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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 uses three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, N.W. 20548, or by calling (202) 275-6241.

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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 that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

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

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

Table of Decision Numbers

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B-232287, December 2, 1988

Procurement

Sealed Bidding
■ Bids
■■ Modification
■■■ Late submission
■■■■ Mail/telegraph delays

Bidders must allow a reasonable time for telefaxed bid modifications to be delivered from the point of receipt to the designated location for receipt of bids; when they do not do so, late arrival at the designated location cannot be attributed to government mishandling. One minute is not a reasonable or sufficient amount of time to deliver a telefaxed bid modification from the mailroom to the office designated for bid opening.

Matter of: Sanchez Painting and Construction Company

Sanchez Painting and Construction Company protests the rejection of its telefaxed bid modification as late and the award of a contract to Dawson Construction and Electric Company by the Department of the Navy under invitation for bids (IFB) No. N62474-88-B-4300 for repairs to 16 housing units located at Naval Air Station, Point Mugu, California.

We deny the protest.

The IFB stated that bids were due by 2:30 p.m., local time—Pacific Daylight time (PDT)—on June 15, 1988, at the following address: Officer in Charge of Construction, Building 632, Point Mugu, California.[1] The solicitation also provided for telegraphic bid modifications so long as they were received by the time specified for receipt of bids.

On June 14, Sanchez mailed its bid by overnight mail to the Navy at Point Mugu, and its bid was timely received. On the morning of June 15, Sanchez informed the Navy by telephone that it intended to submit a bid modification by Western Union telefax. On that same day, Sanchez telefaxed a bid modification lowering its price. According to Sanchez, this modification arrived at the Navy installation at 1:31 p.m. PDT, 59 minutes before bid opening. According to the Navy, the bid opening official was only notified by a mailroom employee of the existence of the telefaxed modification at 2:40 p.m., 10 minutes after the time

[1] The IFB also erroneously required hand-delivered bids to be deposited in a bid box at a government facility in San Diego, California. The agency orally advised bidders before bid opening that hand-delivered bids should be taken to Point Mugu. Sanchez complied with this revised instruction for delivery.

set for bid opening. The agency also maintains that the modification did not arrive at its facility's mailroom until approximately 2:29 p.m., 1 minute before bid opening. The Navy received five bids; it did not consider Sanchez's telefaxed bid modification because it arrived late from the mailroom to the office designated for receipt of bids. Sanchez's bid, considering its downward modification, would have been the low bid.

Sanchez filed an agency-level protest, arguing that its telefaxed bid modification was received by the agency in advance of bid opening, and that the telefax was mishandled by the Navy, resulting in the bid modification being late. By letter of August 1, 1988, the Navy found no evidence of mishandling and awarded the contract to Dawson. This protest followed.

As stated above, the solicitation provided for telegraphic notice of bid modifications so long as the notice was received by the time specified for bid opening. The solicitation further provided that consideration of a late telegraphic bid modification was permitted if the lateness was due to government mishandling. For the reasons that follow, we find that the paramount cause for the late receipt was Sanchez's failure to send the modification until 1 minute before bid opening rather than to mishandling by the Navy.

The parties disagree as to the time of arrival of the telefax at the Navy's mailroom. We have been provided with a true copy of the telefax as received by the Navy. Based on our review of the telefax and after consultation with Western Union, we find that the telefax arrived at the Navy's facility at 2:29 p.m. PDT, 1 minute before the time set for bid opening.

At the top of the Western Union transmission the following line appears, "JUN 15'88 16:29 FROM WU MTWN CTB."

According to Western Union, this line indicates that Western Union transmitted Sanchez's bid modification on June 15, 1988 at 4:29 p.m., Eastern Standard Time (EST), or 2:29 p.m., PDT, from the Morristown, New Jersey Centralized Telephone Bureau. According to Western Union, its computers are always set on EST. When transmission occurred at 4:29 p.m. EST, it was 1:29 p.m., Pacific Standard Time, a 3 hour time difference. However, because the transmission occurred in June during daylight savings time, it was 2:29 p.m., PDT, at Point Mugu when the transmission occurred. Therefore, we find that receipt of the bid modification on the telefax machine in the mailroom at the Pacific Missile Test Center, located approximately one-half mile from the place of bid opening at Point Mugu, occurred, at the earliest, simultaneously with transmission, i.e., 2:29 p.m., PDT, 1 minute before bids were due.[2]

[2] Sanchez also relies on a Western Union mailgram to the firm on June 22, 1 week after bid opening, in which Western Union states that the telefax "was delivered" at 4:31 p.m., Eastern Daylight Time (1:31 p.m. Pacific Daylight Time). First, this is contrary to what our Office was told by Western Union as to the meaning of the date and time on the face of the telefax. Second, contrary to our use of Western Union's information solely to interpret the telefax, information from Western Union purporting to establish receipt by the agency at a specific time is unacceptable evidence and will not be considered. *See Cecile Industries, Inc.*, B-206796, July 7, 1982, 82-2 CPD ¶ 29.

Bidders must allow a reasonable time for bid modifications to be delivered from the point of receipt to the designated location for receipt of bids; when they do not do so, late arrival at the designated location cannot be attributed to government mishandling. *Happy Penguin—Request for Reconsideration,* B-225715.2, Mar. 20, 1987, 87-1 CPD ¶ 324. Sanchez's modification was telefaxed 1 minute before the deadline for receipt of bids. Although the modification was in the Navy's possession, 1 minute certainly was not a reasonable or sufficient amount of time to deliver the modification from the mailroom to the place designated for receipt of bids (a distance of one-half mile). It was Sanchez's responsibility to ensure timely delivery of its modification. Sanchez and its agent, Western Union, contributed to the late receipt of the bid modification by not allowing a reasonable length of time to deliver the modification to the designated office for receipt of bids. There is no evidence of Navy mishandling leading to lateness.

Accordingly, the protest is denied.

B-226380, December 5, 1988

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Training expenses
■■■ Career counseling

The Government Employees Training Act (Act) applies to civilian employees and, by its own terms, does not apply to active duty members of the uniformed services. 5 U.S.C. § 4102(a)(1)(C). Therefore, the Act does not bear on the authority of the Defense Nuclear Agency to spend appropriated funds to enroll a Colonel on active duty in the Air Force in a course entitled "Strategy of Career Transition." B-223447, Oct. 10, 1986; B-195461, Oct. 15, 1979; and B-167156, July 10, 1969, clarified.

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Necessary expenses rule

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Necessary expenses rule
■■■ Training
■■■■ Career counseling

Under proper circumstances, outplacement assistance to employees is a legitimate matter of agency personnel administration. Therefore, appropriations for the Defense Nuclear Agency (DNA) may be available in reasonable amounts to enroll an employee in a course entitled "Strategy of Career Transition," if the DNA determines such enrollment to be a necessary expense of the agency.

Matter of: Defense Nuclear Agency—Use of Appropriated Funds to Pay For Enrollment of Active Duty Member of Armed Forces in Course Entitled "Strategy of Career Transition"

A Defense Nuclear Agency (DNA) certifying officer has requested an advance decision regarding the propriety of using funds appropriated to DNA to pay for the enrollment of an Air Force Colonel in a course entitled "Strategy of Career Transition." For the reasons given below, we conclude that such enrollment is not authorized as a training expense but that it may be authorized as a necessary expense, if the DNA administratively determines that it is necessary for the effective management of its personnel system.

Background

An Air Force Colonel working for the DNA requested DNA funding for his enrollment in a nongovernment course entitled "Strategy of Career Transition." The DNA accounting and disbursing officer has requested an advance decision from this Office on the propriety of approving a voucher for the expenses of the course. The certifying officer has informally indicated that employees of the DNA have participated in this course in the past, but at their own expense. As of 1987, the course cost $450. The "course description" indicates that it is intended to provide enrollees with the skills and practical knowledge needed to effectuate a successful job change. The course syllabus includes classes entitled "Wage and Salary Negotiation," "Self-Marketing," "Female Behavior in the Business World," "Resumes and Letters," and "Clothing and Interviewing."

The certifying officer is of the view that funding for this course is precluded by both the Government Employees Training Act (the Act), 5 U.S.C. §§ 4101–4118 (1982), and by a prior decision of this Office, 36 Comp. Gen. 621 (1957).

Analysis

Reliance on the Act is misplaced here. The Act applies to civilian employees and, by its own terms, does not apply to active duty members of the uniformed services. 5 U.S.C. § 4102(a)(1)(C). *See* H. Rep. No. 1951, 85th Cong., 2nd Sess. 14, *reprinted in* (1958) U.S. Code Cong. & Ad. News 2912. Because this case involves a Colonel on active duty in the Air Force, the Act is not applicable.[1]

With respect to 36 Comp. Gen. 621 (1957), we agree that under the tests applied in that decision the proposed expenditures for the course for the Air Force Colonel would not be allowable because there is no apparent connection between the subject matter of the course "Strategy of Career Transition," which is essentially an outplacement course, and the current duties of any government employee.

[1] We hereby clarify a number of our former decisions which apply the Act to military agencies and fail to make clear that they do so only in relation to civilian employees and not to military employees of those agencies. *See, e.g.*, B-223447, Oct. 10, 1986; B-195461, Oct. 15, 1979; B-167156, July 10, 1969.

On the other hand, although not raised by the certifying officer, the proposed expenditure may be viewed as a necessary expense (incident to DNA's fiscal year 1987 appropriation) of administering DNA's personnel system. In the past, this Office has authorized expenditures by agencies without specific statutory authority for a number of purposes where legitimately justified as necessary expenses.[2]

We view outplacement assistance to employees as a legitimate matter of agency personnel administration, so long as such counseling benefits the agency. Doubtless, there may be instances where the agency determines that it is in its, and an employee's, best interest to help an employee find employment elsewhere. The agency focus need not be so narrow, however. Beyond the benefits that the agency and an employee may derive in individual cases, there are potentially significant benefits that an agency can derive by the incorporation of outplacement assistance into its personnel system. By way of example, the possibility of outplacement assistance can promote work place morale by assuring employees that, if needed, the agency will help them move to other jobs. Outplacement assistance also can enhance the attractiveness of employment in public service and thereby further the recruitment of a dynamic, talented workforce.

Any expenditures authorized as a necessary expense require an agency finding that outplacement assistance is necessary to accomplish the purpose of the appropriation to be charged. In this regard, first and foremost, the agency should consider the benefit to the agency expected from an expenditure of appropriated funds for outplacement assistance. The agency also should evaluate the anticipated benefits in light of the cost of the assistance to be provided to assure itself that the amount expended for outplacement assistance is reasonable. Other appropriate factors for agency consideration include the desirability of a coordinated agency program of outplacement assistance as opposed to *ad hoc* assistance responding to individual employee requests and the desirability of in-house outplacement assistance versus reliance on external sources of outplacement assistance. Thus, as long as the agency finds that expenditures for outplacement assistance benefit the agency and are reasonable in amount, we will view such expenditures as legitimately justified as necessary expenses.

In this case, we conclude that the voucher can be certified for payment, provided that the head of the DNA or the appropriate delegate finds that, taking into account the above considerations, the expenditure is necessary to accomplish the purpose of the appropriation charged.

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[2] For example, such authorized expenditures have been made for employee welfare purposes (*see* 49 Comp. Gen. 476 (1979); 51 Comp. Gen. 797 (1972); and B-169141, Nov. 17, 1970) and for the improvement of employee morale and efficiency (*see* 67 Comp. Gen. 87).

B-232413, December 6, 1988

Procurement

Socio-Economic Policies

■ Small business 8(a) subcontracting

■■ Use

■■■ Administrative discretion

Determination whether to set aside a procurement under section 8(a) of the Small Business Act, and the propriety of the 8(a) award itself, are matters within the discretion of the contracting agency and the Small Business Administration. Such an award will not be reviewed by the General Accounting Office absent a showing of possible fraud or bad faith on the part of government officials or that regulations have not been followed.

Procurement

Bid Protests

■ Bias allegation

■■ Allegation substantiation

■■■ Burden of proof

Allegation of bad faith on the part of government officials in deciding to retain the sample data collection services within the Small Business Administration 8(a) program is denied where protester fails to offer irrefutable proof that the government officials had a specific, malicious intent to cause it harm.

Procurement

Bid Protests

■ GAO procedures

■■ Interested parties

■■■ Direct interest standards

Where award is made under a set-aside pursuant to section 8(a) of the Small Business Act, a protester which is a non-8(a) firm and is questioning the propriety of the award to a particular 8(a) eligible firm is not an interested party under the General Accounting Office Bid Protest Regulations. The protester lacks the requisite direct economic interest since it would not be eligible to compete for the contract even if the protest were sustained.

