled to recover its bid preparation costs and the costs of pursuing its protest, including attorneys' fees; Electric has demonstrated that but for the improper action on the part of the VA it would have received the award. *See* Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987); *Morton Management, Inc.*, B-224031, Jan. 8, 1987, 87-1 CPD ¶ 32. By separate letter, therefore, we are advising the Administrator of our finding that Electric is entitled to be reimbursed for its bid preparation costs and the costs of pursuing the protest, including attorneys' fees. Electric should submit to the VA the documentation required to establish the amount to which it is entitled.

The protest is sustained.

B-229007, December 14, 1987

Procurement

Sealed Bidding
■ All-or-None Bids
■■ Evaluation
■■■ Propriety

An all or none bid qualification should be construed as restricting award to all or none of the line items of a solicitation unless the context and circumstances indicate otherwise.

Procurement

Sealed Bidding
■ All-or-None Bids
■■ Evaluation
■■■ Propriety

Where the language of a message sent to an agency plainly evinces an intent that an "all or none" qualification contained in bid was intended to apply to the total quantities of an individual line

[1] The agency was not required to suspend performance under the provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (Supp. III 1985), since Electric's protest was not filed within 10 days after the award.

item, rather than to all of the line items in the aggregate, the bidder may not subsequently revise the qualification to suit its own purpose of receiving the award of all line items for which it bid.

Matter of: Kings Point Industries, Inc.

Kings Point Industries, Inc. protests the proposed split award of a contract for Multi Line Loops under solicitation number DAK01-87-B-A148 issued by the U.S. Army Troop Support Command.

We deny the protest.

The solicitation was issued as a total small business set-aside for three different contract line items, 0001AA, 0002AA, and 0003AA. The solicitation also incorporated by reference the Federal Acquisition Regulation provision found at 48 C.F.R. § 52.214-10 (1986), which discusses two separate instances in which an offeror might wish to qualify an offer. This provision states as follows:

> The government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise provided in the schedule, offers may be submitted for quantities less than those specified. The government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the offer.

Thus, under the language of the clause, a bidder could restrict the government's right to award anything less than the specific group of items designated by the bidder, or specific quantities within any given item as designated by the bidder. These bid qualifications are generally designated as "all or none" qualifications.

Kings Point's bid consisted of its basic bid submission and a series of messages sent and received prior to bid opening. The first message, dated May 12, 1987, stated:

> Reduce our prices as follows:
>
> Item 0001AA by 14.77 each (Fourteen Dollars Seventy Seven Cents, Item 0002AA by 14.57 each (Fourteen Dollars Fifty Seven Cents), Item 0003AA by 76.10 each (Seventy Six Dollars Ten Cents)
>
> ALL OR NONE TO BE AWARDED
>
> ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED

Kings Point's second and third messages do not affect the issue involved in this case.

Four bids were received as follows:

Bidder	Item 0001AA	Item 0002AA	Item 0003AA
Air Systems	243,318.89	209,994.12	377,950.20
TOTAL (including 9,360.90 transportation)			840,624.11
Aero	245,981.96	148,400.00	354,736.20
TOTAL (including 24,085.69 transportation)			773,203.85
Kings Pt	227,218.03	206,696.34	385,294
TOTAL (including 18,985.32 transportation)			838,193.69

Pioneer	227,034.37	211,057.92	357,700
TOTAL (not including transportation)			795,792.29

After bid opening, Kings Point protested to the agency that Pioneer was a large business not entitled to any award under the set-aside. In a message written on June 4, 1987 to the contracting officer, Kings Point stated, "we are the responsive small business low bidder for item 1AA. . . . Therefore, we protest any award of this item to any firm other than ourselves. . . ." Pioneer was found to be a large business, and its bid was rejected. Subsequently, Aero, the low responsive bidder for items 0002AA and 0003AA, was determined not a responsible prospective contractor, leaving Kings Point as the low responsive bidder for items 0001AA and 0002AA (the Small Business Administration declined to issue a certificate of competency for Aero), and Air Systems low for item 0003AA. The Army proposes to award a contract to Kings Point for items 0001AA and 0002AA, and to Air Systems for line item 0003AA, based on its low bid for that item. Kings Point, however, the low bidder on the aggregate of the three line items, relies on its bid qualification "all or none to be awarded" to argue that it should be awarded all three items.

Kings Point contends that the qualification "all or none to be awarded" should be understood to mean "all line items or none to be awarded." The Army, however, believes that the "all or none" qualification is subject to another interpretation restricting award to all or none of the quantities of each of the three contract line items, as well as restricting the award to all of the line items.

We agree with Kings Point that in most circumstances, a reasonable interpretation of its all or none qualification would be that it intended to limit award to all or none with respect to the group of items. Here, however, Kings Point's agency protest urging award to it for a single line item contradicts that position. We think it is now disingenuous for Kings Point to argue that its purpose in sending its original June 4 protest was only to "excise Pioneer's nonresponsive bid which, under the law, was not eligible for consideration." The plain meaning of its statement "we protest any award of this item [001AA] to any firm other than ourselves," in the face of its all or none qualification, could only mean that it intended the qualification to apply on a line item rather than on an aggregate basis. Within the context of the time the June 4 message was sent (Kings Point was not the apparent low bidder on an aggregate basis), "excising" Pioneer's bid would have served no useful purpose other than to obtain award for the single item for which it was the apparent low bidder at the time.

We believe that an "all or none" qualification should be construed as restricting award to all or none of the line items, unless the context and circumstances indicate otherwise. *See Isometrics, Inc.*, B-208898, Dec. 30, 1982, 82-2 CPD ¶ 588. Here, Kings Point made clear that it was not, in fact, bidding on an all or none basis in the aggregate. Kings Point should not now be permitted to revise the "all or none" qualification when it becomes convenient for its purposes. Under the circumstances, we find that the contracting officer is correct in proposing to split the award.

The protest is denied.

B-226640, December 15, 1987

Civilian Personnel

Relocation
■ Taxes
■■ Allowances
■■■ Eligibility

The Department of Agriculture requests an opinion as to whether claims for Relocation Income Tax (RIT) allowances may be paid to certain employees who were transferred from the United States to the Virgin Islands and Puerto Rico since the statutory authority in 5 U.S.C. § 5724b (Supp. III 1985) does not specifically state that RIT allowances apply to possessions of the United States. The claims may be paid since it is consistent with the intent of Congress that RIT allowances be extended to federal employees transferred in the interest of the government to United States possessions and the Commonwealth of Puerto Rico in the same manner as those employees transferred within the United States. However, it will be necessary for the Administrator of General Services, in consultation with the Secretary of the Treasury, to establish the applicable marginal tax rate.

Matter of: Carlos Garcia, *et al.*—Application of Relocation Income Tax Allowance

This decision is in response to a request by an authorized certifying officer of the United States Department of Agriculture, National Finance Center, for an opinion as to whether claims for Relocation Income Tax (RIT) allowances may be paid to certain employees who were transferred from the United States to the Virgin Islands and Puerto Rico. We conclude that the claims may be paid upon establishment by the General Services Administration of the applicable marginal tax rate.

Background

With the enactment of section 118(a)(7)(A)(i), Pub. L. 98-151, 97 Stat. 978, November 14, 1983, as amended by section 120(b), Pub. L. 98-473, 98 Stat. 1837, 1969, October 12, 1984, a new section was added to chapter 57, title 5, United States Code, to authorize agencies to reimburse transferred employees for the additional income tax liability incurred by them as a result of certain relocation expense reimbursements. This authority is contained in 5 U.S.C. § 5724b (Supp. III 1985), and it provides as follows:

(a) Under such regulations as the President may prescribe and to the extent considered necessary and appropriate, as provided therein, appropriations or other funds available to an agency for administrative expenses are available for the reimbursement of substantially all of the federal, state, and local income taxes incurred by an employee, or by an employee and such employee's spouse (if filing jointly), for any moving or storage expenses furnished in kind, or for which reimbursement or an allowance is provided (but only to the extent of the expenses paid or incurred). Reimbursements under this subsection shall also include an amount equal to all income taxes for which the employee

and spouse, as the case may be, would be liable due to the reimbursement for the taxes referred to in the first sentence of this subsection.

(b) For the purposes of this section "moving or storage expenses" means travel and transportation expenses (including storage of household goods and personal effects under section 5724 of this title) and other relocation expenses under sections 5724a and 5724c of this title.

The President's authority to issue regulations concerning RIT allowances has been delegated to the General Services Administration (GSA), in consultation with the Secretary of the Treasury. *See* Exec. Order No. 12466, February 27, 1984, 3 U.S.C. § 301 note (Supp. III 1985). Thus, GSA issued implementing regulations on April 19, 1985, in Supplement 14 of the Federal Travel Regulations (FTR), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985). *See also* FTR Supplement 25, May 26, 1987, implementing changes necessitated by the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085, October 22, 1986, 26 U.S.C. § 1 *et seq.*

As noted above, 5 U.S.C. § 5724b provides for reimbursement of substantially all of the federal, state, and local income taxes incurred by an employee who is transferred in the interest of the government. However, the cited statutory provision does not specifically refer to territories or possessions of the United States or the Commonwealth of Puerto Rico as being within its sphere of coverage, nor do the implementing GSA regulations contain any reference to these jurisdictions.

Since the Department of Agriculture has many employees transferred to the territories and possessions of the United States as well as Puerto Rico, Agriculture requested clarification of this issue from GSA. On behalf of GSA, the Assistant Commissioner for Policy and Agency Liaison expressed the opinion that there is no authority to reimburse employees for additional income taxes imposed by United States possessions. The basis for the opinion was that the law, as amended, did not make any mention of income taxes imposed by a United States possession, nor was there any legislative history showing the intent of Congress regarding income taxes imposed by United States possessions. Since Agriculture had specific claims, the GSA official recommended that they be referred to our Office for a decision.

Thus, Agriculture has presented claims for reimbursement of RIT allowances for three of its employees, Carlos Garcia, who was transferred from Hidalgo, Texas, to San Juan, Puerto Rico, and Rose M. Brown and Robert J. Nadeau, who were transferred from Uniontown, Pennsylvania, and Tulare, California, to St. Croix and St. Thomas, Virgin Islands, respectively.

Opinion

We agree with GSA that section 5724b does not specifically refer to possessions of the United States and that there is nothing in the legislative history that would clarify this matter. However, it was the objective of the primary sponsors of the bill, Representative Frank B. Wolf and Senator John Warner, that this provision and several other changes made to the relocation statutes (providing for relocation services, increasing the household goods weight allowance, etc.),

would alleviate inequities and hardships which occur when a government employee is transferred. Consistent with this theme, we believe that section 5724b should be given a liberal interpretation. *See NSA Employees,* B-219547, July 17, 1987, 66 Comp. Gen. 568.

Although section 5724b does not refer to territories or possessions of the United States, it specifically refers in subsection (b) to other sections of the code for applicability, in particular 5 U.S.C. § 5724a concerning reimbursement of relocation expenses for transferred employees. Section 5724a provides for reimbursement of subsistence expenses when the employee's new official station is located within the United States, its territories or possessions, and the Commonwealth of Puerto Rico (subsection 5724a(3)), as well as expenses of the sale or purchase of a residence or the settlement of an unexpired lease when the old and new official duty stations are located within the United States, its territories or possessions, and the Commonwealth of Puerto Rico (subsection 5724a(4)(A)). Therefore, it would seem consistent with the statutory language and legislative intent that employees who are specifically authorized certain relocation expenses when transferred to United States territories or possessions or to the Commonwealth of Puerto Rico likewise should be entitled to reimbursement of a RIT allowance.

