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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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# Contents

# Preface

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

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

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

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

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General 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



Cite Decisions as 68 Comp. Gen.—

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

# List of Claimants, etc.

# Tables of Statutes, etc.

## United States Statutes

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



## United States Code

**See also U.S. Statutes at Large**



## Published Decisions of the Comptrollers General



## Decisions Overruled or Modified

# January 1989

## B-230459, January 3, 1989

## Military Personnel

**Relocation**
**■ Relocation travel**
**■■ Dependents**
**■■■ Post differentials**
**■■■■ Eligibility**

## Military Personnel

**Relocation**
**■ Relocation travel**
**■■ Post differentials**
**■■■ Dependents**

The Joint Federal Travel Regulations may be changed to allow the payment of station allowances for service members' dependents who are moved to a designated place outside of the continental United States in Alaska, Hawaii, Puerto Rico, or in any territory or possession of the United States when the service members are transferred from their duty stations inside the continental United States to a restricted area in the same circumstances that would allow payment of the dependents' transportation to the place upon the authorization or approval of the Service Secretary concerned. 49 Comp. Gen. 548 (1970) and *Lieutenant Colonel Charles D. Robinson,* 56 Comp. Gen. 525 (1977), are modified.

## Matter of: Overseas Station Allowances—Dependents at a Designated Place When the Service Member is Transferred to a Restricted Place of Duty

The question in this case is whether the Joint Federal Travel Regulations may be amended to allow the unrestricted payment of station allowances at the uniformed service member's designated place for his dependents outside of the continental United States in Alaska, Hawaii, Puerto Rico, or in any territory or possession of the United States. The question arises only when the service member elects to move his dependents there from the member's old duty station inside the continental United States incident to his transfer to a new duty station in a restricted area to which his dependents are not allowed to travel at government expense.[1] We conclude that the regulations may be amended to allow the payment of station allowances at the designated place provided the

[1] This responds to a request for a decision received from the Per Diem, Travel and Transportation Allowance Committee, dated February 19, 1988.

Secretary of the service concerned (or his designee) has approved the dependents' transportation to that place.

## Background

Station allowances are paid to a service member who is on duty outside the United States or in Hawaii or Alaska. 37 U.S.C. § 405 (Supp. IV 1986). This amount is additional to a service member's regular pay and allowances and is authorized to defray the excess costs experienced by service members on permanent duty at places outside the continental United States. The usual situation in which station allowances are paid occurs when the service member is transferred overseas and his dependents accompany him there at government expense as a result of the transfer. In that situation there is an obvious connection between the service member who is on duty overseas, his duty assignment, the presence of his dependents overseas in the vicinity of his duty station, and the payment of station allowances for them.

When a service member is outside of the continental United States with his dependents and properly receiving station allowances, he is sometimes transferred from that duty station to a new duty station in a restricted area to which his dependents may not accompany him. At that time the service member may select a designated place anywhere in the continental United States to which to move his dependents. Upon the authorization or approval of the Service Secretary involved, he may also select a designated place in Alaska, Hawaii, Puerto Rico, or any territory or possession of the United States. The service member's dependents are then transported at government expense to the designated place. *See* Joint Federal Travel Regulations, vol. 1, para. U5222-D. The Per Diem, Travel and Transportation Allowance Committee correctly points out that this is in recognition of the fact that the dependents need a suitable place to live while the service member serves a tour of duty at a restricted place where dependents are not allowed.

The regulations implementing 37 U.S.C. § 405 have long allowed the continuation of station allowances if the dependents continue to reside in the vicinity of the old duty station after the service member moves to his restricted new duty station. They also allow the continuation of station allowances in such a case if instead of remaining at the old station, the dependents are moved to any other designated place which qualifies for station allowances. We approved the continuation of the station allowances in these situations where the member's new assignment is to a restricted area overseas by viewing the situation ". . . as if the member had continued on duty at his old permanent station overseas." We held that ". . . the dependents were residing outside the United States in a military dependent status because of the member's duty assignment and not because they elected to establish a residence there for personal reasons." 49 Comp. Gen. 548, 550 (1970).

When a service member is inside the continental United States (and thus not entitled to receive station allowances) but is then transferred to a new duty sta-

tion in a restricted area, his dependents may still be transported at government expense to a designated place anywhere in the continental United States, or upon the authorization or approval of the Service Secretary involved, to Alaska, Hawaii, Puerto Rico, or any territory or possession of the United States. However, we have held that if that designated place for the dependents is outside of the continental United States, that selection would normally be purely a matter of personal preference and not sufficiently connected with any duty assignment to support the payment of station allowances at the designated place. 49 Comp. Gen. 548, *supra.* It is this part of the holding in 49 Comp. Gen. 548 that the Per Diem Committee wants reconsidered.

The Committee argues that since all dependent moves to designated places are matters of personal choice, regardless of the location of the old duty station, and since all are occasioned by a governmental act of reassigning service members to restricted areas, there is no clear basis for treating them differently regarding the payment of station allowances. The Committee states that the distinction is especially difficult to understand when the dependents are residents of Alaska, Hawaii, Puerto Rico, or any territory or possession of the United States, and one of those places is chosen as the designated place.

## Analysis And Conclusions

In the past, our decisions authorizing station allowances at a designated place have turned on the sufficiency of the connection between the service member's duty assignment and the dependents' location at the designated place, regardless of whether the service member's old duty station was inside or outside the continental United States. *See Lieutenant Colonel Charles D. Robinson, USMC,* 56 Comp. Gen. 525 (1977). However, another factor that is nearly always involved in our cases concerning the payment of station allowances at a designated place, which is not usually an issue, is the entitlement to payment of the dependents' transportation to the designated place. A different statute, 37 U.S.C. § 406(e) (Supp. IV 1986), than the one that provides for station allowances provides the transportation entitlement. Subparagraph U5222-D, *supra,* implements the statute and provides entitlement to transportation to Alaska, Hawaii, Puerto Rico, or any territory or possession of the United States only upon authorization or approval of the Service Secretary concerned—as distinguished from unrestricted transportation entitlement to anywhere in the continental United States. This authorization or approval requirement for transportation applies regardless of whether the old duty station is inside or outside the continental United States.

Upon further reflection, there appears to be no reason why there should be a different standard for the entitlement to payment of dependents' transportation to a designated place from the standard for the entitlement to payment of station allowances at the designated place. In this regard, we believe that a sufficient connection exists between the service member's duty assignment and the

dependents' location at the designated place where a Service Secretary has authorized or approved transportation of the dependents to the designated place.

Therefore, the Joint Federal Travel Regulations may be amended so that dependents' station allowances at the designated place may be paid if the Secretary concerned (or his designee) approves the dependents' transportation to that place. 49 Comp. Gen. 548, *supra,* and *Lieutenant Colonel Charles D. Robinson, USMC,* 56 Comp. Gen. 525, *supra,* are modified accordingly.

## B-232024, January 4, 1989

## Appropriations/Financial Management

**Appropriation Availability**
**■ Time availability**
**■■ Time restrictions**
**■■■ Fiscal-year appropriation**
**■■■■ Multi-year appropriation**

The Defense Technical Information Center may use 2-year funds appropriated for fiscal year 1987 for obligations properly incurred in fiscal year 1988. As the appropriation was specifically made available for obligation until September 30, 1988, it could be obligated during the entire 2 years of its availability.

## Appropriations/Financial Management

**Appropriation Availability**
**■ Time availability**
**■■ Bona fide needs doctrine**
**■■■ Applicability**
**■■■■ Multi-year appropriation**

The Defense Technical Information Center does not violate the *bona fide* needs rule by charging purchases to a 2-year appropriation during the second year of its availability. Requisitions by the Defense Technical Information Center represented *bona fide* needs arising within the 2-year period for which the appropriation was intended and obligations may be made to the extent funds remain available.

## Matter of: Defense Technical Information Center—Availability of Two Year Appropriations

An authorized certifying officer of the Defense Logistics Agency (DLA), Department of Defense, has requested an advance decision regarding the availability of 2-year funds appropriated in fiscal year 1987 to pay for items requisitioned in fiscal year 1988. For the reasons given below, we conclude that use of the fiscal year 1987 appropriation is proper.

## Background

On February 19, 1988 and March 1, 1988, the Defense Technical Information Center (DTIC) submitted several requisitions for supplies (totaling $4,216) citing its fiscal year 1987 Research and Development appropriation. The certifying officer refused to certify the availability of fiscal year 1987 funds to cover the requisition. DTIC challenged the certifying officer's decision before DLA's Program and Budget Division, Office of the Comptroller (Comptroller). The Comptroller held that DTIC had the authority to obligate fiscal year 1987 carryover funds for fiscal year 1988 obligations because those funds remained available for obligation until September 30, 1988. However, the certifying officer again refused to certify the requisitions, stating it was improper to use fiscal year 1987 funds to pay for material ordered in fiscal year 1988. The certifying officer's decision is based on the fact that traditionally the Office of the Assistant Secretary of Defense Comptroller, Directorate for Research and Development, has followed the rule that costs for common supplies, travel and payroll are properly chargeable only to the first year of Research and Development appropriations. This, the accounting officer asserts, is the position carried out by the Assistant Secretary of Defense Comptroller as part of a policy of "incremental funding". Furthermore, the certifying officer alleges that such an obligation would violate the *bona fide* needs rule.