Matter of: PECO Enterprises, Inc.

PECO Enterprises, Inc., (PECO), protests the decision of the Department of the Army to award a contract to the Small Business Administration (SBA) and the proposed award of a subsequent subcontract to Automation Research Systems, Inc. (ARS) pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), to provide the Army sample data collection services (SDC).[1] PECO contends that the Army's and SBA's decision to retain the SDC services within the 8(a) program was an abuse of discretion and was made in bad faith.[2] PECO fur-

[1] SDC is a program whose objective is to develop, implement, and manage an integrated logistic maintenance data system in support of selected field equipment, training requirements, and other logistics.

[2] While PECO initially alleged violations of law and regulation, it has not pursued these alleged violations and we deem them abandoned.

ther contends that the award to ARS would create an impermissible appearance of impropriety.

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

PECO, the incumbent 8(a) contractor, was a participant in the 8(a) program from October 1974 to March 1986 and performed the SDC services for the Army. In March 1986, PECO graduated from the 8(a) program, and thereby became ineligible for new awards under this program. On September 25, 1985, PECO, while still a participant in the 8(a) program, was awarded an 8(a) subcontract by the SBA for SDC services which, after two renewal options, expired on September 25, 1988. This contract was partially performed for two and one-half years after PECO graduated from the 8(a) program in March 1986.

Before the expiration of this contract in January 1988, PECO was advised of the Army's intent to continue to procure the SDC services under the 8(a) program. Through correspondence and meetings with the Army and SBA, PECO stated that it would be adversely affected by the Army's retention of the SDC requirements in the 8(a) program. It therefore requested that this procurement not be restricted to current participants in the 8(a) program, and that it instead be released for either a small business or a small disadvantaged business set-aside, or if need be, unrestricted competition. The SBA's Kansas City Regional Office, on behalf of PECO, also requested the Army to release a portion of its SDC requirements for small disadvantaged business competition. The Army denied these requests and responded that Department of Defense (DOD) policy required keeping SDC as an 8(a) set-aside so long as a responsible 8(a) contractor is available. The SBA also concluded that there was no basis for releasing any portion of the Army's SDC requirements for small disadvantaged business competition. The SBA chiefly based its decision on its conclusion that the agency had fulfilled its obligation to PECO to assist it in its transition to an 8(a) program graduate through the exercise of options under the prior contract.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The thrust of section 8(a) program is to insulate participants from open price competition with established firms until the section 8(a) firms are capable of so competing. *See Winfield Mfg. Co., Inc.,* B-218537, June 12, 1985, 85-1 CPD ¶ 679. SBA and contracting agencies enjoy broad discretion in arriving at section 8(a) contracting arrangements and, therefore, our review of actions under the section 8(a) program is limited to determining whether applicable regulations have been followed and whether there has been fraud or bad faith on the part of government officials. *Id.*

PECO asserts that the SBA abused its discretion here because the SBA failed to properly follow SBA's Standard Operating Procedures (SOPs) when making the decision to not release the SDC requirements from the 8(a) program. In this regard, SBA's SOP 46(e) simply lists a number of factors that may be considered in determining whether to release a requirement for competitive bidding. PECO

contends that the SBA failed to take into consideration all of the elements of SOP 46(e). PECO also disagrees with the conclusions reached by the SBA that the primary objective of SOP 46(e) is to assist firms nearing 8(a) program graduation and that it had met its obligation to PECO in preparing PECO for graduation from the 8(a) program.

SBA's SOPs represent internal SBA policies and guidelines rather than regulations having the force and effect of law. SBA's compliance with its SOPs concern executive branch management decisions which our Office generally will not review under our bid protest function. Accordingly, PECO's challenge to the SBA's compliance with SOP 46(e) in deciding to continue the requirement under the 8(a) program involves a discretionary management decision which our Office will not review. *See A.R.E. Mfg. Co., Inc.,* B-218116, May 17, 1985, 85-1 CPD ¶ 564.

PECO also argues that the SBA's and Army's alleged disregard of the fact that PECO will be irreparably harmed if not given an opportunity to compete for the SDC requirement is an abuse of discretion and an act of bad faith. PECO further argues that the selection of ARS as the 8(a) contractor also suggests bad faith on the part of the Army and SBA since ARS is owned by a retired Colonel who once served as the deputy director of the Army's Small and Disadvantaged Business Utilization Office and possesses extensive inside knowledge of the various Army procurement commands' 8(a) programs. In this regard, PECO contends that award to ARS would create an impermissible appearance of impropriety because of ARS' alleged employment practice of recruiting individuals from the Army procurement commands.

The Army's decision to retain the requirement under the 8(a) program was made in compliance with DOD policy memorandum of September 25, 1987, which states that "as a matter of Department policy requirements currently in the 8(a) program are to remain in the 8(a) program if a responsible 8(a) firm is available to perform the requirement." The Army accordingly offered the requirement to SBA for the 8(a) program.

Under SBA procedures, the Director of the Office of Program Development for 8(a) has the authority to make the determination to release or not to release a procurement from the 8(a) program. The record is clear that the SBA official reviewed PECO's financial standing before making his decision and the facts before him were that PECO in the 2 years after graduation from the 8(a) program had received two renewal options under the SDC contract totalling over $21 million. This amount was considered to be more than enough to aid PECO's transition to competitive status. Additionally, PECO's current net worth was determined to be $1.8 million dollars. Further, SBA regional officials submitted documentation in support of PECO and sought to have at least part of the SDC requirement released for competition. The record indicates that this documentation was fully reviewed prior to the SBA final decision. While we recognize the decision to continue to reserve the requirement for the 8(a) program undoubtedly has an adverse impact on PECO since it is no longer eligible for this requirement, there is simply no evidence that the decision was made with any intent to

harm PECO. To the contrary, the record indicates that the determination reflects a decision by the SBA to give other 8(a) firms the opportunity to perform the SDC requirement.

Finally, to the extent that PECO is questioning the propriety of the award to ARS because ARS is owned by a former Army official with knowledge of the Army's 8(a) programs and who recruits individuals from the Army commands, it is not an interested party. Under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), a protester must have a direct economic interest which is affected by the award of a contract in order to be considered an interested party. We have found the 8(a) set-aside to be proper, and the record reflects that there are other 8(a) firms capable of performing the SDC requirement if ARS is determined to be ineligible. Thus, even if PECO's protest of the award to ARS were sustained, it would not be eligible to compete for the contract in question. We have explicitly held that a non-8(a) firm is not an interested party to protest the qualifications of a particular 8(a)-eligible firm. *Washington Patrol Service, Inc.—Reconsideration,* B-214568.2, July 17, 1984, 84-2 CPD ¶ 57. Of course, PECO's allegation concerning ARS' conflict of interest has been brought before the Army and SBA for their consideration.

The protest is denied in part and dismissed in part.

B-229304, December 7, 1988

Civilian Personnel

Relocation
■ New appointment
■■ Travel expenses
■■■ First duty stations

An agency ordered a new appointee to successive training assignments en route to a permanent duty assignment in Washington, D.C. Ordinarily, a new appointee must bear the expenses of travel to the first duty station; however, where the employee performs actual and substantial work duties at three locations while being trained on the job for a period of nearly 15 months, GAO would not question the agency's determination to view the transfers as changes of official duty station for reimbursement of authorized relocation expenses.

Civilian Personnel

Relocation
■ Residence transaction expenses
■■ Leases
■■■ Termination costs
■■■■ Reimbursement

An employee, who knew he would be transferred in 6 months, entered into a 6-month lease containing a short-term penalty provision, rather than entering into a customary 12-month lease. Although the employee acted prudently to protect the government from a greater potential liability for breaking a 12-month lease, the employee may not be reimbursed the short-term lease penalties as though they were settlements of unexpired leases. However, they may be reimbursed as miscellaneous expenses subject to the limitations applicable thereto. There is no similar authority to reimburse an employee for a credit clearance report relating to a lease.

Matter of: Thomas D. Wegner—Relocation Expenses—New Appointee

An authorized certifying officer requests an advance decision concerning reimbursement of short-term lease penalties and a credit clearance fee in connection with a new appointee's successive training assignments.[1] We conclude that the lease penalties may be reimbursed as miscellaneous expenses, subject to applicable limitations while the credit clearance fee may not.

Background

When the United States Department of Agriculture, Agricultural Marketing Service (AMS), hired Mr. Thomas D. Wegner as a market news reporter trainee on September 1, 1985, the agency ordered him to three successive locations for a total of 15 months on the job training with the understanding that upon completion of the 15-month period his official duty station would be Washington, D.C. The program involved 3 months in the Madison, Wisconsin, market news office, 6 months with the market administrator in Chicago, Illinois, and 6 months in the New York-New Jersey market administrator's office. In connection with the latter two assignments the agency issued travel authorizations for transfers of official station from Madison to Chicago and from Chicago to New York, and reimbursed Mr. Wegner for his travel expenses and for household goods shipments.

Mr. Wegner's work-training program, as outlined by the division director, called for him to be assigned duties and to engage in activities at each location "leading to a basic understanding of the administration of the order and to the marketing of milk and dairy products by the industry." Except for the first few days of orientation at Madison, Mr. Wegner was engaged in extensive field work, involving travel with dairy inspectors and graders for first-hand experience in various marketing functions. Mr. Wegner's work-training also involved economic and statistical analysis along with writing reports and correspondence. Thus, his training was primarily conducted through on the job experience.

Mr. Wegner presented a claim for reimbursement of expenses he incurred in connection with his training: a $20 credit clearance fee in Chicago, and two short-term lease penalties of $90 and $600 arising out of leases in Chicago and New York, respectively. The AMS reports that normally when leases are acquired in Chicago and New York, they are for a minimum of 12 months. Based on his approved training plan Mr. Wegner entered into 6-month leases rather than the customary 12-month leases since he knew he would have had to break the longer leases, and the penalties would have exceeded the short-term lease

[1] U.S. Department of Agriculture, Office of Finance and Management, National Finance Center, New Orleans, Louisiana, by letter of November 13, 1987, reference A-2 WDM.

penalties. Mr. Wegner believes the short-term lease penalties are reimbursable as being analogous to lease termination expenses.

The AMS asks:

1. Can Mr. Wegner be reimbursed for the $710 in penalties he incurred when he obtained the two six-month short-term leases?

2. Is the credit clearance fee reimbursable as a Miscellaneous Expense?

3. Since Mr. Wegner accepted a position where the actual duty station was Washington, DC, wouldn't it have been more beneficial to the employee and agency if he had been placed on TDY from Washington, DC instead of being transferred every six months?

Opinion

Mr. Wegner's claim presents two basic issues: (1) whether, as a new appointee, he was required to bear the expenses of travel, including relocation expenses to Washington, D.C., and, if not, (2) whether the particular expenses claimed were reimbursable.

Training En Route

In 60 Comp. Gen. 569 (1981), we cited *Cecil M. Halcomb*, 58 Comp. Gen. 744 (1979), for the rule that a training site may not be designated as an employee's permanent duty station for the purpose of determining whether the employee is entitled to travel expenses, unless actual and substantial duties are to be performed at the training location. We said, at 60 Comp. Gen. 572:

As explained in 22 Comp. Gen. 869 (1943), the newly appointed employee who performs actual and substantial duty at his place of appointment—as distinguished from job training or completing administrative matters for entry on the rolls—may have this place designated as his permanent duty station. However, in the absence of such actual and substantial duty, the place of appointment or place of training is only a temporary duty station even if the new appointee's permanent duty station is not ascertained until after his appointment or training.

The record here shows that, except for the first few days of his assignment at Madison, Mr. Wegner performed actual and substantial work at all three training locations, and each assignment's duration was for an extended period. Since the circumstances of Mr. Wegner's assignments do not reflect the short-term training circumstances that were involved in *Halcomb* and 60 Comp. Gen. 569, *supra*, we would not question the agency's consideration of his transfers as changes in official duty station which provide the basis for reimbursement of the short-term lease expenses to the extent authorized by law.

Specific Relocation Expenses

(A) Short-Term Lease Penalty

We cannot agree with the claimant's contention that payment of short-term lease penalties is analogous to unexpired lease termination expenses. The law and regulations authorize reimbursement of expenses only for the "settlement of an unexpired lease." *See* 5 U.S.C. § 5724a(a)(4)(A) (Supp. III 1985), and Federal

Travel Regulations, para. 2-6.2h, *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985). Instead of penalties for termination of unexpired leases, Mr. Wegner paid penalties as a condition of entering into short-term leases. These circumstances are analogous to those in *Raymond J. Sexton,* 65 Comp. Gen. 396 (1986), where an employee incurred surcharges incident to month-to-month leases. In *Sexton,* the employee, in view of a pending transfer, chose not to enter into a new 12-month lease, opting instead to lease his apartment on a month-to-month basis.