There are also certain provisions of the Internal Revenue Code that we believe support the conclusion that the RIT allowance should apply to employees who are transferred to United States possessions and territories, and the Commonwealth of Puerto Rico. As pointed out by Agriculture, the federal income taxes withheld from employees of the United States who are employed by an agency in Guam or the Virgin Islands are paid into the treasuries of those possessions. 26 U.S.C. § 7654(d), as revised and amended by the Tax Reform Act of 1986.[1] The same holds true for American Samoa and the Northern Mariana Islands. 26 U.S.C. § 7654(b)(2). Further, section 7651, regarding the administration and collection of taxes in possessions, provides in subsection 7651(2)(B):

> (B) Applicable laws. All provisions of the laws of the United States applicable to the administration, collection, and enforcement of such tax (including penalties) shall, in respect of such tax, extend to and be applicable in such possession of the United States in the same manner and to the same extent as if such possession were a State, and as if the term "United States" when used in a geographical sense included such possession.

Thus, for the purposes of the collection of federal income taxes imposed on government employees who work and reside in the possessions of the United States, the possession is treated as a state.

Further, we note that GSA has defined a state income tax for purposes of reimbursement for a RIT allowance in the FTR and has established marginal tax rates for the 50 states and the District of Columbia. *See* FTR para. 2-11.5a and Appendix 2-11A. No marginal tax rate has been established for the territories and possessions of the United States; however, GSA refers to the Internal Revenue Code for a definition of a state income tax, and that definition of a state tax

[1] All further references to Title 26 are as amended by the Tax Reform Act of 1986.

includes a tax imposed by a possession of the United States. 26 U.S.C. § 164(b)(2). Thus, GSA's definition appears to be too narrow in scope since, in effect, the tax deducted from the employee's salary in a possession of the United States takes on the character of a state tax by virtue of the fact that it is paid into the treasury of that possession.

As regards the Commonwealth of Puerto Rico, we note that employees of the United States and its agencies pay a federal income tax in the same manner as residents of the United States. 26 U.S.C. § 933. We also note that 26 U.S.C. § 7701(d) states that where not otherwise distinctly expressed, references in the Internal Revenue Code to possessions of the United States also refer to Puerto Rico. Also, as previously stated, the Commonwealth of Puerto Rico is specifically referred to in 5 U.S.C. § 5724a for the purposes of reimbursement for nearly all of the applicable relocation expenses.

Therefore, we believe that it is consistent with the intent of Congress that the RIT allowance be extended to those federal employees who are transferred in the interest of the government to United States possessions and the Commonwealth of Puerto Rico in the same manner as those employees transferred within the United States. Although the tax rate for the possessions and the Commonwealth of Puerto Rico parallels the federal tax rate, we believe it will be necessary for GSA, in consultation with the Secretary of the Treasury, to establish the applicable marginal tax rate. *See* Exec. Order No. 12466, *supra.*

Accordingly, the claims of these and other similarly situated employees may be paid upon establishment by GSA of the applicable marginal tax.

B-226909, December 15, 1987

Military Personnel

Pay

■ Survivor Benefits

■■ Annuity Payments

■■■ Eligibility

A retired Air Force sergeant elected to provide Survivor Benefit Plan annuity coverage for his daughter. The daughter was subsequently adopted by her stepfather following her mother's divorce and remarriage. The adoption proceeding was set aside by a later state court order. Questions about the soundness of the later court order setting aside the adoption do not overcome the presumption in favor of its validity. Therefore, the daughter remained eligible for an annuity under the Plan as the member's dependent child beneficiary.

Matter of: Kimberly Lee Hall—Survivor Benefit Plan—Dependent Child

This action is in response to correspondence received from the Directorate of Retired Pay Operations of the United States Air Force Accounting and Finance Center. The Air Force asks whether it should pay a claim for a Survivor Benefit

Plan annuity submitted by Kimberly Lee Hall, daughter of Technical Sergeant Richard L. Hall (Retired) (Deceased). We authorize the Air Force to make payment to her.

Background

Congress adopted the Survivor Benefit Plan on September 21, 1972, Public Law 92-425, 86 Stat. 706, as amended and as codified, 10 U.S.C. §§ 1447-1455. The purpose of the Plan is "to establish a survivor benefit program for military personnel in retirement to complement the survivor benefits of social security." Department of Defense Directive No. 1332.27 § 101 (January 4, 1974). To that end, military retirees may elect to provide an annuity at death to an eligible beneficiary in exchange for their contributions to the program during their life.

On September 30, 1974, Technical Sergeant Richard L. Hall retired from the United States Air Force. At that time he was married to Glenda F. Hall. They had a daughter, Kimberly, who was born on August 17, 1971. Upon retirement, Sergeant Hall elected to participate in the Survivor Benefit Plan and designated Kimberly as dependent child beneficiary.

On May 10, 1976, Sergeant and Glenda Hall were divorced. Divorce, however, does not preclude an otherwise eligible dependent child beneficiary from taking under the Plan. Sergeant Hall continued to make contributions on Kimberly's behalf until his death on July 1, 1982.

On May 23, 1980, Glenda married John C. Smith. Kimberly was adopted by him on December 10, 1981, without the knowledge or consent of Sergeant Hall. It is undisputed that Sergeant Hall died unaware of the adoption of his daughter by her stepfather. On August 8, 1985, an Alabama Circuit Court set aside the adoption at the request of Glenda and John Smith. A guardian *ad litem* represented Kimberly. The explanation furnished by the Smiths concerning these proceedings is that the adoption was necessary to acquire coverage for Kimberly under John Smith's group health insurance program, and nullification of the adoption was later believed necessary to secure the Survivor Benefit Plan annuity for her.

Kimberly Hall, by her attorney, has petitioned the Air Force for an annuity under the Survivor Benefit Plan. The Air Force questions whether she qualifies as an eligible Plan beneficiary.

It is suggested by the parties that Kimberly's eligibility under the Plan hinges on her relationship to Sergeant Hall under the Alabama laws of adoption. The Air Force suggests that the first adoption proceeding was valid and the subsequent proceeding setting aside the adoption order was invalid under Alabama law. Claimant suggests that the first proceeding is invalid and the second proceeding is valid.

Discussion

Whether Kimberly can be considered an eligible beneficiary under the Plan depends on her status as a "dependent child" within the meaning of the Survivor Benefit Plan. Section 1447(5) of Title 10 of the United States Code states:

(5) "Dependent child" means a person who is—

(A) unmarried;

(B) under 18 years of age . . . and

(C) the child of a person to whom the Plan applies, including (i) an adopted child, and (ii) a step-child, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

In clarifying similar language in a different context we have said:

Since it is generally recognized that there is no body of Federal domestic relations law, issues of personal status arising under [5 U.S.C. § 5582(b) (1970)] are resolved with reference to relevant State law. Consequently, in prior decisions requiring our determination as to the definition of a decedent's "widow or widower," or whether adopted children and step-children are entitled to consideration as "children," we have relied on State law. 54 Comp. Gen. 858, 860 (1975).

Regardless of what effect the adoption had on Kimberly's entitlement, it is our view that the subsequent Alabama Circuit Court action reestablished a full parent and child relationship between Sergeant Hall and Kimberly by setting aside the adoption decree. Accordingly, recognition of that order as valid assures Kimberly's status as a "child of the person to whom the Plan applies" within the meaning of the statute cited above.[1]

In deciding whether or not to recognize a state court judgment as valid, we look to see if the state court had jurisdiction over both the parties and the subject matter. *Master Sergeant Reece Cowan*, B-186676, Oct. 28, 1976. In *Cowan* we examined the law of the state where the decision was rendered (Kansas) to see if jurisdiction was proper. There, a former spouse of a Plan member went to court after the death of her ex-husband and had their divorce decree annulled. In recognizing the annulment and thereby reestablishing her eligibility for SBP annuities, we concluded that this Office will recognize a state court action even if it appears "unusual" so long as the threshold requirements of personal and subject matter jurisdiction are met. *Id.* at 3.

In an earlier case, 16 Comp. Gen. 890, 895 (1937), we held that a state court judgment which unquestionably violated the procedural rules of the issuing state would not be recognized absent a "complete record clearly establishing the legality of such proceedings and the correctness of such decree." There, while clarifying the reasons for denying a former spouse's claim for a 6-month death gratuity, we said that a Virginia court in nullifying a divorce between the deceased Army officer and the claimant had ignored its own procedural requirements for such an action.

[1] Because we recognize as valid the court order setting aside the adoption decree, we need not decide whether Kimberly would qualify as a dependent child beneficiary under the Plan even if the adoption decree was not set aside.

These cases stand for the proposition that we will recognize the validity of a state court decision that meets threshold jurisdictional requirements and is not clearly in violation of that state's procedural rules. Conversely, findings of fact and other subjective elements of a state court judgment are not grounds for us to withhold recognition even where the action by the state court appears "unusual." These cases presume the validity of state court judgments and require us to recognize them as valid where possible.

The Air Force relies in part on B-199265-O.M., Sept. 29, 1981, for the proposition that the Comptroller General may be scrutinizing state court judgments more strictly now than when we decided *Cowan.* That claim was adjudicated on the basis that the court order was defective on its face and would not, therefore, be recognized. Moreover, it was not a decision of the Comptroller General. It was a settlement by the Claims Group of the General Accounting Office on a specific claim and does not establish a precedent.

The Air Force contends that the Alabama Circuit Court decision of August 8, 1985, should not be recognized because, among other things, it is procedurally invalid on its face. Specifically, the Air Force points to the common law rule expressed in 2 Am. Jur. 2d *Adoption* § 72 (1962), that in the context of an adoption proceeding, "[t]hose who participated in the proceedings, those claiming through them, or strangers to the proceedings, cannot attack an adoption decree collaterally when the court rendering it had jurisdiction of the subject matter." This principle was violated, they say, because Glenda and John Smith instigated both the adoption proceeding and the action setting aside the adoption.

The effect of the Air Force's refusal to recognize the Circuit Court decision is that, in their eyes, the adoption was never set aside and, therefore, at Sergeant Hall's death Kimberly was not a "child of a person to whom the Plan applies." However, it must be remembered in light of *Cowan* and the decision at 16 Comp. Gen. 890 (1937) that it is the law of the state rendering the decision, and not general principles of common law that must be used in determining the validity of that state court action.

We find no indication that the common law rule relied on by the Air Force has been used by Alabama in its adoption cases.[2] Nor is there any indication from Alabama's adoption statutes that such a limitation on parties was intended by that state's legislature. In fact, limiting access to the courts in this manner would be at odds with Alabama's stated concern that the "pole star" of any adoption proceeding is the best interests of the child. *Rhodes v. Lewis,* 246 Ala. 231, 20 So. 2d 206 (1944).

The Air Force also contends, citing 2 Am. Jur. 2d *Adoption* § 79 (1962), that the pecuniary interests of the adoptive parents are insufficient grounds for setting

[2] Even assuming the rule does apply in Alabama, rather than overturning the Probate Court's decree on collateral jurisdictional grounds, the Circuit Court set aside that decree as contrary to the "best interests of the minor child." This distinction is crucial since the Am. Jur. rule only prevents the adoptive parents from asserting the due process rights of the natural parent but it does not prevent the adoptive parents from defeating the adoption on the basis that it was not in the best interests of the child.

aside an adoption decree. Underlying this contention is a belief that the pecuniary interests of Glenda and John Smith were the sole reason behind the Circuit Court's order of August 8, 1985. This is precisely the type of speculation that the Comptroller General decisions cited above prohibit. We must take at face value the Circuit Court's determination that setting aside the adoption decree was done in the best interests of Kimberly. The fact that the best interests of a minor child and the pecuniary interests of his or her adoptive parents may converge is neither surprising nor consequential.

