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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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January 1988

B-223799, January 4, 1988

Civilian Personnel

Relocation
■ Household Goods
■■ Weight Restrictions
■■■ Liability
■■■■ Computation

An officer of the Public Health Service selected a motor common carrier to transport his household goods. The officer alleges that the carrier represented that the shipment's weight would not exceed the officer's authorized weight allowance of 13,500 pounds and that a Guaranteed Price Pledge based on the weight was quoted. The shipment's actual net weight, however, as determined from certified weight tickets, was 21,060 pounds. After adjustments for crating and professional books, the certifying officer determined that the officer was liable for 4,454 pounds of excess weight. Where facts show that the Guaranteed Price Pledge was based on tender rates applied to a prudent estimate of the shipment's actual net weight, the determination of excess weight charges is proper. The officer's reliance on the carrier's erroneous low weight estimate does not provide a basis for relief from liability for excess weight charges since the government's legal obligation is to pay the charges for transporting only the officer's authorized weight allowance.

Matter of: Dr. John M. Dyer—Household Goods Excess Weight—Carrier's Guaranteed Price Pledge

An authorized certifying officer of the Department of Health & Human Services requests a decision on the question of whether a commissioned officer of the Public Health Service is liable for a portion of a carrier's guaranteed price for transporting his household goods, even though the price, purportedly, was based on the officer's authorized weight allowance.[1] We conclude that the officer is liable for the shipment's net weight that was in excess of his authorized weight allowance.

Facts

Incident to a permanent change of station, Dr. John M. Dyer had his household goods transported from Glen Ellyn, Illinois, to Dallas, Texas, in late 1985. Dr. Dyer was on temporary duty at the time so his wife made the arrangements for the shipment on a Government Bill of Lading after consulting an agency booklet, which suggested that van carriers are appropriate for the transportation of

[1] The request was made by J. R. Burkett, Certifying Officer, Office of Regional Director, Region VI, Department of Health & Human Services, 1200 Main Tower Building, Dallas, Texas 75202.

uncrated household goods. The booklet also indicated that Dr. Dyer's maximum weight allowance for his grade was 13,500 pounds. Mrs. Dyer selected an agent of Allied Van Lines, Inc., to perform the services, in light of satisfactory personal experience the Dyers had with the carrier on previous ordered transfers.

The Dyers indicate that a representative of the carrier came to their home to estimate the shipment. They state that:

Mr. Larry Jackson came to Mrs. Dyer's home, went through every room and closet, measured all of the larger pieces of furniture, etc. Mrs. Dyer indicated that this was a move pursuant to Commissioned Officer (JTR) procedures, that the limit was 13,500# and that she was concerned that the allowance not be exceeded. Mr. Jackson indicated that he had 10 years experience estimating moves, that he thought the weight would be about 12,000# and gave Mrs. Dyer the verbal assurance that "If you are over this weight, we will ship all you have, at the estimated cost." Mrs. Dyer repeated "you will ship all we have at the estimated cost" and he responded "yes." Mrs. Dyer indicated all of the crating (antiques) and packing that would be necessary and Mr. Jackson completed an Allied form titled "Guaranteed Price Pledge" indicating the weight at 12,500# including 1,000# of professional books. He indicated the "Total Guaranteed Price" as $8,532.71.[2]

The shipment was received by the carrier on December 31, 1985, and delivered on January 6, 1986. The carrier billed the government $9,179.87.[3] The bill referred to the carrier's tariff and a distance of 909 miles, but no actual weight or transportation rate was shown. The carrier's voucher notes that the amount was claimed "per Guaranteed Price Pledge."

The certifying officer points out that this was the first voucher he had received based on a Guaranteed Price Pledge. The certifying officer questioned the billing basis, since the charges did not appear to be based on the shipment's actual weight. He notes that when the carrier originally submitted its voucher the weight tickets were withheld on the theory that since the billing was based on the Guaranteed Price Pledge, weight tickets were unnecessary. When the tickets were submitted upon request, the certifying officer found that the actual net weight of the shipment (before adjustments) was 21,060 pounds. The carrier's billing supervisor responded to the certifying officer's inquiry about the weight and charges as follows:

The weight of 21,060 lbs. is correct for this shipment and is supported by a review of the inventory. An inventory count shows 454 items and since an industry average of 40 lbs. per item would give a "guesstimated weight" of 18,160 lbs., the weight of 21,060 lbs., which was obtained on certified scales at the time of loading, is the proper weight to be used when rating this shipment.

The certifying officer proceeded to collect the excess charges.[4] Dr. Dyer objected to being charged with excess weight, asserting that the Guaranteed Price was

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[2] The record contains a copy of the form showing that it was altered to substitute 17,500 pounds for 12,500 pounds, as the estimated weight.

[3] Although the Guaranteed Price Pledge shown on the form presented to Mrs. Dyer was $8,532.71, the record shows that the increased amount of $9,179.87 that was billed reflects subsequent adjustments for additional services. Although Dr. Dyer disputes the basis for the increase, it appears that the agency agreed to the adjustments and the General Services Administration informally advised us that the carrier did not overcharge the government.

[4] Although a net weight of 21,060 pounds was derived from a difference between the gross and tare weights shown on the weight tickets, the "actual net weight" for determining excess weight charges was computed to be 17,954 pounds, which reflects reductions of 10 percent for crating and 1,000 pounds for professional books. Excess weight of 4,454 pounds was determined by subtracting Dr. Dyer's weight allowance of 13,500 pounds from the adjusted net weight of 17,954 pounds. The excess weight charges of $1,913.53 (less insurance) resulted.

based on 12,500 pounds and that he and Mrs. Dyer had accepted, in good faith, the carrier's representation that the transportation charges would be based on 12,500 pounds.

An opinion rendered by the Per Diem, Travel and Transportation Allowance Committee, based on the circumstances of Dr. Dyer's move, concluded that no excess costs should be involved because, in its view, the carrier's charges were based on only 12,500 pounds; therefore, the government did not absorb any costs for excess weight.[5] In view of these arguments the certifying officer asks for guidance in determining whether excess costs were incurred by the government in cases involving a Guaranteed Price Pledge by a carrier.

Discussion

There is no apparent dispute over the law and implementing regulations. The government's maximum transportation obligation is the cost of one through household goods movement at the prescribed weight allowance at the lowest applicable rate in a carrier's tariff. *See* 37 U.S.C. § 406(b) and Volume 1, Joint Travel Regulations (JTR), para. M8007-1 (Change No. 392, October 1, 1985). Weights exceeding the prescribed weight (after authorized adjustments) are properly chargeable to the shipper. We have recognized that the weights prescribed by the regulations are designated as "actual net weights" and not arbitrary estimates. *See* 1 JTR paras. M8002 and M8003 (Change 376, June 1, 1984); 49 Comp. Gen. 255 (1969).

Notwithstanding the allegations concerning representations made by the carrier's agent that the Guaranteed Price Pledge was based on Dr. Dyer's authorized weight, the record indicates that the carrier's charges were based on a weight that closely approximates the actual net weight computed by the certifying officer on the basis of the weight tickets. The carrier's billing supervisor explained that the inventory of the household goods produced the "guesstimated weight" of 18,160 pounds, and clearly implied that published tariff rates were applied to a prudent estimate of the shipment's actual weight, rather than an arbitrary lower weight of 12,500 pounds.[6] This conclusion is further supported by information informally received from GSA, which also shows that the carrier did not overcharge for its services.

GSA's information indicates that the applicable tender rate applied to 18,160 pounds would produce total charges of about $8,593.24. Charges computed on the same basis for a weight of 12,500 pounds would have been only $6,023.36, an amount that is approximately $3,000 less than the carrier's Guaranteed Price Pledge. From these circumstances, it is reasonably clear that the cost to the government would have been approximately $2,000 less if the weight of Dr. Dyer's shipment was in fact only 12,500 pounds (or even 13,500 pounds).

[5] Memorandum for the Surgeon General, United States Public Health Service, PDTATAC/023ON, dated May 14, 1986.

[6] The carrier's tariff provisions for a Guaranteed Price Pledge are contained in item 803 of Household Goods Carriers Bureau Exceptions Tariff HGB 104-B.

In this case it is alleged that the carrier represented that the weight of the shipment was less than the actual weight. However, the Guaranteed Price Pledge quoted to the Dyers represented the charges provided in the carrier's tariff for a close approximation of the actual weight of the shipment. In any event, a certified actual weight which is considerably more than the estimated weight does not provide a basis to relieve a shipper of liability for the additional cost of transporting the excess weight of household goods. *See Joseph S. Montalbano,* B-197046, Feb. 19, 1980; *Robert Y. Ikeda,* B-181631, Oct. 9, 1974; *see also Rayburn C. Robinson, Jr.,* B-215221, Sept. 5, 1984.

Conclusion

The law and regulations require that the determination of whether weight was transported in excess of the shipper's authorized weight allowance be made on the basis of the shipment's actual net weight as determined from certified weight tickets. This requirement remains applicable where a common carrier bills the government on the basis of a Guaranteed Price Pledge. Thus, while it is unfortunate that Dr. Dyer and his wife were under the impression that the weight of the household goods shipped was within the authorized weight allowance, the fact remains that the carrier did transport household goods in excess of the authorized weight and the price quoted to the Dyers was based on a close approximation of the actual weight of the shipment. Under these circumstances we conclude that Dr. Dyer is liable for the costs of the shipment which exceeded the costs for the authorized weight allowance. The certifying officer here properly determined the net weight and excess weight of Dr. Dyer's household goods shipment on the basis of the carrier's certified weight tickets.

B-226193, January 4, 1988

Civilian Personnel

Relocation
■ Residence Transaction Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Residency

An employee who bought a house and resided there on weekends while remodeling it may be reimbursed for real estate expenses related to its sale even though he was not using it as a residence from which he commuted to and from work on a daily basis at the time he was notified of his transfer. The record shows the employee would have made the house his permanent home but for his transfer in the interest of the government.

Matter of: Timothy R. Glass—Real Estate Expenses—Occupancy Requirements

This decision is in response to a request from a certifying officer with the Rocky Mountain Regional Office, National Park Service, for an advance decision concerning the entitlement of Mr. Timothy R. Glass to reimbursement of real estate expenses he incurred in connection with the sale of a house located at Grand Lake, Colorado, in the vicinity of the Rocky Mountain Regional Park. The certifying officer questions Mr. Glass' entitlement to reimbursement because Mr. Glass resided in the house only on his weekly 3 non-workdays and he did not regularly commute from that residence to and from work. Under the circumstances of this case and for the reasons outlined below, we hold that Mr. Glass' claim may be allowed.

Mr. Glass was an employee of the Rocky Mountain National Park and was living in government quarters within the park when, on May 15, 1984, he purchased a house. In a letter dated September 15, 1986, Mr. Glass states that he and his family did not move into the house at the time of purchase because after the snow melted in late May he found that the main water line had frozen and broken, there were roof and foundation problems, and water draining from a spring on the property had settled at the front entrance. Mr. Glass and his family decided to live in the house on his 3 days off each week while he made repairs. They moved enough furnishings into the house to make it livable during the repair period and made tentative plans to store the rest of their furniture at a warehouse until they could add on to the house.

In late August 1984, before the repairs could be completed, Mr. Glass was offered a job at the Glen Canyon National Recreation Area in Arizona. He accepted the position in September 1984 and was issued a travel authorization dated September 26, which did not specifically provide for reimbursement of real estate expenses but did provide that the transfer was neither primarily for the convenience of the employee nor at his request and that all allowances must be in accord with the Federal Travel Regulations. Mr. Glass moved on October 15, 1984.

In August 1985 Mr. Glass requested that the sale of his house be included as part of the contracted relocation services authorized by 5 U.S.C. § 5724c (Supp. III, 1985). The agency responded on September 2, 1986, that in order for Mr. Glass to be eligible for such service the residence in question must have been his actual residence at the time he was notified of his transfer. It pointed out that the house did not appear to be his residence because his leave and earnings statements from October 1984 showed that deductions were being made for his occupancy of government-owned quarters and the Government Bill of Lading showed that Mr. Glass' household goods had been picked up from those government quarters.

Mr. Glass responded to the Park Service's denial of his request in a letter dated September 15, 1986, in which he explained the circumstances we have outlined above and pointed out further that he had moved the furnishings he had in the

house back to his government quarters for the convenience of the movers. He also stated that he had listed his house for sale in November 1984, had received an offer in August 1986, and expected to go to settlement on October 1, 1986. Mr. Glass submitted a claim for reimbursement of the expenses of that sale in the amounts of $1,750 representing a broker's fee of 7 percent, which the National Park Service reports is customary for that area, $197 for title insurance, $5 for a notary fee for the deed of trust, $28.18 for a phone bill and $16.75 for express mail. It is this claim upon which the National Park Service has requested us to rule.

The statutory authorization for the reimbursement of expenses of the sale of an employee's residence at his old duty station is contained in 5 U.S.C. § 5724a(4) (1982). Section 2-6.1d of the Federal Travel Regulations (FTR) (FPMR 101-7) (Sept. 1981), implementing that statute, provides that reimbursement of the expenses of selling the old residence may be made provided the dwelling for which reimbursement of selling expenses is claimed was the employee's residence at the time he was first definitely informed by competent authority of his transfer to the new official station. The term "residence" is defined in paragraph 2-1.4 of the FTR as "the residence or other quarters from which the employee regularly commutes to and from work."

Ordinarily, a literal interpretation of the above regulation would preclude any reimbursement of selling expenses of a dwelling not used as a residence from which the employee commutes on a daily basis. However, we have allowed reimbursement on a case-by-case basis where there has been a substantial compliance with the occupancy requirement of FTR paragraph 2-6.1d or where circumstances beyond the control of the employee prevent his occupancy of the dwelling.

In 47 Comp. Gen. 109 (1967), we allowed a transferred employee to be reimbursed for the expenses of the sale of a house in which his family lived and to which he commuted only on weekends because the employee was unable to find suitable housing near his official duty station. Our decision in B-165839, Jan. 31, 1969, involved an employee who returned from an overseas post to Washington, D.C., for duty and allowed the tenant who was renting his house to stay until that tenant was transferred. During this period of time the employee was notified of a transfer from Washington to Hawaii. We allowed reimbursement of the expenses of the sale of his residence even though he was not occupying it at the time he was notified of his transfer because he held title to it at that time and had made arrangements to reoccupy it.

Similarly, we have allowed reimbursement of expenses where the employees had never lived in the residences sold. The employees involved in B-168186, Nov. 24, 1969, and B-168818, Feb. 9, 1970, had entered into construction contracts prior to their notification of permanent change-of-station transfers. We held that they were entitled to reimbursement for selling expenses since they were unable to cancel the purchase contracts and were precluded from establishing residency in the house because of their transfers. Additionally, we held in 54 Comp. Gen. 67 (1974) that an employee who entered into a contract for the

purchase of a residence at his old duty station but did not occupy the residence because of a transfer could be reimbursed the costs of selling the residence since he was precluded from occupying the residence due to his transfer, an act of the government.