Although Mr. Sexton, as Mr. Wegner, acted prudently to mitigate the cost impact of his move, in the absence of a settlement of an unexpired lease, we held in *Sexton* that there is no legal basis to reimburse an employee under 5 U.S.C. § 5724a(a)(4)(A) and FTR, para. 2-6.2h. As we held in *Sexton,* however, this type of expense is reimbursable under FTR, para. 2-3.1, as a miscellaneous expense, subject to the limitations in para. 2-3.3, concerning the allowable amount. Accordingly, Mr. Wegner may be reimbursed on that basis subject to the applicable limitations.

(B) Credit Clearance Fee

The rationale for extending reimbursement of miscellaneous expenses to short-term lease penalties, however, does not apply to credit report fees. Specific provision is made for the reimbursement of the cost of preparing credit reports, and it is expressly limited to reimbursement in connection with the sale or purchase of a residence.[2] FTR, para. 2-6.3d(1)(c) (Supp. 4, Aug. 23, 1982). We find no basis to extend the reimbursement of credit report fees to the context of a lease. Accordingly, Mr. Wegner may not be reimbursed for the $20 credit clearance fee he paid in Chicago.

Placing Employee on TDY from Washington, D.C.

The agency's third question is whether, instead of transferring him every 6 months, it would have been more beneficial if Mr. Wegner had been placed on temporary duty from Washington, D.C., since that was ultimately his official duty station.

A newly hired employee may be authorized travel allowances for travel to temporary duty sites (and per diem while there) en route to the employee's first permanent duty station less the constructive cost of traveling directly from the employee's home to the first permanent duty station. *Cecil M. Halcomb,* 58 Comp. Gen. at 747-748; 53 Comp. Gen. 314 (1973). Whether a location is to be considered a temporary duty station or a permanent duty station is a question of fact to be determined from the orders directing the assignment and from the nature and duration of the assignment. *Peter Dispenzire,* 62 Comp. Gen. 560 (1983), and cases cited therein.

As is indicated above, in the circumstances of this case we do not question the agency's treatment of Mr. Wegner's transfers between the three locations as changes in official duty station. Likewise, the agency could have designated

[2] Reimbursement has also been extended to credit reports for a construction loan under strict limitations.

Washington as the permanent duty station and treated the three locations as temporary duty locations under the rule stated above. However, it appears that the cost of the latter action would have been much higher. A comparison of the estimated costs to the government of each type of duty would be appropriate in making such determinations in future cases. *See Robert E. Larrabee,* 57 Comp. Gen. 156 (1977).

B-232412, December 7, 1988

Procurement

Competitive Negotiation
■ Offers
■■ Technical acceptability
■■■ Computer software
■■■■ Modification

Proposal to create a new anti-AIDS drug information system (DIS) by using software enhancements to modify existing anticancer drug DIS and integrate the two systems complies with solicitation which contemplated modifications to existing DIS necessary to accommodate new anti-AIDS drug program.

Procurement

Socio-Economic Policies
■ Small business set-asides
■■ Subcontracting restrictions

In a small business set-aside procurement, small business contractor who proposes to subcontract less than 50 percent of its personnel costs to another firm complies with the limitation on subcontracting of services for small business concerns.

Procurement

Competitive Negotiation
■ Source selection boards
■■ Offers
■■■ Evaluation
■■■■ Propriety

Source selection officials are not bound by the technical evaluators' scores and may reevaluate proposals subject to the test of rationality and consistency with the solicitation's stated evaluation criteria.

Competitive Negotiation

■ **Discussion**

■■ **Adequacy**

■■■ **Criteria**

Protest that agency failed to conduct meaningful discussions with offeror is without merit where agency sent protester detailed questions that informed the protester of the areas of its proposal with which the agency was concerned, and the protester was given an opportunity to revise its proposal in response to these questions.

Matter of: Fein-Marquart Associates, Inc.

Fein-Marquart Associates, Inc., protests the proposed award of a contract to Capital Technology and Information Systems, Inc., under request for proposals (RFP) No. NCI-CM-87222-72, issued by the National Cancer Institute (NCI) for a computer system to handle data associated with anti-AIDS drug research. In general, the protester alleges that: (1) Capital's proposal did not comply with the solicitation requirements; (2) Capital will not comply with the small business set-aside requirements; (3) Fein's proposal was evaluated improperly; and (4) NCI did not conduct meaningful discussions with Fein.

We deny the protest.

NCI has developed an interactive computer system known as the drug information system (DIS) to handle all data associated with its anticancer drug screening program. DIS is an extensive system containing over 20 databases, including separate chemistry and biology files. DIS records all of the daily operations of the drug screening program such as the acquisition, screening, and biological testing of chemicals and is updated daily to include the most current test results. To assist researchers in combating the AIDS epidemic, the agency decided that a DIS-like system should be created with the primary purpose of screening and evaluating chemical agents for their anti-AIDS activity and maintaining the resulting data.

In November 1987, the subject RFP was issued as a total small business set-aside calling for award of a cost-plus-fixed-fee contract to develop and support a version of the DIS for the anti-AIDS program. The RFP stated that proposals would be evaluated based on the demonstrated capabilities of the offerors in relation to the needs of the project as set forth in the RFP. The specific evaluation factors were experience, qualifications and availability of personnel (40 percent); technical approach (30 percent); organizational qualifications and capabilities (20 percent); and facilities and equipment (10 percent).

Fein, the incumbent contractor who had designed the anticancer DIS for NCI, and Capital were the only firms to submit proposals. In January 1988, a technical evaluation group (TEG) performed an initial technical review of the proposals. Fein received a technical score of 878 points and Capital received a technical score of 644 points. Capital's proposed cost was lower than Fein's. In March, the source evaluation group (SEG) reviewed the results of the TEG, concurred

that both proposals were technically acceptable and determined that both firms should be included in the competitive range. The SEG also prepared questions advising the offerors of deficiencies in their proposals. In April, NCI sent letters to the two offerors listing the deficiencies in the proposals and requesting the offerors to provide supplemental information in those areas. In June, the SEG received and evaluated the revised proposals. Fein's overall technical score dropped 69 points to 809 points, while Capital's technical score increased 188 points to 832 points. Because Capital's final technical score was higher than Fein's and its evaluated cost was lower, the SEG recommended that Capital be awarded the contract. In August, Fein was given notice of NCI's proposed award to Capital and then filed its protest with our Office.

Capital's Proposal

The protester argues that Capital proposes to install and maintain a completely new database system, and therefore does not comply with the requirement in the RFP for the contractor to propose a system that uses and supports the existing anticancer DIS. The protester alleges that Capital intends to bypass the anticancer DIS and perform a number of functions outside the DIS, resulting in it being merely a central data repository. Because the anticancer DIS performs many other functions besides accessing data files—maintaining, managing, and searching databases; tracking the acquisition of new substances; and providing data security—Fein asserts that Capital's proposal, in effect, to replace the anticancer DIS with a new anti-AIDS system violates the RFP requirements. In the alternative, the protester alleges that even if Capital proposes to use the anticancer DIS as a database, Capital's proposal does not comply with the solicitation because its proposed enhancements to the DIS are beyond the scope of modifications to the existing system permitted under the RFP. Finally, the protester argues that because the two offerors were interpreting the RFP differently and proposing on two different bases, NCI should have amended the RFP to resolve the apparent ambiguity relating to the permissible degree of modification to the existing anticancer DIS.

NCI asserts that Capital's technical proposal complies with the solicitation requirements. According to NCI, Capital proposed an integrated approach between the anticancer DIS and the new anti-AIDS system by using a relational database package which is separate from, but integrated into, the anticancer DIS. The relational database package will be used to enter, update and query the anti-AIDS screening database; the anticancer DIS will maintain the chemistry, inventory and supplier information relating to the anti-AIDS data.

Although Capital's proposal has not been released to Fein, we have reviewed the proposal and NCI's evaluation documents *in camera,* and we agree with NCI that Capital's proposal complies with the requirements of the RFP.

The RFP requires the contractor to develop, operate, and maintain a version of the DIS to manage data derived from the anti-AIDS discovery effort. The RFP recognizes that the existing anticancer DIS will have to be modified to accom-

modate the requirements of the new anti-AIDS program. Thus, the RFP calls for the contractor to maintain a *version* of the DIS, referred to as a "DIS-like shell." Contrary to the protester's assertion, the RFP clearly contemplates enhancements to the existing system. While the RFP requires the anti-AIDS data to reside in the anticancer DIS, the contractor is required to provide software enhancements that will support the anti-AIDS drug program and conform to the anticancer DIS program. In addition, because NCI recognizes there may be differences between the anticancer drug program and the anti-AIDS drug program, the RFP states that the contractor may be required to provide significant software enhancements to the anticancer DIS to reflect such a difference.

Since the solicitation clearly provided for modification to the anticancer DIS as necessary to fulfill the distinct requirements of the anti-AIDS program, we see no basis to conclude, as Fein argues, that the RFP was ambiguous with regard to the permissible technical approach. Rather, the protester and Capital simply proposed two different ways to satisfy the RFP requirements. Further, after review of the entire record, we see no basis to conclude that Capital's proposed approach involves enhancements to the existing DIS beyond the scope contemplated by the RFP. On the contrary, NCI properly found that Capital proposed an integrated approach with changes to the anticancer DIS necessary to accommodate the distinct or additional requirements of the anti-AIDS program.

The protester also asserts that Capital's proposal violates Federal Acquisition Regulation § 52.219-14(a), which requires that at least 50 percent of the contractor's personnel costs be expended for the contractor's employees, because Capital, a small business concern, intends to subcontract more than 50 percent of its personnel costs to another firm. The protester further states that the fully loaded rates for personnel costs for both Capital and its subcontractor should be included when determining the personnel costs. We have reviewed Capital's cost proposal *in camera* and have determined that less than 50 percent of the personnel costs for both the fully loaded rates and the unburdened rates will be subcontracted. Accordingly, this allegation is without merit.

Fein's Proposal

The protester alleges that the SEG improperly rescored its revised proposal by reducing its technical score by approximately 70 points in the same areas in which its score already had been reduced by the TEG. Fein further alleges that the SEG improperly failed to increase its score in all areas for which Fein provided satisfactory answers in its revised proposal. We find these arguments to be without merit.

Under the procedures used by NCI here, the initial evaluation was performed by the TEG, an *ad hoc* group of outside consultants. Their findings then were reviewed by the agency's own SEG. Based on the SEG's recommendations, the contracting officer made the competitive range determination. After discussions, the SEG reviewed the best and final offers (BAFO) and for the first time scored the proposals. The contracting officer then made the award selection based on

the SEG's recommendation. We see no basis to object to NCI's evaluation procedures. It is well-settled that a source selection official is not bound by the scoring or recommendations of the technical evaluators. *Maschoff, Barr & Associates,* B-228490, Jan. 26, 1988, 88-1 CPD ¶ 77. Similarly here, the SEG was not bound by the TEG's point scores, and, as a result, acted properly by scoring the BAFOs based on its own assessment of the technical merits of the proposals.

Further, based on our review of the record, the SEG's evaluation was reasonable. For example, the SEG explains that Fein's point score for the evaluation criterion "personnel" was reduced because the responses by Fein in its revised proposal actually weakened the original proposal. Specifically, the SEG found that Fein failed to respond to NCI's concerns that its principle investigator was not keeping abreast of the state-of-the-art technology, and that Fein's proposed personnel failed to demonstrate the capability to deal adequately with scientific data. Furthermore, we see nothing improper in the fact that the protester's score was not always increased when it submitted a satisfactory answer. In this regard, the record shows that both Fein's and the awardee's scores were increased only when the responses in their revised proposals were determined to substantially improve the proposals.

Finally, the protester asserts that NCI failed to conduct meaningful discussions by not advising Fein that its proposal was not considered sufficiently innovative. Fein contends that, in contrast, the questions posed to Capital during discussions encouraged it to pursue a more innovative approach. We find this argument to be without merit.

The actual content and extent of discussions are matters of judgment primarily for determination by the agency involved, and our Office will review the agency judgments only to determine if they are reasonable. *Tidewater Health Evaluation Center, Inc.,* B-223635.3, Nov. 17, 1986, 86-2 CPD ¶ 563. Once having been apprised of problem areas in its proposal, the burden is on the offeror to furnish satisfactory responses after discussions are conducted. *Professional Review of Florida, Inc., et al.,* B-215303.3, B-215303.4, Apr. 5, 1985, 85-1 CPD ¶ 394. Moreover, where a proposal is considered to be acceptable and in the competitive range, an agency is not obligated to discuss every aspect of the proposal that receives less than the maximum possible score. *Varian Associates, Inc.,* B-228545, Feb. 16, 1988, 88-1 CPD ¶ 153.