While it is suggested that the proceedings were not suitably adversarial, insufficient evidence exists to conclude that the misgivings we had in 16 Comp. Gen. 890 (1937) are applicable here. Furthermore, although it is suggested that greater elucidation of the court's reasoning should be required, its absence, under the circumstances, does not rise to the level required of a defect under the cited cases. Again, "unusual" results are insufficient to overcome the heavy presumption of validity urged by these precedents.

Conclusion

In the particular facts presented in this matter, we recognize as valid the Alabama Circuit Court's order setting aside the adoption decree. The effect of setting aside the adoption decree is to remove any doubt that Kimberly Hall qualifies as a "dependent child" of Sergeant Hall under the terms of 10 U.S.C. § 1447(5). Therefore, she is entitled to recover amounts owing as sole beneficiary under the Plan coverage elected by Sergeant Hall.

B-228791, December 15, 1987

Appropriations/Financial Management

Claims Against Government
■ Claim Settlement
■■ Permanent/Indefinite Appropriation
■■■ Purpose Availability

Appropriations/Financial Management

Claims Against Government
■ Torts
■■ Government Liability

Based on broad statutory definition, Federal Retirement Thrift Investment Board should be regarded as federal agency for purposes of Federal Tort Claims Act (FTCA). Administrative FTCA settlements of $2,500 or less are payable from Thrift Savings Fund. Administrative settlements greater that $2,500, plus judgments and settlements of lawsuits under the FTCA, are payable from permanent judgment appropriation (31 U.S.C. § 1304) to the extent they represent personal injury or physical property damage. However, liability resulting from program losses, even though tortious in nature, should be governed by statutory provisions on liability and bonding of fiduciaries.

Matter of: Executive Director, Federal Retirement Thrift Investment Board

This responds to your letter of August 12, 1987, requesting guidance on the applicability of the Federal Tort Claims Act (FTCA) to the Federal Retirement Thrift Investment Board (Board). Your primary question is whether the permanent, indefinite appropriation established by 31 U.S.C. § 1304 would be available "for payment of legitimate personal injury or physical property damage claims made against the Board." In general, the answer is yes. In presenting this answer, however, we assume the Board is not referring to claims involving losses from the Thrift Savings Fund or the payment of benefits.

Background: The Board and the Thrift Savings Fund

The Federal Employees' Retirement System Act of 1986 (FERSA),[1] as its title implies, substantially revised the retirement system for federal employees. One element of the new system is the Thrift Savings Plan, under which the employee and employing agency make contributions to a fund in the Treasury known as the Thrift Savings Fund. The funds are invested, and the individual's account, consisting of contributions adjusted to reflect earnings or losses resulting from the investments, is payable under various options upon retirement.[2]

The Thrift Savings Plan is administered by the Federal Retirement Thrift Investment Board, which is "in the Executive branch of the Government." 5 U.S.C.A. § 8472(a). The Board consists of five members appointed by the President for fixed terms of office, with (except for the members first appointed) the advice and consent of the Senate. The Board appoints an Executive Director who in turn is authorized to appoint additional necessary personnel. *Id.* §§ 8472(b) and (c), 8474(a)(1) and . (c)(2)

The Thrift Savings Fund is permanently appropriated for, and is limited to, specified purposes, including investments and benefit payments. *Id.* §§ 8437(c), (f). The Board's administrative expenses, including compensation and travel expenses, are also payable from the Fund. *Id.* §§ 8437(c)(3) and (d), 8474(c)(6), 8476(d)(3). [3]

Applicability of the FTCA

The FTCA, 28 U.S.C. §§ 1346(b), 2671-80, makes the United States liable, subject to a number of exceptions, for damages resulting from the tortious conduct of a federal employee acting within the scope of his or her employment. Agencies

[1] Pub. L. No. 99-335 (June 6, 1986), 100 Stat. 517, 5 U.S.C.A. §§ 8401-8479 (Supp. 1987).

[2] Our summary is greatly oversimplified in order to set forth only that which is necessary to understand the issues. See generally 5 U.S.C.A. §§ 8431-8440 (Supp. 1987).

[3] For fiscal years 1986 and 1987, direct appropriations were authorized as "temporary alternative funding" for administrative expenses. Pub. L. No. 99-335, § 701, as amended, 5 U.S.C.A. § 8472 note. The 1987 appropriation is found in Pub. L. No. 99-591, 100 Stat. 3341-322 (October 30, 1986). Starting with fiscal year 1988, it appears that the Board will receive no further direct congressional appropriations.

are authorized to settle or compromise claims administratively, with awards in excess of $25,000 requiring the prior written approval of the Attorney General. *Id.* § 2672. If the claim cannot be resolved administratively, the claimant may bring a civil action. The Attorney General is expressly authorized to settle or compromise FTCA lawsuits. *Id.* § 2677.

The FTCA applies to each federal agency, defined in 28 U.S.C. § 2671 to include—

> the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

It has been our view that this definition, in light of its legislative history, should be broadly construed as covering all agencies not specifically excluded. 35 Comp. Gen. 511 (1956). The courts have also broadly applied the definition. *See, e.g., Freeling v. Federal Deposit Insurance Corp.,* 221 F. Supp. 955 (W.D. Okla. 1962), *aff'd per curiam,* 326 F.2d 971 (10th Cir. 1963) (holding that the Federal Deposit Insurance Corporation is a federal agency for FTCA purposes).

As noted above, FERSA places the Board in the executive branch. While the statute does not explicitly designate the Board as an "agency" or "instrumentality" of the United States, the legislative history does use the term "agency." *E.g.,* H. R. Conf. Rep. No. 99-606, p. 138 (1986). Based on our review of FERSA, and given the broad remedial purposes of the FTCA, we think the Board should be considered a federal agency within the scope of 28 U.S.C. § 2671. However, we suggest that the Board also consult with the Department of Justice in view of that Department's role in approving certain administrative settlements and representing the United States in litigation.

Payment: Source of Funds

Administrative settlements of $2,500 or less are payable "by the head of the Federal agency concerned out of appropriations available to that agency." 28 U.S.C. § 2672. We have construed this as permitting the use of "any appropriation of that agency which is currently available for obligation at the time the claim is determined to be proper for payment and the use of which for such purpose is not specifically proscribed or limited." 38 Comp. Gen. 338, 340 (1958). As noted previously, the Thrift Savings Fund is permanently appropriated for specified purposes, one of which is the Board's administrative expenses. 5 U.S.C. §§ 8437(c)(3), (d). Assuming the Board receives no further "temporary" direct appropriations (see note (3) above), administrative FTCA settlements of $2,500 or less would be payable from the Thrift Savings Fund as necessary administrative expenses.

With respect to larger administrative settlements and settlements of lawsuits, 28 U.S.C. § 2672 further provides:

> Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title

shall be paid in a manner similar to judgments and compromises in like cases and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

This means payment from the permanent judgment appropriation, unless payment is "otherwise provided for." 31 U.S.C. §§ 1304(a)(1), (a)(3)(A). Payment is otherwise provided for if some appropriation or fund under the control of the agency involved is legally available to satisfy the judgment or award. *E.g.*, B-211389, July 23, 1984.

We reviewed the legal status of the Board and the statutory requirements applicable to the Thrift Savings Fund. FERSA contains no provision addressing the payment of FTCA judgments or awards. The Board, while it operates much like similar private-sector (i.e., business-type) entities and oversees investment of a revolving fund, is not classified as a corporation. Contributions to the Fund, along with net earnings from the investment of those contributions, are held in trust for the individual employee. 5 U.S.C.A. § 8437(g). Apart from certain specified administrative expenses, the Fund is to be used for the exclusive benefit of contributing employees and their beneficiaries. *Id.* §§ 8437(e), (f). Based on our review, we conclude (as clarified below) that payment is not otherwise provided for.

Having said this, we caution that we are talking primarily about "physical torts," such as motor vehicle accidents and so-called "slip-and-fall" cases, as opposed to program losses. We assume the phrasing of your question in terms of "physical" property damage claims was intended to reflect this distinction. Many program losses can be couched in terms of tort claims by attributing them to the negligence of agency employees. We do not think Congress intended to expose the general fund of the Treasury to FERSA program losses or to the making of FERSA benefit payments. FERSA includes detailed provisions on fiduciary responsibilities and liability (5 U.S.C.A. § 8477), requires the bonding of fiduciaries (*id.* § 8478), and authorizes the purchase of insurance to cover the potential liability of FERSA fiduciaries (*id.* § 8479(b)(2)). This statutory scheme, we think, should govern liability resulting from program losses.

We hope this is responsive to your concerns. Please feel free to call upon us if we can be of any further assistance.

B-224133, December 22, 1987

Military Personnel

Relocation

■ Variable Housing Allowances

■■ Eligibility

■■■ Amount Determination

Under a 1985 amendment to the variable housing allowance (VHA) law, VHA is reduced under certain circumstances where it, together with basic allowance for quarters, exceeds a member's housing costs. The amount of reduction, if any, depends on the member's monthly housing costs, with higher

monthly housing costs resulting in no reduction or a lesser reduction. The regulation defining monthly housing costs may not include the cost of a second mortgage taken for reasons other than repairing, renovating or enlarging a residence since VHA is an allowance to help a member pay for housing in a high cost area.

Military Personnel

Relocation

■ Variable Housing Allowances

■■ Eligibility

■■■ Amount Determination

The definition of monthly housing costs for the purpose of computing the VHA may include the cost of a loan not secured by realty provided that the loan is taken for the purpose of repairing, renovating or enlarging the member's residence. There is no statutory impediment to amending applicable regulations to reflect this, but it is a matter left to administrative discretion in implementing the VHA statute.

Matter of: Variable Housing Allowance—Offset for Monthly Housing Expenses

The Chairman of the Per Diem, Travel and Transportation Allowance Committee, Department of Defense, requested an advance decision concerning the computation of variable housing allowances authorized members of the uniformed services to help defray their housing costs in high cost areas in the United States. The questions concern the regulations which define monthly housing costs for a residence for purposes of the variable housing allowance (VHA). Specifically, the Chairman asked whether the following two expenses not currently included in the regulations may be included: (1) personal loans, as distinguished from a second mortgage, for repairing, renovating or enlarging a residence and (2) second mortgages on a residence obtained for other than repairing, renovating or enlarging a residence. As will be explained below, we conclude that it is within the discretion of the services to authorize inclusion of a personal loan in the circumstances described as a housing expense, but we do not view the cost of a second mortgage in the circumstances described to be a housing expense as contemplated by Congress in enacting the VHA statute.

Background

Presently, a VHA is authorized by 37 U.S.C. § 403a (Supp. III 1985). Pursuant to the authority granted by 37 U.S.C. § 403a(e), implementing regulations are prescribed in Volume 1 of the Joint Federal Travel Regulations (1 JFTR).[1] Under section 403a(a)(1) of title 37, a member of a uniformed service who is entitled to a basic allowance for quarters (BAQ) is also entitled to a VHA if he or she is "assigned to duty in an area of the United States which is a high housing cost area with respect to that member." Subsection 403a(c)(1) prescribes the monthly amount of the VHA for a member with respect to an area as:

[1] Effective January 1, 1987, Volume 1 of the Joint Travel Regulations, which had included the VHA regulations, was replaced by Volume 1 of the Joint Federal Travel Regulations.