## Discussion

The fiscal year 1987 appropriation for Research, Development, Test, and Evaluation activities of the Defense Agencies—from which funding for DTIC derives—states:

> For expenses of activities and agencies of the Department of Defense (other than the military departments), necessary for basic and applied scientific research, development, test, and evaluation, advanced research projects as may be designated and determined by the Secretary of Defense, pursuant to law; maintenance, rehabilitation, lease, and operation of facilities and equipment, as authorized by law; $6,742,091,000, *to remain available for obligation until September 30, 1988.*

Pub. L. No. 99-591, 100 Stat. 3341, 3341-97 (1986) (Italic added).

The appropriation by its terms is available for obligation until September 30, 1988. The general rule is that the availability period relates to the authority to obligate the appropriation. 37 Comp. Gen. 861, 863 (1958). Therefore, the funds appropriated in fiscal year 1987 remained available until September 30, 1988, and DTIC's use of these funds in fiscal year 1988 was proper.

The certifying officer also argues that DTIC's action involves a possible violation of the *bona fide* needs rule. The *bona fide* needs rule provides that a fiscal year appropriation may be obligated only to meet a legitimate need arising in the fiscal year for which the appropriation was made. 58 Comp. Gen. 471, 473 (1979). The *bona fide* needs rule applies with equal force to multiple year appropriations. 55 Comp. Gen. 768, 773 (1976).

The appropriation involved here was available for a 2-year period and any *bona fide* need arising within that 2-year period could be charged to the appropriation. There is no requirement that 2-year funds be used only for the needs of the first year of their availability.

Thus, we conclude that there is no violation of the *bona fide* needs rule because DTIC's requisition items represent legitimate requirements—supplies needed for DTIC's ongoing research operations—arising in one of the fiscal years for which the appropriation was made, *i.e.,* 1988. Obligations may be made to the extent unexpended funds carried over from the fiscal year 1987 Research and Development appropriation are still available.[1]

## B-232646, January 12, 1989

### Procurement

**Bid Protests**
**■ GAO procedures**
**■■ Protest timeliness**
**■■■ 10-day rule**

Where the agency's and the protester's versions of the facts conflict concerning when the protester was orally notified that part of its offer was considered unacceptable, the General Accounting Office will resolve doubt over whether the protest was timely filed within 10 days of that notification in the protester's favor.

### Procurement

**Competitive Negotiation**
**■ Contract awards**
**■■ Personnel**
**■■■ Substitution**
**■■■■ Propriety**

### Procurement

**Competitive Negotiation**
**■ Requests for proposals**
**■■ Terms**
**■■■ Interpretation**

Protester's interpretation of a clause in a solicitation for dental services as allowing substitution of dentists initially proposed by the protester with dentists proposed by other offerors is reasonable where the solicitation does not specifically prohibit such practice.

[1] Whether the DTIC's purchasing action conflicts with nonstatutory policies and practices of the DOD Comptroller is an internal policy matter; we merely hold that given the facts presented, there appears to be no violation of federal appropriations law.

## Matter of: Med-National, Inc.

Med-National, Inc., protests a partial rejection of its offer under request for proposals (RFP) No. F41689-88-R-A122, issued by Randolph Air Force Base for general dental services at various locations throughout the United States.

We sustain the protest.

The solicitation sought a contract for 1 to 3 full-time equivalent (FTE) dentists at 69 Air Force bases, for a total of 98 FTEs. Separate contracts were to be awarded for each location for a basic period of 1 year with options for 4 additional years. The RFP stated that, in order to be considered acceptable for award, offerors were required to submit credentials packages for each dentist and to designate the location for which each dentist was offered. After proposals were judged to be technically acceptable, individual contracts would be awarded on the basis of the lowest total price for the basic contract period and all options at each location.

The Air Force received 37 proposals. A committee reviewed the credentials submitted for each dentist, and provided a list of acceptable and unacceptable dentists to the contracting officer, who then selected the apparent successful offerors at each site based on offering the low total price at a site and having submitted approved credentials for the required number of dentists at that site. In accordance with the RFP, notices of conditional award were sent to nine offerors, inviting each to submit notarized letters from the dentists they proposed to use stating that the dentists intended to begin work at a particular site by October 3, 1988, the RFP's starting date for performance.

Med-National was the apparent successful offeror at 29 sites. After receiving a notice of conditional award, the protester obtained letters of intent from 36 of the 46 dentists which it initially had proposed for the 29 sites, but could not obtain letters of intent from 10 dentists. Consequently, Med-National contacted 10 dentists whose credentials had not been originally submitted as part of that firm's proposal, but had been submitted by other offerors under the solicitation, and who had passed the credentials review. Med-National reviewed and submitted to the Air Force letters of intent from those substitute dentists.

On September 5, 1988, the contracting officer determined that under the terms of the solicitation Med-National could only use those dentists it had originally submitted, and rejected Med-National's offer as technically unacceptable for the nine locations at which substitute dentists had been submitted. Med-National filed a protest in our Office on September 19, arguing that the RFP allowed it to substitute dentists that had passed the credentials review, even if another offeror initially had submitted the names and credentials of those dentists.

The Air Force contends that Med-National's protest should be dismissed as untimely because the contracting officer told a Med-National representative on August 29, 1988, that the solicitation did not allow Med-National to submit letters of intent from dentists that Med-National had not proposed in its initial offer. The Air Force argues that since Med-National's protest was not filed until

September 19, more than 10 working days after Med-National knew its basis for protest, it is untimely under our Bid Protest Regulations, which require that a protest of other than an apparent solicitation impropriety be filed within 10 working days after the basis for the protest is known. 4 C.F.R. § 21.2(a)(2) (1988).

Med-National denies that the contracting officer told its representative on August 29 that only dentists originally listed in its proposal could submit letters of intent to work for Med-National. The protester has submitted an affidavit from its executive vice-president stating that the conversation was general, regarding the use of a dentist's credentials by more than one offeror, and that it did not put Med-National on notice that such use was not allowed. According to Med-National, it was not informed that its proposal had been rejected in part because of the use of substitute dentists until the contracting officer met with the firm's president on September 9.

We consider the protest to be timely because it is not clear from the record when Med-National first became aware of the basis for protest. It is our practice to resolve doubts over when a protester first becomes aware of its basis for protest in the protester's favor for timeliness purposes. *Hooven Allison—Request for Reconsideration,* B-224785.2, Mar. 6, 1987, 87-1 CPD ¶ 257. Because the contracting officer did not reject the protester's proposal in part as technically unacceptable until September 5, and the protester contends it was not informed of the basis for this rejection until September 9, we consider the protest to be timely filed within 10 working days after the protester became aware of its basis for protest.

The relevant provisions of the RFP are found in section M, "Evaluation Factors for Award." Paragraph 7 of section M stated, in pertinent part:

a. Upon identification of the apparent successful offeror at each site, a "Notice of Conditional Award (NCA)" will be sent to the identified firms/individuals advising them they are the apparent successful offeror and subsequent award will be made to them contingent upon their fulfilling the requirements set forth in this clause.

b. The firms/individuals receiving a "Notice of Conditional Award" shall, no later than 3:00 PM on 1 Sep 88, furnish from each proposed FTE at the sites identified in their NCA the following:

i) A notarized letter from the FTE confirming his/her intent to commence work at the Air Force installation (the letter should identify the site) on 3 Oct 88.

ii) A renewal or notarized letter of intent to renew or a copy of submitted application of renewal of any or all of the following documents that will expire prior to 3 Oct 88:

1. Dental License

2. CPR Certification

3. DEA Certification

c. Failure to provide this information by the date and time specified in subparagraph (b) above shall result in the rejection of the offeror's proposal at the applicable sites (award will still be made on those sites for which the appropriate information was provided). . . .

d. The identified low offeror may identify other than the originally offered FTE to fill a site, provided the newly offered FTE fulfills the requirements in (b) above and has previously passed the credentials review performed in conjunction with this solicitation. Offerors may not submit an FTE that has not previously been credentialed under this solicitation.

e. Award will be made to those offerors receiving an NCA and who successfully provide the information required in subparagraph (b) above.

Med-National bases its protest on section M, paragraph 7d, which it argues specifically permits a low offeror to use any dentist who has passed the credentials review under this RFP and who fulfills the requirements in paragraph 7b. Med-National contends that nothing in paragraph 7d prohibits the use of a particular dentist on the basis that the dentist was not part of an offeror's original proposal.

The Air Force disagrees with Med-National's interpretation of paragraph 7d, maintaining that the phrase "newly offered FTE" means a dentist that is new at the site awarded to a particular offeror, but previously included in the particular offeror's proposal. The Air Force argues that when read in context with the other solicitation provisions, the only reasonable interpretation of paragraph 7d is that any dentist offered must have previously been offered under the same offeror's proposal. The agency relies on section L, paragraph 29, which prohibits offerors from submitting new credentials packages or updates to previously submitted credentials for evaluation purposes after the July 7 closing date for receipt of proposals. The Air Force contends that, because Med-National had not submitted credentials itself for the newly offered FTEs, its proposal for these dentists was not technically acceptable under section M, paragraph 3d, which requires an offeror to provide the credentials for each dentist offered in order to be considered technically acceptable. In the alternative, the Air Force argues that Med-National was prohibited from updating its credential package to include the newly proposed, substitute dentists.