Here, both offerors were treated equally with respect to discussions in that they were both presented a list of written questions outlining the deficiencies in their proposals. Fein's notice contained nine questions relating to perceived deficiencies and Fein, as well as Capital, was afforded the opportunity to revise its proposal. The fact that different types of questions were posed to Fein and Capital is not significant since the questions were tailored to each offeror's proposal; to the extent Capital proposed a more "innovative" approach, NCI's discussion questions logically focused on that aspect of its proposal. In any event, the evaluation documents show that Fein's lack of innovation related only to one aspect of its proposal—the degree to which the proposed system would be "user friendly"—and one of the questions posed to Fein during discussions specifically re-

ferred to innovation in this context. Contrary to Fein's contention, there is no evidence that the technical evaluation of Fein's proposal turned on some general determination by NCI that Fein's approach was not sufficiently innovative overall.

The protest is denied.

B-229917.11, December 8, 1988

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Request for recovery of proposal preparation costs by unsuccessful offeror based on decision sustaining protest brought by another offeror under same solicitation is denied where firm requesting costs did not file protest, since recovery of costs under General Accounting Office Bid Protest Regulations is limited to actual protesters whose protests are sustained.

Matter of: Federal Auction Service Corporation—Request for Costs

Federal Auction Service Corporation requests recovery of its proposal preparation costs in connection with request for proposals (RFP) No. 26/101/2, issued by the Veterans Administration (VA) for auctioneering services in connection with sales of single family properties owned by VA. We deny the request for costs.

The procurement by VA has been the subject of numerous protests to our Office. We recently sustained a protest filed by Kaufman Lasman Associates, Inc., an unsuccessful offeror, concerning award of a contract under the RFP to Larry Latham Auctioneers, Inc. *Kaufman Lasman Associates, Inc.*, B-29917.9, Oct. 21, 1988, 68 Comp. Gen. 34, 88-2 CPD ¶ 381. We held that VA improperly made award to Latham based on price-related factors not set out in the RFP, despite the contracting officer's finding that the proposals submitted by Kaufman Lasman and Latham were technically equal. Given that the base period under Latham's contract expires in December 1988, we concluded that it was not appropriate to recommend termination of Latham's contract. Instead, we recommended that VA refrain from exercising any of the options under the contract and instead conduct a new procurement for its future needs. In addition, we found that Kaufman Lasman was entitled to recover its proposal preparation costs and the costs of filing and pursuing the protest, including attorneys' fees.

Federal Auction Service now contends that, in view of our holding in the *Kaufman Lasman* case, it is entitled to recover its proposal preparation costs since it, like Kaufman Lasman, submitted an offer under the RFP. We find this argument to be without merit.

With regard to the award of costs, our Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988), provide as follows:

If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare *the protester* to be entitled to reasonable costs of:

(1) Filing and pursuing the protest, including attorneys' fees; and

(2) Bid and proposal preparation. (Italics added.)

Here, Federal Auction Service chose not to file a protest raising the issues on which we ultimately sustained the protest by Kaufman Lasman.[1] Instead, it now attempts to reap the benefit of our decision sustaining Kaufman Lasman's protest without having assumed the burden of filing a protest itself. There clearly is no basis in our regulations for awarding costs to Federal Auction Service under these circumstances.

The request for costs is denied.

B-229189, December 9, 1988

Military Personnel

Relocation
■ Household goods
■■ Losses
■■■ Replacement
■■■■ Shipment costs

Where a service member's household goods are lost at sea during government-procured transportation to Iceland incident to a permanent change of station, the transportation of replacement items, within the member's authorized weight allowance applicable when the travel orders became effective, may be made at government expense, even though the items were acquired after the effective date of orders. Our holding in 50 Comp. Gen. 556 (1971) will no longer be followed. The Joint Federal Travel Regulations may be amended to authorize the transportation of replacement items under such circumstances. 50 Comp. Gen. 556, overruled.

Matter of: Staff Sergeant Mitchel G. Brannon, USAF—Overseas Shipment of Household Goods—Lost Shipment

We conclude that the expense of transporting a replacement shipment of household goods for a service member may be paid by the government, and the Joint Federal Travel Regulations may be amended to specifically authorize payment for transporting similar shipments, within prescribed limitations.

[1] Federal Auction Service did file one of the earlier protests concerning this procurement. *See Federal Auction Service Corp., et al.*, B-229917.4, *et al.*, June 10, 1988, 88-1 CPD ¶ 553, *aff'd on reconsideration*, B-229917.8, June 22, 1988, 88-1 CPD ¶ 597. In its protest, which was filed before the award decision had been made, Federal Auction Service contended that Kaufman Lasman had been given an unfair competitive advantage due to certain information that had been released by the contracting agency. That protest was denied, and, in any event, it clearly had no relation to the issues subsequently raised by Kaufman Lasman.

Background

In November 1985, household goods belonging to Staff Sergeant Brannon, USAF, were lost at sea while in transit from the United States to Iceland incident to a permanent change-of-station move. He filed a claim with the Air Force for $40,138.32, which included $5,040 to reimburse him for the cost of shipping replacement household goods from the United States, a measure that was necessary since replacement items could not be purchased in Iceland.

Settlement of the claim is limited by law to $25,000. *See* 31 U.S.C. § 3721 (1982). Therefore, Sergeant Brannon will be required to absorb the shipping expenses of transporting replacement household goods, unless 37 U.S.C. § 406(b)(1)(A) (Supp. IV 1986) authorizes the transportation of the shipment at government expense.

In this context, the Chairman of the Per Diem, Travel and Transportation Allowance Committee asks the following two questions:

a. May a shipment of replacement items of household goods be made at Government expense [under 37 U.S.C. § 406(b)(1)(A)] in SSgt Brannon's case?

b. May the Joint Federal Travel Regulations be amended to authorize a shipment of replacement items of household goods when through no fault of the member concerned, items of household goods have been lost or damaged prior to consummation of the original shipment in cases where the loss, including the cost of shipping replacement items, will exceed the statutory maximum claim liability of $25,000?

Opinion

Section 406(b)(1)(A) of title 37 provides in relevant part:

. . . in connection with a change of temporary or permanent station, a member is entitled to transportation . . . of baggage and household effects, or reimbursement therefor, within such weight allowances prescribed by the Secretaries concerned. . . .

Military officials point out that our decision in 50 Comp. Gen. 556 (1971) prohibits shipment of replacement items under 37 U.S.C. § 406(b)(1)(A). In that case, all of the household goods of military members on a permanent change of station were destroyed in a warehouse fire in Europe before final delivery could be performed. We held that there was no statutory authority for an additional shipment of replacement household goods. The rule prohibiting the shipment of after-acquired property at government expense was stated as follows:

Under the provisions of 37 U.S.C. 406(b), the right of members of the uniformed services to shipment of household effects at Government expense incident to change of station accrues to such members upon the issuance of orders and becomes definite on the effective date of such orders. Therefore, entitlement to shipment generally relates only to those effects possessed by a member at that time. 43 Comp. Gen. 514 (1964) and decisions therein cited.

We agree with the military officials that our decision in 50 Comp. Gen. 556 reflects an unduly restrictive interpretation of 37 U.S.C. § 406(b) and may also be inconsistent with exceptions we have made to the so-called after-acquired property rule.

In 27 Comp. Gen. 171 (1947), we authorized the amendment of regulations to pay for the transportation overseas of household goods acquired after a permanent change of station occurred. Due to a critical housing shortage in the United States at the time, many members had been living in furnished quarters. Where they received overseas assignments, it was necessary that they purchase household goods between the date that orders were issued and the date they became effective. In some cases, the members were even unable to purchase household goods until after the effective date of orders. *See also* 43 Comp. Gen. 514 (1964), allowing the transportation of replacements for broken and worn out articles in the member's possession on the effective date of orders. These long-established exceptions are reflected in the definition of "Household Goods" in appendix A, note 4 of the Joint Federal Travel Regulations.

The statute provides broad authorization for the transportation of household goods in connection with a change of temporary or permanent stations. We believe the statutory entitlement contemplates the delivery of the member's goods in usable condition. Accordingly, we hold that where a member's original shipment of household goods is destroyed or lost during transportation incident to a change of temporary or permanent stations, a replacement shipment of household goods, within the member's prescribed weight allowance, may be made at government expense as though the original shipment was improperly shipped or unavoidably separated from the member. *See* Joint Travel Regulations, vol. 1, para. M8012 (Change No. 388, June 1, 1985). Our holding in 50 Comp. Gen. 556 will no longer be followed. Therefore, a shipment of replacement items of household goods may be made at government expense on behalf of Sergeant Brannon.

The second question is whether the Joint Federal Travel Regulations may be amended to permit replacement shipments under the same circumstances where the loss will exceed the statutory maximum claim liability of $25,000 under 31 U.S.C. § 3721(b).

Our holding in 50 Comp. Gen. 556 was partly based on the understanding that members could be compensated for the cost of replacement shipments under what is now 31 U.S.C. § 3721. We did not contemplate a situation where the total loss, including replacement shipment costs, would exceed the government's maximum claim liability. In any event, consistent with our decision to overrule 50 Comp. Gen. 556, we have no objection to the proposed amendment to the Joint Federal Travel Regulations. We see no reason to tie the authority to ship replacement items under 37 U.S.C. § 406(b)(1)(A) to the monetary limit on claims settlements under 31 U.S.C. § 3721.

B-232323, December 12, 1988

Procurement

Small Purchase Method

■ Purchases

■■ Propriety

Protest concerning agency's failure to solicit protester for appraisal services procured under small purchase procedures is sustained, where record shows that agency failed to obtain maximum practicable competition by not disclosing basic procurement information to protester and other solicited appraisers, and then proceeding with an expedited award based on single price quote received.

Matter of: California Properties, Incorporated

California Properties, Incorporated (CPI), protests the award of a contract under an oral request for quotations issued by the Department of Housing and Urban Development (HUD) for appraisal services for the Geneva Towers Apartment building in San Francisco. CPI contends that HUD acted unreasonably in failing to allow CPI to compete for the appraisal contract.

We sustain the protest.

The facts according to HUD are as follows. On July 28, a HUD official conducted an oral request for quotes for an appraisal of the Geneva Towers complex using small purchase procedures, calling six appraisers from a list of known capable appraisers. HUD received a quote from a Ms. Farkas ($5,000) and left messages for the other appraisers, including Rosenbusch. One of the firms with which HUD spoke was CPI, which had performed appraisal services for HUD previously, and recently had advised HUD by letter that it was interested in performing future appraisals for the agency. During the conversation, CPI requested information on the property (*e.g.*, any physical defects, or whether the appraisal should be made as is), and reportedly stated that it would not give a quote without "written specifications." The HUD official advised that no written specifications would be issued for this appraisal; rather, interested appraisers would have to come to the HUD offices or make a site inspection to obtain information on the project.

On the next day, July 29, Rosenbusch called in response to HUD's message and expressed interest in the project. Later that day, Rosenbusch came to the HUD offices and was given the general requirements for the appraisal; he stated that he would be interested in the project. On August 1, Ms. Farkas withdrew her quote. On August 4, the HUD's chief appraiser called CPI to determine if CPI wanted to submit a quote. CPI once more expressed interest, but repeated that it would need written specifications. The chief appraiser stated that CPI would have to come to the HUD offices for any information.

On August 5, after being advised by another HUD official that there were "compelling circumstances" requiring a prompt award, HUD's chief appraiser called Rosenbusch to get his quote for the appraisal; he quoted a price of $7,250, and the chief appraiser proceeded to make an oral award. Rosenbusch then submitted a written acceptance of the contract on August 8. (Subsequently, the chief

appraiser learned that he lacked authority to make award, and thus sought ratification of the contract by letters of August 19 and 26. A contracting officer subsequently ratified the contract.)

CPI's account of the facts is different from HUD's in several material respects. CPI states, for example, that it was first contacted by the HUD official on July 22 as to whether CPI was interested in quoting on the Geneva Towers appraisal. CPI expressed interest, but asked several questions about the project that the official could not answer; the official told CPI to call the chief appraiser. CPI called the chief appraiser on July 26, and was told that the information CPI wanted would be provided in the event HUD decided to use a private, rather than an internal HUD, appraiser. HUD's account of the facts does not mention this conversation.