* * * the difference between (A) the median monthly cost of housing in that area for members of the uniformed services serving in the same pay grade and with the same dependency status as that member, and (B) 80 percent of the median monthly cost of housing in the United States for members of the uniformed services serving in the same pay grade and with the same dependency status as that member.

In late 1985 there were several amendments to the law regarding VHA. One of these changes required that a member's monthly VHA be reduced by one-half of the amount, if any, by which the total of the member's prescribed VHA and BAQ exceeds the member's "monthly housing costs." 37 U.S.C. § 403a(c)(6)(A) as added by Public Law 99-145, § 602(c)(2), 99 Stat. 583, 636 (Nov. 8, 1985). This was the first time that a member's personal and individual housing costs became directly relevant in determining his or her VHA.[2]

To implement this reduction provision, the term "monthly housing costs" had to be defined by the services since no definition was provided by the statute. Consequently, the regulations were amended so that for a member owning his or her home, the allowable housing expenses for purposes of the VHA offset were determined to be periodic mortgage payments, hazard and liability insurance, real estate taxes, and a standard utility maintenance expense. 1 JFTR, para. U8001-F. [3] Furthermore, the regulations specify that allowable mortgage payments are limited to:

1. mortgages used in connection with the initial purchase of a residence;

2. mortgages used to refinance an existing mortgage which was used to purchase a residence (i.e., the existing mortgage is paid off with proceeds from the new mortgage) to the extent that the new mortgage payments do not exceed the old mortgage payment;

3. real estate equity loans (e.g., a second mortgage) to the extent used to repair, renovate, or enlarge a residence (does not include loans used to furnish or decorate a home, or loans for personal reasons) * * *.

Questions and Analysis

Questions have arisen regarding whether the regulation is too restrictive and unfairly penalizes members in two situations. The first situation involves members who, prior to the passage and implementation of the offset provision for monthly housing costs, had taken a second mortgage for purposes other than repairing, renovating or enlarging their residences. According to the submission, many of these members anticipated a full VHA payment and took this into account in their financial planning. The implication here is that these members are being unfairly penalized, and it is inequitable to delete any second mortgage cost from housing expenses if the second mortgage was taken prior to the effective date of the reduction provision. Additionally, it is suggested that the legislative history of the offset provision does not mandate this result.

[2] It should be noted that 37 U.S.C. § 403a both before and after the 1985 amendment provided for a reduction in VHA for members under certain conditions other than an individual member's housing costs.
[3] Previously 1 JTR para. M4551-6.

Initially, we point out that VHA is an allowance paid in addition to BAQ to defray expenses related to securing living quarters in high cost areas of the United States. *See* 1 JFTR para. U8000. Legislation providing for the allowance was first enacted in 1980,[4] and modifications to it have been made several times since then. Compare 37 U.S.C. § 403(2)(b) (1982) with 37 U.S.C. § 403a(a)(1) (Supp. III 1985). The 1985 series of changes, of which the 50 percent reduction was a part, appears to have been made as the result of concerns over the cost of the program and to more closely attune the allowance to members' housing costs.[5]

The purpose of a VHA is to defray housing costs; it is not necessarily to reimburse a member for a second mortgage. Thus, it would be contrary to the purpose of the statute to allow inclusion of the cost of a second mortgage payment as a housing cost in the circumstances described where that mortgage is taken for other than housing-related purposes. Furthermore, there is no legal impediment to Congress changing or even repealing the VHA authorization entirely. While it may cause some inconvenience to some members who took second mortgages in these circumstances prior to the effective date of the reduction provision, Congress included no "grandfather" provision to delay implementation of this provision for such members, although it did provide "grandfather" provisions for those affected by two other changes in VHA entitlement made by the same statute.[6] Thus, we find no support for making an exception to the statutory criteria for qualifying second mortgages based on when the mortgage was executed.

The second situation presented involves a member taking a loan to repair, renovate or enlarge his residence when the loan is not secured by the realty. The submission suggests that it is the purpose of the loan and not its form which should govern whether a loan is included as an allowable monthly housing expense.

We have not found in the legislative history of the offset provision a definitive statement as to what is meant by housing costs, although the legislative history does mention mortgage payments as being includable. Thus, some administrative latitude is left in implementing the statute. It is our view that the law does not require the exclusion of the cost of loans unsecured by mortgages if the loans are taken for the purposes of repairing, renovating or enlarging a residence. Therefore, we would not object to the exercise of administrative discretion to amend the regulation to include such loans in the definition of housing costs, although such a change in the regulations is not required.

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[4] Public Law 96-343, § 4, Sept. 8, 1980, 94 Stat. 1123, 1125-1126. (1980)

[5] *See* S. Rep. No. 99-118, 99th Congress, 1st Session, 426 (1985).

[6] *See* Pub. Law 99-145, § 602(f), 37 U.S.C. § 403a note, concerning members stationed in Hawaii or Alaska being switched from overseas station allowance to VHA, and § 602(e), concerning the reduction of VHA entitlement for members paying child support.

B-228809, December 23, 1987

Procurement

Noncompetitive Negotiation
■ Contract Awards
■■ Sole Sources
■■■ Propriety

Agency's justification for a sole-source procurement is inadequate where the record does not demonstrate that agency had any reasonable basis for concluding that sole-source awardee was the only responsible source capable of meeting the agency's needs.

Matter of: Lea Chemicals, Inc.

Lea Chemicals, Inc. protests the rejection of its offer under request for proposals (RFP) No. DABT59-87-R0074, issued by the United States Army at Fort Lee, Virginia for a 1-year requirements contract to supply the Fort with water treatment chemicals for its boilers and cooling towers.

We sustain the protest.

The solicitation, which stated that it was issued on a sole-source basis to Vestal Laboratories, was for six different types of water treatment chemicals. Lea's proposal in the amount of $21,302 was rejected primarily because it was based on chemicals it manufactured rather than the required Vestal products. Award was made to Calgon Vestal Laboratories at a price of $29,947.

In essence, Lea argues that its chemicals will perform as well as those specified in the solicitation and maintains that there can be no justification for procuring water treatment chemicals, which are commercially available from a number of firms, on a sole-source basis.

The Army states that Lea's proposed chemicals were unacceptable for use in its boilers and cooling towers. The agency explains that Lea's proposed chemicals are unacceptable because they are based on a "Bureau of Mines Standards" type of treatment for the boilers and a "phosphonate system" for the cooling towers. The agency states that Vestal's "polymer-type" system is better and cheaper. In this regard, the Army assures us that it will cost more than $3 million per year in equipment conversion costs, recalibration costs, and additional fuel, water, and labor costs if Lea's chemicals are used rather than Vestal's.[1]

On the other hand, the protester states that the agency's cost figure is much too high and that, with just some minor changes in the agency's maintenance procedures, Lea's chemical can be used effectively and inexpensively.

[1] The agency argues that the protest is untimely because the protester knew that the agency intended to conduct a sole-source procurement from the face of the solicitation and the protest was not filed until after the closing date for submission of initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987). We do not agree. The record shows that the agency sent solicitations to eight sources on its bidder's list and that it evaluated and rejected the offers it received from four sources other than the awardee. Therefore, the protester is, in essence, objecting to the rejection of its proposal, and the protest, which was filed within 10 days of the protester's receipt of its rejection notice, is timely. 4 C.F.R. § 21.2(a)(2).

We think that the protester has not shown that the agency's requirements for a "polymer-type" treatment system are clearly unreasonable. *See Soletanche, Inc.*, B-227032, June 26, 1987, 87-1 CPD ¶ 636. Nevertheless, for the reasons specified below, we find that the Army has failed to demonstrate a reasonable basis for its conclusion that Vestal is the only responsible source for the type of products required.

The Army prepared a written justification for the sole-source procurement pursuant to 10 U.S.C. § 2304(f)(1) (Supp. III 1985). It concluded that a sole-source award to Vestal was justified under 10 U.S.C. § 2304(c)(1), which authorizes use of other than competitive procedures when the items needed are available from only one responsible source and no other product type will satisfy the agency's needs. Our Office will scrutinize closely sole-source procurement actions. *See NI Industries, Inc., Vernon Division*, B-223990.2, June 16, 1987, 87-1 CPD ¶ 597.

According to the justification and to the requiring activity's written request upon which that justification was based, Vestal had been working with Fort Lee's engineering and housing staff for 18 months as a supplier and adviser in the improvement of its water treatment systems for cooling towers and boilers. As a result of that effort, the agency projects significant potential savings using Vestal's "polymer-type" chemical treatment systems. However, nowhere is it stated that Vestal is the only source for "polymer-type" chemicals capable of producing these savings. There is also no suggestion that Vestal's chemicals are in any way proprietary. Indeed, the request document states, without explanation, that "[a]dditional chemicals procured after the requested supply is exhausted could be on a competitive basis. . . ."

The record here simply does not demonstrate that the Army had a reasonable basis for its conclusion that Vestal is the only responsible source for chemicals which will meet the agency's minimum needs. As outlined above, the initial request and the justification never even discuss, much less establish, that Vestal's "polymer-type" chemicals are unique. *Audio Intelligence Devices*, B-224159, Dec. 12, 1986, 66 Comp. Gen. 145, 86-2 CPD ¶ 670. Further, the fact that the agency is impressed with Vestal's chemicals and thinks their use will result in significant savings does not support the agency's position that no other product can meet the agency's needs.

Thus, we find that the agency has not adequately justified its sole-source award to Vestal. We therefore recommend that the agency reassess its needs and either execute a justification for its sole-source procurement from Vestal which is consistent with the statutory requirements, or terminate its contract with Vestal and conduct a competitive procurement for the items needed. In addition, since an improper sole-source award has been successfully challenged, we find that Lea is entitled to recover the costs of filing and pursuing the protest. *See* Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987); *Washington National Arena Limited Partnership*, 65 Comp. Gen. 25 (1985), 85-2 CPD ¶ 435.

The protest is sustained.

B-229690, December 23, 1987

Procurement

Contract Management
■ Contract Administration
■■ Contract Terms
■■■ Compliance
■■■■ GAO Review

Procurement

Contractor Qualification
■ Responsibility
■■ Contracting Officer Findings
■■■ Affirmative Determination
■■■■ GAO Review

Protest that proposed awardee will not be able to satisfy solicitation clauses concerning preaward survey, preproduction milestones, and production capacity is dismissed since the clauses are not definitive responsibility criteria, *i.e.*, specific, objective standards measuring the offeror's ability to perform, but, rather, concern factors encompassed by the contracting officer's subjective responsibility determination or contract administration, both of which are matters not for review by the General Accounting Office.

Matter of: Nationwide Glove Company, Inc.

Nationwide Glove Company, Inc. protests award to the apparent low bidder, Propper International, Inc., under invitation for bids (IFB) No. DLA100-87-B-0782, issued by the Defense Logistics Agency for a quantity of light duty gloves. Nationwide contends that Propper cannot satisfy certain solicitation clauses that the protester characterizes as definitive responsibility criteria.

We dismiss the protest.

Nationwide protests that Propper cannot satisfy the following three solicitation clauses: (1) clause 52.209-L002, entitled "Preaward Plant Survey," in which the government reserves the right to conduct physical surveys of plants which are to be used in contract performance; (2) clause 52.212-H004, entitled "Preproduction Milestones," in which bidders were to indicate the number of days after award for specifically requested preproduction milestones; and (3) clause 52.215-M001, entitled "Production Capacity," which permitted offerors to limit acceptance of offers depending on awards they might receive under other solicitations. The basis of the protester's belief that these alleged definitive responsibility criteria cannot be met is Propper's alleged failure to perform satisfactorily on a prior contract.