Where, as here, a dispute exists as to the actual meaning of a solicitation requirement, we read the solicitation as a whole and in a manner that gives effect to all its provisions in an effort to resolve the dispute. *Energy Maintenance Corp.*, B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. In our opinion, Med-National's interpretation of the RFP—permitting offerors to submit names of dentists that had not been listed in their initial proposal but whose credentials had been determined to be acceptable under this procurement—is correct.

We find no provision in the RFP that prohibits the substitution of dentists after a notice of conditional award has been received, even if the substitute dentists were part of another offeror's credentials package. In fact, paragraph 7d of section M specifically states that the identified low offeror may identify "other than the originally offered [dentist] to fill a site," provided only that the substitute dentist has been approved by the credentials committee in conjunction with this solicitation. The express terms of section M, paragraph 7d state that the only limitation on a proposed awardee's ability to substitute one dentist for another is that the substitute must have been approved by the credentials committee in this procurement.

From a reading of the RFP as a whole, it is clear that the Air Force was, in effect, treating the proposed dentists as interchangeable employees who could be substituted for each other in the event a proposed dentist became unavailable to work for the Air Force for any reason. For example, paragraph L28 ex-

pressly allowed an offeror to list a dentist for up to three different locations and also provided that dentists could be listed as "backups" to the first choice where appropriate. Moreover, the RFP did not prohibit any dentist from being listed in more than one offeror's proposal. Another example is found in paragraph H23 of the RFP which specifically noted that a proposed dentist might become unavailable before the start of performance and, therefore, allowed another credentialed dentist to be substituted for the unavailable dentist after award. In addition, paragraph H20 allows contractors to reassign dentists to new locations and to replace dentists who are reassigned with fully qualified replacements after award. The common thread in each of these substitution situations is that a fully qualified or credentialed substitute has to be provided. In our opinion, these clauses lend further support to our conclusion that MedNational should have been allowed to substitute one credentialed dentist for another once MedNational was evaluated as the low-priced, technically acceptable offeror at any location.

The Air Force's reliance upon paragraph L29 which prohibits submission of new credentials packages or updates of previously submitted credentials packages—to reject MedNational's offer of substitute dentists is misplaced. As Med-National points out, its initial proposal was determined to be acceptable and it did not submit credentials for any dentist after the closing date in contravention of paragraph L29, since the newly offered dentists had already been evaluated and approved in this procurement.

The Air Force argues that allowing Med-National to substitute dentists in this manner puts other offerors who had the expense of providing the credentials packages at a competitive disadvantage. We disagree. Med-National had the same expense, since in order to be found technically acceptable and receive a notice of conditional award in the first place, it submitted credentials packages for the 46 dentists it initially listed. Offerors had the choice of submitting as many or as few dentists and accompanying credentials packages as they wanted under section L28, and could therefore adjust their proposal costs accordingly, but this is a business decision left to each offeror. Just as we have recognized that it is neither unusual nor inherently improper for an awardee to recruit and hire personnel employed by an incumbent contractor that was also a competing offeror, we believe that a conditional awardee such as Med-National may recruit dentists initially submitted by other offerors, since there was nothing in the RFP to prohibit the practice. *See Applications Research Corp.,* B-230097, May 25, 1988, 88-1 CPD ¶ 499.

Accordingly, we sustain Med-National's protest and by letter of today to the Acting Secretary of the Air Force, we recommend that the Air Force award Med-National contracts for the nine locations at which Med-National offered qualified substitute dentists. In addition, we find that Med-National is entitled to the cost of filing and pursuing the protest, including attorneys' fees. *See* 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

## B-232525, January 13, 1989

## Procurement

**Competitive Negotiation**
**■ Requests for proposals**
**■■ Evaluation criteria**
**■■■ Subcriteria**
**■■■■ Disclosure**

Contention that protester could have proposed items with improved overall performance had it been advised of new, higher optical density standard is without merit where (1) protester should have been on notice of new optical density standard from incorporation by reference in solicitation, and (2) solicitation provided for evaluation based on items previously submitted that were furnished under prior, lower standard, and did not contemplate modifications to the technology of those items; thus, even had protester been aware of higher standard, evaluation still would have been based on items furnished under the prior, lower standard.

## Matter of: Gentex Corporation

Gentex Corporation protests award to EDO Corporation, Barnes Engineering Division, under request for proposals (RFP) No. F33657-88-R-0083, issued by the Department of the Air Force for 4,000 laser eye protection visors. Gentex argues that the agency evaluated offers on the basis of an undisclosed requirement.

We deny the protest.

The procurement here was Phase I of a joint Air Force/Navy two-phase program initiated to protect air crew members from the threat of exposure to potentially eye damaging lasers. Short term, interim protection was to be provided by the purchase under Phase I of visors employing existing technology until better technology could be developed in Phase II. In connection with Phase I, the Air Force determined that only one technology was immediately available and that this technology was only available for production from two known companies, Gentex and EDO. After discussions with both firms, the agency concluded that little or no objective information existed on the protection capability and operational effectiveness of the visors for use in combat aircraft. Accordingly, a test program was designed encompassing both laboratory and operational flight testing using 200 representative visors purchased from each firm in April 1987. A benchmark test specification was established, designated as AESE 871391; that same specification, renumbered technical requirements document (TRD) 412-A-07878-54104 and dated October 9, 1987, was provided subsequently to both companies by the agency under cover letter dated November 6, 1987. Lab and flight testing commenced in August and November 1987 respectively, and all testing was completed in May 1988.

On February 11, the agency issued the RFP here, soliciting visors of the same part number as the visors both firms had supplied to the agency in April 1987 and which then were being tested. The RFP listed the primary evaluation criteria, in descending order of importance, as technical, price, and delivery schedule, with the latter two factors of equal weight. No provision was made in the RFP for submission of sample visors; rather, as the agency was making what it

describes as "a one time purchase of existing equipment, which was then in the process of being tested," the RFP specifically provided for a technical evaluation based on a comparison of the results of laboratory and flight tests then being conducted with the requirements of the TRD (AESE 871391) and a pre-award survey. Among other things, the TRD required the visor to be designed to afford protection from specific laser wavelengths as defined in a February 1987 classified addendum to the TRD. After evaluating initial and best and final offers, the agency determined that the technical superiority of EDO's visor, as demonstrated in laboratory and flight testing, outweighed the advantages of Gentex's lower price; consequently, award was made to EDO on August 26.

In its protest, Gentex argues that its visor was evaluated for compliance with an optical density requirement of which it had not been informed. Gentex alleges that it never received the February 1987 classified addendum to the TRD, which required an optical density level of 3.6 (at a wavelength of LAMBDA 3); according to the protester, the only notice of the applicable optical density requirements it received was a letter dated March 27, 1987, which contained an optical density requirement of 3.4. The protester states that its visors were fabricated to meet this 3.4 optical density level, and that it was not until its debriefing that it learned its visors had failed the required optical density level of 3.6. Gentex maintains that had it been notified of the actual optical density requirement, it would have manufactured visors to meet that requirement. Further, the protester contends that if it had manufactured to the required optical density level, other characteristics of its visor would have been affected, resulting in a probable improvement in the overall performance and technical evaluation of its visor.

Although the agency has been unable to provide documentary evidence of transmission, it believes that the classified addendum to the TRD, which Gentex denies receiving, was in fact provided to each offeror in November 1987, when the applicable TRD was furnished. In any event, the agency argues that the protester was clearly on notice of the classified addendum, since the addendum was incorporated by reference into the TRD.

Preliminarily, we agree with the agency that Gentex should have been on notice of the optical density requirement of 3.6 at least as of its receipt of the TRD in November 1987. This TRD, which Gentex does not deny receiving, clearly put offerors on notice of the existence and applicability of the February 1987 classified addendum containing the 3.6 optical density requirement. It was unreasonable for Gentex to assume that the March 1987 document it had received contained the correct optical density requirement, since the TRD specifically stated that the optical density requirement was based on the February 1987 addendum.

Whether Gentex was on notice of the 3.6 optical density requirement is not determinative of the outcome here in any event. As stated above, the RFP did not contemplate any modifications to the two offerors' items furnished as samples in April 1987; the evaluation was to be based on those existing items. Since the optical density requirement for these April 1987 items was 3.4, both Gentex and

EDO were to be evaluated on the basis of items furnished in response to a 3.4 optical density standard, not the 3.6 standard. The Air Force did in fact evaluate the April 1987 items for both offerors and, not surprisingly, found that neither had a 3.6 optical density. Thus, while we do not understand why the agency provided for an evaluation of sample items against a higher standard than the one in effect when the sample items were produced, doing so here had no apparent effect on the outcome of the competition.