In considering Mr. Glass' case the National Park Service became aware of B-168186 and 54 Comp. Gen. 67 but was concerned that Mr. Glass' situation did not fall within the confines of those cases. The certifying officer has pointed out that unlike the employee in B-168186, who entered a construction contract because no suitable housing was available, Mr. Glass was occupying government quarters at the time he purchased his house and apparently did so purely as a matter of personal preference. Mr. Glass' situation was also distinguishable from the employee in 54 Comp. Gen. 67, who had made arrangements to terminate the lease on the apartment he was occupying. Mr. Glass had not indicated that he intended to leave his government quarters at any definite time although the certifying officer states that it appears to have been Mr. Glass' intention to leave his government quarters at some point.

It is our view that Mr. Glass' decision to purchase a home rather than continuing to reside in government quarters should not affect his entitlement to reimbursement, especially since the Park Service has informed us that there is no requirement for employees at the Rocky Mountain National Park to reside in those quarters. Although it would be less costly for the government if all employees lived in rental apartments and thus did not incur the costs associated with the sale and purchase of residences, there is no such requirement and the FTR provide for reimbursement of costs that result from what is often simply an exercise of personal preference.

Nor do we think it necessary for Mr. Glass to show that he had set a definite time for the termination of his occupancy of government quarters. We are satisfied that his actions show definite intent to move into his newly purchased home which was prevented by his transfer in the interest of the government. As a result, we believe that the circumstances of Mr. Glass' situation show, as in our other cases where we allowed exceptions to the general occupancy requirement for reimbursement of real estate expenses, that there was substantial compliance with that requirement. As a result, Mr. Glass may be reimbursed for the expenses he has claimed.

In that connection, the certifying officer expressed the view that Mr. Glass' claim of $28.18 for a phone bill and $16.75 for express mail would not be reimbursable. Mr. Glass has explained that the phone calls related to the closing on his home, and the express mail charge was for mailing back the purchase contract on the house. Each of these charges may be reimbursed as part of the miscellaneous expense allowance authorized by FTR paragraph 2-3.1. We have permitted reimbursement under the miscellaneous expense allowance when the expenses relate to an item which would be an allowable expense. Thus, we have allowed as real estate-related expenses, the cost of telegrams, telephone calls and certified mail necessary for real estate transactions. *See* B-189140, Nov. 23, 1977; B-185160, Jan. 2, 1976; and B-203009, May 17, 1982.

B-228140 *et al.*, January 6, 1988

Procurement

Bid Protests
■ GAO Procedures
■■ Protest Timeliness
■■■ Apparent Solicitation Improprieties

Contention, not raised until after bid opening, that agency abused its discretion by failing to delete labor surplus area (LSA) clause and cancel solicitations set-aside for LSA concerns after realizing that one required place of performance no longer was designated as an LSA, constitutes an untimely challenge to the agency's initial determination to set aside the procurements, and will not be considered.

Procurement

Sealed Bidding
■ Bid Guarantees
■■ Responsiveness
■■■ Letters of Credit
■■■■ Adequacy

Bid guarantee (in the form of an irrevocable letter of credit), unless otherwise required by the procuring agency's own regulations, need only be available for the full duration of the solicitation's acceptance period; there is no general requirement that a bid guarantee extend for a full year.

Procurement

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

There is no discrepancy between the legal entity named on a bid and a bid guarantee where the nominal bidder is an operating unit of the corporation designated as principal on the bid guarantee.

Procurement

Sealed Bidding
■ Bid Guarantees
■■ Responsiveness
■■■ Letters of Credit
■■■■ Adequacy

The naming of a federal employee on a bid guarantee who is required to certify as to the bidder's default before payment would be made under irrevocable letter of credit is unobjectionable since it would not affect the procuring agency's ability to enforce the bid guarantee in the event the bidder failed to carry out its obligations under the solicitation.

Procurement

Sealed Bidding
■ Bids
■ ■ Responsiveness
■ ■ ■ Terms
■ ■ ■ ■ Deviation

Bid incorporating statements set forth in bidder's internal guidelines that did not parallel the language of the IFB but did not conflict with any of the IFB's requirements or otherwise reduce the bidder's affirmative obligation to perform in strict conformance with the solicitation is responsive.

Procurement

Contractor Qualification
■ Responsibility/Responsiveness Distinctions

Statement in bid that bidder did not currently have an affirmative action plan on file because of a recent corporate reorganization did not render the bid nonresponsive, as a bidder's compliance with such requirements is a matter of the bidder's responsibility that can be satisfied any time prior to award.

Procurement

Sealed Bidding
■ Bids
■ ■ Responsiveness
■ ■ ■ Contractor Liability
■ ■ ■ ■ Liability Restrictions

Inclusion in bid of statement reserving bidder's right to provide performance and payment bonds from any surety reasonably could be construed as limiting the government's right to enforce the bidder's bid guarantee in event of default and, therefore rendered the bid nonresponsive.

Matter of: General Electric Company; Westinghouse Electric Corporation

General Electric Company (GE) and Westinghouse Electric Corporation protest the award of contracts under four different solicitations issued by the General Services Administration (GSA). These solicitations, each of which was set-aside for firms agreeing to perform as labor surplus area (LSA) concerns, sought bids for the removal and replacement of PCB-contaminated transformers at the following sites, all located in Washington, D.C.: Federal Building 10B (invitation for bids (IFB) No. GS-11P87MKC7468); Federal Buildings 6 and 8 (IFB No. GS-11P87MKC7434); the National Courts building (IFB No. GS-11P87MKC7444); and the General Accounting Office building (IFB No. GS-11P87MKC7439). GSA found Sun Environmental, Inc., Retrotex Division, to be the low responsive, responsible bidder under each of the first three solicitations, Westinghouse under the other, and hence selected Sun for award for removal of the contaminated

equipment at Federal Buildings 6, 8 and 10B and the National Courts building[1] and Westinghouse for the removal of the equipment at the GAO building.

GE contends that GSA abused its discretion by failing to delete the LSA set-aside restriction from each of the solicitations. Westinghouse asserts that Sun's bids did not comply with material terms of the solicitations and, thus, should have been rejected as nonresponsive. We dismiss GE's protests, and deny Westinghouse's protest of the award for Federal Buildings 6 and 8. We sustain Westinghouse's protest of the award for Federal Building 10B.

GE Protests

GE's protests of all four contract awards stems from GSA's inclusion of the standard clause, "Notice of Total Labor Surplus Area Set Aside" in each of the four solicitations. *See* Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.220-2 (1986). This clause requires offerors to agree to perform as LSA concerns—defined as a firm that will perform substantially (over 50 percent of the contract price) in a geographical area designated by the Department of Labor as an area of concentrated unemployment or underemployment, or an area of labor surplus—or else be considered nonresponsive and thus ineligible for award. GSA routinely included this clause in solicitations for construction projects in Washington, D.C., which had been classified as an LSA. Unbeknownst to GSA, however, Washington, D.C., no longer was listed as an LSA at the time of issuance of the four solicitations. GSA states that the contracting officer first became aware of this change during the period between bid opening and contract award (although GE states it advised the agency of this fact prior to bid opening). Although the contracting officer indicates he would not have set the contracts aside for LSA concerns had he been aware of the change at the time the IFBs were issued, he decided that the change did not warrant the cancellation of any of the solicitations in view of the affirmative representations by both Sun and Westinghouse that they would abide by the LSA requirement.

GE asserts that GSA's failure to cancel the solicitations after realizing that Washington, D.C., no longer was an LSA amounted to an abuse of agency discretion. GE maintains that GSA was obligated under FAR, 48 C.F.R. § 20.205.5(a), to withdraw the set-aside, as it had reason to know before award, and indeed even before bid opening (based on GE's advice), that the set-aside was unduly restrictive of competition and therefore detrimental to the public interest.

Although GE would have us characterize it differently, we view this argument as a challenge to GSA's initial determination to set-aside the procurement for LSA concerns. In this regard, GE was aware prior to bid opening that Washington, D.C., was no longer an LSA, and even claims it brought this fact to the agency's attention. Thus, the LSA provision constituted an alleged defect on the

[1] GSA has notified our Office of its plans to cancel the award to Sun for performance of the work at the National Courts building, and to award a replacement contract to Westinghouse, the bidder next in line for award. In view of this intended action, Westinghouse has agreed to withdraw its protest of this award.

face of the IFB which, under our bid protest regulations, was required to be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1987).

In any case, we find that GSA acted properly in not canceling the solicitations. Contrary to GE's assertions, FAR, 48 C.F.R. § 20.205, did not mandate the withdrawal of the set-aside and the resolicitation of the four procurements. This provision provides for withdrawal of such a set-aside only if the contracting officer determines prior to award that the set-aside is detrimental to the public interest, e.g., because of unreasonable prices. Here, the contracting officer did not make such a determination, and the record does not show that he should have; the prices offered by both Sun and Westinghouse were significantly below those offered by GE and the record does not contain any evidence suggesting that the prices offered by either of the two awardees were unreasonable.

Moreover, the fact that GSA acknowledges it may not have set-aside the solicitations had it known at the time of their issuance that Washington, D.C., no longer was an LSA does not render the set-asides improper *per se.* Rather, the inclusion of this clause remained within the discretion of the agency, *see Friedrich Air Conditioning & Refrigeration Co.,* B-212777, Sept. 6, 1983, 83-2 CPD ¶ 308; since the contracts still could be performed at reasonable prices by firms qualifying as LSA concerns, it was well within the agency's discretion to proceed with the awards instead of canceling the IFBs, thereby serving the original purpose of the set-asides.

Accordingly, General Electric's protests are dismissed.

Westinghouse Protests

Westinghouse asserts that Sun's bid for Federal Buildings 6 and 8 should have been rejected as nonresponsive because its bid guarantee, which was in the form of an irrevocable letter of credit: (1) is not valid for a full year; (2) named a principal, Sun Environmental, Inc., different than the bidder, Sun Environmental Inc., Retrotex Division; and (3) required a statement signed by a named individual identified as the contracting officer (an official who in fact held a different position), certifying that Sun was in default on its bid; if this individual is unable or unwilling to sign a certified statement to this effect, Westinghouse argues, the bank could refuse to honor the letter of credit on grounds of improper presentation. These arguments are without merit.

The letter of credit was available for the full duration of the IFB's acceptance period and consequently satisfied all applicable requirements; there is no requirement that a bid guarantee extend a full year. *See Control Center Corp. et al.,* B-214466.2 *et al.,* July 9, 1984, 84-2 CPD ¶ 28. Westinghouse states that the Department of the Treasury regulations require bid guarantees to extend a full year. Since this procurement was not subject to those regulations, however, this is irrelevant. Similarly, the designation of Sun Environmental, Inc., as the principal on the letter of credit was consistent with all requirements. Sun's Retrotex Division, the nominal bidder, is not an independently incorporated concern or a separate or distinct legal entity but, rather, is an operating unit of Sun Envi-

ronmental. Accordingly, there is no discrepancy between the legal entity named on the bid and the bid bond. *See generally Montgomery Elevator Co.*, B-220655, Jan. 28, 1986, 86-1 CPD ¶ 98; *Lamari Electric Co.*, B-216397, Dec. 24, 1984, 84-2 CPD ¶ 689. As for the provision naming an individual to certify a default by Sun, since the individual named was a federal government employee, and thus merely an agent of the federal government, we see no reason, and Westinghouse has not furnished a persuasive explanation, why a certification by any authorized government agent would not ultimately be found sufficient to permit the government to draw against the letter of credit. We thus do not believe the potential unavailability or unwillingness of this named individual to sign the required certification would affect GSA's ability to enforce the letter of credit if Sun failed to carry out its obligations under the IFB. *See generally Flagship Cruises, Ltd. v. New England Merchants*, 569 F.2d 699 at 705 (1st Cir. 1978) (a variance between documents specified and documents submitted is not fatal if there is no possibility that the documents could mislead the payer bank to its detriment).

Westinghouse also challenges the award of the contract for Federal Buildings 6 and 8 on the ground that Sun's bid is ambiguous with respect to Sun's affirmative obligation to perform the contract in exact conformance with the IFB requirements. Sun, as required by the IFB, submitted certain information to establish its capabilities and qualifications with its bid, which included the statement that "all work on this project will be in compliance with all Federal and State EPA regulations and Retrotex corporation specifications as attached." Westinghouse speculates that Sun may have attached internal guidelines to its bid inconsistent with the terms and conditions of the IFB. Westinghouse also asserts that two other statements in these bid materials—offering to furnish "paperwork verifying proper disposal" of the PCB contaminated materials by the disposal agent and to use waste haulers "fully licensed and approved" by the Environmental Protection Agency (EPA)—took exception to IFB requirements that the contractor provide "EPA-approved PCB disposal certificates of destruction," and that subcontractors selected for haulers be "EPA-permitted." These arguments are without merit.

Contrary to Westinghouse's speculation, the record does not show that Sun's qualification materials included corporate policies, guidelines, or specifications inconsistent with the terms of the IFB. While Sun's qualification materials did include statements regarding disposal verification and use of waste haulers which did not parallel the language of the IFB, the substance of these statements appears consistent with the IFB requirements. In this regard, we believe Sun's general offer to furnish "paperwork" necessary to verify proper disposal constituted sufficient agreement to provide the documentation called for (*i.e.*, EPA-approved certificates of destruction). By the same token, we think the broad term EPA "licensed and approved" reasonably encompasses the term EPA "permitted;" Westinghouse has not explained why it believes the terms would be given different effect.

Finally, Westinghouse questions the responsiveness of Sun's bid with respect to Sun's compliance with the affirmative action requirement set forth in the IFB. The IFB contained the standard clauses set forth in the FAR, 48 C.F.R. §§ 52.222-22 and 52.222-25, requiring the bidder to represent that (1) it either has or has not participated in contracts subject to affirmative action requirements; and (2) that it has or has not submitted compliance reports and/or developed and filed an affirmative action plan. Westinghouse argues that Sun's statement that it did not currently have an affirmative action plan on file because of a recent corporate reorganization rendered its bid nonresponsive.

We have held that a bidder's compliance with affirmative action requirements is a matter of the bidder's responsibility, rather than of bid responsiveness. *A&C Building and Industrial Maintenance Corp.*, B-218035, Feb. 13, 1985, 85-1 CPD ¶ 195; the standard clauses in the IFB here are for informational purposes and do not purport to obligate the bidder upon acceptance of the bid. *Id.* Before award was made to Sun, the contracting officer necessarily determined that Sun was responsible. Accordingly, we deny Westinghouse's protest of this award.