CPI agrees that it spoke with the HUD official again on July 28, but its account of the conversation is different from HUD's: CPI repeated its July 22 request for answers to specific questions on the appraisal and the HUD official agreed to call CPI after obtaining the answers; he never called back with the answers. CPI's account of its August 4 conversation with HUD's chief appraiser also is different from HUD's: the chief appraiser advised CPI that HUD had not yet decided whether to use a private appraiser, and that he would call CPI if HUD decided to use a private appraiser. CPI maintains it was never invited to the HUD offices for the information it wanted. CPI phoned HUD on August 11 and was advised that the award had been made to Rosenbusch. This protest ensued.

Small purchase procedures require agencies to promote competition to the "maximum extent practicable." 41 U.S.C. § 253(g)(4) (Supp. IV 1986). The regulations provide that, generally, the solicitation of three suppliers may be considered to promote competition to the maximum extent practicable. Federal Acquisition Regulation § 13.106; *Gateway Cable Co.*, 65 Comp. Gen. 854, 86-2 CPD ¶ 333.

The solicitation of three or more suppliers, however, does not automatically mean that the maximum practicable competition standard has been met. In procurements expected to exceed $10,000 but where less than two offerors are otherwise expected to respond to a solicitation, an agency is required to publish notice of the intended procurement in the *Commerce Business Daily* and make available a completed solicitation package to any business concern requesting it. 41 U.S.C. § 416 (Supp. IV 1986). This provision obviously requires an agency to do more than simply solicit a single known supplier. Further, the Small Business Act, as amended, 15 U.S.C. § 637b (1982), expressly requires that contracting agencies provide a copy of a solicitation to any small business concern upon request, and CPI apparently is a small business. While the publication requirement does not apply to the protested small purchase since it involves an amount under $10,000, the point is that the procurement statutes and the Small Business Act obviously contemplate that, regardless of whether three suppliers are solicited, responsible sources requesting the opportunity to compete should be afforded a reasonable opportunity to do so. *Gateway Cable Co.*, B-223157, *supra.*

In short, we view the requirement for maximum practicable competition to mean that an agency must make reasonable efforts, consistent with efficiency and economy, to give a responsible source the opportunity to compete, and cannot, therefore, unreasonably exclude a vendor from competing for an award. As we read the record, HUD did not meet the above standard.

The thrust of HUD's position is that it was aware of CPI's interest in the project, but understood CPI to have refused to give a quote without written specifications; since HUD did not plan on issuing written specifications, there was no point in soliciting CPI again immediately before making the expedited award to Rosenbusch. CPI maintains, on the other hand, that it only requested answers, written or oral, to certain general questions, such as whether the appraisal was to be on an as is basis, and the schedule for completion. CPI states that it had recently completed four other HUD appraisals without written specifications, and thus would have had no reason to expect anything different on this project.

While it is not clear which party's understanding of the facts is the correct one, we think the record supports CPI's position that HUD failed to take reasonable, simple steps to maximize competition for this contract. We find particularly persuasive in this regard a July 28 memorandum (included in the HUD report), prepared to respond to the questions CPI posed during its July 28 conversation with the HUD official. The memorandum provides answers to eight questions, including the purpose of the appraisal; any relevant financing terms; whether the appraisal was to be made subject to repairs; a property description; the due date for the appraisal report; and the number of reports and copies required. (The memorandum stated that appraisers should conduct a site visit and research project records to get a current property description.)

This memorandum suggests to us that CPI had, as it contends here, merely asked for answers to these basic questions to determine if it would or could perform the job, and did not condition its giving a quote on the receipt of more detailed written specifications. In any case, even if HUD correctly understood CPI as requesting written specifications, the memorandum evidences the agency's understanding that CPI also desired answers to more basic questions. This being the case, it is unclear to us why the answers in the memorandum apparently were never transmitted to CPI; in this regard, there is no statement by HUD that CPI was given the answers, and CPI firmly denies ever receiving the information.

HUD's approach of giving no written or telephone information on the project to interested appraisers clearly did not serve to promote the maximum practicable competition. The questions CPI presented during the July 28 conversation (and later answered in the memorandum) generally were basic, not expansive, and we agree with the view CPI apparently expressed to HUD at the time that this information would be helpful, if not essential, to the firm in deciding whether to compete, and in preparing a price quote. Indeed, had this same information been furnished to all six of the solicited appraisers at the outset, it is possible

that HUD would have had more than one quote from which to choose when it made the award.

While the small purchase procedures do not require "full and open competition," as indicated above, they do require reasonable efforts to permit a responsible source to compete. Whether or not HUD understood that CPI had requested more information in writing, we do not think HUD met this requirement when it proceeded with an expedited award to Rosenbusch without first furnishing CPI with the answers it had requested (and which the HUD official apparently had agreed to furnish), and then giving the firm an opportunity to quote a price based on that information. Following such a course of action could have increased competition; would have imposed no significant administrative burden on HUD (it could have been done with a single phone call); and would not have prevented HUD from proceeding promptly with the award.

Although we therefore sustain the protest, corrective action is not practicable; HUD proceeded with performance of the Geneva appraisal notwithstanding CPI's protest, based on a determination that continued performance was dictated by urgent and compelling circumstances, *see* Bid Protest Regulations, 4 C.F.R. § 21.4 (1988), and the contract has been completed. By separate letter, however, we are advising the Secretary of our decision. We also find CPI entitled to recover its costs of filing and pursuing this protest. *See* 4 C.F.R. § 21.6(e).[1]

The protest is sustained.

B-232760, December 14, 1988

Procurement

Sealed Bidding
■ Bids
■■ Modification
■■■ Late submission
■■■■ Rejection

Telegraphic bid modification, recorded by the agency as having been received for the first time the day after bid opening, is properly rejected as late notwithstanding information from Western Union purporting to show that it was transmitted prior to bid opening; the only acceptable evidence to establish timely receipt is the government's time/date stamp or other evidence of receipt maintained at the government installation.

[1] CPI also requests recovery of unidentified "actual damages," presumably representing anticipated profits. It is well established, however, that anticipated profits are not recoverable even in the presence of wrongful agency action. *Sonic, Inc.*, B-225462.2, May 21, 1987, 87-1 CPD ¶ 531.

Sealed Bidding

■ Bids

■■ Modification

■■■ Allegation substantiation

■■■■ Burden of proof

Protester's assertion that contracting official improperly refused to accept attempted telephone modification of its bid through Western Union is not sufficiently supported by record where protester presents confirming notice from Western Union that call was attempted, but there is no contemporaneous documentation that call was made or that contracting official refused to accept modification, and contracting official denies in affidavit that she received call from Western Union or that she ever instructed any employee to refuse telephone modification.

Matter of: Singleton Contracting Corp.

Singleton Contracting Corp. protests the rejection of its telegraphic bid modification as late, and the award of a contract to F.H. Myers Construction Company, under invitation for bids (IFB) No. 00-88-B-90, issued by the Department of Agriculture (USDA) for the installation of wainscoting and bumper railings at its National Finance Center building in New Orleans.

We deny the protest.

According to the IFB, bids were to be received by 3 p.m. on September 19, 1988. Although Singleton's initial bid was timely received, the firm subsequently sought to modify its bid by telex, via Western Union, on the morning of September 19. The modification would have made Singleton's the low bid. According to the agency, however, the modification was not received until 12:18 p.m., on September 20, approximately 21 hours after bids had been opened. Consequently, it was rejected as late and award was made to Myers as the low responsible bidder. Singleton argues that its telex was timely received, as evidenced by documentation furnished the firm by Western Union.

Generally, a telegraphic modification of a bid may be accepted only under the exact circumstances set out in a solicitation. *Delta Lighting Corp.,* B-219649, Oct. 30, 1985, 85-2 CPD ¶ 491. Here, the IFB incorporated the "Late Submissions, Modifications, and Withdrawals of Bids" clause of the Federal Acquisition Regulation (FAR) § 52.214-7. This clause permits consideration of a telegraphic modification received at the office designated in the solicitation after bid opening if (1) it is received before award is made, and (2) the government determines that late receipt was due solely to mishandling after receipt at the installation. As provided in the FAR and in our decisions, the only acceptable evidence of receipt at the government installation is the time/date stamp on the bid wrapper or other documentary evidence of receipt maintained by the installation. *Boniface Tool & Die, Inc.,* B-226550, July 15, 1987, 87-2 CPD ¶ 47.

Here, the proof offered by Singleton of the timely receipt of its bid modification is information from Western Union which indicates the time and date of that firm's attempted transmission of Singleton's bid price reduction. We have specif-

ically held that such information from Western Union is unacceptable to establish the time of receipt of a telegraphic modification. *Id.; see also, Kings Point Industries,* B-228150, Nov. 10, 1987, 87-2 CPD ¶ 474. This is not evidence maintained by the installation, and thus does not suffice to establish timely receipt. For its part, USDA reports that the earliest record of its receipt of the telexed bid modification is 12:18 p.m., on September 20, at its telegraphic message room. The agency further states that a review of the message room's "hard disk," which permanently records all telegraphic messages received by USDA, indicated that none had been received from Singleton on September 19. Consequently, there is no evidence of receipt at the government installation to support Singleton's contention that its bid modification was timely received.

In the alternative, the protester offers information from Western Union that it attempted delivery of Singleton's message via telephone on the morning of September 19, but was directed by an agency contracting official to forward the message to the agency's telex number. According to Singleton, since it was improper for the agency to refuse the telephonic modification (which is provided for by FAR § 14.303(a)), the agency's doing so constituted government mishandling of the bid modification that warrants consideration of the subsequent telex.

In support of this argument, the protester has submitted a mailgram from Western Union to Singleton advising that Singleton's telegram of September 19, 9:36 a.m., "was attempted for delivery via telephone and refused by addressee [office designated for receipt of bids]. Agent was instructed per Brenda Whitingham to forward to telex number 89491. . . ." (Brenda Whittingham is a contract specialist and is named in the solicitation as the person authorized to receive bids.) Ms. Whittingham has stated in a sworn affidavit, however, that she neither received a telephone call from Western Union on September 19, nor instructed the only other person in her office that day, her secretary, to refuse any such call. She also states that she did not even know the agency's telex number, and therefore could not have provided it to Western Union even had she received the call. Given these considerations and the absence in the record of any conclusive, comtemporaneous evidence of an attempted telephonic communication, we find that Singleton has failed to demonstrate that a telephonic bid modification was attempted by Western Union and refused by any authorized agency official.[1] The protester bears the responsibility for its agent's failure to make a timely and complete transmission of a bid modification. *See Hargis Construction, Inc.,* B-221979, May 6, 1986, 86-1 CPD ¶ 438.

The protest is denied.

[1] We offered Singleton the opportunity for a fact-finding conference on the issue of whether USDA officials refused any attempted telephonic modification of the firm's bid, but after Singleton determined that it was unable to obtain a knowledgeable witness from Western Union who could testify on the issue, Singleton declined.

B-233266, December 14, 1988

Procurement

Sealed Bidding
■ Bid guarantees
■■ Responsiveness
■■■ Letters of credit
■■■■ Adequacy

Where copy of irrevocable letter of credit submitted as a bid guarantee indicates that the agency can only demand payment from the surety upon presenting the original letter of credit, the letter is of questionable enforceability, and the bid therefore is properly rejected as nonresponsive.

Matter of: DDD Company

DDD Company protests the rejection of its low bid for mailroom services under invitation for bids (IFB) No. NASP-N7-B-0103, issued by the National Archives and Records Administration (NARA). The agency rejected the bid as nonresponsive because it found DDD's bid bond, in the form of a copy of a letter of credit, to be unenforceable, and therefore unacceptable. DDD contends that it submitted the original letter of credit with its bid and that its bid therefore is responsive.

We deny the protest.

The IFB required each bidder to submit a bid guarantee in the amount of 20 percent of the bid price, or $3,000,000, whichever was less. In accord with Federal Acquisition Regulation (FAR) § 52.228-1, the IFB stated that failure to furnish a guarantee in the proper form and amount by the time set for bid opening may be cause for rejection of the bid.

DDD's was the low bid of the six received and included as a bid guarantee an irrevocable letter of credit issued by the Maryland National Bank on September 1, 1988. The letter, in the amount of $17,540, referenced the NARA in Washington, D.C., and further stated that "the original of this letter of credit must be presented to us with any drawings hereunder for our endorsement of any payments effected by us." However, after further examination of the three copies of the bid submitted by DDD, the contracting officials determined that all three copies of the bid contained copies of the letter of credit, and that the original was not furnished. Since the copies submitted expressly stated that the original document must be presented as a condition of payment, the contracting officer determined that DDD had not satisfied the bid guarantee requirement and rejected the bid as nonresponsive.