The selection of EDO ultimately had little to do with the optical density requirement: the determining factor in the selection of EDO for award was the firm's substantial superiority in the area of operational testing. The operational testing consisted of ratings by crew members in a number of areas to determine compatibility of the visors with cockpit lighting and display systems for eight aircraft, and a criterion of the operational testing was whether 80 percent of the participating crew members rated the visor as at least satisfactory. The EDO visor ultimately was rated acceptable in five of the eight aircraft tested, and Gentex's visor was rated unsatisfactory in all eight.

Gentex's argument that it could have improved its visor's performance in several areas had it been advised of the 3.6 optical density standard (and been given a chance to propose items based on that standard) ignores the fact that the RFP sought offers of visors based on the two firms' established technology, as reflected in the April 1987 sample items. The Air Force did not want visors based on unproven technological changes that would have to be subjected to new testing. Again, as indicated above, this should have been clear from language in the RFP, including the provision for evaluation based on the samples previously submitted.

We conclude that the firms were evaluated on an equal basis and that the Air Force reasonably determined that selection of the EDO visor was warranted in view of the results of the operational testing.

The protest is denied.

## B-232730, January 18, 1989

## Procurement

**Noncompetitive Negotiation**

■ **Use**

■■ **Justification**

■■■ **Urgent needs**

Where the contracting agency has an urgent requirement for clocks used in navigation of aircraft and the applicable procurement regulation calls for acquisition of domestically-manufactured clocks if available, the agency properly may restrict reprocurement after default to the one firm the agency has determined can produce the domestic item without first article testing and attendant delays.

## Matter of: Aerosonic Corporation

Aerosonic Corporation protests the award of a reprocurement contract to Waltham Clock Company for domestically-manufactured clocks for Army and Air Force aircraft under request for proposals No. DAAA09-89-R-0015, issued by the Army Materiel Command (AMC). Aerosonic asserts that the agency failed to obtain competition to the maximum extent practicable, as required in a reprocurement, and that the contract constitutes an improper sole-source award.

We deny the protest.

## Background

The requirement at issue here, 1,588 domestic aircraft clocks, is the undelivered quantity under a previous contract with Waltham Precision Instruments, Inc. AMC terminated that contract for default after Waltham Precision had disaffirmed the contract and undergone dissolution in bankruptcy. On October 28, 1988, the agency awarded a replacement contract to Waltham Clock, the successor in bankruptcy to Waltham Precision, with deliveries to commence November 30, 1988.

AMC justified the award without further competition on the basis that only Waltham could satisfy the urgent need for the clocks, which are used in navigation and required for the safe operation of Army and Air Force aircraft. According to AMC, the shortage of clocks resulting from the defaulted contract already had caused the grounding of a number of aircraft, and both the Army and the Air Force had determined that additional aircraft would be grounded each month the resumption of deliveries was delayed. AMC's determination that only Waltham Clock could meet the requirement was based on its finding that Waltham Clock was the only manufacturer that (through its predecessor, Waltham Precision) had supplied aircraft clocks entirely of domestic manufacture, as called for by the Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 8.74. In this regard, AMC found through preaward surveys of Waltham Clock and Aerosonic that only Waltham Clock qualified for waiver of a first article test (FAT), which was deemed necessary to avoid further delays.

Aerosonic objects that it was improper for AMC to waive a FAT requirement for Waltham, and otherwise to treat the firm as if it were equivalent to the predecessor firm, Waltham Precision; it disputes AMC's finding that Waltham Clock, having acquired virtually all of Waltham Precision's assets and most of its employees, is essentially the same firm. Aerosonic asserts that Waltham Clock, unlike Waltham Precision, is not among those firms whose aircraft clocks are on the relevant Qualified Products List (QPL) of clocks that had been tested and approved by the agency, or whose pinion and gear components for the clocks are on the list of confirmed domestic sources. Since Waltham allegedly was not entitled to waiver of the FAT requirement, Aerosonic contends it should have been solicited for the requirement as well, in either of two ways: either the agency should have considered the procurement of clocks containing

foreign-made components (which Aerosonic could have provided), which is permitted where domestic clocks are unavailable, DFARS § 8.7403(a)(2); or the requirement should have been added to an earlier solicitation for domestic clocks on which Waltham Clock and Aerosonic competed, and under which Aersonic received an award on August 31, 1988. Since under either of these alternatives Aerosonic allegedly would have been able to deliver the clocks as quickly as Waltham Clock if Waltham Clock were subject to the FAT requirement (as Aerosonic argues it should be), Aerosonic concludes that AMC improperly failed to permit Aerosonic to compete, resulting in an improper sole-source award.

## Analysis

Generally, in the case of a reprocurement after default, the statutes and regulations governing regular federal procurements are not strictly applicable. *TSCO, Inc.*, 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. To repurchase the same requirement on a defaulted contract, the contracting agency may use any terms and acquisition methods deemed appropriate for the repurchase, provided that competition is obtained to the maximum extent practicable and the repurchase is at as reasonable a price as practicable. Federal Acquisition Regulation (FAR) § 49.402-6; *United States Pollution Control, Inc.*, B-225372, Jan. 29, 1987, 87-1 CPD ¶ 96. Aerosonic does not question the reasonableness of the contract price (the same as the price under Aersonic's own contract for domestic clocks). The question here, therefore, is whether the award to Waltham Clock satisfied the competition requirement. We find that it did.

### Competition Based on Non-Domestic Clocks

First, we do not agree with Aerosonic that AMC could or should have considered Aersonic available for a competition based on its on-hand supply of non-domestic clocks. The DFARS specifically provides that defense requirements for aircraft clocks must, to the maximum extent practicable, be of domestic manufacture only; non-domestic clocks may be purchased only when domestic items cannot be obtained. DFARS § 8.74. Here, AMC specifically determined that domestic clocks could be obtained from Waltham Clock, and that there thus was no need to purchase non-domestic clocks under the DFARS exception.

Aerosonic challenges AMC's conclusion that domestic clocks were available on the basis that AMC incorrectly determined that the Waltham Clock was entitled to a FAT waiver (which would enable the firm to meet the delivery schedule), based on the past performance of Waltham Precision, an entirely different company. We find nothing objectionable in the agency's determination. In June 1988, AMC conducted a preaward survey of Waltham Clock. Based on that survey, both the Army and the Air Force determined that no FAT would be required for Waltham Clock and the firm would be able to commence deliveries of domestically-manufactured clocks 30 days after award. The conclusion was based, in part, on the findings that Waltham Clock had purchased virtually all of the assets of the bankrupt Waltham Precision, which had been the only man-

ufacturer of domestic aircraft clocks for the government since World War II, and that Waltham Clock's key engineering, quality control, and production personnel had previously worked for Waltham Precision and were "the best in their business." Aerosonic's argument that Waltham Clock is not the same firm as Waltham Precision is of limited relevance; the preaward survey focused on Waltham Clock, not Waltham Precision, and represented an assessment of that firm's production capacity. Thus, in our view, AMC reasonably concluded that Waltham Clock did not require a FAT, and thus was in a position to make prompt delivery of domestic clocks, *see Automated Power System, Inc.*, B-224203, Feb. 4, 1987, 87-1 CPD ¶ 579. There thus was no need for AMC to invoke the exception to the DFARS permitting the purchase of non-domestic clocks.

**Incorporation in Aerosonic Contract**

Aerosonic's alternative argument that AMC should have added the requirement in question to the quantities under its August 1988 contract also is unpersuasive. First, we fail to see how a noncompetitive award of the requirement to Aerosonic would eliminate the impropriety Aerosonic alleges, namely, the award of a contract without competition. More importantly, we think AMC reasonably determined that Aerosonic could not perform this requirement within AMC's urgent timeframe. In this regard, at the same time (June 1988) Waltham Clock was found capable of performing without a FAT and commencing deliveries 30 days after award, AMC determined that the FAT requirement could not be waived for Aerosonic; Aerosonic had never manufactured domestic aircraft clocks prior to its August 1988 contract, and the FAT results from that contract were not due until December 30, with delivery not scheduled to commence until February 28, 1989. In light of the FAT requirement, AMC reasonably concluded that Aerosonic could not timely furnish the clocks, whether under its August 1988 contract or a new contract.

We conclude that AMC reasonably determined that only Waltham Clock, and not Aerosonic (there is no evidence that other firms were available), was capable of delivering the required aircraft clocks within the agency's urgent timeframe. It follows, therefore, that AMC's award of a contract to Waltham Clock was consistent with the requirement that reprocurement awards be based on the maximum practicable competition.

**Other Issues**

Aerosonic's other objections also are without merit. For example, Aerosonic asserts that Waltham Clock was not qualified for award because it was not a firm whose aircraft clocks were listed on the relevant Qualified Products List (QPL). However, AMC has submitted evidence that on November 10, 1988, the name of Waltham Clock was approved to replace that of Waltham Precision on the QPL for the particular model of aircraft clock at issue here; further, the agency reports that Waltham Clock had satisfied all of the requirements for being placed on the QPL, and had in fact qualified for listing, prior to the award on October

28. In any event, if a potential offeror can demonstrate to the satisfaction of the contracting agency that the offeror (or its product) meets the standards established for qualification, or can meet those standards prior to award, it may not be denied consideration for award of a contract solely because it is not yet on the relevant QPL. *See* FAR § 9.202 (c). Here, the agency has determined that the product manufactured by Waltham Clock was essentially the same as that manufactured by Waltham Precision, which it had already qualified and which was already on the QPL. The delay in adding Waltham Clock to the list was an administrative technicality, irrelevant to the issue of whether the firm was a qualified source.