As a challenge largely to Propper's ability and capacity to perform, the protest here involves the issue of Propper's responsibility. Our Office will not review protests against affirmative determinations of responsibility unless either possible fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. *See* 4 C.F.R. § 21.3(f)(5) (1987); *Yale Materials Handling Corp.—Reconsider-*

ation, B-226985.2, *et al.*, June 17, 1987, 87-1 CPD ¶ 607. Definitive responsibility criteria are objective standards established by a contracting agency in a particular procurement to measure the offeror's ability to perform the contract. *Repco, Inc.*, B-225496.3, Sept. 18, 1987, 87-2 CPD ¶ 272. Such criteria in effect represent the agency's judgment that an offeror's ability to perform in accordance with the specifications for the procurement must be measured not only against the traditional and subjectively evaluated factors, such as adequate facilities and financial resources, but also against more specific requirements, compliance with which at least in part can be determined objectively, for example, a requirement for unusual expertise or specialized facilities. *See* Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-2 (1986); *Repco, Inc., supra.*

Here, the IFB clauses cited by the protester do not set out specific, objective standards for measuring the offeror's ability to perform; rather, the provisions express in general terms factors encompassed by the contracting officer's subjective responsibility determination, or concern whether the successful bidder actually performs in compliance with contract requirements. As a result, we do not find that the clauses cited by the protester constitute definitive responsibility criteria, and thus their alleged misapplication is not for review by this Office.

Concerning the preaward plant survey clause, the IFB specifically states that the purpose of the clause is to determine the responsibility of prospective contractors. The FAR requires, as a general standard of responsibility, that a prospective contractor have the necessary production facilities. 48 C.F.R. § 9.1041(f). The preaward plant survey clause here does not contain any requirement for specialized facilities; accordingly, it cannot be considered a definitive responsibility criterion.

The production capacity clause, permitting offerors to limit acceptance of their offers depending on awards they may receive under other solicitations, also is not a specific, objective standard for measuring an offeror's ability to perform, and thus is not a definitive responsibility criterion. The clause merely enables an offeror to submit its offer based on the stipulation that it will not receive an award under other specified solicitations; if the offeror receives any of those awards, the clause would operate to remove the offeror from consideration for the current award. The clause does not, as Nationwide contends, establish any specific standard for judging an offeror's capacity to perform several contracts contemporaneously; a prospective contractor's ability to comply with the required delivery/performance schedule, taking into consideration all existing commercial and governmental business commitments, is part of the general responsibility determination. FAR, 48 C.F.R. § 9.104-1(b).

The clause requiring the contractor to furnish dates for preproduction milestones is not directly related to responsibility; rather, as indicated in the IFB, it is to be used by the contracting officer to monitor the performance of the successful offeror. Whether the successful offeror actually performs in compliance with the milestone dates, which will become a part of the contract, is not a definitive responsibility criterion, but a matter of contract administration, which

is not for consideration under our Regulations. 4 C.F.R. § 21.3(f)(1); *Descomp Inc.*, B-220085.2, Feb. 19, 1986, 86-1 CPD ¶ 172.

As for the protester's allegation of prior poor performance by Propper, under the FAR and our prior cases the circumstances surrounding an offeror's prior performance is only one of several relevant factors that should be considered by the agency when reviewing a prospective contractor's responsibility. FAR, 48 C.F.R. § 9.104-1(c); *see C.W. Girard, C.M.*, 64 Comp. Gen. 175 (1984), 84-2 CPD ¶ 704. Again, an affirmative determination of responsibility, made after consideration of prior performance, would not be reviewable by this Office, except under circumstances not shown here.

Finally, the protester maintains that the agency cannot make award to Propper because it would essentially be reprocuring supplies at a price greater than the price of a previous contract on which Propper allegedly has failed to perform. The protester cites a number of our previous decisions in support of its argument; however, the firm has erroneously interpreted these decisions. The cases cited by the protester hold that, in a reprocurement to complete work under a *defaulted* contract, a repurchase contract may not be awarded to the defaulted contractor at a price that would give the contractor more than the terminated contract price, because this would be tantamount to modification of the terminated contract without consideration. *See, e.g., Preston-Brady Co., Inc.*, B-211749, Oct. 24, 1983, 83-2 CPD ¶ 479. Since there is no indication here that the instant solicitation is a reprocurement to complete work under a defaulted contract, the rule cited by the protester is inapplicable.

Accordingly, we find that Nationwide Glove has not stated a valid basis of protest, and we dismiss the protest pursuant to our Regulations without requesting a report from the agency. 4 C.F.R. § 21.3(f). In view of this dismissal, we also find that the conference the protester has requested would serve no useful purpose. *Hettich GmbH and Co. KG*, B-224267, Oct. 24, 1986, 86-2 CPD ¶ 457.

The protest is dismissed.

B-228294, December 24, 1987

Procurement

Competitive Negotiation
■ Contract Awards
■■ Government Delays
■■■ Justification

Procurement

Socio-Economic Policies
■ Small Businesses
■■ Corporate Entities
■■■ Modification
■■■■ Effects

Where firm's proposal under Small Business Innovation Research program initially is found acceptable for award, but firm subsequently undergoes a restructuring, the agency has a reasonable basis for reevaluating the firm's technical capability and financial responsibility to perform the project originally proposed; fact that reevaluation delays award process to end of fiscal year, and funds are reallocated so that award cannot be made to the firm, does not evidence improper action on agency's part.

Matter of: Xemet, Inc.

Xemet, Inc., protests the Department of the Navy's failure to award it funds for an unsolicited development project the firm proposed under the Department of Defense (DOD) Small Business Innovation Research (SBIR) program. According to Xemet, its proposal, submitted under the general guidelines of SBIR program solicitation No. 87.1, would have been funded if the Navy had conducted its evaluation properly and in a timely manner.

We deny the protest.

The DOD's SBIR program is conducted pursuant to the Small Business Innovation Development Act, 15 U.S.C. § 638 (Supp. III 1985), which requires certain federal agencies to reserve a portion of their research and development funds for award to small businesses. Two types of awards are made: under phase 1 of the program, small businesses are invited to submit proposals to conduct research on one or more topics specified in the DOD solicitation; under phase 2, firms that have received phase 1 awards may, on their own initiative, submit proposals for further development work on the topic.

Xemet's proposal was for phase 2 development of a porous nose component for the Naval Underwater Systems Center (NUSC) at New London, Connecticut. Consistent with the manner in which the SBIR program operates, the proposal was submitted, not in response to a specific request for proposals issued by the Navy, but rather under the general guidelines provided in the SBIR program solicitation. NUSC evaluated Xemet's proposal for technical merit and on June 5, 1987, recommended to the sponsor, the Naval Sea Systems Command, that

the firm be awarded a phase 2 contract. On June 17, the sponsor forwarded the $499,192 needed to fund the project; the expiration date for the funding was the close of the fiscal year, September 30.

In the course of reviewing the procurement request prior to award, the contracting officer became aware of letters from Xemet, dated June 4 and 12, notifying NUSC that significant changes had taken place within the company, specifically, the replacement of the principal investigator and the departure of two of the three key personnel listed in the firm's original proposal. Xemet proposed no plan for replacing the people who had departed, but merely stated that the firm would identify their replacements after it received the award. At the same time, Xemet did not propose changes in either the number of labor hours or the total cost for the proposed project.

Because the contracting officer believed all of these factors raised questions concerning the restructured firm's technical capability and cost of performing the project as originally proposed, on August 28 she made inquiries to the Defense Contract Administration Service Management Area (DCASMA), Nuys, California, regarding Xemet's ability to perform. DCASMA lacked current information on Xemet and, thus, recommended that the contracting officer have a financial preaward survey conducted. The contracting officer contacted the Defense Contract Audit Agency on August 31, and found that a January 1987 audit of Xemet's facility showed Xemet lacked an auditable accounting system. Based on this information, the contracting officer determined that a current preaward survey was required, and on September 1 asked DCASMA to perform one. On September 22, DCASMA advised that it would submit a negative report, recommending against award based on inadequate financial resources. Subsequently, the sponsor requested that the funds be returned before the end of the fiscal year so that they could be used to fund another project.

Xemet argues that the Navy improperly delayed undertaking its review of Xemet's ability to perform so that there was no time for negotiations and a Xemet response to the agency's concerns. In essence, the firm argues that but for the Navy's wrongful delay in evaluating its proposal it would have received an award. We find nothing objectionable in the Navy's actions. In light of the significant changes that had occurred in the proposed personnel since Xemet submitted its proposal, the Navy's decision to reevaluate Xemet for award was entirely prudent and reasonable. Further, we see no indication of any undue delay by the Navy in reexamining Xemet. Although Xemet submitted its proposal in November 1986, the funds for the award were not available until June 17, by which time the contracting officer had learned of the Xemet reorganization and resultant significant change in its proposal. Moreover, the SBIR program solicitation does not require that awards be made within any specific timeframe and, indeed, clearly reserves to the agency the right to make no award. Finally, the solicitation specifically provides that the agency may require the proposer to submit organizational, financial, and other information prior to award to confirm the proposer's responsibility. This is precisely what the Navy did here, and doing so was not improper merely because the concomi-

tant delay left insufficient time for Xemet to respond to the Navy's concerns so that the award could be made.

Xemet alleges that the Navy's reevaluation of Xemet's suitability for award violated several provisions of the Federal Acquisition Regulation (FAR). This allegation is without merit. Xemet asserts, for example, that the Navy violated FAR, 48 C.F.R. § 32.108 (1986), because "Xemet has not been asked for a cash flow statement." However, the provision cited, entitled "Financial Consultation," merely states that a contracting officer should avail himself of experienced contract financing personnel when questions arise concerning a firm's financial capability; this is precisely what the Navy did here. This and the other provisions cited by Xemet (in FAR parts 9 and 32), moreover, merely provide guidance for the agency and do not establish requirements that confer any rights on offerors.

Finally, Xemet argues that the Navy's decision not to make award to Xemet should have been referred to the Small Business Administration (SBA) for a conclusive determination of the firm's responsibility under the certificate of competency program. We disagree. Such a referral is required only where a small business firm has been found not to be a responsible prospective contractor. 15 U.S.C. § 637(b)(7). Here, although the preaward survey recommended against award based on inadequate financial resources, the contracting officer never adopted this recommendation; before the contracting officer made a final determination regarding Xemet's capabilities to perform, the sponsor, exercising its broad discretion, withdrew the funds earmarked to fund the proposed award to Xemet and reallocated these monies for another project. Xemet, at all times, remained eligible for award but due to the expiration of fiscal year 1987 funds, its proposal no longer could be considered for award. Xemet, however, may resubmit its proposal for consideration during fiscal year 1988.

We conclude that there is no showing that the Navy acted unreasonably, in bad faith, or otherwise improperly. *See Twenty-first Century Technological Innovations Research and Development Enterprising,* B-225179.2, Apr. 1, 1987, 87-1 CPD ¶ 368.

The protest is denied.

B-229059, December 24, 1987

Procurement

Competitive Negotiation

■ Offers

■■ Evaluation Errors

■■■ Prices

Protest is sustained where agency failed to discover and call to offeror's attention an obvious proposal pricing error which should have been reasonably detected and which materially prejudiced the offeror.

Matter of: Centel Business Systems

Centel Business Systems protests the award of a contract to GTE Telecom Marketing Corporation under request for proposals (RFP) No. F11624-87-R-0016, issued by the Air Force for a telecommunications system for Grissom Air Force Base, Indiana. The procurement contemplated the award of a firm-fixed-price contract for a telecommunications system for 120 months. Centel argues that the Air Force did not perform a proper price analysis of its proposal or conduct adequate discussions because contracting officials failed to discover a mistake in the firm's price proposal. We sustain the protest.