Westinghouse challenges the award to Sun for Federal Building 10B because Sun's bid contained the following statement typewritten on the bottom of a page of its bid: "Sun Environmental, Inc., Retrotex Division, reserves the right to provide performance and payment bonds from any surety. These bonds will be backed by an approved irrevocable letter of credit." Westinghouse asserts that the phrase "from any surety" materially qualified Sun's bid, thereby rendering it nonresponsive. This reservation, Westinghouse maintains, could severely limit the government's right to enforce Sun's bid guarantee in the event of default; that is, if the government agreed to accept bonds from any surety, it would be unable to go against Sun's bid guarantee in the event Sun furnished performance and payment bonds from sureties GSA considered unacceptable, e.g., because the surety's assets are pledged against several other contracts.

GSA (and Sun) responds that this phrase was merely a restatement of a bidder's already existing right to provide bonding from any surety, subject to the right of the government to accept or reject those bonds. In addition, GSA points to the language "approved letter of credit" as recognizing the government's right to approve any proposed surety, any other language notwithstanding. GSA further notes that Sun, as requested by the contracting officer, ultimately deleted this statement, thereby assuring Sun's performance under the terms and conditions set forth in the IFB.

Where a bid is ambiguous with respect to a material requirement, *i.e.*, is subject to more than one reasonable interpretation, and under one of the interpretations the bid is nonresponsive, the bid must be rejected as nonresponsive. *Achievement Products, Inc.*, B-224940, Feb. 6, 1987, 87-1 CPD ¶ 132. We find this to be the situation here. The plain language of the reservation "reserves the right" to provide bonds "from any surety." While GSA reads the reservation as being subject to GSA's regulatory discretion to reject a surety it deems unacceptable, the reservation does not include any such language. Indeed, we consider persuasive the reasoning that GSA's interpretation would turn the reserva-

tion into a nullity; since GSA has existing authority to determine a surety's acceptability, there is no reason to assume that the bidder's underlying intent was merely to restate, essentially, the agency's authority.

The fact that Sun referred to an "approved irrevocable letter of credit" does not alter our view; GSA could find fault with a surety even if the letter of credit backing the surety's bond were considered acceptable (e.g., where the letter of credit was the surety's only asset and was overpledged against several contracts). We emphasize that Sun did not offer to submit a letter of credit in lieu of a bond (in which case the government could draw directly against the instrument in case of default). Rather, Sun offered to submit a bond *backed* by a letter of credit. As with any assets underlying performance or payment bonds, an irrevocable letter of credit, even if acceptable to the government, could be pledged by the surety against several contracts simultaneously; this is precisely what contracting officers are to consider in determining a surety's acceptability. *See* FAR, 48 C.F.R. § 28.202-2. Thus, if a letter of credit, or other legitimate asset, were found to be overpledged, the government could reject the surety. It appears the reservation in Sun's bid could be found to preclude the government from doing so here; at minimum, it is unclear whether the reservation would be interpreted in the government's favor in the event of a dispute.

Sun's deletion of the qualifying language after bid opening upon the insistence of the contracting officer did not cure this material deficiency; a nonresponsive bid cannot be made responsive after bid opening. *Imperial Maintenance, Inc.*, B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34.

We sustain Westinghouse' protest of the award for Federal Building 10B and, by separate letter to the Administrator, we are recommending that Sun's contract be terminated for the convenience of the government, and that a replacement contract be awarded to Westinghouse, the next low bidder, if found otherwise eligible.

B-228200, January 6, 1988

Procurement

Specifications
■ Minimum Needs Standards
■■ Competitive Restrictions
■■■ Justification
■■■■ Sufficiency

A blanket solicitation requirement in a small business set-aside that all individual sureties provide a security interest consisting of a first deed of trust on the unencumbered value of real property listed on an affidavit of individual surety, or obtain a subrogation agreement from the party holding a first deed of trust on encumbered real property, as well as a requirement to furnish proof of title and an appraisal of value of the real property, is not reasonably related to the minimum needs of the agency and is restrictive of competition where there are no unusual circumstances justifying the requirement.

Matter of: Altex Enterprises, Inc.

Altex Enterprises, Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. DACA85-87-B-0005, issued by the United States Army Engineer District, Alaska, for construction of a satellite communication ground terminal at Clear Air Force Station, Alaska. The contracting officer found Altex to be nonresponsible based on the failure of its sureties to grant the agency a security interest in real property listed on the standard form (SF) 28, Affidavit of Individual Surety,[1] submitted with Altex's bid.

We sustain the protest.

The IFB, issued on July 14, 1987, required bidders to furnish a bid guarantee as well as performance and payment bonds. The IFB stated that if individual sureties are used for bid, performance, and payment bonds as permitted by FAR, 48 C.F.R. § 28.202-2, the individual sureties must meet the following requirements "in addition to execution of [SF 28]:"

(4) A security interest shall be provided in any or all of the assets listed in SF 28 and refusal to provide such security interest shall render the surety unacceptable. The security must be equal to the penal amounts of the performance and payment bonds required by this solicitation and may be provided by one or a combination of the following methods:

(i) Escrow account in the name of the U.S. Army Corps of Engineers, Alaska District, for the duration of the contract and for 90 days after final settlement . . . . Acceptable securities in escrow would include, but not be limited to cash, treasury notes, bearer instruments having a specific value, and money market certificates.

(ii) First Deed of Trust with U.S. Army Corps of Engineers, Alaska District, as beneficiary, against the unencumbered value of real property, or an agreement by a second party, holding deeds of trust, mortgage, lien, or judgment interests to subrogate their interests to that of the U.S. Army Corps of Engineers on the real property which has been offered by the individual surety.

Additionally, the individual sureties were required by the IFB to evidence ownership of real property with a "litigation report" prepared by a title insurance company and to furnish an appraisal by a "member of either the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers."[2]

The agency opened bids on August 19; all six bids received were lower than the government estimate. Altex and Ghemm Company, Inc. and Associates (Ghemm) submitted the low and second low bids, $889,750 and $1,013,600, respectively. The contracting officer reviewed Altex's SF 24 (bid bond) and SF 28, which listed Merril Blake and Barbara Iles of Shelley, Idaho, as individual sureties and provided a listing of the sureties' principal assets, primarily real estate but including a substantial amount of personalty such as furniture, precious metals, antiques and paintings.[3] The individual sureties did not provide any security interest in their property.

[1] SF 28 is a form prescribed by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 53.301-28 (1987), which is used by individual sureties to a bond to list their assets and which, in turn, is used by the contracting agency to determine the net worth of proposed individual sureties.

[2] None of these requirements are prescribed by FAR; rather, they were generated locally by the Corps' district office in Alaska.

[3] Merril Blake listed real estate with a value of $3,812,000, encumbered by a mortgage of $759,307; Barbara Iles listed real property worth $1,053,000, encumbered by a mortgage of $103,000.

The contracting officer contacted Altex on August 21 to ask that Altex's sureties provide the security interest required by the IFB. On August 31, Altex responded by letter advising the agency that Altex's underwriters were unwilling to grant security interests as required by the IFB.

On September 3, the contracting officer determined Altex to be nonresponsible for failure to submit the required "bonding information" for individual sureties. The agency advised Altex of this determination by letter dated September 8 and awarded a contract to Ghemm on September 16. This protest followed.

On an initial matter, the agency argues that the protest is untimely because the instructions to bidders clearly set forth the requirements for individual sureties and under our Bid Protest Regulations, protests based upon improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1987). The issue of whether an agency may impose a requirement restricting the use of individual sureties has not previously arisen in this context. As an issue of first impression with widespread significance to the procurement community, we believe that the instant case deserves the invoking of the exception to our timeliness rules at 4 C.F.R. § 21.2(c).

Generally, Altex contends that FAR, 48 C.F.R. Subpart 28.2, does not give contracting officers the discretion to require security interests on an across-the-board, routine basis and that this requirement is unduly restrictive of competition and discriminates both against the use of individual versus corporate sureties and against companies who must use individual sureties, primarily small businesses. We agree.

Where a solicitation requirement is challenged as unduly restrictive of competition, the procuring activity must establish *prima facie* support for its contention that the restriction is reasonably related to its minimum needs. *Software City,* B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475. This requirement reflects the agency's statutory obligation to employ solicitation terms that permit full and open competition consistent with the agency's actual needs. *See Southern Technologies, Inc.,* B-224328, Jan. 9, 1987, 87-1 CPD ¶ 42. The agency argues that the suretyship requirements were an exercise of the contracting officer's discretion and that the contracting officer has the responsibility for safeguarding the interests of the United States in its contractual relationships.

Significantly, the contracting officer does not allege that any unusual circumstances here justify these requirements; rather, he claims to have the discretion to apply these requirements on a routine, across-the-board basis regardless of the financial qualifications of a small business bidder's individual sureties. In this regard, the contracting officer does not believe that the FAR regulatory framework governing individual sureties provides sufficient protection for the government. For example, the agency argues that the SF 28 bears serious weaknesses in that it does not provide for proof of title to the listed assets, does not require any independent appraisal of the assets' fair market value and relies upon a certification by a postmaster or U. S. Attorney who may have no personal acquaintance with the surety. In addition, according to the agency, there is

no assurance that an individual surety will maintain his net worth throughout contract performance.

We find that the agency has failed to demonstrate *prima facie* support for these stringent requirements at issue. We recognize that in particular circumstances, a contracting officer may establish very specific and very strict financial qualifications for a particular firm to demonstrate its financial responsibility. *See Nova International, Inc.*, B-227696, Sept. 21, 1987, 87-2 CPD ¶ 284. However, the regulations simply require that agencies obtain "adequate security for bonds" (*see* FAR, 48 C.F.R. § 28.201(a)); they do not contemplate obtaining perfected liens from all bidders as a condition for bidding. Here, the contracting officer is attempting to impose a provision, regardless of the particular financial circumstances or qualifications of sureties, that places a heavy burden upon an entire class of bidders—those who use individual sureties. The following illustrates the restrictiveness of the present requirement. For example, an individual surety may have a $40,000 mortgage on a $400,000 house; under the IFB, he is required to ask his lender to subordinate its security interest to the government's. If the lender will not do so, the bidder is nonresponsible even though its individual surety has $360,000 net worth which would otherwise be acceptable. Similarly, if the surety owns a house outright, he can only pledge it once until his obligation is discharged (an event that does not occur until all payments for labor and materials have been made and all warranty periods have expired, *see T&A Painting, Inc.*, B-224222, Jan. 23, 1987, 66 Comp. Gen. 214, 87-1 CPD ¶ 86), even if he has substantial equity remaining.

We think the solicitation requirement comes close to being a prohibition against the use of individual sureties, a prohibition that would clearly conflict with FAR provisions allowing the use of individual sureties. In this regard, we have held that as long as each surety has a net worth adequate to cover the penal amount of a bond, a bid is acceptable so long as it establishes the sureties' joint and several liabilities, even if sureties pledge the same assets. *Argus Services, Inc.*, B-226164, Apr. 21, 1987, 87-1 CPD ¶ 429. The contracting officer here made no attempt to determine the sureties' net worth; he had no reason to doubt nor did he question the sureties title to property listed on the SF 28 or their appraisal of its value. Thus, in the instant case, the contracting officer simply has not demonstrated a need for the extraordinary measures here required of bidders relying on individual sureties.

We conclude that the solicitation requirement that all individual sureties submit a security interest in all real property listed on the SF 28 constitutes an undue restriction on full and open competition.

With regard to a remedy, the Army has suspended performance of the awardee's contract. We recommend that Altex's responsibility be evaluated without consideration of the additional solicitation requirements concerning security interest. In this connection, we have noted that the contracting officer has broad discretion to determine the responsibility of an individual surety. *See Eastern Metal Products & Fabricators, Inc.*, B-220549.2, *et al.*, Jan. 8, 1986, 86-1 CPD ¶ 18. If the Army finds Altex is responsible, it should terminate for the conven-

ience of the government Ghemm's contract and award to Altex. We further recommend that, absent a compelling reason for such a requirement, the Army refrain from future use of this provision.

Accordingly, by separate letter today, we are advising the Secretary of the Army of our decision and recommendation.

The protest is sustained.

B-225967, January 14, 1988

Civilian Personnel

Compensation
■ Classification
■■ Appeals
■■■ Statutes of Limitation

An employee with the Soil Conservation Service who was classified as an intermittent employee from 1966 to 1974 asserts that she should instead have been classified as part-time during that period. However, her claims based on her alleged misclassification between 1966 and 1974 for retroactive holiday pay, additional pay for within-grade increases, and credit for annual and sick leave were not received here until 1986, and consequently they are barred by the 6-year time limit on the filing of claims prescribed by the Barring Act, 31 U.S.C. § 3702(b). Decisions where we have held that a claim for sick leave is not a monetary claim cognizable by the Comptroller General, and subject to the Barring Act, are overruled. (58 Comp. Gen. 741; B-189288, Nov. 23, 1977; B-171947.36, Nov. 16, 1972; B-171947.24, June 16, 1972).

Matter of: Irene L. Marek—Claims for Backpay and Leave Credit—Statute of Limitations

A certifying officer with the United States Department of Agriculture's National Finance Center has requested our opinion as to whether Ms. Irene L. Marek is entitled to annual and sick leave, holiday pay, and within-grade increases, based on her claim that she was improperly classified as intermittent rather than part-time while employed with the Soil Conservation Service between 1966 and 1974. We did not receive her claim until 1986, and we therefore conclude that the 6-year time limit on the filing of claims prescribed by the Barring Act of October 9, 1940, as amended and now codified at 31 U.S.C. § 3702(b), prevents any recredit or reimbursement for annual or sick leave, holiday pay, or within-grade increases.

Background

Ms. Marek, an intermittent employee with the Soil Conservation Service in Temple, Texas, since 1966 received a permanent part-time appointment effective August 18, 1974. Sometime in 1985 Ms. Marek requested that the agency also change her prior service from November 2, 1966, to August 17, 1974, from intermittent to part-time.

The Office of Personnel Mangement (OPM) subsequently advised the agency that it would be permissible to reclassify her as a part-time employee retroactively during that period for civil service retirement purposes. Later, the agency forwarded to our Office her claims for backpay and leave credit based on the alleged misclassification. We first received those claims on December 30, 1986.

Opinion

Under the Barring Act of October 9, 1940, as amended and now codified at section 3702(b) of title 31, United States Code, claims against the United States cognizable by the Comptroller General must be received within 6 years of the date they first accrue in order to be considered on their merits.

Claims cognizable by the Comptroller General are claims for the payment of money which are not within the exclusive jurisdiction of another agency to decide. *See* 42 Comp. Gen. 337, 339 (1963). Ms. Marek's claims for holiday pay and within-grade increases are clearly claims cognizable by the Comptroller General. As a result, Ms. Marek's claims relating to those items are barred from consideration. On the other hand, since OPM has specific statutory authority under 5 U.S.C. § 8347(b) to adjudicate and settle accounts under the retirement laws, the operation of the Barring Act does not affect OPM's allowance of retirement service credit for the period of time she was classified as an intermittent employee.