Similarly, with respect to Aerosonic's objection that Waltham Clock was not on the list of confirmed domestic sources for pinions and gears (components of the aircraft clocks), AMC reports that Waltham Clock was in fact qualified to be placed on the list, but that the practice of maintaining lists of confirmed domestic sources for these components expired on December 31, 1987, well before the award was made.

The protest is denied.

## B-233166, January 18, 1989

## Procurement

**Noncompetitive Negotiation**
**■ Use**
**■■ Justification**
**■■■ Urgent needs**

Where agency properly determines due to urgent circumstances that it must use noncompetitive procedures provided for under the Competition in Contracting Act, agency properly may limit the number of sources to those firms it reasonably believes can promptly and properly perform the work. Agency reasonably determined protester was not a potential source for a 12-month, emergency contract where protester, who was terminated for default on the previous contract for the solicited services, had encountered problems in an aspect of performance critical to the emergency contract.

## Procurement

**Contract Management**
**■ Contract administration**
**■■ Default termination**
**■■■ Propriety**
**■■■■ GAO review**

General Accounting Office will not consider the propriety of the procuring agency's decision to terminate a contract for default, since this is a matter for the procuring agency's board of contract appeals under the contract disputes clause.

## Matter of: Joseph L. De Clerk and Associates, Inc.

Joseph L. De Clerk and Associates, Inc., protests any award of a contract under request for proposals (RFP) No. F09603-88-R-58351, issued by the Department of the Air Force for on-call computer maintenance services in support of the Expanded Missile Data Analysis System (EMDAS). The EMDAS, located at nine continental United States sites, monitors the operational status and readiness posture of the Minuteman Missile System. The Air Force limited competition to two known qualified sources based on a determination that an unusual and compelling urgency for the services existed. The protester, who was terminated for default on the previous contract for the solicited services, principally argues that the agency improperly excluded it as an available source. We deny the protest.

The Air Force awarded contract No. F09603-87-D-0965 to De Clerk for a base year and four option years. The base year was scheduled to expire on August 30, 1988. However, the Air Force terminated De Clerk's contract for default on July 11, for failure to timely perform. De Clerk has appealed this termination to the Armed Services Board of Contract Appeals.

On August 29, the Air Force issued the protested RFP to two known sources for the maintenance of the EMDAS. The initial closing date of September 19 was extended to September 26 at 4 p.m., at the request of one source. By letter dated September 23, and received by the Air Force on September 26 at 10:30 a.m., De Clerk protested to the agency that it was capable of competing for the solicitation but not given the opportunity. By message dated October 6, De Clerk protested to our Office that it was not given an opportunity to compete despite notifying the Air Force of its desire to participate.

De Clerk contends that the Air Force wrongfully terminated its contract for default, and held it to a different standard than the previous EMDAS contractor, to whom the Air Force issued the RFP. According to De Clerk, the Air Force implicitly recognized the defective nature of De Clerk's contract by rewording defective clauses and incorporating those changes into the protested RFP. De Clerk argues it should be given the opportunity to compete for the RFP since it has dedicated personnel located in close proximity to each EMDAS site, can provide faster response time than the restricted-source list bidders and is the only company with spare parts located within close proximity of each site.

The Air Force responds that the RFP is an emergency partial reprocurement of computer maintenance services provided for under De Clerk's terminated contract. The Air Force limited competition to known qualified sources due to the urgent nature of the services, and excluded De Clerk because it determined its previous performance for the same services was unsatisfactory.

The Air Force notes that a justification for using other than full and open competitive procedures due to an unusual and compelling urgency was approved by the Air Force's Director, Competition Advocacy. *See* 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). The justification referred to the critical nature of the EMDAS, which collects maintenance data and allows for the forecast of component failures to

determine cycle repair items, parts acquisitions, and end item replacement requirements for the Minuteman Missile Fleet. According to the Air Force, since De Clerk's contract has been terminated, EMDAS is receiving only emergency repairs as components fail, and emergency purchase orders are issued each time a computer requires repair. Under this method of support, the Air Force reports, the system is not being maintained at the latest manufacturer's configuration, and using activities are not able to realize the required 95 percent System Effectiveness Level.

The Air Force explains that it issued the protested RFP to provide services for 1 year to avoid the administrative delay involved in issuing a purchase order each time a computer requires repair. The Air Force states that it plans to competitively solicit the maintenance requirements under Air Force Logistics Command Five Year Policy procedures, and notes that previous experience indicates the administrative lead time required to award such a contract is approximately 1 year.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2). This authority is limited by the CICA provisions at 10 U.S.C. § 2304(e), which require agencies to request offers from as many sources as practicable. An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work promptly and properly, *see Industrial Refrigeration Service Corp.*, B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67, and we will object to the agency's determination only where the decision lacks a reasonable basis. *See TMS Building Maintenance*, 65 Comp. Gen. 222 86-1 CPD ¶ 68.

We believe the Air Force's decision to use noncompetitive procedures was reasonable. The record indicates that an exigent situation existed, and a limited competition was called for, because EMDAS, a vital part of our national defense, and our first strike capability, lacked needed repair coverage. In light of the emergency situation, the Air Force limited the competition to firms which, in the Air Force's view, had satisfactory work experience and could promptly and properly furnish the needed repair coverage.

We see no basis to object to the Air Force's decision to exclude De Clerk from the competition. The record shows that the Air Force had issued a cure notice to De Clerk in April 1988, stating that De Clerk's failure to deliver software and manual updates had severely impacted EMDAS software development. De Clerk responded by letter dated May 9, alleging vendor delay as one reason for its failure and stating that its vendor problem had been solved and delivery of the required items would be within 2 weeks. By letter dated May 13, the Air Force advised De Clerk that, acting in reliance upon De Clerk's assurances, it would forbear until May 25. De Clerk was advised that failure to deliver by that date would result in its contract being terminated for default. After De Clerk failed to deliver the items by May 25, the Air Force notified De Clerk by letter dated

June 16 that it was considering terminating the contract for default, and that De Clerk should respond within 10 days. In a telephone conversation on June 28, the Air Force granted De Clerk a 5-day extension to reply. The Air Force reviewed De Clerk's response letter dated June 30, and notified De Clerk by letter dated July 7 that its contract was terminated for default because De Clerk had failed to show its failure to comply with the terms of the contract was without fault or negligence on its part. Notably, while De Clerk disputes the reasons for its performance problems, it does not deny that problems existed. Given these factors, we cannot conclude that the Air Force unreasonably determined that De Clerk was not an available source to perform the services solicited in the protested RFP.

De Clerk's contention that the termination of its contract was improper concerns a matter of contract administration within the jurisdiction of the contracting agency and the Armed Services Board of Contract Appeals under the disputes clause of De Clerk's contract and, therefore, is not for consideration by this Office under our Bid Protest Regulations. *See* 4 C.F.R. § 21.3(m)(1) (1988); *VCA Corp.—Reconsideration,* B-219305.3, Oct. 11, 1985, 85-2 CPD ¶ 403.

The protest is denied.

## B-231814, January 19, 1989

## Civilian Personnel

**Travel**

**■ Government vehicles**

**■■ Use**

Under the provisions of 31 U.S.C. §§ 1344 and 1349 (1982 & Supp. IV 1986), a government-owned or leased vehicle may only be used for the performance of official business. It does not violate those statutes, however, for an agency to allow a dependent of an employee to accompany the employee as a passenger in such vehicle. 57 Comp. Gen. 226 (1978).

## Civilian Personnel

**Travel**

**■ Government vehicles**

**■■ Accidents**

**■■■ Government liability**

If a vehicle being operated by a federal employee in the performance of official business is involved in a collision due to the employee's negligence and a member of the family who is accompanying the employee as a passenger is injured, that a passenger may seek damages. Since the right of recovery under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), is predicated on the law of the place of occurrence, the government's liability might be increased by permitting the family member to accompany the employee.

## Matter of: Ruben Carranza—Dependents as Passengers in Vehicles on Government Business

This decision is in response to a request from the Director, Office of Finance and Accounting, United States Department of Housing and Urban Development (HUD), concerning the legality of permitting dependents to travel as passengers in a vehicle being operated by a federal employee while performing official business.

## Background

An employee of HUD's Fort Worth Regional Office has requested permission to take his spouse as a passenger in a government-furnished vehicle. The agency asks: (1) whether the employee may be granted permission to do so; (2) whether the granting of such permission would increase the potential liability of the government under the Federal Tort Claims Act; (3) whether the same criteria would apply to commercially rented vehicles obtained under an agreement negotiated for the government by the Military Traffic Management Command or any other commercially rented vehicle; and (4) what, if any, implications are associated with dependents traveling with an employee on official government business as passengers in a privately owned vehicle?