The protester alleges that it did submit the original letter of credit with its bid, and contends that its position is substantiated by the agency's acknowledgment at the bid opening that the protester's bid guarantee was present. The contracting officer states, however, that DDD's bid documents all were in bound volumes enclosed in a brown paper wrapping, and that at the bid opening there were no loose papers in the brown paper wrapping, and no loose papers in the

bound volumes. The NARA official present at the bid opening states that she announced that the protester's bid contained a bid guarantee based on the copy of the letter of credit she saw in one of the three copies submitted; it was never her intent to indicate the acceptability or validity of the protester's bid guarantee.

A letter of credit is essentially a third-party beneficiary contract. Upon request of its customer, a financial institution may issue such a letter to a third party, whose drafts or other demands for payment will be honored upon the third party's compliance with the conditions specified in the letter. The effect and purpose of a letter of credit is to substitute the credit of some other entity for the credit of the customer. *See Chemical Technology Inc.,* B-192893, Dec. 27, 1978, 78-2 CPD ¶ 438. The purpose of any bid guarantee, including a letter of credit, is to secure the liability of a surety to the government in the event the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. *Hydro-Dredge Corp.,* B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Thus, the sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms. When the liability of the surety is not clear, the guarantee properly may be regarded as defective, *Desert Dry Waterproofing Contractors,* B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268, and the bid must be rejected as nonresponsive. *A&A Roofing Co., Inc.,* B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

Here, since the terms of the letter of credit made payment contingent on presentation of the original, we think it is clear under the above standard that, absent submission of the original instrument with DDD's bid, the enforceability of the guarantee is at best questionable, and the bid had to be rejected as nonresponsive. We have specifically held, moreover, that a photocopy of a letter of credit is unacceptable as a bid guarantee, since there would be no way (other than by an examination of the original) that the agency could be certain that there had not been alterations to which the surety had not consented. *See Imperial Maintenance, Inc.,* B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. Our decision thus ultimately turns on whether DDD submitted the original with its bid.

While DDD argues that the original guarantee was received by the agency along with its bid, DDD is in a position to assert only that it *included* the original when it was preparing its bid package; DDD was not present when the bid was received by NARA, and neither DDD nor any other person saw the original at the bid opening. Since there is no other reason to believe, or evidence establishing, that NARA incorrectly determined that the original was not received, on this record we think it only reasonable to conclude that the original was misplaced during preparation of the bid, or lost in the process of transporting the bid to the agency. Whatever the explanation, since we find no evidence belying NARA's statement that the original guarantee was not received—the contracting official's acknowledgment at bid opening based on examination of a copy does not constitute such evidence—we conclude that the agency properly determined that DDD's bid was nonresponsive.

The protest is denied.

B-232258, December 15, 1988

Procurement

Special Procurement Methods/Categories
■ Communications systems/services
■■ Evaluation
■■■ Technical acceptability

The contracting agency reasonably determined that the protester offered a private branch exchange (PBX) system in response to a procurement to replace existing, leased telephone equipment, where: (1) the protester specifically stated that it was offering a "PBX/Integrated Data Voice switch" in its best and final offer; (2) there were many references to a PBX switch in the protester's proposal and attached descriptive literature; and (3) the protester admits that the distinction between PBX and key systems has become blurred and stated that it referred to its proposed switch as a PBX switch as a "sales answer" to the contracting agency in its proposal.

Procurement

Special Procurement Methods/Categories
■ Communications systems/services
■■ Contract awards
■■■ Authority delegation

Where the General Services Administration (GSA) authorized the contracting agency to procure new telephone equipment, but the authorization specifically excluded purchase of a private branch exchange (PBX) system, the contracting agency properly referred the protester's proposal of a PBX system to GSA for a delegation of procurement authority (DPA). When GSA denied the contracting agency's DPA request, award could not be made to the protester because it was not authorized.

Procurement

Special Procurement Methods/Categories
■ Communications systems/services
■■ Contract awards
■■■ Authority delegation

Protest that it was unreasonable for the General Services Administration (GSA) to deny the procuring agency a delegation of procurement authority (DPA) to purchase the protester's private branch exchange telephone system will not be reviewed by the General Accounting Office as the decision whether to issue a DPA is committed by law to GSA, subject to review by the Director of the Office of Management and Budget.

Matter of: Comcraft, Inc.

Comcraft, Inc., protests the Corps of Engineers' award of a contract for the design and installation of a telephone system to ISOETEC Communications, Inc., pursuant to request for proposals (RFP) No. DACW41-88-R-0003. Comcraft contends that the Corps improperly rejected its offer even though it received the highest technical evaluation score and was significantly lower in price than ISOETEC's offer. Comcraft also contends that ISOETEC's offer should have been rejected as unacceptable, because ISOETEC is not a small business and it proposed to supply a telephone system manufactured in a foreign country.

We deny the protest.

The RFP, issued on December 31, 1987, solicited offers for replacing the telephone equipment currently leased from AT&T and used by the Corps' Kansas City District Office, and, as amended, required that initial proposals be submitted by February 8, 1988. The RFP contemplated award of a firm fixed-price, indefinite delivery supply contract for design of a telephone system and supply of assorted telephone equipment and related services such as maintenance for the basic 1-year contract period, and contained options for 2 additional years. The RFP set out a number of performance specifications that the telephone system had to meet and indicated that technical factors would be considered more important than price for evaluation purposes.

The statement of work required installation of electronic station units and related equipment in four buildings in which the District Office is located. Because most of the District Office is housed, along with several other federal agencies, in a building managed by the General Services Administration (GSA), the solicitation required that the telephone system be compatible with a consolidated private branch exchange (PBX) switch previously procured by GSA to meet the voice and data transmission needs of the tenant agencies. The RFP did not specify whether the proposed system had to be an electronic key system or a PBX system; either type was acceptable to the Corps so long as the telephone system could meet all of the RFP's performance requirements. The RFP required that the telephone wire be able to receive and transmit data and interface with a local area network system (LAN), but did not require data networking capability or equipment.

At a preproposal conference on January 14, 1988, the Corps informed potential offerors, including the protester, that they were free to propose whatever type of telephone system (electronic key or PBX) they chose, but, if a PBX system were proposed and selected for award, the Corps would have to request a delegation of procurement authority (DPA) from GSA, because GSA had not authorized the Corps to replace its existing telephone system with a PBX system without specific approval from GSA.[1] This information was subsequently incorporated into the solicitation.

Four proposals were submitted by the closing date, and the Corps held negotiations with all four firms. Best and final offers were received by March 25. A technical evaluation panel evaluated the proposals and determined that Comcraft's proposal was the best technical proposal overall when compared to the RFP's requirements; the evaluators also determined that Comcraft proposed to provide a PBX system. The evaluators gave ISOETEC's proposal the second-highest technical rating, based upon its offer of an electronic key system. The evaluators recommended that the contract be awarded to Comcraft if the award properly could be made under the Federal Information Resources Management Regulations (FIRMR), 41 C.F.R. Part 201. On the other hand, the evaluators rec-

[1] Pursuant to the Statement of Areas of Understanding between the Department of Defense (DOD) and GSA, communications services for DOD activities occupying property controlled by GSA generally are to be procured or provided by GSA. However, GSA subsequently authorized agencies to purchase telecommunications equipment to replace existing leased equipment and key systems; this authorization specifically excluded purchases of PBXs.

ommended that the contract be awarded to ISOETEC if the contract had to be made on the basis of an electronic key system. The contracting officer agreed that Comcraft's proposal was the best overall proposal, and, because Comcraft proposed to supply a PBX-type system, requested a DPA from GSA.

Ultimately, GSA denied the Corps' request for a DPA, primarily because Comcraft's PBX system would duplicate the services already available to the Corps through GSA's existing consolidated PBX switch. In other words, GSA determined that a PBX system that included data networking capabilities, such as Comcraft's, represented an unnecessary duplication of PBX capabilities that had already been purchased by GSA for the Corps' use.

The contracting officer determined that, because GSA had denied the Corps a DPA for a PBX system, the Corps had no authority to award a contract to Comcraft. Therefore, the contracting officer decided to make award to ISOETEC on the basis of its second-highest technical evaluation score, even though its evaluated costs were higher than Comcraft's. Because ISOETEC's proposed system was an electronic key, rather than a PBX system configuration, the contracting officer did not request a DPA from GSA. ISOETEC was awarded the contract on July 27, 1988, and Comcraft protested to our Office on August 11.

Comcraft argues that the Corps acted improperly in making award to ISOETEC instead of Comcraft in view of Comcraft's technical superiority and lower price. The Corps contends that it lacked authority to make award to Comcraft because GSA denied its request for a DPA to purchase Comcraft's system. The underlying issue on which the propriety of the decision not to award to Comcraft turns is whether the Corps properly decided that Comcraft proposed a PBX system for which a DPA from GSA was required. As explained below, we find that the Corps' determination that Comcraft offered a PBX system and a DPA was required was reasonable. Accordingly, in light of GSA's denial of the DPA, the Corps was not authorized to make award to Comcraft.

It is neither our function nor practice to conduct a *de novo* review of technical proposals and make an independent determination of their acceptability or relative merit. The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment and discretion. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. *System Development Corp., and International Business Machines,* B-204672, Mar. 9, 1982, 82-1 CPD ¶ 218.

At the preproposal conference, the Corps specifically told potential offerors, including Comcraft, that its authority to replace its existing telephone equipment did not extend to PBX-type systems and that, if a PBX system were offered, a DPA would have to be obtained from GSA before award could be made based upon the PBX system proposal. These statements were ultimately incorporated into the RFP. Accordingly, after the Corps concluded that Comcraft's proposal

was for a PBX system, it requested a DPA from GSA. GSA denied the request because in its view Comcraft's proposed system would duplicate the services available from and the costs associated with GSA's existing PBX switch.

The protester contends that it did not propose a PBX system and that, therefore, no request for a DPA had to be made. According to the protester, the system it proposed was an electronic key system even though it had many of the features generally attributed to a PBX system. The protester states that it proposed a Cyber Digital MSX switch that is configured in such a way that it does not meet the generally accepted definition of a PBX. According to the protester, for example, a PBX system must be connected directly to the network; Comcraft contends that its system is connected to the network by means of an NT D-3 Channel Bank, rather than directly. Thus, Comcraft argues that, by definition, the configuration it offered cannot be a PBX system. Essentially, Comcraft contends that the Cyber Digital MSX switch is a product that can be used in a variety of ways, including as a PBX switch. However, the protester argues that it did not intend to use the Cyber Digital MSX switch as a PBX switch in the configuration it proposed.

We find that the Corps' determination that the Comcraft system used a PBX switch was reasonable. There were several references to the use of a PBX switch in Comcraft's proposal and in the descriptive literature included with the proposal. For example, during discussions the Corps asked Comcraft to clarify a number of points, including the question: "Is the switch proposed registered as a data switch?" In its best and final offer, Comcraft answered: "The switch is registered as a PBX/Integrated Data Voice switch." There are also a number of references to the Cyber Digital MSX switch's PBX capabilities in the descriptive literature supplied to the Corps by Comcraft with the proposal. Among the references that support the Corps' determination that a PBX switch was being offered is this statement from Comcraft's literature concerning linking phones to the Cyber Digital MSX switch: "From that moment on you have a fully featured voice PBX with data capability."

We believe the Corps justifiably concluded from the many references to a PBX switch in Comcraft's proposal that Comcraft was in fact offering a PBX system. Comcraft states that the distinctions between a PBX and a key system have become blurred; Comcraft further states that it only referred to its switch as a PBX as a "sales answer . . . to offer the [District Office] the biggest bang for their buck." However, a technical evaluation must be based upon the information contained in a proposal, and an offeror risks being excluded from the competition if its proposal is not adequately written. *Pharmaceutical Systems, Inc.*, B-221847, May 19, 1986, 86-1 CPD ¶ 469. Even assuming that Comcraft did not intend its system to be configured as a PBX, it failed to communicate its intention in its proposal and in fact led the Corps to the opposite conclusion by using the term PBX switch throughout its proposal without sufficient explanation.

Finally, GSA agreed with the Corps' conclusion that the Cyber Digital MSX switch proposed by Comcraft is a PBX switch. GSA reported to our Office that the proposed switch is not a key or hybrid switch, but is considered by the Fed-

eral Communications Commission to be a PBX switch. In our view, the Corps was entitled to rely on GSA's finding. *See Ship Analytics, Inc., et al.,* B-230647, July 12, 1988, 88-2 CPD ¶ 37. Accordingly, because GSA refused to issue a DPA to the Corps based on Comcraft's proposal, the Corps had no authority to award the contract to Comcraft and properly rejected Comcraft's offer. *See Plus Pendetur Corp., et al.,* 65 Comp. Gen. 258 (1986), 86-1 CPD ¶ 107.