As to Ms. Marek's claims for additional leave credit based on her employment between 1966 and 1974, we have specifically held that claims for annual leave are cognizable by the Comptroller General and are, therefore, subject to the Barring Act. *See John E. Denton*, B-221252, Sept. 19, 1986. In that case we pointed out that although leave earned and credited to a leave account is not immediately convertible to money, annual leave claims are monetary claims since additions to the leave balance are payable in a lump sum upon an employee's separation from federal service. Furthermore, the increased leave balance from hours earned permits the employee's absence from duty for additional hours without deduction of money from salary. Finally, claims for annual leave are not adjudicated solely by the employing agencies or other federal offices. The Comptroller General has traditionally decided these claims after initial consideration by the employing agency. *See, e.g.*, 62 Comp. Gen. 253 (1983) and 62 Comp. Gen. 545 (1983). As a result, Ms. Marek's claim for annual leave recredit is subject to the Barring Act and may not be considered.

Our position with regard to sick leave has been somewhat less clear. In several cases involving claims for recredit of sick leave we have stated that such claims are not monetary claims and, therefore, are not proper subjects for settlement by our Office. *See* 58 Comp. Gen. 741, 743 (1979); *Ruth L. Jones*, B-189288, Nov. 23, 1977; B-171947.36, Nov. 16, 1972; B-171947.24, June 16, 1972. In these cases we have held that the crediting of sick leave is primarily an administrative matter and that the employing agency must determine the acceptability of the evidence presented to support those claims. It appears that in each of these

cases, the claims would have been barred by operation of the Barring Act but we did not address that issue. On the other hand we have, on occasion, held that the Barring Act precludes consideration of claims for recredit of sick and annual leave. *See John W. Matrau,* B-191915, Sept. 29, 1978, and *Philip Reisine,* B-182014, Sept. 29, 1975.

We believe the latter approach is correct and the distinction we have made in the past between sick and annual leave is faulty. Although unused sick leave is not payable in a lump sum upon an employee's retirement as is annual leave, an increased sick leave balance permits the employee's absence from duty for additional hours without deduction from his salary just as with annual leave. The Comptroller General has traditionally decided cases regarding both the proper use of sick leave and its recrediting. *See, e.g.,* 55 Comp. Gen. 183 (1975) and *John H. Adams,* B-209769, Mar. 28, 1983.

Therefore, we hereby overrule those cases cited previously where we have stated that claims for sick leave are not monetary claims subject to settlement by the Comptroller General. Since Ms. Marek's claim for recredit of sick leave falls within this category we hold that as a claim cognizable by the Comptroller General it is subject to the provisions of the Barring Act and, as a result, is barred from consideration.

In summary, we hold that Ms. Marek's claims for holiday pay, within-grade increases and annual and sick leave accrual for the period of her alleged misclassification between 1966 and 1974 are barred from consideration since they were not presented within the 6-year period prescribed by 31 U.S.C. § 3702(b).

B-224081, January 15, 1988

Appropriations/Financial Management

Appropriation Availability
■ Time Availability
■■ Time Restrictions
■■■ Fiscal-Year Appropriation

Procurement

Special Procurement Methods/Categories
■ Multi-Year Procurement
■■ Fiscal-Year Appropriation
■■■ Time Restrictions

Proposed multiyear contract for the supply, storage, and rotation of sulfadiazine silver cream by the Philadelphia Defense Personnel Support Center of the Defense Logistics Agency (DLA) is not permissible. The Anti-deficiency Act, 31 U.S.C. § 1341(a)(1)(B) (1982), prohibits multiyear procurement, *i.e.,* a procurement which obligates the United States for future fiscal years, without either multiyear or no-year funding or specific statutory authority. The storage and rotation portion of the proposed contract satisfies neither of those conditions. Nothing in 10 U.S.C. § 2306(a) (1982), cited by DLA, constitutes authority for multiyear procurement. A "subject to availability clause" does not permit a multiyear procurement using annual funds.

Matter of: Defense Logistics Agency Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream

In a recent report of our National Security and International Affairs Division, "Medical Readiness: DOD Can Improve Management of Dated Drug Items Held as War Reserves," GAO/NSIAD-87-38, January 9, 1987, we discussed the procurement of sulfadiazine silver cream by the Philadelphia Defense Personnel Support Center of the Defense Logistics Agency (DLA). The acquisition plan reportedly called for a supply and services contract for a 5-year period with an option for an additional 5-year period. We indicated in our report that while we regarded the services portion of the contract as a worthwhile cost-savings device, we had serious doubts about whether the proposed multiyear contract was legal. In this decision we conclude that DLA does in fact lack authority to enter into a multiyear contract in these circumstances.

Background

Under the contract, which was awarded in July 1987, the contractor is required to supply sufficient stocks of the cream to meet DOD's medical needs in case of a sudden emergency. It is also required to store the supplies in its own facilities and to rotate them as necessary in order to a assure that DOD will always have fresh supplies available. The supply portion of the contract apparently will not extend beyond the first year of the contract. The storage and rotation portion of the contract, however, is to extend for the 5-year life of the contract, with an option for an additional 5 years. The supply and rotation costs are to be funded with annually appropriated Operation and Maintenance funds, which are available for obligation only during the year for which they were appropriated.

Analysis

This Office has no objection to the concept of a multiyear stock rotation contract for medical supplies. We agree with the DLA Competition Advocate's observation that the contract would be innovative, cost-saving, and otherwise beneficial to the government in many respects. Nonetheless, as set forth below, we conclude that DLA lacks the necessary statutory authority to engage in a multiyear procurement of storage and rotation services in these circumstances, notwithstanding the potential benefits to the government.

The authority of all government contracting officers is circumscribed by statutory restrictions on the obligation and expenditure of appropriated funds. All contracting authority, no matter how broadly worded, is limited by these statutory restrictions, in the absence of language indicating a clear intent to make an exception. One of these statutory restrictions is the Anti-deficiency Act, which provides that no officer of the government may involve the government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B) (1982). *See* FAR, § 32-702. Both the courts and the Comptroller General have held that the Anti-deficiency

Act prohibits multiyear procurement; including a procurement which obligates the United States to pay for severable services to be performed in future fiscal years, without either multiyear or no-year funding or specific statutory authority. *See generally,* 48 Comp. Gen. 497 (1969). In *Leiter v. United States,* 271 U.S. 204 (1925), the Supreme Court held that a purported multiyear lease of office space by the Veterans Bureau was binding on the government only for the first year of the lease. The Court held that,

> to make it [the lease] binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year. *Id.* at 207.

The Comptroller General has relied on the *Leiter* case in several subsequent decisions involving "continuing" service contracts. In 42 Comp. Gen. 272 (1962), the Comptroller General reviewed an Air Force contract for maintenance services on Wake Island. The contract was for 3 years, but was to be funded with annual funds as they became available. The Air Force contended that the contract was a permissible "requirements" contract because the funds were not obligated in the Air Force's accounts until orders were placed with the contractor. The Comptroller General rejected that contention, pointing out that the services were "automatic incidents of the use of the air field" and no affirmative administrative decision or act was required to obligate the government for the second and third years of the contract. *Id.* at 277. *See also* 33 Comp. Gen. 90 (1953) (Atomic Energy Commission trucking contract for 3 years impermissible); 29 Comp. Gen. 91 (1949) (Food and Drug Administration 3-year lease of publicity film with annual funds impermissible); 28 Comp. Gen. 553 (1949) (Post Office contract for truck servicing and storage with "automatic renewal" provision invalid).

Multiyear procurement, accordingly, is permissible only in two limited circumstances: when multiyear or no-year appropriations are available, at the time the contract is executed, covering the entire period of the government's commitment, or when permitted by specific statutory authority. FAR, § 17.102-1(a). The storage and rotation portion of the Defense Personnel Support Center's sulfadiazine silver cream procurement falls within neither of those categories.

First, multiyear or no-year funds are not available for the storage and rotation portion of the sulfadiazine silver cream contract. As DLA indicates in a June 2, 1987 letter to this Office, that portion of the contract is to be funded with annually appropriated Operation and Maintenance funds, which are 1-year funds. *See, e.g.,* Department of Defense Appropriations Act, 1987, Pub. L. No. 99-591, §§ 101(c), 9006, 100 Stat. 3341, 3341-86, 3341-101 (1986).

Second, there is no statutory authority permitting the use of a multiyear contract in these circumstances. The Congress has provided specific statutory authority for multiyear contracting with annual funds in certain limited circumstances. Two examples of this authority are 10 U.S.C. § 2306(g) (1982) and 10 U.S.C. § 2306(h) (1982). These statutes permit the Department of Defense to

enter into multiyear contracts using annual funds to procure services and supplies in limited circumstances. Subsection (g), which is applicable to certain contracts for services, was enacted specifically in response to the Comptroller General's decision in 42 Comp. Gen. 272 (1962) (Wake Island), discussed above. *See* S. Rep. No. 1313, 90th Cong., 2d Sess. 1 (1968). Subsection (h), added in 1981, provides authority for the multiyear procurement of weapons systems and related items and services by the Department of Defense in certain prescribed circumstances. In its June 2, 1987 letter to this Office, DLA concedes that neither subsection (g) nor subsection (h) is applicable in the instant case.

DLA advises, however, that since "no other statutory limitations have been located," it concludes "that the broad authority contained in 10 U.S.C. § 2306(a) authorizes this procurement." As discussed earlier, we think that such a statutory limitation is imposed by the Anti-deficiency Act which, in the absence of express statutory authority to the contrary, precludes multiyear procurement. We conclude that there is nothing in 10 U.S.C. § 2306(a) (1982) which overcomes that prohibition and constitutes authority for multiyear procurement.

Subsection 2306(a) title 10 reads as follows:

> The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)-(f), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States.

The second sentence of subsection 2306(a) is, in part, a codification of subsection 4(a) of the Armed Services Procurement Act of 1947, Act of February 19, 1948, ch. 65, 62 Stat. 21, 23. The first sentence of subsection 4(a) reads, "Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government." It is apparent from the context of subsection 4(a) that the phrase "any type of contract" refers to the varying ways in which performance and cost may be structured in government contracts. *See generally* FAR Part 16, "Types of Contracts." The legislative history of the 1947 Act supports this interpretation. *See* S. Rep. No. 571, 80th Cong., 1st Sess. 16-18 (1947); H.R. Rep. No. 109, 80th Cong., 1st Sess. 19-20 (1947). An interpretation of 10 U.S.C. § 2306(a) as broad as asserted by DLA would effectively nullify the Anti-deficiency Act and several other fiscal law limitations. We cannot find that the Congress intended such a sweeping result.

Contracting officials at DLA sought and obtained from the Director of DLA "deviations" from the requirements of FAR, § 17.103-1(b)(2), which prohibits multiyear contracts when requirements "exceed a 5-year planned program," and FAR, § 17.204(e), which provides that the "total of the basic and the option periods" in the case of service contracts "shall not exceed 5 years." Neither of these FAR sections, however, addresses or implements statutory restrictions on the obligation of appropriations in advance of availability. No deviations were obtained to FAR sections which do implement those statutory restrictions. *See, e.g.,* FAR, § 17.102-1(a); FAR, § 17.103(1)(b)(1), nor could DLA contracting offi-

cials have obtained such deviations, because no officer of the government has authority to waive these statutory requirements.

Finally, the inclusion in the contract of FAR clause 52.232-19, "Availability of Funds for the Next Fiscal Year," does not permit multiyear contracting. Inclusion of that clause may permit contracting for a single fiscal year in advance of the enactment of a pending appropriations act in certain circumstances. *See, e.g.*, 39 Comp. Gen. 340 (1959). Such a clause, however, does not permit a multiyear procurement using annual funds. 48 Comp. Gen. 497, 501 (1969). We note that in both the *Leiter* case and 42 Comp. Gen. 272 (Wake Island), the contracts found to be impermissible included a "subject to availability" clause. The Antideficiency Act covers not only appropriation obligations recordable in the accounts of an agency, but any other obligation or liability which may arise under a contract and "ultimately require the expenditure of funds." *Id.* at 277.

Accordingly, we recommend that DLA seek specific statutory authority from the Congress to continue this contract beyond the close of the current fiscal year.

B-227682, January 15, 1988

Procurement

Payment/Discharge
■ Utility Services
■■ Payment Procedures
■■■ Administrative Policies
■■■■ Revision

The General Accounting Office has no objection in principle to a General Services Administration (GSA) proposal to combine elements of fast pay procedures and statistical sampling to pay and audit utility invoices, even though payments involved may be larger than normally associated with statistical sampling procedures. However, a valid sampling plan should be carefully designed and documented to provide for effective monitoring, meaningful sampling of all invoices not subject to 100 percent audit, audit emphasis commensurate with the risk to the government, and a basis for the certification of payments. In our opinion, GSA, with appropriate modification to current proposal, could develop a valid statistical sampling plan to meet these requirements.

Matter of: GSA's Post-Payment Examination of Utility Invoices by Statistical Sampling

This advance decision to the General Services Administration (GSA) is in response to a request from Raymond A. Fontaine, GSA Comptroller, requesting our approval under 31 U.S.C. § 3521 (1982), of a change in the procedures GSA employs to estimate and audit utility bills.[1] As will be explained in greater

[1] We note that 31 U.S.C. § 3521(a) provides authority for waiver of agency administrative audit with the consent of the Comptroller General. However, since GSA's submission requests approval of a sampling procedure, we assume its request is for approval of a statistical sampling procedure pursuant to the authority of 31 U.S.C. § 3521(b)-(d).

Continued

detail later in this decision, we have no objection to a proposal by GSA to combine elements of fast pay procedures and statistical sampling techniques to examine utility invoices, even though invoice amounts could exceed the limit established by our standards for using statistical sampling. Furthermore, although we cannot approve GSA's proposed sampling plan at this time since it does not meet the requirements of a valid statistical sampling plan, GSA could meet these requirements by making appropriate modifications to its current proposal.

GSA's Proposal

GSA proposes to improve the techniques employed to achieve "fund control" [2] objectives by revising its process for estimating monthly utility bills in advance (called "accruals" by GSA). GSA also proposes to use sampling procedures in its post-payment audit of utility bills (called "certifications" by GSA). GSA suggests that the proposed changes will be more cost effective than those currently employed without unduly increasing the government's risk exposure by permitting overpayments of utility bills to go unidentified and uncorrected.

Currently, GSA estimates monthly accruals for utility services based upon the most recent monthly payment to vendors. When the later payment is made against that accrual, the outstanding obligation is adjusted to reflect the actual cost of the services received. In addition, GSA's Central Accounts Payable Office currently receives and pays invoices for utility services immediately upon receipt and prior to audit in order to comply with Prompt Payment Act requirements and to avoid any late payment charges. The Central Accounts Payable Office then sends copies of the paid bills to the Public Building Service (PBS) in order for the PBS to conduct the post-payment examination (certification)[3] of the invoice's accuracy. In addition, the Central Accounts Payable Office needs records to assure the post-payment examination (certification) of all invoices.