The solicitation, issued on March 6, 1987, provided that award would be made to the offeror whose proposal met all the mandatory technical requirements and who offered the lowest evaluated life cycle cost. Proposals were required to be submitted on the basis of lease, lease with an option to purchase (LWOP), purchase and lease to ownership (LTOP) plans.[1] Each of the four plans included line items for a basic system consisting of installation and monthly maintenance of a complete telecommunications system and expanded services consisting of additional equipment and services not provided in the first year under the basic system. The basic and expanded services were also broken down into "non-recurring" line items, for which a single charge is to be paid and "recurring" line items (consisting of lease and maintenance items), which call for a charge every month after the item is acquired under the contract.

Seven proposals were received by the April 24 closing date; all seven met the solicitation's mandatory technical requirements. After conducting discussions on May 21 the Air Force issued amendment 0003, which, among other things, added under the expanded services three subline items (SLINs) for the repair of buried telephone cables accidently cut during the life of the contract. The Air Force explains that, as a result of agency uncertainty as to how offerors would price cable repair work and because of concern with water leaks in repaired cables, three separate SLINs were provided for offerors' proposed prices for repair of cut cables. The first, listed as a nonrecurring SLIN, included all labor associated with cable repairs, such as excavation, splicing and reburying. The second, also a nonrecurring SLIN, included all materials and equipment required for cut cable repairs, such as cable, cable connectors, and splice enclosures. The third, SLIN 0014AH, was a recurring monthly charge for maintenance of repaired cables. The estimated quantity for the three cable cut SLINs was 20,000 wire pairs.[2] There were corresponding SLINs for cable cuts in all four of the required plans.

Centel's revised price pages, which were submitted on June 8, 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 for cut cables. Since the first two SLINs represented one-time, nonrecurring costs they each added only $58,000 to Centel's total proposed

[1] All of the prices mentioned in the decision pertain to the LWOP plan because that plan was the subject of the award.

[2] The Air Force explains that cables range in size from 25 to 1800 pair of wires.

price. However, since 0014AH was a recurring monthly maintenance charge, Centel's entry in that SLIN added $58,000 for every month remaining in the contract. For evaluation purposes, Centel's entry in SLIN 0014AH increased its total price by $3,479,365 for the projected life of the system.

According to the Air Force, after all offerors' revised price pages were submitted in response to the amendment, they were reviewed by contracting officials for minor informalities and apparent clerical mistakes as required by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.607 (1986). No errors were detected in any offerors' revised price pages. Discussions were conducted and best and final offers (BAFOs) were requested and received by July 8.

The BAFOs were forwarded to the Air Force command headquarters for calculation and comparison of the contract life cycle costs of each proposal under the four plans (lease, LWOP, purchase and LTOP) in accordance with the terms of the RFP. The result of this calculation was a report consisting of cost figures for each offeror under each of the four plans. According to the Air Force, this report did not cause contracting officials to suspect a mistake in Centel's price proposal.

Based on the price evaluation, the contracting officer decided that the most advantageous award would be to GTE on the basis of its LWOP proposal; award was made to that firm on August 26 at an evaluated 10-year life cycle cost of $6,475,317.

Centel maintains that there was a mistake in its proposal which occurred when its computer operator erroneously inserted $2.90 in all three cut cable SLINs on the firm's revised price pages submitted in response to amendment 0003.[3] According to Centel, it intended to distribute its entire proposed charge associated with repair of cut cables over SLINs for labor and materials, so that the entry in 0014AH for monthly maintenance of cut cables, should have been "NSP," for not separately priced. Centel says that if its mistake had been corrected, it would have been the low offeror by almost $200,000 and would have received the award.

Centel argues that the mistake was obvious so contracting officials should have noticed it and pointed it out so the firm could correct the mistake or resolve it in discussions. Centel maintains that the agency's failure to discover and inform the firm of the mistake violated the agency's duty to conduct meaningful discussions and its duty, under the FAR, 48 C.F.R. § 15.607(a), to inspect proposals for minor informalities and irregularities and to permit offerors to correct them. Finally, Centel argues that contracting officials should have performed a price evaluation on the Centel proposal prior to the submission of BAFOs.

While acknowledging that the insertion of $2.90 for cable cut maintenance must have been an error, the Air Force concludes that because of the complex nature

[3] Centel requested that proprietary information in its price proposal and protest not be disclosed outside the government. In order to comply with this request, we have reviewed Centel's proprietary price information *in camera* and we will discuss Centel's actual prices only to the extent necessary to address the protest.

of the solicitation's pricing schedule it had no reason to believe prior to award that Centel's response to amendment 0003 and its BAFO contained errors. In this regard, the agency notes that the price schedule provided for the insertion of 5,000 prices for four separate plans and was so complicated that the offerors' prices had to be analyzed by a computer, which was only available for evaluating the BAFOs.

More specifically, the Air Force states that it reviewed the responses to amendment 0003 and did not find Centel's $2.90 unit price for monthly maintenance of cut cable out of line either with Centel's $2.90 unit prices for labor and parts for cable repair or its $2.75 unit price for monthly maintenance of switched lines. The agency notes in this connection that it had no prior pricing experience in this area and it had no government estimate. Finally, the agency states that when it evaluated the total price for each of the offerors' four plans, Centel's total evaluated prices, while the highest of the offers received, were not "extraordinarily" higher than the other BAFOs. For the reasons set forth below, we do not agree with the agency that it properly executed its duty to review proposals for errors.

Where a contracting officer is on actual or constructive notice of a possible error in an initial or revised proposal, the error must be called to the offeror's attention and resolved—generally through written or oral discussions. FAR, 48 C.F.R. §§ 15.607, 15.610(c)(4); *American Management Systems, Inc.*, B-215283, Aug. 20, 1984, 84-2 CPD ¶ 199. Where an agency fails to resolve a proposal error that it should have reasonably detected and which materially prejudices an offeror, the agency has failed in its obligation to conduct meaningful discussions. *Id.*

Based on our review of the Centel proposal, we find that a clear discrepancy exists in that firm's pricing for cut cable maintenance which should have led the Air Force to suspect that an error existed in both Centel's revised offer and BAFO.

While it is true, as the Air Force argues, that the $2.90 unit price for cut cable maintenance does not seem extraordinary in the context of Centel's $2.90 unit prices for cut cable labor and materials, it must be noted that not only is the maintenance unit price extended to $58,000 by the 20,000 pair solicitation estimate (which also applied to both the labor and material charges), but it also must be multiplied by a 108-month evaluation factor representing the system's useful life. Thus, when the $2.90 is evaluated in accordance with the solicitation, it totals $3,479,365. This figure is obviously absurd when compared with the $116,000 total charge for repairing all the estimated cable cuts. Further, when evaluated under the solicitation, the maintenance charge for the cut cables becomes nearly six times higher than Centel's proposed maintenance charge for the entire basic system and causes Centel's price for the expanded services to be almost as high as the awardee's total price for both the basic and

expanded services.[4] Further, we are informed by the agency that none of the other firms offered a separate price for the maintenance of cut cable.[5]

We agree with the Air Force that it would be difficult to detect errors in proposals like Centel's, which in total included almost 5,000 separate prices. Nevertheless, the prices for the cable repairs were submitted in response to amendment 0003, not the initial solicitation. The agency specifically states that it separately examined the responses to amendment 0003. These responses contained nowhere near 5,000 separate unit prices.

In sum, it appears 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. Given the significant impact this one price made on Centel's overall offer, we think the agency should have detected the problem and raised the issue with Centel during discussions.

There is nothing on the face of Centel's proposal to show what, if anything, it intended to offer as a price for cut cable maintenance. It argues that it intended to offer no separate price for this item and the record shows that none of the other firms offered a separate price for this item. Further, the solicitation's evaluation scheme (unit price x 20,000 x 108 months) suggests that Centel did not intend to submit a unit price because even an extremely low price when extended would dwarf Centel's $116,000 total charge for cable repair. Such a pricing scheme, with a much higher cost for cut cable maintenance than for overall cable repair, obviously would be illogical. Therefore, based on the circumstances here, we conclude that it is highly unlikely that Centel, in the absence of error, would have offered a separate unit price for this item. Accordingly, we recommend that the Centel offer be evaluated as if that firm did not offer a separate price for cut cable maintenance. If Centel is evaluated as low, in view of the fact that contract performance has been suspended, the Air Force should terminate the existing contract for the convenience of the government.

The protest is sustained.

[4] The $2.75 unit price for monthly maintenance cited by the Air Force results in a $6,875 per month charge. This figure represents the maintenance charge for all the expanded services items except for cut cable. This is also incongruous in the context of the $58,000 per month figure offered for cut cable maintenance.

[5] In this respect, neither the Air Force or GTE contend that there will be any significant cost for maintenance of cut cables under the contract.

B-228281, December 29, 1987

Procurement

Specifications
■ Ambiguity Allegation
■■ Specification Interpretation

Procurement

Specifications
■ Brand Name/Equal Specifications
■■ Salient Characteristics
■■■ Sufficiency

Solicitation called for the submission of bids on a brand name or equal basis, and the brand name manufacturer submitted a bid on its model called for in the solicitation. Award was thereafter made to bidder offering a product which more closely resembled brand name manufacturer's less expensive model, based on agency's different, but reasonable interpretation of purchase description. Since brand name manufacturer's less expensive model was sufficient to meet government's needs, it was prejudiced by specifications which it reasonably interpreted as requiring its more expensive model, and agency should have canceled solicitation and resolicited requirement on less restrictive basis.

Matter of: Flow Technology, Inc.

Flow Technology, Inc. (FTI) protests the award of a contract to Flow Management Systems Inc. (FMSI) under invitation for bids (IFB) No. F33659-87-B-0063, issued by the Department of the Air Force for the acquisition of a quantity of liquid flow calibrators. FTI argues that the bid of FMSI is nonresponsive.

We sustain the protest.

The IFB was issued as a brand name or equal solicitation and requested bids on FTI's model No. CT 40-2-0-00056 Comtrack liquid flow calibrator or equal. The calibrator is used to measure the performance of various flow meters which regulate the flow of liquids and gasses into engines. The Air Force's purchase description states, among other things, that the calibrators are to be equipped with calibrator consoles used to operate the mechanism. Specifically, the purchase description states that:

> The calibrator console will consist of an IBM compatible computer with disc storage and a complete set of software to operate the calibrator and calculate results from the calibrator data. The computer program shall be designed to accept a wide range of fluid densities and viscosities with simple input of fluid data by the operator.

At bid opening, three bids were received. The low bid of A.O. Grumney Co., Inc. was rejected as nonresponsive, and the second low bid of FMSI, which offered a price of $129,700 for the first article and $119,700 each for all subsequent units was accepted as the low responsive bid. FTI bid $174,000 per unit for all units, having submitted its bid on its brand name model called for under the solicitation.

According to the protester, the bid of FMSI was nonresponsive. Specifically, the protester argues that its calibrator model called for under the solicitation is fully automatic, including control of flow valves which are set by the operator

at the control console. In contrast, the calibrator offered by FMSI is fully automatic except that the flow valves must be set manually by the operator rather than being set automatically at the control console. Accordingly, the protester argues that FMSI's bid is nonresponsive with respect to the above-quoted portion of the purchase description which requires that the control console "operate the calibrator." The protester points out that it felt constrained to bid only on its Comtrack model called for in the solicitation but that, had it known that the Air Force did not require the fully automatic model, it could have submitted a bid on one of its lesser models, the Flow Technology Omnitrack liquid flow calibrator, model No. OT-900, which it offered at an approximate price of $114,000 per unit under a previous solicitation.