## Opinion

Under the law, a government-owned or leased motor vehicle or aircraft may only be used on official business. Any other use is prohibited and would subject the employee so using that vehicle to sanctions. 31 U.S.C. § 1344, 1349 (1982 & Supp. IV 1986). However, there is nothing in the law or regulations which would prohibit a member of an employee's family from accompanying him as a passenger in such vehicle while he is traveling on official business for the government. In this regard, we held in 57 Comp. Gen. 226 (1978) that it would be a violation of law to transport a dependent for other than "official purposes" or to permit that dependent to drive a government vehicle on personal business. We went on to state that:

> . . . where the transportation of a dependent in a Government vehicle is such that the dependent merely accompanies an employee on an otherwise authorized trip scheduled for the transaction of official business, and the agency involved makes a determination that it is in the Government's interest for the dependent to accompany the employee (for instance, for morale purposes), we do not believe that the provisions of [31 U.S.C. § 1349] would be violated. 57 Comp. Gen. at 228.

With regard to the possible increase in liability exposure to the government due to the presence of an employee's dependent as a passenger in a government-furnished or leased vehicle, we note that under the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), in order to establish governmental responsibility in tort, three conditions must be present. First, any monetary claim arising out of injury, death, or property damage suffered by a third party must have been caused by the negligent or wrongful act or omission of an employee

of an agency. Second, the employee must have been acting within the scope of his office or employment at the time of the occurrence. Finally, the right of that third party to recover is to be determined by the law of the place where the negligent act or omission occurred.

Assuming that the first two conditions are met, the liability exposure of the government arising out of injury or property damage suffered by a passenger in a government vehicle would be dependent on the law of the place of occurrence. Some jurisdictions limit or even prohibit recovery by passengers in a vehicle being negligently operated, but other jurisdictions do not so. We believe that the government could have an increased liability exposure under the Federal Tort Claims Act because of a passenger who is not a federal employee. The fact that the vehicle in question may be a commercial rental vehicle leased under an agreement negotiated for the government by the Military Traffic Management Command, or by any other rental arrangement, rather than a government-furnished vehicle, or even if it is a vehicle privately owned by the employee which is being used on official travel, would not alter that conclusion.

## B-232746, January 19, 1989

### Procurement

**Noncompetitive Negotiation**
**■ Contract awards**
**■■ Sole sources**
**■■■ Propriety**

### Procurement

**Special Procurement Methods/Categories**
**■ Computer equipment/services**
**■■ Federal supply schedule**
**■■■ Non-mandatory purchases**

Purchase under non-mandatory automatic data processing schedule contract from firm which agency reasonably determines to be only source available to supply the desired product is not objectionable where procurement was conducted in accordance with applicable regulations and protester has not shown that there is no reasonable basis for the sole-source award.

### Procurement

**Special Procurement Methods/Categories**
**■ Federal supply schedule**
**■■ Price adjustments**
**■■■ Reduction**

A contractor under a General Services Administration (GSA) non-mandatory automatic data processing schedule contract may offer a price reduction at any time and by any method without approval by GSA, and under the contract's terms the price reduction generally will remain in effect for the remainder of the contract.

## Matter of: KYBE Corporation

KYBE Corporation protests the Department of the Navy's issuance of delivery order No. N66032-88-F-0060 to Computer-Link Corporation for 21 Computer-Link Model 3800-6 Magnetic Tape evaluator/cleaners under Computer-Link's nonmandatory automatic data processing (ADP) schedule contract No. GS-00K-86-AGS-5308 with the General Services Administration (GSA). The protester contends that the Navy improperly placed a sole-source order with Computer-Link, that the Navy's technical requirements that were used to select the Computer-Link product were not essential to meet the needs of the agency, and that the Navy improperly accepted a discount from the list price stated in Computer-Link's GSA schedule contract.

We deny the protest.

The Navy states that as a result of an audit of aviation supplies aboard aircraft carriers it determined that it required the procurement of magnetic tape evaluator/cleaners for regular tape maintenance to promote reliable performance in its magnetic tape system. In April 1988, the Navy conducted a market survey in which it evaluated models of tape evaluator/cleaners available from four different vendors, including the protester. Based on the results of the evaluation, the Navy intended to procure the Computer-Link Corporation Model 3800-6, which it determined best met its requirements.

The market survey was based on 54 technical requirements which Computer-Link met. Computer-Link was the only firm which could meet several of the requirements, including the following: detect tape errors at 800, 1600 and 6250 bits per inch (bpi) (the density with which data is packed); print by data block locations; and print eight types of errors at 6250 bpi.

As required by the Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. § 201-32.206(f) (1987), the Navy published a notice in the *Commerce Business Daily* (CBD) on August 23 announcing its intent to purchase from Computer-Link's GSA schedule twenty Model 3800-6 Magnetic Tape evaluator/cleaners.[1] The CBD notice also stated that "through a market survey it was determined that this model would best satisfy the requirement." On August 30, a representative from KYBE and another firm called to express interest in the market survey and to inquire about whether their respective products had been included. The Navy states that the firms were advised that their products were considered but that they did not fully meet the technical requirements. Both firms resubmitted technical literature and current pricing data for their respective magnetic tape cleaners which were then reevaluated. The prices submitted by both firms were based on their current GSA non-mandatory schedule contracts, and the firms did not offer any discount from the schedule prices. The Navy again determined that neither company could fully comply with the technical requirements.[2] Moreover, the Navy on September 9, also con-

[1] The quantity was subsequently increased to twenty-one units.

[2] In its response to the agency's report, the protester concedes that its product does not meet many of the technical requirements, including the ones set forth above.

ducted a price analysis of the comparable products of the three firms, including Computer-Link's and KYBE's. Because Computer-Link offered a discount from its schedule contract, while the others did not do so, its Model 3800-6 had the lowest evaluated overall cost.

In accordance with FIRMR § 201-32.206(a)(2), which provides that the use of a GSA non-mandatory ADP schedule contract for requirements available from only one responsible source shall be certified, justified, and approved in accordance with Federal Acquisition Regulation (FAR) §§ 6.303 and 6.304, the Navy executed a justification for other than full and open competition which was certified by the contracting officer and approved by the competition advocate. Also, as stated above, in accordance with the FIRMR provision, the agency conducted a price analysis and determined that the Computer-Link Model 3800-6 provided the lowest overall cost alternative. A delivery order was issued to Computer-Link on September 9, 1988. This protest followed.

The record shows that the Navy did justify the delivery order on the basis that the requirement (a tape cleaner meeting its technical needs) was available from only one responsible source. We note that the prices obtained from all three firms after the publication of the CBD notice on August 23, clearly showed that KYBE's product was not the lowest priced. Indeed, KYBE only argues that its product would have been the lowest priced if Computer-Link's undiscounted schedule contract prices had been evaluated.[3] (KYBE also objects to the Navy's acceptance of Computer-Link's discount from its schedule contract as unauthorized.) Since KYBE did not propose a product that was the lowest priced, it does not appear that relaxation of the allegedly unduly restrictive technical requirements would have resulted in the selection of KYBE for award. *See generally Whittaker-Yardney Power Systems,* B-227831, Sept. 10, 1987, 87-2 CPD ¶ 232.

In any event, the record indicates that the award was proper under the applicable regulations. Where the agency has substantially complied with the procedural requirements for the written justification for, and higher-level approval of, the contemplated sole-source action and publication of the requisite CBD notice, we will not object to a sole-source award unless it is shown that there is no reasonable basis for it. *See Abbott Laboratories,* B-230220, May 18, 1988, 88-1 CPD ¶ 468.

Here, the record indicates that the Navy complied with all the procedural requirements for placing an order under a non-mandatory ADP schedule contract for requirements available from only one responsible source, and the protester does not allege otherwise. As stated above, the Navy contends, and KYBE does not refute, that only ComputerLink can meet the requirements that tape errors be detected at 800, 1600 and 6250 bpi and that the evaluator/cleaner print eight types of errors at 6250 bpi.

The Navy's justification for other than full and open competition stated that only the proposed Computer-Link equipment meets the government's critical re-

[3] This assumes that KYBE's product was technically acceptable and that selection was based on price alone.

quirement for the certification of tapes at extremely high densities. The Navy has explained that because of an increase in data required to be maintained, the Navy added a newer technology using high density disk drives. It states, however, that higher speeds and higher recording densities increased the requirement for ensuring the quality of the magnetic tapes. The Navy has informed our Office that recording densities of 800 bpi and 1600 bpi are the primary densities used when sending data to or from a ship, and a recording density of 6250 bpi is used primarily for back-up systems. Because all these recording densities are used daily, the Navy states that the tape evaluator/cleaner must be capable of detecting errors at 800, 1600 and 6250 bpi and printing them by data block locations and also be capable of printing eight types of errors at 6250 bpi. Aside from bare allegations, the protester has not presented evidence that the Navy's stated requirements do not reflect the agency's minimum needs and that the agency's decision to award to Computer-Link, the only supplier of a product meeting these requirements, was clearly unreasonable. Thus, since only Computer-Link can meet the requirement, we think that the award to that firm must be viewed as proper.