In any event, subsection (a) was enacted at a time when GAO performed post-payment "account settlement" audits. Since that time, we have come to rely increasingly on agency internal audits for account settlement purposes. Thus, waiver under subsection (a) now would rarely, if ever, be appropriate.

[2] The term "fund control" refers to control over the use and management of appropriations to ensure that (1) funds are used only for authorized purposes, (2) they are economically and efficiently used, (3) obligations and expenditures do not exceed the amounts authorized and available, and (4) the obligation or disbursement of funds is not reserved or otherwise withheld without congressional knowledge and approval. See *GAO, Policy and Procedures Manual for Guidance of Federal Agencies*, tit. 2, app. I, F50.01 (TS 2-24, October 31, 1984).

[3] We note that when GSA speaks of "certification" of invoices in its submission, it is not speaking of certifying a voucher for payment since payment has already been made by the time GSA "certifies" the invoice. Instead, it is speaking of the post-payment examination of the invoice to determine its accuracy.

GSA's certification involves: (1) verifying the actual meter readings against the meter reading on the invoice; (2) comparing the beginning meter readings of the current statement to the ending readings of the previous statement; and (3) verifying the arithmetic accuracy of the invoicing statement. See "Accounting Operations Voucher Examination Payment Handbook," PFM P 4252.1, ch. 13-14. GSA also prescribes that the principal items that should be reviewed when checking bills include meter reading, dial indication, the use of multipliers, the demand rate, the calculations of the applicable rates used, power factor penalties, fuel adjustment charges, and environmental adjustment charges. The electric meter should be checked for accuracy in accordance with the frequency established by local regulations or whenever the meter appears to be malfunctioning. See PBS P 5800.35, ch. 6-7e and f. Inherent in this process is the ability to identify and apply the proper utility tariff to the government, and to determine whether the utility is collecting any taxes (or surcharges) levied on customers but from which the United States may be immune.

Thus, under the current system, it appears that GSA contemplates a 100 percent post-examination of the accuracy of paid invoices.

GSA points out in its submission that the current method of estimating utility costs based on the most recent payment causes difficulties, given the significant seasonal fluctuations inherent in utility services. Thus, fund control is significantly weakened due to the inability to make accurate projections. GSA is also concerned that the current process of post-payment examination requires a significant amount of clerical labor. To address these concerns, GSA has proposed a new procedure which interrelates the method of estimating utility costs with the method of examining paid invoices for utility services.

GSA proposes to establish monthly estimates that are derived from historical data accumulated over the last 2 years in conjunction with estimates of current usage. The estimates therefore should provide for expected seasonal fluctuations. GSA indicates that the PBS will be able to make cost projections that very closely approximate actual costs since utility charges are based on fixed rate schedules. In view of this expected accuracy in estimating costs, it is expected that post-payment audit of all utility bills will no longer be necessary.

Instead of a 100 percent post-payment audit of paid utility invoices, GSA would only audit those invoices which exceed GSA's estimates of utility costs for the corresponding month. While all invoices would still be directed to the PBS for review and analysis for improprieties, no further post-payment examination would be required of invoices which do not exceed the accrued estimates.

In addition, GSA proposes internal controls to prevent recurring overstatements of accrual estimates by means of a monthly sampling of 1 percent of payments for the prior 3 months to the vendors on record. GSA proposes to examine all payments made over the last 3 months to the vendors sampled in order to determine if GSA's estimates of monthly costs based on historical vendor billings exceed invoice payments actually made. If, in any case, historical billings exceed payments by 15 percent, PBS will be notified to make appropriate adjustments to its records and a recalculation of the future accrual estimates will be requested.

In effect, under the GSA proposal, the requirement for PBS to perform post-payment examinations of paid utility invoices in addition to the 1 percent sample described above will be dispensed with except in those cases where the vendor's bill exceeds GSA's estimate.

GSA states in this connection:

> In effect, PBS will be pre-certifying utility payments for the amount of the accrual. We feel that this is acceptable given the nature of utility services. As mentioned above, PBS is able to forecast utility costs per month with a high degree of accuracy. Utility services are an essential and recurring element of services provided to the Federal Government by PBS. The vendors involved are generally sole providers of these services in their localities, operating under Federal and/or state regulatory bodies. This environment promotes stability and security to both vendor and customer. Formal contracts are generally not required, as rate schedules act as informal contracts. As utility services are recurring in nature, GSA can readily adjust future payments for inequities in past billings.

Inherent in the certification of invoices for utility services is the relative inability of PBS to verify the meter readings cited on an invoice with any precision. As utility companies, in most cases, are unable to inform their customers concerning the exact time that a meter will be read, we are forced to certify invoices as long as the readings cited fall within a range consistent with those taken by PBS building managers. While this method is not precise, significant errors in the misreading of meters will be detected and overcharges recouped against future month's payments.

The detection of significant billing errors would not be affected by the proposed certification method, as copies of all invoices paid will continue to be provided to PBS for their internal verification and analysis. Where errors in the meter readings are not discovered due to their insignificance, under or overpayments made in a current month tend to be recouped, as the inverse should be true in the following month.

Analysis

1. Preaudit vs. Postaudit

Generally, the preaudit of vouchers is required by audit standards set forth in the *GAO Policy and Procedures Manual for Guidance of Federal Agencies*, tit. 7, § 20.2 (TS 7-41, January 18, 1985). The preaudit is deemed necessary in order to protect the financial interests of the government. Exceptions to the preaudit requirement are allowed, for example, in order to permit agencies to take advantage of prompt payment discounts or to effect other economies (including the avoiding of late payment charges or interest under the contract or under laws such as the Prompt Payment Act).[4]

The common thread supporting these exceptions is that savings to be achieved by procedures which dispense with the preaudit requirement will exceed any losses from overpayments which would have been prevented by preaudit. Generally, the situations involve a large number of recurring transactions with known reputable vendors. In these situations, post-payment audit of invoices and, when necessary, adjustment of overpayments against future billings, minimize the government's risk of loss. In the past, post-payment audits have been used when the individual transactions involved, while numerous, were relatively small in dollar amounts. Admittedly, some utility billings may be large. However, we do not believe the amount of the transactions involved alters the acceptable nature of the fast pay procedure when an ongoing relationship with reputable vendors is present and thus offers the same opportunity for adjustment of overpayments discovered during post-payment audits. In this regard, while the amount of individual payments is larger, the impact of the fast pay procedures in effecting economies is also larger since the prompt payment discounts taken advantage of, and any late payment charges avoided, are also larger. Thus, the fact that many monthly utility bills can be relatively large in dollar amount should not preclude the use of fast pay procedures in appropriate circumstances.

[4] See, for example, *Payment of Goods in Advance of Notification of Receipt*, 60 Comp. Gen. 602 (1981); *VA Centralized Accounting Local Management Systems*, B-205868, June 14, 1982, and decisions cited therein.

However, GAO's approval of fast pay procedures in the past has been based on the assumption that agencies would conduct post-payment audits involving 100 percent of the billings in order to identify potential overcharges and to permit recovery by adjustments to future billings.[5]

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2. Statistical Sampling

Section 3521 of title 31 authorizes the head of an agency to prescribe statistical sampling procedures to audit agency vouchers when the head of the agency decides that economies will result. Any disbursing or certifying official relying in good faith on the statistical sampling procedure adopted by the agency to disburse funds or certify a voucher for payment may not be held liable for any loss to the government resulting from a payment or certification of a voucher not audited specifically because of the use of the statistical sampling procedure.[6]

The law authorizes the Comptroller General to prescribe the maximum amount of the voucher that may be audited under the statistical sampling procedure and to evaluate the effectiveness of these procedures as part of GAO's accounting system review. Statistical sampling is currently authorized for vouchers not in excess of $1,000 and is required to conform to the requirements of title 3 of the *GAO Policy and Procedures Manual for Guidance of Federal Agencies.*[7]

We have no objection to authorizing, in appropriate circumstances, GSA's use of a statistical sampling technique for auditing vouchers in excess of the $1,000 currently authorized, if the economic benefit to the government exceeds the risk of loss to the government as a result of using the proposed system. GSA's proposal would require a waiver of any ceiling on the amount of the transactions subject to sampling since the amount of some invoices exceed $1,000.

We note that GSA's proposal involves the use of post-payment examinations. While, as we indicated earlier, one of the grounds for approving fast pay procedures over the years has been the assumption that 100 percent post-payment audits would be employed as a means of protecting the government's interests, we concur in the view that the government's interests may also be adequately protected in a fast pay environment by using statistical sampling.[8] Inherent in the congressional authorization for agencies to use statistical sampling is the recognition that 100 percent audits are not always necessary to protect the government's interests. Similarly, inherent in our authorization of agencies' use of fast pay procedures is recognition of the fact that preaudits of vouchers are not

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[5] While we have approved the use of statistical sampling to review aspects of fast pay procedures to assure that they are being adequately implemented, we have not expressly authorized its use in post-payment audits. See decisions cited in footnote no. 4, *supra.*

[6] 31 U.S.C. § 3521(b)-(d) was enacted in response to a ruling by the Comptroller General that *in the absence of statutory authority,* reliance upon a statistical sampling plan for the internal examination of vouchers prior to certification for payment would not operate to relieve a certifying official from liability under 31 U.S.C. § 3528 (1982) (formerly 31 U.S.C. § 82c). 43 Comp. Gen. 36 (1963).

[7] 7 GAO-PPM § 19.4. (TS 7-41 Jan. 18, 1985).

[8] Statistical sampling in the traditional sense contemplated by 31 U.S.C. § 3521 is a method for examining vouchers prior to certification for payment. *GAO Policy and Procedures Manual for Guidance of Federal Agencies,* tit. 3, § 42.

always necessary to protect the government's interests. We see no reason why these two techniques cannot be combined in appropriate circumstances if they result in economies and adequately protect the interests of the government.

However, while we have no objection to these aspects (fast pay coupled with statistical sampling) of GSA's plan, other aspects of GSA's proposal do not meet the requirements of a valid statistical sampling plan[9] and thus preclude our approving the plan at this time. However, in our opinion GSA could meet these requirements by making appropriate modifications to its current proposal.

Generally, when statistical sampling is properly employed, the sample taken should give a picture of 100 percent of the universe covered by the sample without having to review 100 percent of the universe. Based upon the information disclosed by the sample, one then has a basis for drawing conclusions about the status of the universe sampled within identified limits, and can make decisions based upon these conclusions. While the sample universe may be stratified (subuniverse) and each strata submitted to a different sample necessitated by the special conditions of that strata, the sample taken must be adequate to disclose the condition of that strata to permit reliable decisions within recognized limits for errors concerning that strata. Generally, the risk of loss incurred by the government because it has not audited each voucher is offset by the cost savings affected by using the statistical sampling technique.[10] GSA proposes (1) to audit any bill which exceeds the monthly estimate and (2) to sample monthly 1 percent of the vendors of record.

In the first situation, a 100 percent audit is contemplated and thus statistical sampling is not involved. In the second situation, the review seeks only to determine if GSA's estimate exceeds invoices for a 3-month period by more than 15 percent in order to adjust *GSA's estimates.*[11] However, this review ignores the fundamental question of whether the invoices themselves are accurate. Thus, the proposal does not disclose the condition of the universe sampled for the purpose of determining the accuracy of the paid invoices (within some tolerable limit) or to provide a basis for GSA to determine whether to take additional steps, including expanding the sample (when the limit is exceeded) and recovering any overpayments identified.[12]

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[9] Current requirements are found in 3 GAO-PPM, Ch. 5, Secs. 45-51.

[10] GSA has not identified the specific savings it feels will be effected through use of the post-payment invoice examination system it proposes to employ. This is fundamental to assessing the propriety of any statistical sampling technique. As we point out in 3 GAO-PPM Sec. 49:

. . . statistical sampling should be applied when a reduction in current auditing costs is attainable. The measure of savings is the difference between the cost of examining all the vouchers and the costs of the sample examination *plus* the amount of the undetected errors in the vouchers not examined.

While GSA has claimed savings it has not specifically identified where these savings are effected (other than a reduction in the number of invoice copies generated for audit purposes) and in what amounts. Furthermore, it has provided nothing regarding potential losses resulting from implementation of the proposed system.

[11] GSA has indicated that invoices below the estimates will be provided to PBS for internal verification and analysis although no further certification examination for accuracy will be required. We have been informally advised that these invoices will be used by PBS to review utility consumption within buildings and to review utility rates for management purposes.

[12] We note that even if the vendors are audited once every 8 years and 4 months (based upon the proposed 1 percent per month sampling of vendors), GSA proposes taking no action if the estimates are less than 15 percent

Continued

While GSA's estimates (if properly supported by identifiable data and periodically tested for accuracy) of billings might serve as a starting point for determining the size of the sample for invoices falling above or below the estimates, it cannot serve as a basis for *forgoing the invoice examination altogether* since the status of unreviewed invoices will be totally unknown. While the rate of error may vary between invoices above GSA's estimate and invoices below GSA's estimate, we are not persuaded that errors will not exist in the invoices falling below GSA's estimate, an assumption inherent in GSA's proposal. Furthermore, the more appropriate unit for sampling would appear to be the invoice rather than the vendor since some vendors provide more than one utility service, and the variation among vendors' billings from month to month could be large. These differences could result in the same amount of resources being allocated to a review of vendors involving larger dollar billings and those involving smaller dollar billings. Also the tendency of some vendors towards inaccuracy might necessitate that GSA stratify its sample based upon regions in order to allocate more attention and resources to those areas shown to be unreliable when developing or maintaining the sample.

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3. Matters for Consideration by GSA

We are of the opinion that the concept of limiting risk by means of specific invoice strata and categories, as has been done in existing statistical sampling programs, could be incorporated into a statistical sampling plan for GSA's utility payments. The specifics of such a plan would have to be developed by GSA. However, such a plan should provide audit emphasis commensurate with the risk to the government; and, pursuant to 31 U.S.C. § 3521(b), it would need to provide for some meaningful sampling of *all invoices not subjected to 100 percent audit.* It must also provide a reliable and defensible basis for the certification of payments.

It seems evident that any useful plan will require a departure from the dollar limitations currently observed for statistical sampling procedures. Analysis of audit data may identify higher dollar thresholds for particular types of invoices below which statistical sampling would be appropriate. If so, this analysis could be the basis for an exception to the $1,000 limitation.