The Air Force on the other hand argues that the purchase description did not call for a fully automatic flow calibrator and that, although full automation may be one of the features of FTI's Comtrack model, the purchase description made it clear that this feature was not necessary to fulfill the Air Force's minimum needs and thus it was not prohibited from accepting a less than fully automatic model.

While we cannot conclude that the bid of FMSI was nonresponsive, we think that the solicitation's specifications contained a latent ambiguity. Here, the brand name or equal solicitation called for FTI's fully automatic model and went on in the purchase description to require that the control console "operate the calibrator." We believe that the protester, in reading the solicitation, was reasonably led to believe that it could submit a bid only on its fully automatic model. On the other hand, the Air Force apparently did not, despite the identification of the fully automatic model as the brand name, intend to require a fully automatic equal product and does not agree that requiring that the control console operate the calibrator means fully automatic absent explicit language to that effect. As we stated in *Wheeler Brothers, Inc., et al.—Request for Reconsideration*, B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388, an ambiguity exists where two or more reasonable interpretations of a specification are possible. Moreover, a firm's particular interpretation need not be the most reasonable to have a finding of ambiguity; rather, a firm need only show that its reading of the solicitation provision is reasonable and susceptible of the understanding it reached. We conclude in this case that the calibrator requirement, at best, was ambiguous as drafted, that is, susceptible to two reasonable interpretations.

The record further indicates that FTI was prejudiced by the ambiguity in the solicitation. Had FTI known that the Air Force's minimum requirements could be met with its less expensive Omnitrack model, as the Air Force contemplated, the results of the bidding might well have been different. In cases such as this, where the solicitation requirement is ambiguous, with the result that bidders responded to it based upon different, reasonable assumptions as to what the requirement was, the competition has been conducted on an unequal basis. *Amdahl Corp., et al.*, B-212018, B-212018.2, July 1, 1983, 83-2 CPD ¶ 51. Moreover, the ambiguity in the specifications may have resulted in less than "full and open" competition since under one interpretation of the agency require-

ments only a fully automatic calibrator was permissible whereas the Air Force contemplated bids on a less restrictive basis. *See* Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (Supp. III 1985).

Accordingly, by separate letter of today we are recommending that the contract awarded to FMSI be terminated for the convenience of the government and that the solicitation be canceled and reissued so as to eliminate the ambiguity contained in the specifications. *See McCotter Motors, Inc.*, B-214081.2, Nov. 19, 1984, 84-2 CPD ¶ 539.

The protest is sustained.

B-228324, December 29, 1987

Procurement

Contractor Qualification

■ **Responsibility Criteria**

■■ **Performance Capabilities**

Procurement

Contractor Qualification

■ **Responsibility/Responsiveness Distinctions**

Solicitation provision which calls upon bidders at the request of the contracting officer, to demonstrate their experience by supplying evidence of the commerciality of the equipment being offered or similar equipment, is a definitive responsibility criterion which looks to the manufacturer's capability rather than to the product history of the particular model solicited. Consequently, an experienced manufacturer who bids its newest model may be deemed responsible even though the offered model does not meet the requirements of the solicitation provision (i.e., was not marketed for the stated period of time prior to bid opening).

Matter of: Dresser Industries, Inc.

Dresser Industries, Inc. protests the award of a contract to Deere & Company by the Defense Logistics Agency (DLA) under invitation for bids (IFB), No. DLA700-87-B-4514 for a quantity of four cubic yard scoop loaders. Dresser argues that the product offered by Deere fails to meet the commerciality requirements of the solicitation.

We deny the protest.

The solicitation called for the submission of bids for a quantity of four cubic yard scoop loaders, built in accordance with Federal Specification KKK-L-1542C as amended by the terms of the solicitation. Of particular importance for purposes of this protest is a provision (clause 3.1.1) added by the solicitation to the above-referenced federal specification which reads as follows:

Commerciality. The manufacturer shall be experienced in designing and building scoop loaders and shall have sold them to the general public at least one year prior to the opening date of the solicitation. Upon request of the contracting officer, offerors shall submit evidence of the commerciality of their machines in the form of catalogs, commercial brochures and data. Additionally, these bidders

shall furnish names and addresses of nongovernment sources which were sold equipment at least one year prior to the opening date of the solicitation. Equipment and configurations covered by this paragraph include the basic vehicle configuration (body, engine, tires, cab, counterweights, coupler and all buckets) as well as either: 1. All equipment specified in ordering data, or 2. A minimum of 15 optional and allied equipment items applicable to 4 yard loaders which are described in paragraphs 3.24.1 and 3.24.2.

The solicitation, in a separate provision, required bidders either to certify that "[t]he loader shall be essentially the standard current product of the manufacturer, differing therefrom only in respect necessary to meet special requirements," or (for bidders failing to certify) to comply with a warranty provision contained in the solicitation.

At bid opening on August 18, 1987, a total of six bids were received. The apparent low bid was submitted by Deere, followed by J.I. Case Company and Dresser respectively.[1] A contract was thereafter awarded to Deere as the low responsive, responsible bidder.

In its initial letter of protest, Dresser alleged that the product offered by Deere failed to meet the "commerciality" requirement of the solicitation. Specifically, Dresser stated that, given the price bid by Deere, Deere allegedly had offered a substantially modified version of its model 644D scoop loader, which was not a "commercial" item.

By letter dated October 9, Deere stated to our Office that Dresser's assumption—that it had based its bid on a significantly modified version of its model 644D loader—was incorrect. According to Deere's letter, Deere had based its bid on its model 644E-H. Deere's October 9 submission included a commercial brochure dated September 1987, which details the features of its model 644E-H. We note that Deere's model 644E-H is a new model, introduced officially on the market subsequent to the time of bid opening.

As a threshold matter, the agency has argued that Dresser's protest is untimely. Specifically, the agency argues that since the protester's interpretation of the commerciality clause is "unreasonable," but if correct would constitute an impropriety apparent on the face of the solicitation, it should have protested prior to bid opening in accordance with our Bid Protest Regulation, 4 C.F.R. § 21.2(a)(1) (1987).

We disagree with the agency. Bidders may assume that contracting officials will act in accordance with law and regulation, and it is *only* when they learn that officials will not act or proceed in a fashion that is consistent with what the bidder reasonably believes to be correct that a basis of protest arises. *See R.R. Gregory Corp.*, B-217251, Apr. 19, 1985, 85-1 CPD ¶ 449. Within the context of this case, we believe that Dresser was entitled to assume that the agency would act in conformance with Dresser's interpretation of the commerciality clause until award to Deere was made. After award, Dresser was required to file its

[1] Although J.I. Case submitted the apparent second low bid, the product offered by it was to be substantially manufactured in Brazil. Consequently, after application of the price differential required under the Buy American Act, 41 U.S.C. § 10 *et seq.* (1982), the Dresser bid was determined to be the second low responsive bid.

protest within 10 working days under 4 C.F.R. § 21.2(a)(2); since it filed within this time, we believe the protest to be timely.

Turning to the merits of the protest, Dresser argues that the product offered by Deere—its 644E-H model—fails to meet the requirements of the solicitation's commerciality clause. In particular, the protester argues that the commerciality clause requires that the product offered have been commercially available and sold for a minimum of 1 year prior to bid opening. The protester further states that, whether we consider this a matter of Deere's responsiveness or responsibility is unimportant since even up to the time of award, Deere was unable to comply with the terms of the commerciality clause.

The agency on the other hand argues that, to the extent we consider this a matter of responsiveness, Deere's bid took no exception to the terms of the solicitation's specifications and, consequently, the question of whether the product in fact complies with the specifications is a matter of contract administration. The agency also argues that, insofar as the commerciality clause is a definitive responsibility standard, it goes to the manufacturer's experience in building scoop loaders rather than to the particular scoop loader offered and, thus, Deere could reasonably be deemed responsible, having commercially sold similar scoop loaders for at least 1 year.

In our opinion, the commerciality clause contained in this solicitation constitutes a definitive responsibility standard. In 52 Comp. Gen. 648 (1973), we discussed the distinction between responsibility and responsiveness within the context of experience requirements contained in solicitations. There we stated that we considered experience requirements which go to the performance history of the item being procured as matters of responsiveness whereas, experience requirements which go to the experience of the bidder—which could be demonstrated through the performance history of either the item being procured or some other similar product offered by the bidder—were matters of responsibility. 52 Comp. Gen. at 649-650 (1973). As explained below, we believe the commerciality clause in this case is properly interpreted as requiring that the manufacturer demonstrate its experience in building scoop loaders generally (as distinct from demonstrating the performance history of the particular model solicited) and thus that it falls into the latter category. Further, we believe that the commerciality clause in this case is a definitive responsibility criterion imposed in addition to the traditional requirements of responsibility, and is therefore reviewable by this Office since compliance therewith may be objectively determined. *See Clausing Machine Tools,* B-216113, May 13, 1985, 85-1 CPD ¶ 533.

With respect to satisfying the requirements of the commerciality clause in this case, we believe that bidders could do this by submitting evidence of the commerciality of either the offered loader or a similar product. First, the clause consistently employs plural rather singular terms; "[t]he manufacturer shall be experienced in designing and building scoop *loaders* . . ." ". . .offerors shall submit evidence of the commerciality of their *machines* . . . ." "[e]quipment and *configurations* covered by this paragraph include . . . ." Second, under the separate certification requirement, bidders were afforded the option of either certifying

their offered product as "essentially their standard current product" or alternatively warranting a product which was other than "essentially their standard current product." Reading the solicitation as a whole, we believe that a bidder could offer a product which was other than its "standard current product;" it would be inconsistent however, to then require it to demonstrate the commerciality of only that product. Finally, the commerciality clause, by its own terms, allows bidders to demonstrate the commerciality of their scoop loaders either by demonstrating the commerciality of the offered loader (i.e., to basic vehicle configuration plus all equipment specified in the ordering data) or by demonstrating the commerciality of a similar loader (i.e. the basic vehicle configuration plus a minimum of 15 optional and allied equipment items applicable to four yard loaders).

For the above stated reasons, we believe that the commerciality clause contained in this solicitation could be satisfied through evidence of a bidder's having manufactured and marketed either the exact scoop loader called for or a similar scoop loader. Stated differently, the clause calls for evidence of the manufacturer's ability rather than the product's performance history. Accordingly, since Deere (although not called upon to do so) could have demonstrated the commerciality of its scoop loaders which are similar to the offered model, we conclude that the agency properly found it responsible and award was proper.

The protest is denied.

B-228931, December 29, 1987

Procurement

Special Procurement Methods/Categories
■ In-House Performance
■■ Cost Evaluation
■■■ Government Estimates
■■■■ Computation Errors

Cost comparison showing cost of the low commercial offer exceeded the government's estimated cost of in-house performance is invalid, and protest on that basis is sustained, where the solicitation's statement of work included work that the government excluded from its estimate and that was more costly than the difference between the government estimate and the low bid.

Matter of: Contract Services Company, Inc.

Contract Services Company, Inc. (CSC), protests the rejection of its bid under invitation for bids (IFB) No. N62467-87-B-2736, issued by the Naval Facilities Engineering Command's Southern Division at the Naval Air Station, Key West, Florida. The IFB was issued under step two of a two-step sealed bid procurement for a broad range of maintenance services at the Station. The IFB solicited offers for the express purpose of comparing the cost of performing the services in-house with the cost of awarding a commercial contract for a base year plus 2 option years. The cost comparison indicated that the costs associated with

CSC's low commercial bid exceeded the Navy's estimate of its in-house costs; the Navy thus determined to retain the function in-house. CSC appealed the results of the cost comparison to a Navy appeals board which, after making a few relatively minor adjustments, determined that the 3-year cost of CSC's bid properly should be $16,152,414, while the cost of in-house performance should be $15,465,140; the appeals board thus affirmed the decision that retaining the services in-house would be less costly (by $687,274). The protester alleges three errors in the cost comparison which, if corrected, would change the outcome. We sustain the protest.