Comcraft also argues that it was unreasonable for GSA to deny the Corps' request for a DPA because Comcraft's proposed system will result in significant cost savings to the Corps. In response, GSA states that it had insufficient information on which to compare the costs associated with Comcraft's and ISOETEC's proposed systems.

To the extent Comcraft challenges GSA's judgment as to what system the Corps should purchase, the issue is not for our review. Specifically, the Brooks Act, 40 U.S.C. § 759(e) (Supp. IV 1986), provides in pertinent part:

> If [GSA] denies an agency procurement request such denial shall be subject to review and decision by the Director of the Office of Management and Budget, unless the President otherwise directs.

In view of this provision, it is clear that the decision whether to issue a DPA is committed to GSA, subject to review by the Office of Management and Budget (OMB), not our Office. Similarly, any disagreement between the Corps and GSA as to what kind of system the Corps should purchase constitutes an interagency dispute subject to resolution by OMB.

Finally, Comcraft contends that ISOETEC was not eligible for award because it is not a small business and because it offered a foreign-made product. These arguments are without merit because the RFP was not restricted to small businesses and did not prohibit offerors from proposing foreign-made products.

The protest is denied.

B-232616, December 19, 1988

Appropriations/Financial Management

Appropriation Availability

■ Time availability

■■ Fiscal-year appropriation

■■■ Replacement contracts

Funds originally obligated in one fiscal year, for a contract that is terminated for convenience in response to a court order (or a determination by the General Accounting Office or other competent authority) that the contract award was improper, remain available in a subsequent fiscal year to fund a replacement contract, provided the original contract was awarded in good faith, the agency has a continuing *bona fide* need for the goods or services involved, and the replacement contract is awarded without undue delay and on the same basis as the original contract. 60 Comp. Gen. 591 (1981) is modified accordingly.

Matter of: Funding of Replacement Contracts

This decision is in response to a request from the Chief, Operations Accounting and Reporting Division, United States Mint (Mint), Department of the Treasury, for our decision on whether funds originally obligated in fiscal year 1988 by the Mint for an asbestos abatement contract are available in a subsequent fiscal year after a federal district court orders the Mint to terminate the award and resolicit the contract. As explained below, since the Mint is compelled to terminate the contract for the convenience of the government, the funds in question remain available to the Mint in fiscal year 1989 to fund a replacement contract for asbestos removal, provided the Mint still has a *bona fide* need for such services and the replacement contract is awarded without undue delay and on the same basis as the original contract. Our decision reported at 60 Comp. Gen. 591 (1981) is modified accordingly.

Background

On June 15, 1988, under a negotiated procurement, the Mint awarded a $1.8 million contract to LVI Environmental, Inc. (LVI), to remove asbestos-containing materials from the Denver Mint in Denver, Colorado. Thereafter, an unsuccessful offeror, A&B Asbestos Abatement, Inc. (A&B), filed a motion in the Federal District Court for the District of Colorado for a temporary restraining order on the grounds that the award of the contract was "arbitrary, capricious, and not in accordance with law."[1] The court granted A&B's motion for a temporary restraining order. Subsequently, on November 1, 1988, the court issued a permanent injunction enjoining the Mint from awarding the contract to LVI and ordering the Mint to resolicit new proposals "conditioned on the availability of funds." *A&B Asbestos Abatement, Inc. v. United States,* Civil Action No. 88-F-1267 (D. Colo. November 1, 1988).

In light of the court's order, the Mint will be required to terminate the contract with LVI under the termination for the convenience of the government clause of the contract. The Mint does not have sufficient funds in its budget for fiscal year 1989 to fully fund a new contract, nor are there sufficient funds allocated in its budget for fiscal year 1990 for the removal of asbestos from the Denver Mint. Therefore, the Mint will be unable to resolicit the contract unless the funds previously obligated for the contract with LVI remain available for the reprocurement or a supplemental appropriation can be obtained.

Issue

Specifically, the Mint requested our decision as to

[1] Before A&B filed its motion for a temporary restraining order with the court, it filed a protest with our Office. We dismissed the protest as untimely. B-232128.1, July 29, 1988. Subsequently, A&B requested reconsideration of our dismissal of its protest. We dismissed the request for reconsideration upon learning that the matter was before a federal district court. B-232128.2, September 20, 1988.

whether funds originally obligated in fiscal year 1988 for an awarded asbestos abatement contract will be deobligated if a federal district court orders the aforesaid contract to be cancelled.

The court has now enjoined the Mint from awarding the contract to LVI and has ordered it to resolicit the contract. As stated in the Mint's submission, the current position of our Office regarding the availability of funds originally obligated in one fiscal year to fund a "replacement contract" in a subsequent fiscal year is set forth in our decision reported at 60 Comp. Gen. 591 (1981). While our decision in that case stated that funds obligated for a contract in one fiscal year would not remain available to fund a replacement contract in a subsequent fiscal year if the original contract was terminated for the convenience of the government, the Mint has requested that we modify that decision "by carving out an exception to the deobligation rule if a government agency is ordered by a Court to terminate a contract."

Analysis

When a government contract is terminated for default, we have consistently taken the position that the funds obligated for the original contract are available in a subsequent fiscal year to fund a replacement contract.[2] 55 Comp. Gen. 1351, 1353 (1976); 40 Comp. Gen. 590, 591 (1966); 34 Comp. Gen. 239, 241 (1954). However, when contracts are terminated for reasons other than the contractor's default, or when the termination for default is subsequently changed to a termination for convenience,[3] our position has been less consistent.

As pointed out by the Mint, our current position regarding funding of replacement contracts in situations involving terminations for convenience is set forth in 60 Comp. Gen. 591, 595–596 (1981), as follows:

> The original funding obligation is extinguished upon termination of the contract and the funds will not remain available to fund a replacement contract:
>
> (1) where the contracting officer terminates an existing contract for the convenience of the Government, either on his own initiative or upon the recommendation of the General Accounting Office; or
>
> (2) where the contracting officer has terminated an existing contract for default and has not executed a replacement contract on the date that a competent administrative or judicial authority orders the conversion of the original termination for default to a termination for convenience of the Government.

Thus, in 60 Comp. Gen. 591 we said that when an agency terminates a contract for convenience, even if it does so to comply with an order of a competent administrative or judicial authority or a recommendation of the General Accounting Office, the original obligation ordinarily would be extinguished and prior

[2] In this context, a replacement contract is a new contract the agency enters into to satisfy a continuing *bona fide* need for the goods or services covered by the original contract that was terminated. 55 Comp. Gen. 1351, 1353 (1976). In addition, the replacement contract must be of substantially the same size and scope as the original contract and should be executed "without undue delay" after the original contract is terminated. 60 Comp. Gen. 591, 595 (1981).

[3] A termination for default could be changed to a termination for convenience if a competent administrative or judicial authority determines that the contractor had not defaulted or that the default was excusable. B–197279, September 29, 1980.

fiscal year funds would not be available to fund the replacement contract. Adherence to that principle in this case would require us to hold that, even though the court, in effect, has required the Mint to terminate the contract for convenience, funds obligated for the contract in fiscal year 1988 would not be available to the Mint to fund a replacement contract in a subsequent fiscal year.

On the other hand, in a number of decisions predating 60 Comp. Gen. 591, we allowed replacement contracts to be funded with prior fiscal year funds even when the original contract was terminated for reasons other than the contractor's default, including several cases involving terminations for convenience. *See* 55 Comp. Gen. 1351, 1353 (1976), and cases cited therein.

Particularly relevant is our holding in 55 Comp. Gen. 1351. After discussing the general rule allowing funding of replacement contracts when the original contract is terminated for default, we said the following:

> In addition, where contracts have been terminated for reasons other than contractor default, e.g., where contract awards were erroneously made, we have allowed the use of fiscal year funds after the expiration of the fiscal year to fund replacement contracts, if the foregoing conditions [a continuing *bona fide* need for the goods or services involved] have been satisfied. 55 Comp. Gen. at 1353.

Furthermore, our discussion of the underlying reasons behind the establishment of the replacement contract funding rule, as enunciated in 60 Comp. Gen. 591, would support a broader application of the rule. In that case we explained the basis for the establishment of the replacement contract funding rule as follows:

> When a contract is terminated for default, the funds obligated for the contract generally remain available for a replacement contract whether awarded in the same or the following fiscal year. . . . The obligation established for the original contract is not extinguished because the replacement contract is considered to represent a continuation of the original obligation rather than a new contract. . . . This rule was founded on policy considerations as early as 1902 . . . and with a few special exceptions, has been maintained by this Office ever since. . . . The primary reason for the rule was to facilitate contract administration. Under a termination for default clause, the Government can terminate the contract when the contractor's performance fails to satisfy critical requirements of the contract. The default clause provisions allow the Government to repurchase the terminated performance and charge the defaulted contractor for any excess costs. This reprocurement arrangement became known as a replacement contract. *If all replacement contracts were treated as new contracts, an agency whose contractor defaults would be required to deobligate prior year's funds which support the defaulted contract, and reprogram and obligate current year funds, even though the particular expenditure was budgeted for the prior year. Because contractor defaults can neither be anticipated nor controlled, a great deal of uncertainty would be introduced into the budgetary process.* In some cases agencies would have to request supplemental appropriations to cover those unplanned and unprogrammed deficits which could result in costly program overruns. The rule, therefore, avoids many administrative problems that cause procurement delays. 60 Comp. Gen. at 592-93. (Italic added.)

The rationale we stated in 60 Comp. Gen. 591 is equally applicable to a situation in which an agency, whose need for the goods or services covered by the original contract remains unchanged, cannot allow the contractor to complete performance because it has subsequently been determined that the contract award was improper. Such situations in which the agency must terminate the contract for convenience, like those involving terminations for default, can "neither be anticipated nor controlled," and, as stated by the Mint, would result in

"an undue hardship" for government agencies if they were "faced with the possibility of completely losing the obligated funds earmarked for a particular contract." These considerations lead us to conclude that the replacement contract funding rule should apply to terminations for convenience in this type of situation, as well as to terminations for default.

Our discussion of this principle in a recent case recognizes that the issue of "control" is useful in determining whether to allow a replacement contract to be funded with prior year money. In 66 Comp. Gen. 625 (1987) we considered the availability of prior year money to fund a replacement contract for two vessels that were deleted from the original contract by a modification initiated by the Navy. In holding that the Navy could not use prior year funds for the replacement contract in those circumstances, we discussed the replacement contract doctrine as set forth in 60 Comp. Gen. 591, and said the following:

> However this concept is not available to the Navy in this case. *An essential element of the replacement contract rule, as reflected in decisions such as 60 Comp. Gen. 591, is that the failure by the original contractor to complete performance must be beyond the agency's control.* Thus, the originally obligated funds remain available for the replacement contract in the case of a termination for default, but not in the case of a termination for convenience. 60 Comp. Gen. at 595. (Italic added.)

In the type of case at issue here, where a court determines that a good faith contract award by the agency was not made in accordance with law, or was otherwise improper, and, in effect, orders the agency to terminate the contract, a termination for convenience is, in fact, beyond the control of the agency. A termination for convenience under these circumstances creates the same problems and uncertainties for agencies in contract administration and budgeting that our decision in 60 Comp. Gen. 591 was intended to alleviate.

While the question presented to us here involves an order issued by a court, we conclude the same principle should also be applied when other competent authority, such as a board of contract appeals or the General Accounting Office, determines that a contract was improperly awarded and should be terminated. In such circumstances, an agency, whose actions necessarily must conform with all applicable statutes and regulations, has no legitimate choice other than to terminate the contract for convenience once a competent authority has determined that the contract award was not made in accordance with such laws or regulations and was thus improper.

Accordingly, funds originally obligated in one fiscal year, for a contract that is later terminated for convenience, in response to a court order or determination by another competent authority that the contract award was improper, remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions: (1) the original award was made in good faith, (2) the agency has a continuing *bona fide* need for the goods or services involved, (3) the replacement contract is of the same size and scope as the original contract, and (4) the replacement contract is executed without undue delay after the original contract is terminated for convenience.

In accordance with the foregoing, we would not object to the Mint's use of funds, originally obligated in fiscal year 1988 for the asbestos abatement con-

tract with LVI, to pay for a replacement contract in a subsequent fiscal year, provided the stated conditions are satisfied. 60 Comp. Gen. 591 is modified in accordance with this decision.