An alternative might be to combine sampling techniques with the ability described in GSA's submission to accurately estimate utility invoices. The estimated billings might be the basis for establishing appropriate strata, which would then be subjected to specific sampling criteria. These strata and these criteria could be modified as experience dictates, and in fact, could vary according to the nature and extent of problems experienced in different regions, with different utility companies, with various rate structures, and so forth. As an example, the plan might require (1) 100 percent audit of invoices that exceed estimates by

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above its invoices for the last 3 months. Aside from the fact that a 14 percent margin of error appears rather high in view of the fact that GSA has assured us that it will be capable of making very accurate estimates, this could result in erroneous payments to vendors going undetected for very long periods of time unless the vendor during some month submits a bill for more than GSA's estimate.

some tolerance limit, such as 5 percent; (2) relatively light, but statistically meaningful, sampling of all vouchers that fall below such a tolerance limit; and (3) even lighter, but still statistically meaningful, sampling of vouchers that approximate the estimates, that is, that are within the established tolerance range. All audit results should be captured and analyzed in a way that reaffirms the reliability of, or identifies and corrects problems with, the audit approach or the estimating procedures.

We believe that such approaches, if carefully designed and documented (including provisions for effective monitoring) could result in a valid statistical sampling program under the authority of 31 U.S.C. § 3521(b), and we would be pleased to further consider such a proposal.

B-229065, January 15, 1988

Procurement

Sealed Bidding
■ Invitations for Bids
■ ■ Competition Rights
■ ■ ■ Contractors
■ ■ ■ ■ Exclusion

Under Competition in Contracting Act of 1984, agency is required to make a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials. Because the agency's effort to comply with those requirements was flawed in that the agency failed to solicit an incumbent and therefore it received only one bid on many of the line items solicited, the General Accounting Office recommends that the agency resolicit those line items under which single bids were received.

Matter of: Abel Converting Company

Abel Converting Company, an incumbent contractor, protests its exclusion from bidding under invitation for bids (IFB) No. 7PRT-53157/K3/75B, issued by the General Services Administration (GSA) on July 27, 1987. The IFB requested bids for 33 line items of paper towel products.

We sustain the protest.

The protester has been an active bidder for these items since 1985. Abel states that in late 1984 or early 1985, and again in mid-1986, it submitted applications to GSA to be included on its Automated Bidders Mailing List. Despite GSA's inability to locate evidence of these requests, Abel states that it regularly received solicitation packages through June 1987. Abel states that it submitted eight to ten bids and two "no bids" in response to these solicitations. Abel is the current contractor for many of the items which are the subject of the protested solicitation.

The instant procurement was synopsized in the *Commerce Business Daily* (CBD) on June 8, approximately 6 months prior to the expiration of Abel's current

contract. It announced a preinvitation notice date of "on or about" June 5, an issuance date of "on or about" July 1, and an opening date of "on or about" August 3. In fact, issuance occurred on June 27 and bids were opened August 28—with more than 5 months remaining on Abel's contract. Abel was not sent a solicitation, and GSA admits that the protester was neither on the automated list nor the contracting activity's "local" mailing list for 1987.

GSA argues that, although it inadvertently omitted sending Abel a copy of the solicitation, the procurement should not be disturbed because the agency in fact obtained full and open competition. The agency states that Abel had constructive knowledge of the procurement because of the CBD notice and should have protected its interests by requesting a copy of the solicitation.[1] In this regard, GSA maintains that it made a significant effort to obtain competition by publishing the CBD notice and by sending copies of the solicitation to 85 potential offerors. As a result the agency points out that it received six bids in response to the solicitation: a minimum of two bids on 19 of the solicitation items and a single bid on the remaining 14 items. Although it has yet to make award, the agency considers all the prices received reasonable as they are close to those bid under the solicitation which resulted in the current contract. Hence, GSA concludes that it satisfied its obligation to obtain full and open competition by making a good faith effort to solicit offerors and by, in fact, obtaining reasonable prices.

Under the Competition in Contracting Act (CICA) of 1984, agencies are required, when procuring property or services, to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." *Id.* §§ 259(c) and 403(7). The term has been further explained in the legislative history of CICA as meaning "all qualified vendors are allowed and encouraged to submit offers . . . and a sufficient number of offers is received to ensure that the government's requirements are filled at the lowest possible cost." H.R. Rep. No. 98-1157, 98th Cong., 2d Sess. 17 (1984). Accordingly, we give careful scrutiny to an allegation that a firm has not been provided an opportunity to compete for a particular contract. *Keener Mfg. Co.*, B-225435, Feb. 24, 1987, 87-1 CPD ¶ 208. In this regard, we will consider that the agency has met its obligation if it can show that it made a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials and it obtains reasonable prices. *Id.; Packaging Corp. of America,* B-225823, July 20, 1987, 87-2 CPD ¶ 65.

[1] GSA argues that the protest is untimely because Abel was on constructive notice of the CBD announcement and its contents at the time the notice was published in June and did not protest prior to bid opening. Our rules require protests of patent IFB defects to be filed prior to bid opening. *See* 4 C.F.R. § 21.2(a)(1) (1987). However, the issue here is not whether the IFB was defective, but whether the agency improperly failed to send the protester a copy of the solicitation. Such an issue need be protested not prior to bid opening, but, under 4 C.F.R. § 21.2(a)(2), within 10 days of when the protester knows of this basis for protest. *See Aluminum Co. of America,* B-227139, July 21, 1987, 87-2 CPD ¶ 72. Indeed, GSA itself has recognized the applicability of the 10-day rule to the type of issue raised here. *See Packaging Corp. of America,* B-225823, July 20, 1987, 87-2 CPD ¶ 65. Under the timeliness rule applied in the two cited cases, the protest here is timely.

Whether an agency's efforts in this regard are sufficient in light of the applicable statutory and regulatory requirements depends upon the facts and circumstances of each case. Significant deficiencies on the part of the agency that contribute to a firm's failure to receive a solicitation will result in our sustaining a protest. We have recognized, however, that a firm's failure to receive solicitation materials will not always warrant disturbing the procurement. *See NRC Data Systems,* 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84, where we held that when the agency receives a sufficient number of offers, an agency's failure to solicit an incumbent under circumstances indicating that the agency's mistake was inadvertent does not violate CICA.

We think the circumstances of this case warrant sustaining the protest. First, the agency did not comply with the regulatory requirements concerning the mailing of solicitations to prospective bidders. The Federal Acquisition Regulation (FAR) provides that solicitation mailing lists are to be maintained by contracting activities, that the lists are to include those considered capable of filling agency requirements, and that solicitations normally are to be sent to those on the lists. FAR, 48 C.F.R. §§ 14.203-1, 14.205-1 (1986). Although the FAR permits agencies to rotate the names on a list so that not all those on an excessively lengthy list need be solicited for every procurement, the regulation clearly provides that when agencies rotate names they must solicit the "previously successful bidder." 48 C.F.R. § 14.205-4(b). From this, we think it is apparent that contracting agencies are expected to solicit their satisfactorily-performing incumbent contractors; in fact, we, the courts, and the General Services Administration Board of Contract Appeals have recognized that in light of these requirements the incumbent normally should expect to be solicited. *See Trans World Maintenance, Inc.,* 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; *Packaging Corp. of America, supra; U.S. v. The Thorson Co.,* 806 F.2d 1061 (Fed. Cir. 1986).

Second, unlike cases such as *NRC Data Systems, supra,* where adequate competition was obtained, here GSA received only one bid for many of the items solicited. Thus, although Abel may have been on constructive notice of the procurement through the CBD notice, under the circumstances it appears that GSA's failure to solicit the protester contributed to the agency's failure to obtain full and open competition so as to assure itself of reasonable prices for all of the items.

Accordingly, since GSA has received multiple bids for 19 of the line items, we are recommending that GSA cancel the solicitation only as to the 14 items for which it received a single bid and resolicit those requirements using full and open competitive procedures. Since our sustaining the protest furthers the purpose of the statutory requirement for full and open competition, Abel should be reimbursed the costs of filing and pursuing this protest. *Packaging Corp. of America,* B-225823, *supra.* Abel should submit its claim for such costs directly to the contracting agency. Bid Protest Regulations, 4 C.F.R. § 21.6(f) (1987).

The protest is sustained.

B-228516, January 21, 1988

Procurement

Sealed Bidding

■ Invitations for Bids

■■ Amendments

■■■ Notification

A bidder bears the risk of not receiving invitation for bids amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing, or the agency inadvertently failed to furnish the amendment where the bidder availed itself of every reasonable opportunity to obtain the amendment.

Matter of: Southern Technologies, Inc.

Southern Technologies, Inc., protests the award of contract No. DAAA22-87-C-0245 to the second low bidder, Frank Lill & Sons, Inc., in response to invitation for bids (IFB) No. DAAA22-87-B-0140 issued by the Watervliet Arsenal, United States Army. The IFB, issued on April 20, 1987, was for the replacement of steam turbine drives with electric motor drives, forced draft fans, and the installation of an oil burner. Southern's protest is based upon alleged nonreceipt of amendment No. 0003 to the IFB, by Southern and several other bidders. Southern asserts that "the government did not make a conscious and deliberate effort to insure that the majority of bidders received that amendment and therefore restricted competition." We deny the protest.

A series of three amendments to the solicitation were issued by the Army to all offerors on the bidders list. Amendment No. 0001, dated May 5, 1987, incorporated a new wage determination. Amendment No. 0002, dated June 1, 1987, extended the bid opening to June 22, 1987, pending a technical review of the specifications to remove restrictive portions as claimed by another firm. Amendment No. 0003, dated July 9, 1987, incorporated changes to the specifications based on the above review and extended the bid opening date to July 24, 1987. In addition, amendment No. 0003 extended the performance time on this project from 90 to 180 calendar days based on a request from Southern dated May 13, 1987. Southern, the low bidder at $259,000, acknowledged only amendment No. 0002. Frank Lill & Sons, Inc., the second low bidder at $278,569, acknowledged all three amendments.

On the day of bid opening, July 24, 1987, 15 minutes before bids were opened, the president of Southern called the contracting officer to request a copy of amendment No. 0003. Southern indicated that it had not received the third amendment by mail, nor had the amendment which the agency also sent by telex (dated June 18, 1987), been received because the firm does not have a telex machine. In the contracting officer's report, he states that if a firm does not have a telex or facsimile machine, the message is sent to the Commercial Refile Center of the Army which calls the firm and follows up with a mailgram. If a message is undeliverable, the originating office is notified. No such notification was received by the contracting officer in this case.

The president of Southern also stated in his July 24, 1987, telephone conversation with the contracting officer that he had just received amendment No. 0001, although it had been issued May 5, 1987. However, amendment No. 0001 did not make any changes to the wage determination which were material to the solicitation, and thus failure to acknowledge it would not have provided a basis for rejecting the bid.

The contracting officer advised Southern on that date (July 24) that it was too late to mail another copy of amendment No. 0003 and that bid opening would proceed as scheduled. Southern filed a protest with the Army on September 30, 1987.

The Army maintains that Southern was mailed a copy of amendment No. 0003 in the same manner as it furnished other documents which the firm did receive, including amendment Nos. 0001 (which Southern claims it received late) and 0002. From the record, it appears that three of the four other bidders received amendment No. 0003 (Frank Lill & Sons, Inc.; American Boiler, Tank and Welding Co.; and Praught Construction Corp.), and the former two firms acknowledged all three amendments in their bids. The remaining bidder, Combustion Equipment, was sent the three amendments by mail to the same address as was the solicitation. Amendment No. 0003 was returned as undeliverable due to insufficient address; however, the solicitation and the other two amendments mailed to Combustion Equipment were not returned.

It is well-established that a bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing, *TCA Reservations, Inc.,* B-218615, Aug. 13, 1985, 85-2 CPD ¶ 163, or the agency failed to furnish the amendment inadvertently where the bidder availed itself of every reasonable opportunity to obtain the amendment. *Catamount Construction, Inc.,* B-225498, Apr. 3, 1987, 87-1 CPD ¶ 374. We find no evidence of an attempt by the Army to deliberately exclude certain bidders from the competition. It appears that three of the five bidders that responded to the IFB actually received the third amendment, two of the five acknowledged all three amendments, and reasonable prices and adequate competition were obtained in the subject procurement. Moreover, other than the telephone call to the contracting officer just prior to bid opening, there is nothing to suggest that the contracting officer had any notice that Southern had not received amendment No. 0003. In summary, we believe that the record establishes that the Army issued and mailed amendment No. 0003 in sufficient time to allow all offerors to respond, and therefore met its obligation. *See Maintenance Pace Setters, Inc.,* B-212757, Jan. 23, 1984, 84-1 CPD ¶ 98.

Southern nonetheless asserts that even though the amendment may have been delivered to the Postal Service, it nonetheless remained in the possession of the government because the Postal Service failed to deliver it. However, the "government" for this purpose is not the Postal Service; rather the word "government" refers only to the contracting activity. *Cf. Minority Business Enterprises, Inc.,* B-211836, May 31, 1983, 83-1 CPD ¶ 583.

Lastly, we note that Southern does not dispute that its failure to acknowledge amendment No. 0003 was proper cause for rejection of its bid. A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. *Tri-S Inc.*, B-226793.2, June 26, 1987, 87-1 CPD ¶ 634. In this case, the amendment at issue was material because it amended the specifications and doubled the performance period of the project from 90 calendar days to 180 calendar days.

The protest is denied.

B-228419, January 22, 1988

Procurement

Socio-Economic Policies

■ Preferred Products/Services

■■ American Indians

Bureau of Indian Affairs' determination that a firm meets eligibility criteria—100 percent Indian ownership and control—for responding to Buy Indian Act procurement is not objectionable where agency reasonably finds that an Indian was the sole stockholder, director, officer, and manager of the corporation.

Matter of: White Buffalo Construction, Inc.

White Buffalo Construction, Inc. protests the award of a contract to Blaze Construction, Inc. under invitation for bids (IFB) No. R87-10, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for road construction on the Tulalip Indian Reservation in Washington.

We deny the protest.

The solicitation was issued as a total set-aside for small business economic enterprises certified as 100 percent owned and controlled by Indians/Alaska Natives. Three bids were received in response to the solicitation, including the low bid submitted by Blaze. Shortly after the August 28, 1987 bid opening, White Buffalo, the second low bidder, protested to the contracting officer, alleging that any award to Blaze would be improper because that firm was neither Indian owned and controlled nor a small business. After the contracting officer denied its protest and the Small Business Administration (SBA) found Blaze to be a small business concern, White Buffalo filed this protest with our Office.

White Buffalo contends that Blaze "may be affiliated" with companies controlled by a non-Indian, asserting that there is "reason to believe" that such companies provided Blaze with bonds, financing and expertise.

The solicitation was set aside for 100 percent Indian owned and controlled enterprises pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1982), which provides that:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior.

The Secretary of the Interior, acting through the BIA Commissioner, has broad discretionary authority to implement this statute; defining the criteria a firm must meet to qualify as an Indian enterprise, and the quantum of evidence required to establish compliance with the established criteria, falls within that broad discretion. Accordingly, we will disturb such decisions only where they are shown to be arbitrary, unreasonable or in violation of law or regulation. *Interstate Brands Corp.*, B-225550, Mar. 3, 1987, 87-1 CPD ¶ 242. White Buffalo has not made such a showing here.