Initially, we note that while the Navy has provided backup materials, it has not submitted a substantive report addressing the issues raised by CSC. Rather, the Navy asserts that our Office lacks jurisdiction to consider protests concerning cost comparisons. The Navy (specifically, the Naval Facilities Engineering Command) has raised these same arguments previously; we have considered the arguments at length and rejected them in our prior decisions. *See, e.g., Dyneteria, Inc.*, B-222581.3, Jan. 8, 1987, 87-1 CPD ¶ 30. As we indicated in those cases, we recognize that the underlying determination involved in cost comparisons—whether work should be performed in-house by government personnel or performed by a contractor—is one which is a matter of executive branch policy and not within our protest function. However, where a contracting agency utilizes the procurement system to aid in its determination of whether to contract out, we consider a protest from an offeror alleging that its proposal has been rejected because the agency failed to follow advertised procedures. *Id.*

One of the cost comparison errors alleged by CSC, and the most significant error in terms of cost impact, is the Navy's failure to include in its in-house estimate the cost of maintaining air conditioning and ventilation equipment in the air station's housing units. In this regard, the specifications stated that a successful bidder would be required to provide everything necessary to maintain facilities at the air station "complex and as generally described in [attachment] J-C1," which included housing unit maintenance. Annex 11 of the specifications, entitled "Maintenance, Repair, and Operation of Air Conditioning, Ventilation, and Refrigeration," further stated that the contractor shall be responsible for the maintenance of "all air conditioning, ventilation, ice making, cold storage and refrigeration systems located on the . . . complex." CSC's proposal under step one offered to perform housing air conditioning services, and CSC avers that it factored more than $900,000 into its bid based on its interpreting the solicitation to encompass the work. The record shows this maintenance currently was being performed for the Navy by a contractor at a cost exceeding $300,000 per year, or more than $900,000 for 3 years.

The board rejected this aspect of CSC's appeal on the basis that the Navy never intended to include maintenance services for family housing air conditioning because those services were covered by a separate contract. The board conceded, however, that "the requirement for air conditioning service is stated so broadly in the solicitation it could easily be misinterpreted." The board nevertheless believed that other aspects of the solicitation should have been sufficient to indi-

cate to CSC that the scope of work in fact did not include maintenance of the family housing air conditioners. Specifically, the board noted that the air conditioners were not included in the solicitation attachment listing major systems requiring preventive maintenance, and were not reflected in the attachment showing historical data for housing maintenance work included in the solicitation.

We disagree with the board's conclusion on this issue. The plain language of the IFB expressly calls for this work, and, unlike the board, which noted that its role "is to rule on the basis of the economic merits of the appeal items, not to critique contract phraseology," we are not persuaded that CSC should have known from the rest of the IFB that this plain language should have been disregarded. First, the fact that the air conditioners were not included in the listing of "major systems" could have indicated, merely, that the Navy did not consider the family housing air conditioners to be major systems; the list seems to include only relatively large systems (*i.e.*, equipment ranging from 3 to 100 tons), and the board decision seems to indicate that the housing air conditioners are smaller in scale (*i.e.*, since tenants will be responsible for changing their own air filters).

Second, the IFB section setting forth historical workload data for housing maintenance was not broken down by specific types of work so as to exclude air conditioning maintenance but, rather, stated that "this matrix includes all trades that perform work in family housing." The fact that CSC's resulting estimated workhours may have exceeded the historical workload due to the inclusion of air conditioning maintenance was not necessarily an indication to the firm that this maintenance was not meant to be included; the firm reasonably could have concluded that, because the air conditioning maintenance previously had been performed by contract rather than in-house, the historical data did not include the air conditioning maintenance.

Given the clear language of the IFB requiring the air conditioning maintenance work, therefore, we do not believe it was unreasonable for CSC to interpret the IFB as requiring this work.

It is a fundamental principle of federal procurement that, for cost comparison purposes, commercial offers and the government's estimate of in-house costs must be based on the same statement of work. *Alliance Properties, Inc.*, B-217544, Oct. 16, 1985, 85-2 CPD ¶ 413, *aff'd, Department of the Navy—Request for Reconsideration,* B-220991.2, Dec. 30, 1985, 85-2 CPD ¶ 728. Based on the record here, we conclude that CSC included in its bid work which the Navy excluded from its cost estimate. As the price of the Navy's current contract for the work was more than the $687,274 in-house cost advantage, and CSC claims it factored more than $900,000 into its bid for this work, it appears the Navy's cost comparison was faulty and that under the terms of the IFB contracting with CSC should have been seen as the less costly alternative.

By letter of today to the Secretary of the Navy, therefore, we are recommending that the Navy revise its cost comparison and award CSC a contract based on a

reduction of its bid by the amount attributed to providing maintenance for family housing air conditioning. *See Alliance Properties, Inc.*, B-217544, *supra.* If a contract is not awarded, CSC is entitled to be reimbursed its proposal preparation costs as well as its costs of pursuing the protest. *See Dyneteria, Inc.*, B-221089, Mar. 31, 1986, 86-1 CPD ¶ 302.

The protest is sustained.

Appropriations/Financial Management

Civilian Personnel

Leaves of Absence
■ Administrative Leave
■■ Use
■■■ Administrative Discretion

This Office would not object to Department of Housing and Urban Development exercising administrative discretion in authorizing short periods of administrative leave for employee to participate in research project at Public Health Service, National Institutes of Health (NIH). Although it is generally not within the discretion of an agency to grant administrative leave for a lengthy period of time, each agency has the responsibility for determining situations in which administrative leave will be granted for brief absences.

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■ Taxes
■■ Allowances
■■■ Eligibility

The Department of Agriculture requests an opinion as to whether claims for Relocation Income Tax (RIT) allowances may be paid to certain employees who were transferred from the United States to the Virgin Islands and Puerto Rico since the statutory authority in 5 U.S.C. § 5724b (Supp. III 1985) does not specifically state that RIT allowances apply to possessions of the United States. The claims may be paid since it is consistent with the intent of Congress that RIT allowances be extended to federal employees transferred in the interest of the government to United States possessions and the Commonwealth of Puerto Rico in the same manner as those employees transferred within the United States. However, it will be necessary for the Administrator of General Services, in consultation with the Secretary of the Treasury, to establish the applicable marginal tax rate.

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Military Personnel

Pay

■ Survivor Benefits

■■ Annuity Payments

■■■ Eligibility

A retired Air Force sergeant elected to provide Survivor Benefit Plan annuity coverage for his daughter. The daughter was subsequently adopted by her stepfather following her mother's divorce and remarriage. The adoption proceeding was set aside by a later state court order. Questions about the soundness of the later court order setting aside the adoption do not overcome the presumption in favor of its validity. Therefore, the daughter remained eligible for an annuity under the Plan as the member's dependent child beneficiary.

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■ Variable Housing Allowances

■■ Eligibility

■■■ Amount Determination

The definition of monthly housing costs for the purpose of computing the VHA may include the cost of a loan not secured by realty provided that the loan is taken for the purpose of repairing, renovating or enlarging the member's residence. There is no statutory impediment to amending applicable regulations to reflect this, but it is a matter left to administrative discretion in implementing the VHA statute.

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■ Variable Housing Allowances

■■ Eligibility

■■■ Amount Determination

Under a 1985 amendment to the variable housing allowance (VHA) law, VHA is reduced under certain circumstances where it, together with basic allowance for quarters, exceeds a member's housing costs. The amount of reduction, if any, depends on the member's monthly housing costs, with higher monthly housing costs resulting in no reduction or a lesser reduction. The regulation defining monthly housing costs may not include the cost of a second mortgage taken for reasons other than repairing, renovating or enlarging a residence since VHA is an allowance to help a member pay for housing in a high cost area.

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Procurement

■ Offers
■■ Evaluation Errors
■■■ Prices

Protest is sustained where agency failed to discover and call to offeror's attention an obvious proposal pricing error which should have been reasonably detected and which materially prejudiced the offeror.

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Contractor Qualification
■ Approved Sources
■■ Qualification
■■■ Standards

Where the contracting agency's stock of certain aircraft spare parts was projected to be depleted during the procurement lead time and the agency lacked the technical data to develop competitive specifications or precise qualification requirements that the protester could have met in the short time available, the agency properly awarded a sole-source contract to the only available qualified source; the agency was not required to delay the procurement in order to develop and advise the protester of precise qualification requirements.

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Contract Management
■ Contract Administration
■■ Contract Terms
■■■ Compliance
■■■■ GAO Review

Contractor Qualification
■ Responsibility/Responsiveness Distinctions

Solicitation provision which calls upon bidders at the request of the contracting officer, to demonstrate their experience by supplying evidence of the commerciality of the equipment being offered or similar equipment, is a definitive responsibility criterion which looks to the manufacturer's capability rather than to the product history of the particular model solicited. Consequently, an experienced manufacturer who bids its newest model may be deemed responsible even though the offered model does not meet the requirements of the solicitation provision (i.e., was not marketed for the stated period of time prior to bid opening).

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■ Responsibility
■■ Contracting Officer Findings
■■■ Affirmative Determination
■■■■ GAO Review

Protest that proposed awardee will not be able to satisfy solicitation clauses concerning preaward survey, preproduction milestones, and production capacity is dismissed since the clauses are not definitive responsibility criteria, *i.e.*, specific, objective standards measuring the offeror's ability to perform, but, rather, concern factors encompassed by the contracting officer's subjective responsibility determination or contract administration, both of which are matters not for review by the General Accounting Office.

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■ Responsibility Criteria
■■ Performance Capabilities

Noncompetitive Negotiation
■ Contract Awards
■■ Sole Sources
■■■ Propriety

Agency's justification for a sole-source procurement is inadequate where the record does not demonstrate that agency had any reasonable basis for concluding that sole-source awardee was the only responsible source capable of meeting the agency's needs.

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■ Contract Awards
■■ Sole Sources
■■■ Propriety

Where the contracting agency properly determined that only one qualified source could meet its needs within the required timeframe, the fact that the qualified source submitted a late quotation had no adverse effect on the protester, and acceptance of the quotation thus was unobjectionable, since the protester could not have received the award in any event.

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Sealed Bidding
■ All-or-None Bids
■■ Evaluation
■■■ Propriety

An all or none bid qualification should be construed as restricting award to all or none of the line items of a solicitation unless the context and circumstances indicate otherwise.

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statement of work included work that the government excluded from its estimate and that was more costly than the difference between the government estimate and the low bid.

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Specifications
■ Ambiguity Allegation
■■ Specification Interpretation

■ Brand Name/Equal Specifications
■■ Salient Characteristics
■■■ Sufficiency

Solicitation called for the submission of bids on a brand name or equal basis, and the brand name manufacturer submitted a bid on its model called for in the solicitation. Award was thereafter made to bidder offering a product which more closely resembled brand name manufacturer's less expensive model, based on agency's different, but reasonable interpretation of purchase description. Since brand name manufacturer's less expensive model was sufficient to meet government's needs, it was prejudiced by specifications which it reasonably interpreted as requiring its more expensive model, and agency should have canceled solicitation and resolicited requirement on less restrictive basis.

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