B-232588.2, December 20, 1988

Procurement

Contractor Qualification
■ Responsibility
■■ Contracting officer findings
■■■ Affirmative determination
■■■■ GAO review

Procurement

Contractor Qualification
■ Responsibility criteria
■■ Education

An unincorporated bidder can demonstrate compliance with special responsibility standards through its employees to the same extent as an incorporated bidder.

Matter of: Margaret N. Cox

Margaret N. Cox requests reconsideration of our decision in *Margaret N. Cox,* B-232588, Sept. 29, 1988, 88-2 CPD ¶ 303, in which we dismissed her protest against the award of a contract under invitation for bids (IFB) No. DABT15-88-B-0079, issued by the Army Soldier Support Center for a Military Writing Assignments Evaluation.

As her basis for protest, Ms. Cox asserted that the award was improper because the awardee did not personally have the academic qualifications called for by the solicitation. We dismissed the protest because the IFB did not preclude a contractor from employing qualified persons to perform the contract and the question of whether the awardee could perform as required concerned the awardee's responsibility, the affirmative determination of which we do not review.

Ms. Cox asserts in her request for reconsideration that our dismissal was improper; she claims she did not contend that the IFB does not permit a contractor to employ qualified individuals to perform the contract and that she did not raise the issue of responsibility. She asks us to consider the question of whether Mr. Wiehe has the qualifications called for by the IFB. Specifically, Ms. Cox argues that Mr. Wiehe, an unincorporated bidder, must personally possess the academic qualifications required in the IFB of "the contractor" to be awarded the contract, irrespective of his ability to employ qualified individuals.

Mr. Wiehe, as an unincorporated bidder, is treated no differently than is an incorporated bidder. To be eligible for award, he must unequivocally agree to the

terms and conditions of the IFB and satisfy the agency of his ability to perform. These determinations concern bid responsiveness and bidder responsibility, respectively.

To be responsive, a bid must constitute an unqualified offer to perform in accordance with all material solicitation provisions. *Contract Service Co., Inc.*, B-226780.3, Sept. 17, 1987, 87-1 CPD ¶ 263. There is no evidence that the awardee took exception to the solicitation's material requirements. On the other hand, a bidder's ability or capacity to perform is a matter of bidder responsibility. The requirement for the contractor to possess certain academic qualifications is a special standard of responsibility.

Mr. Wiehe is not excused from meeting that responsibility standard. However, it is not necessary that Mr. Wiehe, as an unincorporated bidder, personally possess the required academic qualifications. Just as a corporate bidder may be viewed as complying with special responsibility standards through the experience or qualifications of its subcontractors or employees, *see, e.g., J. Baranello and Sons,* 58 Comp. Gen. 509 (1979), 79-1 CPD ¶ 322; *Haughton Elevator Division, Reliance Electric Co.,* 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294, so may Mr. Wiehe. Stated another way, Mr. Wiehe's legal status as a sole proprietor rather than a corporation does not preclude an affirmative finding of responsibility based on his employment of one or more individuals who meet the special standard. Thus, it was only Mr. Wiehe's ability to employ personnel with the required academic qualifications that was the key to this element of the responsibility determination.

The dismissal is affirmed.

B-232764, December 21, 1988

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Conflicting terms
■■■■ Ambiguity

Where a discrepancy exists between the legal entity shown on the bid and the legal entity shown on the bid bond, and it is not possible to conclude from the bid itself that the intended bidder was the same legal entity as the named principal on the bid bond, the contracting officer properly rejected the bid as nonresponsive since the bid was at best, ambiguous.

Matter of: C.W.C. Associates, Inc., and Chianelli Contracting Co.

C.W.C. Associates, Inc., and Chianelli Contracting Co. d/b/a/ C.W.C. Associates, Inc., a joint venture, protest the rejection of its bid under invitation for bids (IFB) No. N62472-87-B-0473 issued by the Naval Facilities Engineering Command for repairs to barracks at the Naval Construction Battalion Center, Davis-

ville, Rhode Island. The Navy determined that C.W.C.'s bid was nonresponsive because there was a discrepancy between the legal entity shown on the bid and the legal entity shown on the bid bond.

We deny the protest.

The IFB required a bid guarantee in the form of a bid bond or certified check and the solicitation further provided that the failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of a bid.

C.W.C. was the low bidder. In the bid form, the name of the bidder was identified as C.W.C. Associates, Inc., and the form was signed by Albert Chianelli, President. Also, in the representations and certifications under "Type of Business Organization," C.W.C. completed the section as follows:

The bidder, by checking the applicable box, represents that—

(a) It operates as *X* a corporation incorporated under the laws of the State of *NY*, ——— an individual, ——— a partnership, ——— a nonprofit organization, or *X* a joint venture.

The bid bond identified its principal as C.W.C. Associates, Inc., and Chianelli Contracting Co. d/b/a/ C.W.C. Associates Inc., a joint venture. In the signature block for the principal, block 1, appeared C.W.C. Associates, Inc., with the signature of Albert Chianelli, President, in block 2, Chianelli Contracting Co., with the signature of Robert Chianelli, partner. In the space entitled "Type of Organization," appearing in the upper right hand corner of the bid bond, the word "joint venture" was checked.

By letter dated September 19, 1988, the contracting officer notified C.W.C. that its bid was being rejected as nonresponsive because of the discrepancy between the bidder and the principal shown on the bid bond.

Bid bond requirements are a material part of the IFB that a contracting officer cannot waive. *See Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture,* B-208332, Jan. 19, 1983, 83-1 CPD ¶ 69. Thus, a bid bond which names a principal different from the nominal bidder is deficient and the defect may not be waived as a minor informality. *A.D. Roe Co., Inc.,* 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. This rule is prompted by the rule of suretyship that no one incurs a liability to pay the debts of another unless he expressly agrees to be bound. *See Hoyer Construction Co./K.D. Hoyer, a Joint Venture,* B-183096, Mar. 18, 1975, 75-1 CPD ¶ 163. Moreover, a surety under a bond in the name of more than one principal is not liable for the default of one of them. For this reason, we rigidly apply the rule that the principal listed on the bid bond must be the same as the nominal bidder. *Opine Construction,* B-218627, June 5, 1985, 85-1 CPD ¶ 645.

C.W.C. contends that its bid is responsive because the entity listed on the bid is the same entity listed on the bid bond and, therefore, the government's interest is protected. The protester argues that both the bid and the bid bond identify the bidder and principal as C.W.C. Associates, Inc., and that both indicate that C.W.C. is a joint venture. C.W.C. also argues that the surety would be bound

under the bid bond whether C.W.C. Associates, Inc., individually, or C.W.C Associates, Inc., the joint venture, is considered to be the bidder because under state law the surety is bound unless the departure from the suretyship contract is shown to be a "material variance," and C.W.C. contends that no such variance exists here.

In our opinion, C.W.C.'s arguments are without merit. As stated above, our cases adhere to the holdings that a bid bond which names a principal different from the nominal bidder is a material defect which cannot be waived. Thus, the issue remains whether the legal entity listed on the bid is the same as the legal entity listed on the bid bond.

The entity on the bid is identified as C.W.C. Associates, Inc., a corporation *or* a joint venture, while the entity on the bid bond is a joint venture doing business under the name of C.W.C. Associates, Inc. It cannot be conclusively determined from the bid without resort to post-bid opening explanations whether the C.W.C. Associates, Inc., named on the bid is the individual corporation or the joint venture. While the names may be the same, the possibility exists that the legal entities are different. While the protester contends that it bid as a joint venture, the bid is at best ambiguous and therefore was properly rejected. *See Future Electric Co.,* B-212938, Feb. 22, 1984, 84-1 CPD ¶ 216; *Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture,* B-208332, *supra.*

With regard to C.W.C.'s allegations concerning earlier procurements in which the Navy accepted substantially similar bidding documents, we cannot consider them. Each procurement action is a separate transaction, and the action taken under one is not relevant to the propriety of the action taken under another for purposes of a bid protest. *Ferrite Engineering Labs,* B-222972, July 28, 1986, 86-2 CPD ¶ 122.

The protest is denied.

Appropriations/Financial Management

Civilian Personnel

Military Personnel

Relocation

■ Household goods

■■ Losses

■■■ Replacement

■■■■ Shipment costs

Where a service member's household goods are lost at sea during government-procured transportation to Iceland incident to a permanent change of station, the transportation of replacement items, within the member's authorized weight allowance applicable when the travel orders became effective, may be made at government expense, even though the items were acquired after the effective date of orders. Our holding in 50 Comp. Gen. 556 (1971) will no longer be followed. The Joint Federal Travel Regulations may be amended to authorize the transportation of replacement items under such circumstances. 50 Comp. Gen. 556, overruled.

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Procurement

■ Bids
■■ Modification
■■■ Allegation substantiation
■■■■ Burden of proof

Protester's assertion that contracting official improperly refused to accept attempted telephone modification of its bid through Western Union is not sufficiently supported by record where protester presents confirming notice from Western Union that call was attempted, but there is no contemporaneous documentation that call was made or that contracting official refused to accept modification, and contracting official denies in affidavit that she received call from Western Union or that she ever instructed any employee to refuse telephone modification.

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■ Bids
■■ Modification
■■■ Late submission
■■■■ Mail/telegraph delays

Bidders must allow a reasonable time for telefaxed bid modifications to be delivered from the point of receipt to the designated location for receipt of bids; when they do not do so, late arrival at the designated location cannot be attributed to government mishandling. One minute is not a reasonable or sufficient amount of time to deliver a telefaxed bid modification from the mailroom to the office designated for bid opening.

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■ Bids
■■ Modification
■■■ Late submission
■■■■ Rejection

Telegraphic bid modification, recorded by the agency as having been received for the first time the day after bid opening, is properly rejected as late notwithstanding information from Western Union purporting to show that it was transmitted prior to bid opening; the only acceptable evidence to establish timely receipt is the government's time/date stamp or other evidence of receipt maintained at the government installation.

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■ Bids
■■ Responsiveness
■■■ Conflicting terms
■■■■ Ambiguity

Where a discrepancy exists between the legal entity shown on the bid and the legal entity shown on the bid bond, and it is not possible to conclude from the bid itself that the intended bidder was the same legal entity as the named principal on the bid bond, the contracting officer properly rejected the bid as nonresponsive since the bid was at best, ambiguous.

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Small Purchase Method

■ Purchases

■■ Propriety

Protest concerning agency's failure to solicit protester for appraisal services procured under small purchase procedures is sustained, where record shows that agency failed to obtain maximum practicable competition by not disclosing basic procurement information to protester and other solicited appraisers, and then proceeding with an expedited award based on single price quote received.

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Socio-Economic Policies

■ Small business 8(a) subcontracting

■■ Use

■■■ Administrative discretion

Determination whether to set aside a procurement under section 8(a) of the Small Business Act, and the propriety of the 8(a) award itself, are matters within the discretion of the contracting agency and the Small Business Administration. Such an award will not be reviewed by the General Accounting Office absent a showing of possible fraud or bad faith on the part of government officials or that regulations have not been followed.

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■ Small business set-asides

■■ Subcontracting restrictions

In a small business set-aside procurement, small business contractor who proposes to subcontract less than 50 percent of its personnel costs to another firm complies with the limitation on subcontracting of services for small business concerns.

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Special Procurement Methods/Categories

■ Communications systems/services

■■ Contract awards

■■■ Authority delegation

Protest that it was unreasonable for the General Services Administration (GSA) to deny the procuring agency a delegation of procurement authority (DPA) to purchase the protester's private branch exchange telephone system will not be reviewed by the General Accounting Office as the decision whether to issue a DPA is committed by law to GSA, subject to review by the Director of the Office of Management and Budget.

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■ Communications systems/services
■■ Contract awards
■■■ Authority delegation

Where the General Services Administration (GSA) authorized the contracting agency to procure new telephone equipment, but the authorization specifically excluded purchase of a private branch exchange (PBX) system, the contracting agency properly referred the protester's proposal of a PBX system to GSA for a delegation of procurement authority (DPA). When GSA denied the contracting agency's DPA request, award could not be made to the protester because it was not authorized.

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■ Communications systems/services
■■ Evaluation
■■■ Technical acceptability

The contracting agency reasonably determined that the protester offered a private branch exchange (PBX) system in response to a procurement to replace existing, leased telephone equipment, where: (1) the protester specifically stated that it was offering a "PBX/Integrated Data Voice switch" in its best and final offer; (2) there were many references to a PBX switch in the protester's proposal and attached descriptive literature; and (3) the protester admits that the distinction between PBX and key systems has become blurred and stated that it referred to its proposed switch as a PBX switch as a "sales answer" to the contracting agency in its proposal.

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