Pursuant to BIA policy, firms eligible to compete under Buy Indian set-asides must be not only Indian owned, they must also be Indian controlled as evidenced by active Indian participation in the business such that would tend to increase Indian self-sufficiency. In May 1985, Blaze was certified by BIA, for a period of 3 years, as a 100 percent Buy Indian firm on the basis that the only stockholder, member of the board of directors, officer, and manager of the corporation was William Aubrey, a Blackfoot Indian. In August 1987, personnel from BIA and the Department's Office of Inspector General conducted an onsite preaward survey of Blaze in connection with three other road construction projects. The survey team, which subsequently recommended award, reported that: (1) Mr. Aubrey was the owner, president, and sole member of the board of directors; (2) payroll records had been examined and employees interviewed so as to verify the size of Blaze's workforce; (3) Blaze had access to necessary heavy equipment; and (4) based upon a review of its original bid worksheets for the three projects, Blaze planned to perform virtually all of the work with its own workforce. Finding that Mr. Aubrey was the sole stockholder, director, officer and manager of Blaze, the contracting officer for the solicitation at issue here concluded that Blaze qualified as a 100 percent Indian owned and controlled enterprise.[1]

White Buffalo has failed to demonstrate either that BIA's factual conclusions were unreasonable or that the agency's interpretation and application of the requirements for qualification under the Buy Indian Act were unsound.

The protest is denied.

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[1] Likewise, in responding to the size determination protest of White Buffalo, SBA's Assistant Regional Administrator for Minority Enterprise and Procurement Assistance determined that Blaze was under the ownership and control of Mr. Aubrey. Although White Buffalo appealed this determination to SBA's Office of Hearings and Appeals, the appeal was denied.

Procurement

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

Bidder's failure to acknowledge invitation for bids (IFB) amendment changing the line items under which costs for different parts were to be included but not changing the requirement to supply parts for radio repair services and requiring bidders to use manufacturer-approved replacement parts and testing equipment for the maintenance and repair of a particular type of radio equipment may be waived since these provisions merely clarified already existing requirements in the solicitation's performance work statement and bidding schedule and thus had no material effect on the procurement.

Matter of: Adak Communications Systems, Inc.

Adak Communications Systems, Inc., protests the rejection of its low bid under invitation for bids (IFB) No. F07603-87-B0004, issued by Dover Air Force Base, Delaware, for the maintenance and repair of land mobile radios for a base year and 2 option years. Adak's bid, which was $254,620.20 for all 3 years, was rejected as nonresponsive due to its failure to acknowledge a solicitation amendment. The Air Force intends to make award to the next low bidder, Motorola at $298,725.

We sustain the protest.

The IFB as originally issued contained a Statement of Work (SOW) and a 103-page bid schedule which required separate unit prices for each piece of equipment to be maintained or repaired as well as for engineering services, nonrecurring services, and other items. The schedule also provided that the contractor would be reimbursed for direct materials (parts) required in the performance of the contract's nonrecurring services in an amount not to exceed $5,000. Subsequently, IFB amendment 0002 was issued which substituted a Performance Work Statement (PWS) for the SOW. The amendment also deleted the original bid schedule and substituted a new schedule which contained only two line items for each of the 3 years. The first line item, 0001AA,[1] provided for the insertion of a price for all the maintenance and repair work required by the PWS. The second line item, 0001AB, provided that the contractor must supply "all direct materials [parts] required in the performance of the contract" and that the contractor will be reimbursed for those materials in an amount up to $5,000. There is no provision for the insertion of a price under this line item and the $5,000 was to be added to the bidder's price for item 0001AA to determine the evaluated bid price. A list of the equipment to be repaired or maintained was included as an attachment to the PWS.

[1] Each of the two options contained corresponding line items, 0002AA, 0002AB, 0003AA and 0003AB.

The agency then determined that clarification was needed and issued amendment 0003. That amendment provided that the price in line item 0001AA should include all parts needed for preventive maintenance and repairs and that line item 0001AB was for reimbursement for batteries and parts that needed to be replaced due to physical abuse and acts of God. The amendment also incorporated an addendum which required bidders to have the manufacturer's testing equipment and manufacturer-approved replacement parts for repair of Digital Encryption Standard (DES) radio equipment.

Adak admits that it failed to acknowledge amendment 0003,[2] but argues that its bid should have been accepted because that amendment merely clarified what was already in the solicitation as modified by amendment 0002.

The agency responds that the amendment was material because it made the contractor responsible for the costs of parts used in preventive maintenance and repairs covered by item 0001AA and required the contractor to incorporate that cost in its price for the item. The agency estimates that the cost of those parts is about $10,500 per year and notes that while Adak bid $78,873 for the unamended item 0001AA, Motorola, which acknowledged the amendment, bid $90,000 for the same item. In view of this disparity, the agency is concerned that Adak may not have been aware that under the amended schedule it could only be reimbursed for a limited number of the parts that it used (batteries and replacements for abused parts) under item 0001AB. From this the agency concludes that the amendment could have had a $10,500 impact on Adak's price for the base year (and presumably a similar impact on the prices for the 2 option years) and therefore is not trivial and could not be waived.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. *Maintenance Pace Setters, Inc.*, B-213595, Apr. 23, 1984, 84-1 CPD ¶ 457. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. *See* Federal Acquisition Regulation, 48 C.F.R. § 14.405 (1986). An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the solicitation as it existed prior to the particular amendment was issued as, for example, where it merely clarifies an existing requirement. *Tri-S, Inc.*, B-226793.2, June 26, 1987, 87-1 CPD ¶ 634.

We do not believe that the portion of amendment 0003 concerning the bid schedule made any material changes in the solicitation's legal requirements. The amendment did not change in any way the underlying obligation of the contractor to provide the parts needed to perform the maintenance and repair work described by line item 0001AA. The amendment merely changed the extent to which the government would reimburse the contractor for parts used in doing the work under line item 0001AB.

[2] The protester did acknowledge both amendments 0001 and 0002.

The amendment does, however, change the type of parts for which the contractor is to be reimbursed under item 0001AB. Before amendment 0003, the contractor would be reimbursed up to $5,000 for all the parts it needed. Under the amended schedule only the cost of batteries and replacement parts for abused components could be reimbursed under that line item. The cost for all other parts needed for maintenance and repair work had to be included in the price for line item 0001AA.

Nevertheless, it seems to us that considering the solicitation's ceiling on reimbursements the maximum amount by which Adak could possibly benefit by bidding under the preamendment schedule would be $5,000 for each of the 3 years, or $15,000. Adak's total bid for the 3 years was approximately $44,000 lower than the awardee's bid. The agency has not contended that the amended schedule altered its legal relationship with the contractor to the agency's advantage. Further, since whatever pecuniary advantage that Adak might gain (none is clear) is limited to $15,000 if the options are exercised, an amount which would still leave Adak the low bidder by a considerable amount, we conclude that this portion of the amendment did not have a material impact on the procurement.

Amendment 0003 also, however, required the inclusion in the PWS of an additional clause concerning DES equipment maintenance. That clause stated that only replacement parts approved by the original manufacturer may be used in the repair and maintenance of DES equipment and that the contractor must use the manufacturer's documentation and required test equipment and perform maintenance to the manufacturer's specifications. The agency contends that this clause "imposed on bidders additional obligations" but offers no further explanation. While the PWS does not specifically refer to DES equipment, it provides at section C-5 that "[o]nly original manufacturer's parts shall be used," and that the "equipment shall be maintained . . . in accordance with the applicable manufacturer's specifications." We think that this requirement substantially duplicates the material to be included by the DES clause in amendment 0003. In the absence of any explanation from the agency as to exactly what this clause adds to the solicitation requirements, we conclude that it was merely a clarification of the requirements already in the solicitation.

Based on the above, we believe that amendment 0003 did not impose any additional material legal requirements on the bidder and thus Adak's failure to acknowledge the amendment should have been waived as a minor informality. *B&T International, Inc.,* B-224284, Dec. 8, 1986, 86-2 CPD ¶ 654. Consequently, we are recommending that the award be made to Adak if otherwise appropriate.

Adak is not entitled to the costs of filing and pursuing its protest in view of our recommendation that Adak be awarded the contract and assuming it actually receives the award. *Baurenovierungsgesellschaft, m.b.H.,* B-220809.2 *et al.,* Aug. 5, 1986, 65 Comp. Gen. 778 86-2 CPD ¶ 145. *See* Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987).

The protest is sustained.

B-227708, January 29, 1988

Procurement

Payment/Discharge

■ Shipment

■■ Carrier Liability

■■■ Burden of Proof

Claim for damage to household goods not noted at time of delivery can be substantiated by subsequent timely notification to the carrier of additional damage. While the memorandum of understanding between the household goods moving industry and the military services prescribes a standardized method for reporting and processing claims, the failure of the installation claims office to send the carrier a specified form listing additional damage does not relieve the carrier of liability when the demand on the carrier and supporting documentation, which in substance fully notified the carrier of the damage, is furnished the carrier within the agreed upon 75 days of delivery.

Matter of: Sherwood Van Lines—Loss and Damage to Household Goods—Notice of Damage

This decision concerns a household goods loss and damage case against Sherwood Van Lines (Sherwood) in the amount of $321.99. Sherwood has denied liability for all damages except $21. The Air Force requested setoff of the entire amount, and Sherwood seeks a refund of $300.99. The liability for damages arises from the shipment of household goods belonging to Master Sergeant Allen Wesley, USAF, which were shipped under Government Bill of Lading DP-189,600, dated June 7, 1985. For the reasons stated hereafter, we deny Sherwood's claim for refund.

Background

The record shows that Sherwood accepted the shipment of household goods on June 11, 1985, in the condition noted on the inventory prepared by its agent. The shipment moved from North Highlands, California, to Myrtle Beach Air Force Base, South Carolina, where it was delivered on October 4, 1985. Upon delivery, DD Form 1840, Joint Statement Of Loss Or Damage At Delivery, was filled out by the carrier's agent and Sergeant Wesley listing damages. Also, Sergeant Wesley noted the same damages on DD Form 619-1, under the section titled Consignee's Statement of Delivery and Loss or Damage. Subsequent to delivery, additional damage to the household goods was found and listed on the DD Form 1840R, Notice of Loss or Damage (the reverse side of the DD Form 1840), and the completed form was provided to the Myrtle Beach Air Force Base claims office. On November 19, 1985, the 46th day after delivery, Sherwood was sent DD Form 1843, Demand on Carrier, and DD Form 1844, Schedule of Property and Claim Analysis Chart. DD Form 1844 itemized the loss and damage to the household goods in detail, including those items for which an exception was taken at delivery, as well as the additional items not noted at time of delivery. However, the Myrtle Beach claims office failed to include the completed DD Form 1840/1840R which contained the same information as that in the DD Form 1844. No inspection of the damage is indicated in the record.

Discussion

The carrier admits liability for those items listed on DD Form 1840 which were excepted to at time of delivery, but contends that DD Forms 1843 and 1844 did not afford it adequate notice as to those items which were not excepted to at the time of delivery, as prescribed in the Military-Industry Memorandum of Understanding. Further, Sherwood contends that it was effectively denied an opportunity to inspect the household goods because DD Form 1844 did not constitute the same quality of notice as to those additional damaged items as would a DD Form 1840/1840R.

The issue in this case is whether a *prima facie* case of carrier liability has been established. It must be shown that the shipment was delivered to the carrier in good condition and that on arrival there was damage to the shipment. The amount of damages also must be shown. *Missouri Pacific R.R. v. Elmore & Stahl,* 377 U.S. 134, 138 (1964). *See also Southeastern Freight Lines,* 63 Comp. Gen. 243, 244 (1984). The record shows that the shipment was delivered to the carrier in good condition. The additional damage was discovered shortly after delivery and was listed by Sergeant Wesley on DD Form 1840/1840R. Although the claims office neglected to include the completed DD Form 1840/1840R with its formal claim, the information contained in this form was listed in greater detail on the DD Form 1844.

The notice requirement cited by Sherwood is found in the Military-Industry Memorandum of Understanding, which for domestic household goods shipments became effective on October 1, 1985. In Section A of the memorandum it is stated that in cases of later discovered damage, written documentation on DD Form 1840R advising the carrier of the loss and damage shall be accepted by the carrier as overcoming the presumption of the correctness of the delivery receipt. While that section does not state that the furnishing of information on a Form 1840R is the only acceptable method of notifying the carrier, Sherwood points to Section F under *Loss and Damage Rules,* which reads in pertinent part:

> It is agreed that the claim will be limited only to the items indicated on the DD Forms 1840 and 1840R * * *

The purpose of the memorandum is to establish the fact that loss or damage occurred while the household goods were in the possession of the carrier. To accomplish this goal, the memorandum prescribes standardized methods and time frames under which to process and settle claims. Under ordinary circumstances, these procedures should be relied upon in determining timely claims processing.[1] While the memorandum seeks to prescribe a standard reporting format for notifying the carrier of loss and damage discovered subsequent to delivery, we do not believe that the provisions of section F would preclude holding a carrier liable for damages in a case such as this.

[1] The memorandum prescribes a 75-day period following delivery within which to notify the carrier of additional loss or damage.

Although the memorandum refers to a DD Form 1840R, which was filed with the Myrtle Beach claims office but was not sent to the carrier, Sherwood was sent DD Form 1843, Demand on Carrier and DD Form 1844, Schedule of Property, 46 days after the delivery. DD Form 1844 listed each item damaged, the nature and extent of the damage and the cost of repairs. It included the items excepted to at delivery as well as the damaged items discovered after delivery. Thus, DD Form 1844 certainly gave Sherwood sufficient information upon which a prompt and complete investigation could have been based. In fact, as noted previously, it contained greater detail than the DD Form 1840/1840R. Moreover, if, after receiving this notice of the damage the carrier felt the need for a DD Form 1840/1840R, a simple inquiry of the claims office would almost certainly have resulted in the carrier receiving it since Sergeant Wesley had completed it and filed it with that office within the prescribed time period. In sum, Sherwood received notice which in substance more than complied with the requirements of the Memorandum of Understanding, well within a reasonable time after delivery, and failed to make an inspection of the damage.

Accordingly, since a *prima facie* case of carrier liability has been established and has not been rebutted by the carrier, Sherwood's claim for a refund of $300.99 is denied.

B-228229, January 29, 1988

Procurement

Competitive Negotiation
■ Offers
■■ Revision
■■■ Propriety

An agency is not required to permit an offeror to revise an unacceptable proposal when the revisions required would be of such magnitude as to be tantamount to the submission of a new proposal.

Matter of: CSP Associates, Inc.