KYBE also alleges that the purchase will exceed the maximum order limitation prescribed by the GSA schedule or that the procurement will not utilize the GSA contract pricing. The record shows that the purchase of 21 Computer-Link Model 3800-6 tape evaluator/cleaners does not exceed the maximum order limitation. However, the record also indicates, as KYBE contends, that the purchase order price, as a result of the discount, is lower than the price listed in Computer-Link's authorized ADP Schedule Price List.

Generally, a Federal Supply Schedule such as the one here lists contracts between the GSA and suppliers of commercially available items commonly used by the government, under which federal agencies may acquire the items at the prices contained in the contracts. 41 C.F.R. § 101-26.402-1(a) (1987). The contracts include a clause stipulating that if a contractor sells the contract items either commercially or to a federal agency at a reduced price, the equivalent price reduction shall apply to the contract for the remainder of its duration. 41 C.F.R. § 101-26.408-5. Under the clause, a contractor may offer a price reduction at any time and by any method without prior or subsequent approval by GSA. *See National Business Systems, Inc.,* B-224299, Dec. 17, 1986, 86-2 CPD ¶ 677. Thus, the award to Computer-Link at a price lower than its listed price does not provide a basis to disturb the award.

The protest is denied.

## B-233480, January 23, 1989

## Procurement

**Sealed Bidding**
**■ Bid guarantees**
**■■ Sureties**
**■■■ Acceptability**

Bidder, who is also the principal on the bid bond, cannot be his own surety since a surety necessarily must be distinct from the principal.

## Procurement

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

Where a solicitation requires a bid guarantee but protester submits a letter of credit which in fact is merely a revocable line of credit, and a promissory note which merely provides for the furnishing of a performance bond in the future upon acceptance of the bid, the bid properly is rejected as nonresponsive.

## Matter of: Appropriate Technology, Ltd.

Appropriate Technology, Ltd. (ATL), protests the rejection of its apparent low bid as nonresponsive for failure to provide an adequate bid guarantee as required by invitation for bids (IFB) No. GS-05-P-88-GAC-0131, issued by the General Services Administration (GSA) for janitorial and related services at the J.C. Kluczynski Federal Building and the U.S. Post Office, and window washing and trash removal services at the E. M. Dirksen Federal Building in Chicago, Illinois. ATL contends that the promissory note and letter of credit it submitted comply with the bid guarantee provisions of the solicitation. We deny the protest.

The IFB, issued June 27, 1988, required that each bidder submit with its bid a bid guarantee in the amount of 20 percent of the bid price. Additionally, the IFB required that the bid guarantee be furnished in the form of a firm commitment and stated that failure to furnish a bid guarantee in the proper form and amount by the time of bid opening may be cause for rejection of the bid. *See* Federal Acquisition Regulation (FAR) § 28.101-3(b) (FAC 84-12) and § 52.228-1 (FAC 84-27).

Bid opening was July 28. ATL submitted as its bid guarantee a promissory note and a letter of credit. The promissory note was signed by the President of ATL on July 28. The note stated that the principals of ATL promised to provide ". . . 20% ($313,433.40) of our bid price in Performance Bond and/or Letter of Credit in the same amount, within the Government's specified time period, if our bid for [the project] is accepted by the Government." The alleged letter of credit was issued by Performance Financial Services, Inc. of Vienna, Virginia on July 12,

1988. The letter stated that "a line of credit . . . for accounts receivable financing" was available to ATL up to $1,600,000. Three additional contingencies were listed and Performance Financial reserved "the right to amend, modify or terminate this commitment at any time for failure to comply with program requirements or credit parameters."

GSA found the promissory note and letter of credit submitted by ATL nonresponsive and rejected the bid. GSA contends that neither the promissory note nor the letter of credit were firm commitments since the promissory note was conditioned on the government's acceptance of the bid, and the line of credit was revocable.

ATL contends that the promissory note and letter of credit it submitted are responsive. ATL argues that the note meets all general requirements of negotiability, and the contingencies stated in the letter of credit are standard contingencies. We do not agree.

A bid guarantee is a form of security assuring that the bidder will not withdraw a bid within the period specified for acceptance and will execute a written contract and furnish the payment and performance bonds required under the contract. FAR § 28.001 (FAC 84-12). Its purpose is to secure the surety's liability to the government for excess costs in the event the bidder fails to carry out these obligations. The key question in determining the sufficiency of a bid guarantee is whether the government will be able to enforce it. *Freitas-Lancaster, Inc.*, B-230569.2, June 7, 1988, 88-1 CPD ¶ 539; *Meridian Construction Co., Inc.*, B-230566, June 8, 1988, 88-1 CPD ¶ 544.

We first note that the bid was submitted in the name of ATL, signed by (and identified as) the president of the corporation, and that the promissory note was submitted in the name of the "Principals of [ATL]," signed by (and identified as) the same president of the corporation. Thus, it appears that the bidder is also the surety. However, a surety necessarily must be distinct from the principal, as the surety undertakes to pay the debt or to perform an act for which the principal has bound himself, should the principal default. *F&F Pizano—Request for Reconsideration*, 64 Comp. Gen. 805 (1985), 85-2 CPD ¶ 234. Thus, a bidder, who is the principal on the bid bond, cannot be his own surety. *Id.; see also* Standard Form 28, Instruction 2 (covering the unacceptability of a partner as a surety where the partnership or an individual partner is the principal obligor on the bond).

Moreover, even assuming that the principals on the promissory note were different from the bidder, we think the promissory note submitted here was still unacceptable. The promissory note submitted by ATL promised to provide the government with 20 percent of the "bid price in Performance Bond and/or Letter of Credit . . . if our bid . . . is accepted." Thus, the note is merely a promise to provide a performance bond in the future upon acceptance of ATL's bid. The note does not secure the financial liability of the surety in the event the bidder withdraws its bid or fails to provide payment and performance bonds as

required. Therefore, the promissory note clearly falls short of an adequate bid guarantee.[1]

Finally, the letter of credit submitted by Performance Financial Services, Inc., on ATL's behalf does not promise to honor payment against ATL. Rather, the letter promises only to extend a line of credit to ATL and by its own terms, the letter is revocable. Accordingly, the letter of credit was materially defective and the bid was properly rejected as nonresponsive. *See Freitas-Lancaster, Inc.*, B-230569.2, *supra*.

The protest is denied.

## B-233624, January 23, 1989

### Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Price data**
**■■■■ Minor deviations**

Where an uninitialed bid correction leaves no doubt as to the intended bid price, the requirement for initialing changes is a matter of form and the omission may be excused as a minor informality.

### Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Determination criteria**

Where submitted copies of a bid are not exact copies of the original, the bid is responsive provided the bidder is given no opportunity to select between two prices.

### Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Acceptance time periods**
**■■■■ Deviation**

The offer of a bid acceptance period significantly longer than the 60-day period requested in the IFB is acceptable since it exceeds the agency's minimum needs.

[1] ATL also argues that the promissory note contained a typographical error in that the promise to provide 20 percent of the "bid price *in* Performance Bond," should have stated 20 percent of the "bid price *or* Performance Bond." This does not cure the deficiency since the promise is still contingent upon acceptance of the bid by the government. Further, a nonresponsive bid cannot be cured after bid opening to become responsive. *See Servidyne, Inc.*, B-231944, Aug. 8, 1988, 88-2 CPD ¶ 121.

## Matter of: Hughes & Hughes/KLH Construction

Hughes & Hughes/KLH Construction (KLH) protests the pending award of a contract to Baldi Brothers Construction (Baldi) by the Department of the Navy under invitation for bids (IFB) No. N62474-86-B-0568. KLH contends that the agency erred in finding Baldi's low bid responsive because Baldi made uninitialed corrections to the price written on the bid forms. KLH further argues that Baldi's bid is nonresponsive because it provided a 425-day bid acceptance period—a period far in excess of the 60 days required by the solicitation. We deny the protest.

The IFB solicited bids for military construction projects P-460 and P-423 at the Marine Corps Air-Ground Combat Center, Twentynine Palms, California. Eight bids were received with Baldi the low bidder at a total price of $4,766,061 for base bid item 001 and additive bid items 00001AA through 00001AD. KLH was the second-low bidder with its total bid of $4,946,718.

Central to the protest is Baldi's failure to initial corrections made to the base bid figure as it appears on Standard Form (SF) 1442. Prior to submission of its bid, Baldi crossed out the original figure listed for the base bid, drew an arrow to the right, wrote a second figure labeled base bid, crossed this out, and inserted a third figure. Although none of these corrections was initialed, it is apparent from the labeling that the third figure written is Baldi's intended base bid. This Office has held that a bidder's failure to initial changes is a matter of form that may be waived as a minor informality where the bid leaves no doubt as to the intended price. *TCI, Ltd.,* 65 Comp. Gen. 23 (1985), 85-2 CPD ¶ 433. A clear example of a minor informality is a bidder's failure to initial an erasure or correction as required by the IFB. *Werres Corp.,* B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243. In the instant case, the contracting officer's determination that the uninitialed changes left no doubt as to Baldi's intended bid price was reasonable.