CSP Associates, Inc., protests the rejection of the proposal it submitted in response to request for proposals (RFP) No. HO51-RFP87-10, issued by the Office of Surface Mining, Reclamation and Enforcement, Department of the Interior, for an advanced technical training course on evidence collection, preservation and presentation. CSP contends that Interior failed to adhere to the stated evaluation criteria and disputes the agency's conclusion that its proposal was technically unacceptable. We deny the protest.

The RFP sought proposals to develop and conduct an advanced training course for federal, state and tribal inspectors and enforcement personnel charged with implementing the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1982). Those who will take the course will have had either previous basic training or relevant experience or, in many cases, both. CSP pre-

viously has presented the agency's basic enforcement procedures course. The objective of the advanced course is to improve the participants' existing abilities both to collect, preserve, and document evidence and to describe such evidence in administrative and judicial forums.

The solicitation provided for proposals to be scored in four technical categories: innovative approaches, understanding of the problem, management approach, and corporate experience. Award was to be based on the technically acceptable offer with the lowest evaluated cost over the potential 60-month life of the contract, which includes a base period and four option periods. The RFP advised that a proposal determined to be completely unacceptable as submitted, and which could not be made acceptable without changes so major as to be tantamount to submission of a new proposal, would be excluded from the competitive range.

The agency received proposals from three firms. The technical evaluation committee scored the initial proposals and found that each had major deficiencies and significant weaknesses. The agency reports that it considered canceling the solicitation, but decided instead to request each of the three offerors to respond to seven identical questions. The questions asked offerors to explain how they planned to assure a balance of legal and technical experts, how judicial officials would be used, and how classroom techniques and instructors would be utilized to train individuals with extensive courtroom experience. In addition, the agency requested the offerors to describe how they would present material listed in the statement of work to a class of advanced students, as opposed to students at a basic or intermediate level, and how instruction on the use of sampling equipment and the collection of evidence would relate to evidentiary standards, given that the advanced course would not include how to conduct an inspection or how to determine whether a violation exists. After receiving the offerors' responses, the agency rescored the proposals and concluded that CSP's proposal and that of another offeror were unacceptable and could not be made acceptable through discussions without substantial proposal revisions. This resulted in a competitive range of one.

In view of the importance of achieving full and open competition in government procurement, we closely scrutinize any evaluation that results in only one offeror in the competitive range. *Coopers & Lybrand,* B-224213, Jan. 30, 1987, 66 Comp. Gen. 216, 87-1 CPD ¶ 100. In doing so, however, we recognize that contracting officials enjoy a reasonable degree of discretion in the evaluation of proposals to determine their acceptability, and therefore we will not disturb an agency's determination that a proposal is not in the competitive range absent clear evidence that the determination lacked a reasonable basis. *Laser Photonics, Inc.,* B-214356, Oct. 29, 1984, 84-2 CPD ¶ 470. In this regard, a protester's mere disagreement with the agency's judgment does not establish that the evaluation of proposals and competitive range determination were unreasonable. *SETAC, Inc.,* 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121.

Interior's decision to exclude CSP from the competitive range was based on the agency's assessment of the firm's proposal under two evaluation criteria: (1) un-

derstanding of the problem in presenting material to an advanced, specialized audience, and (2) staffing capability and mix.[1] With respect to the first criterion, the technical evaluation committee concluded that, given the time allotted for the course and the range of possible training techniques, CSP's proposal relied excessively on role-playing and on mock hearings. The committee questioned CSP's excessive use of these techniques for classes comprised of advanced students. The committee also stated that CSP's use of mock field exercises, simulated inspections, and demonstrations of sampling equipment is not suitable for advanced participants who already have extensive mine inspection and courtroom experience.

CSP contends that the course described in its proposal in fact was directed at advanced participants. The firm argues that its emphasis on practice was in direct response to the RFP's reference to role-playing and exercises, techniques that were specifically listed in the RFP as examples of progressive, interactive training techniques for advanced students.

Based on our review of the record, it appears that the agency did not regard as objectionable *per se* the protester's proposed use of teaching methods that involved various types of practice exercises. Indeed, CSP's proposal received a high score (25 of 30 points) under the evaluation criterion related to innovative and creative approaches. The agency was very concerned, however, that the use of these techniques was excessive given the experience level of the students. We have reviewed CSP's proposal, particularly the provisions concerning simulation of the evidence collection, preservation and presentation processes, and we find that indeed the proposal stresses mock exercises to a great extent. While the proposal, particularly as revised in response to the agency's questions, asserts that such exercises can be valuable even for experienced students, the proposal does not appear to offer much to the advanced student beyond the opportunity to practice existing skills. The proposal repeatedly states that the target audience would be advanced students, but focuses quite heavily on basic tasks such as performing inspections and collecting evidence. From our review of the evaluators' comments, it appears that an underlying concern was that the course proposed by CSP would not be taught at a level significantly above that of the basic course. We cannot say that this concern was not reasonably based.

With respect to staffing, the agency found CSP's technical staff to be inadequate because, while CSP offered a principal attorney, a retired administrative law judge, and another attorney as trainers throughout the course—all of whom CSP also used in its basic course—the proposal did not provide for sufficient technical expertise. A technical person Interior considered to have no more experience than the course participants was to be used only if needed.

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[1] The agency had a number of other concerns with CSP's proposal, but has characterized these as minor. In addition, the agency contends that CSP's proposed costs, as adjusted, were higher than those of the offeror whose proposal was included in the competitive range. Although CSP disputes the amount of the agency's adjustment to the firm's proposed costs, we need not consider that issue since we have found no basis to question the agency's determination that CSP's proposal was technically unacceptable.

CSP argues that its proposed technical staff was acceptable because it included an experienced attorney who also qualifies as a technical expert since he has two degrees in engineering. CSP asserts that this instructor has developed inspection and enforcement policy guidance while in the government, has conducted training in all aspects of enforcement, has supervised inspectors and regulatory program personnel for Interior's Office Of Surface Mining, and has conducted inspections where samples were collected. In addition, CSP states that its technical person has conducted numerous surface coal mining inspections.

From our reading of the proposal, it does not appear that CSP presented a staffing plan that showed key personnel with the type of technical training required for advanced instruction in evidence collection, preservation and documentation. Although the principal attorney offered by CSP as a technical expert does have degrees in engineering, his experience is principally in administration and enforcement policy, and he does not appear to have experience in other scientific disciplines, such as hydrogeology, that Interior considers essential to instruction of advanced students with respect to evidence preservation issues. In addition, the alternate technical instructor proposed by CSP has a mining engineering background with only 4 years inspection experience (which, according to the agency, is less than that of the students expected to attend the course) and no scientific training. In short, we have no basis for disagreeing with Interior's conclusion that the personnel offered would not provide the technical resources to assist advanced personnel in acquiring the skills, information and insight necessary for the technical aspects of their jobs. CSP did not balance its proposed legal staff with technical personnel having adequate scientific expertise.

An agency is not required to permit an offeror to revise an unacceptable proposal when the revisions needed would be of such magnitude as to be tantamount to the submission of a new proposal. *Emprise Corp.— Request for Reconsideration,* B-225385.2, July 23, 1987, 87-2 CPD ¶ 75. Here, CSP's proposal for the advanced course appeared to draw heavily on the basic course taught by CSP and relied to a very great extent on the qualifications of the firm's principal attorney. This individual not only was to provide a significant amount of the instruction on legal matters, but also would be providing training in the technical areas. The agency made a qualitative judgment that this individual did not have adequate scientific credentials with respect to both his education and his experience. In order to correct the deficiency, CSP would have had to restructure its approach to the agency's requirement by proposing a staff with significantly more technical expertise. Since this would have involved a major revision of the proposal, we have no legal basis to question the agency's decision to exclude that proposal from the competitive range.

The protest is denied.

Appropriations/Financial Management

Appropriation Availability
■ Time Availability
■■ Time Restrictions
■■■ Fiscal-Year Appropriation

Proposed multiyear contract for the supply, storage, and rotation of sulfadiazine silver cream by the Philadelphia Defense Personnel Support Center of the Defense Logistics Agency (DLA) is not permissible. The Anti-deficiency Act, 31 U.S.C. § 1341(a)(1)(B) (1982), prohibits multiyear procurement, *i.e.*, a procurement which obligates the United States for future fiscal years, without either multiyear or no-year funding or specific statuttory authority. The storage and rotation portion of the proposed contract satisfies neither of those conditions. Nothing in 10 U.S.C. § 2306(a) (1982), cited by DLA, constitutes authority for multiyear procurement. A "subject to availability clause" does not permit a multiyear procurement using annual funds.

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Civilian Personnel

Compensation
■ Classification
■■ Appeals
■■■ Statutes of Limitation

An employee with the Soil Conservation Service who was classified as an intermittent employee from 1966 to 1974 asserts that she should instead have been classified as part-time during that period. However, her claims based on her alleged misclassification between 1966 and 1974 for retroactive holiday pay, additional pay for within-grade increases, and credit for annual and sick leave were not received here until 1986, and consequently they are barred by the 6-year time limit on the filing of claims prescribed by the Barring Act, 31 U.S.C. § 3702(b). Decisions where we have held that a claim for sick leave is not a monetary claim cognizable by the Comptroller General, and subject to the Barring Act, are overruled. (58 Comp. Gen. 741; B-189288, Nov. 23, 1977; B-171947.36, Nov. 16, 1972; B-171947.24, June 16, 1972).

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■ Household Goods
■■ Weight Restrictions
■■■ Liability
■■■■ Computation

An officer of the Public Health Service selected a motor common carrier to transport his household goods. The officer alleges that the carrier represented that the shipment's weight would not exceed the officer's authorized weight allowance of 13,500 pounds and that a Guaranteed Price Pledge based on the weight was quoted. The shipment's actual net weight, however, as determined from certified weight tickets, was 21,060 pounds. After adjustments for crating and professional books, the certifying officer determined that the officer was liable for 4,454 pounds of excess weight. Where facts show that the Guaranteed Price Pledge was based on tender rates applied to a prudent estimate of the shipment's actual net weight, the determination of excess weight charges is proper. The officer's reliance on the carrier's erroneous low weight estimate does not provide a basis for relief from liability for excess weight charges since the government's legal obligation is to pay the charges for transporting only the officer's authorized weight allowance.

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■ Residence Transaction Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Residency

An employee who bought a house and resided there on weekends while remodeling it may be reimbursed for real estate expenses related to its sale even though he was not using it as a residence from which he commuted to and from work on a daily basis at the time he was notified of his transfer. The record shows the employee would have made the house his permanent home but for his transfer in the interest of the government.

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Procurement

Bid Protests
■ GAO Procedures
■■ Protest Timeliness
■■■ Apparent Solicitation Improprieties

Contention, not raised until after bid opening, that agency abused its discretion by failing to delete labor surplus area (LSA) clause and cancel solicitations set-aside for LSA concerns after realizing that one required place of performance no longer was designated as an LSA, constitutes an untimely challenge to the agency's initial determination to set aside the procurements, and will not be considered.

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Competitive Negotiation
■ Offers
■■ Revision
■■■ Propriety

An agency is not required to permit an offeror to revise an unacceptable proposal when the revisions required would be of such magnitude as to be tantamount to the submission of a new proposal.

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Contractor Qualification
■ Responsibility/Responsiveness Distinctions

Statement in bid that bidder did not currently have an affirmative action plan on file because of a recent corporate reorganization did not render the bid nonresponsive, as a bidder's compliance with such requirements is a matter of the bidder's responsibility that can be satisfied any time prior to award.

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Payment/Discharge
■ Shipment
■■ Carrier Liability
■■■ Burden of Proof

Claim for damage to household goods not noted at time of delivery can be substantiated by subsequent timely notification to the carrier of additional damage. While the memorandum of understanding between the household goods moving industry and the military services prescribes a standardized method for reporting and processing claims, the failure of the installation claims office to send the carrier a specified form listing additional damage does not relieve the carrier of liability when the demand on the carrier and supporting documentation, which in substance fully notified the carrier of the damage, is furnished the carrier within the agreed upon 75 days of delivery.

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would not affect the procuring agency's ability to enforce the bid guarantee in the event the bidder failed to carry out its obligations under the solicitation.

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Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Contractor Liability
■■■■ Liability Restrictions

Inclusion in bid of statement reserving bidder's right to provide performance and payment bonds from any surety reasonably could be construed as limiting the government's right to enforce the bidder's bid guarantee in event of default and, therefore rendered the bid nonresponsive.

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■ Bids
■■ Responsiveness
■■■ Terms
■■■■ Deviation

Bid incorporating statements set forth in bidder's internal guidelines that did not parallel the language of the IFB but did not conflict with any of the IFB's requirements or otherwise reduce the bidder's affirmative obligation to perform in strict conformance with the solicitation is responsive.

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■ Invitations for Bids
■■ Amendments
■■■ Acknowledgment
■■■■ Waiver

Bidder's failure to acknowledge invitation for bids (IFB) amendment changing the line items under which costs for different parts were to be included but not changing the requirement to supply parts for radio repair services and requiring bidders to use manufacturer-approved replacement parts and testing equipment for the maintenance and repair of a particular type of radio equipment may be waived since these provisions merely clarified already existing requirements in the solicitation's performance work statement and bidding schedule and thus had no material effect on the procurement.

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■ Invitations for Bids
■■ Amendments
■■■ Notification

A bidder bears the risk of not receiving invitation for bids amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing, or the agency

inadvertently failed to furnish the amendment where the bidder availed itself of every reasonable opportunity to obtain the amendment.

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Sealed Bidding
■ Invitations for Bids
■■ Competition Rights
■■■ Contractors
■■■■ Exclusion

Under Competition in Contracting Act of 1984, agency is required to make a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials. Because the agency's effort to comply with those requirements was flawed in that the agency failed to solicit an incumbent and therefore it received only one bid on many of the line items solicited, the General Accounting Office recommends that the agency resolicit those line items under which single bids were received.

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Socio-Economic Policies
■ Preferred Products/Services
■■ American Indians

Bureau of Indian Affairs' determination that a firm meets eligibility criteria—100 percent Indian ownership and control—for responding to Buy Indian Act procurement is not objectionable where agency reasonably finds that an Indian was the sole stockholder, director, officer, and manager of the corporation.

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Special Procurement Methods/Categories
■ Multi-Year Procurement
■■ Fiscal-Year Appropriation
■■■ Time Restrictions

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Specifications
■ Minimum Needs Standards
■■ Competitive Restrictions
■■■ Justification
■■■■ Sufficiency

A blanket solicitation requirement in a small business set-aside that all individual sureties provide a security interest consisting of a first deed of trust on the unencumbered value of real property listed on an affidavit of individual surety, or obtain a subrogation agreement from the party holding a first deed of trust on encumbered real property, as well as a requirement to furnish proof of title and an appraisal of value of the real property, is not reasonably related to the minimum needs of the agency and is restrictive of competition where there are no unusual circumstances justifying the requirement.

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