Similarly, KLH argues that Baldi's bid was nonresponsive because the two copies of SF 1442 attached to the solicitation are not identical to the original SF 1442 submitted. Although these copies reflect the same corrected base bid, the first base bid item is not crossed out in the same manner on one copy and not stricken at all on the second copy. While the protester is correct that all copies of a submitted bid should match the original, a bid is nonresponsive only where the deficiency makes the bid ambiguous so that the bidder is given an opportunity to select between two prices. *Don's Wheelchair & Ambulance Service, Inc.,* B-216790, Jan. 22, 1985, 85-1 CPD ¶ 82. It is obvious from the original bid that the first base bid on the second copy was meant to be crossed out. Baldi was not given an opportunity to choose between two prices; rather, the contracting officer determined the bid price by considering the original copy of the bid as submitted.

KLH argues that Baldi's bid is also nonresponsive because Baldi inserted a figure of 425 calendar days, a sum equal to the performance period specified in the solicitation, as the bid acceptance period. This unnecessarily lengthy acceptance period does not render the bid nonresponsive since the solicitation re-

quired a minimum period of just 60 days. The mistake in the bid results in prejudice only to Baldi because the bidder alone bears the burden of holding its bid open for 14 months.

The protest is denied.

## B-232719, January 25, 1989

## Procurement

**Sealed Bidding**

**■ Bids**

**■■ Additional information**

**■■■ Incorporation by reference**

Where solicitation incorporates by reference a prior solicitation but provides for revised delivery schedule, a bidder obligates itself to perform all work as changed in the revised solicitation when it signs the revised solicitation; the bidder does not render its offer nonresponsive to the revised schedule by including the prior solicitation in its bid without crossing out or editing the prior schedule to conform it to the revised schedule.

## Matter of: Bruce Industries, Inc.

Bruce Industries, Inc. protests the award of a contract to E.G. Power Company, under invitation for bids (IFB) No. DLA400-88-B-4688, issued by the Defense Logistics Agency (DLA), for electrical outlets and distribution boxes. Bruce alleges that Power's bid was nonresponsive to the required delivery schedule and should have been rejected.

We deny the protest.

On July 27, 1988, DLA issued this IFB, in the form of a mailgram, seeking bids on the reprocurement of the undelivered quantity of electrical outlets and distribution boxes under a recently terminated 1987 contract. The IFB provided that, with the exception of certain specified clauses, all terms and conditions of IFB No. DLA400-87-B-6264, under which the 1987 award had been made, would be applicable to the reprocurement. One of the clauses changed was the delivery schedule; while the 1987 IFB had called for delivery to commence not later than January 1988, but allowed for extensions in case of award delays, the mailgram required delivery to commence by December 15, 1988, irrespective of any award delays.

Three bids were received in response to the solicitation. Bruce's was the apparent low bid, but Bruce alleged a mistake and was permitted to correct its bid upward. As a result, Bruce became the second low bidder and Power the apparent low bidder. DLA made award to Power after obtaining Power's verification of its bid and finding the firm to be responsible.

Bruce alleges that Power rendered its bid nonresponsive to the revised delivery schedule in the 1988 IFB by including in its bid a copy of the 1987 IFB contain-

ing the original delivery schedule. Power's bid consisted of the 1988 mailgram IFB (and two amendments) signed by Power, and the 1987 IFB signed, dated (August 14, 1988), and annotated "88-B-4688" (the 1988 IFB number) by Power. Power did not alter or annotate the delivery schedule in the copy of the 1987 solicitation. Bruce argues that Power, by including in its bid an unaltered copy of the 1987 IFB with the more lenient delivery schedule, either qualified the bid or rendered it ambiguous because it was unclear on the face of the bid which of the two delivery schedules Power would be obligated to comply with.

The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation which, upon acceptance, will bind the contractor to perform in accordance with all the terms and conditions thereof. In ascertaining responsiveness, a bid must be given a reasonable interpretation and read in its entirety. *Technical Support Services, Inc.,* B-227328.2, Oct. 2, 1987, 87-2 CPD ¶ 322. We have previously recognized the general principle that the specific acknowledgment of an amendment binds the bidder to perform all work as substantively changed in the amendment. *See Rocky Ridge Contractors, Inc.,* B-224862, Dec. 19, 1986, 86-2 CPD ¶ 691; *Jem Development Corp.,* B-209707, Apr. 22, 1983, 83-1 CPD ¶ 444. Thus, for example, where a bidder inserted 60 days as its bid acceptance period in the original bid form and also acknowledged an amendment that changed the IFB minimum acceptance period from 60 days to 90 days, we held that the bidder's blanket acknowledgment of the amendment indicated its acceptance of the longer bid acceptance period. *See Alaska Mechanical, Inc.,* B-225260.2, Feb. 25, 1987, 87-1 CPD ¶ 216. Similarly, we have held that where a bidder crosses out delivery terms based on their deletion by one amendment, but the terms are added back in by a later amendment, the acknowledgment of the later amendment binds the bidder to the terms. *Aerojet Techsystems Co.,* B-220033, Dec. 6, 1985, 85-2 CPD ¶ 636.

The principle in the above cases clearly applies here. That is, when a solicitation incorporates by reference a prior solicitation, but revises that prior solicitation, we consider the bidder to have obligated itself to perform all work as changed when it signs the revised solicitation. There is no additional requirement that the bidder edit the earlier, incorporated specifications so as to conform them to the later, revised specifications. Thus, since Power signed the 1988 solicitation, Power was obligated to perform pursuant to the revised delivery schedule.[1]

The protest is denied.

[1] Bruce asserts that Power's bid price is unrealistically low and that this constitutes proof that Power failed to bind itself to comply with the revised, expedited delivery schedule required by the 1988 solicitation. As indicated above, however, we find that acceptance of Power's bid obligates Power to meet the revised schedule.

## B-233066, January 25, 1989

## Procurement

**Sealed Bidding**
**■ Invitations for bids**
**■■ Amendments**
**■■■ Acknowledgment**
**■■■■ Responsiveness**

Contracting agency properly accepted low bid that failed to acknowledge a solicitation amendment making changes that either had only a minimal impact on cost, or merely clarified requirements already contained in the solicitation.

## Matter of: Head Inc.

Head Inc. protests the award of a contract to Lobar, Inc., for construction work on two warehouse buildings at the Navy Ship Parts Control Center in Mechanicsburg, Pennsylvania, under invitation for bids (IFB) No. N62472-87-B-0094, issued by the Department of the Navy. Head asserts that Lobar's low bid should have been rejected as nonresponsive because it failed to acknowledge an amendment to the IFB until after bids had been opened.

We deny the protest.

The amendment at issue contains three major provisions applicable to each of the two warehouses. First it modifies the sprinkler system called for in the IFB to protect the exterior loading dock area; instead of a system in which water from the interior of the building is conducted to the exterior by pipes that penetrate the sidewall of the building at 60 points, as specified in the IFB, the amendment provides for a system in which water is carried from the interior by a single pipe to multiple overhead sprinklers located in the canopy above the loading dock. Essentially, the amendment changes the system from a sidewall to an overhead type. Second, the amendment illustrates, through an engineering sketch, the appropriate camber (that is, curvature, or deviation from a straight line) for the steel beams used to support the warehouse roof. Finally, the amendment provides certain design details for the building's electrical system that were not previously included in the IFB.

According to Head, since these three major provisions (as well as several less important ones) materially affect either the work to be performed or the cost of the project, the failure to acknowledge the amendment renders Lobar's bid nonresponsive. The Navy, on the other hand, asserts that, while the amendment may increase the contractor's cost of performance by at most $6,000, when considered in the context of Head's bid of $5,305,152 and Lobar's bid of $4,761,576 (a difference of $543,576), the cost impact of the amendment is *de minimis*. Further, the Navy denies Head's allegation that failure to include the amendment in the contract significantly affects the nature of the work to be performed.

Generally, a bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the gov-

ernment's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. *Pittman Mechanical Contractors, Inc.*, B-225486, Feb. 25, 1987, 87-1 CPD ¶ 218. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. *Id.*; Federal Acquisition Regulation § 14.405. An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation; that is, for example, where it merely clarifies an existing requirement. In that case, the failure to acknowledge the amendment may be waived and the bid may be accepted. *Star Brite Construction Co., Inc.*, B-228522, Jan. 11, 1988, 88-1 CPD ¶ 17.

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**Sprinkler System**

Head asserts that the substitution of overhead sprinklers for the sidewall type constitutes a material change in the quality of work to be performed, and was included in the amendment because the Navy realized that the original system called for in the IFB was inadequate. The change, according to Head, entails different configurations of pipe and different types of sprinkler heads and pipes, and results in an increased cost of approximately $44,421.

The Navy responds that the changes made by the amendment not only do not require any additional effort or any significant additional materials, but in fact relax the level of work called for initially. The overhead system specified in the amendment, according to the agency, is much more common than the original design for loading docks of the size in question, since it is easier and more economical to install. Further, the Navy contests Head's allegation that the original method was inadequate; in an affidavit of a senior fire protection engineer, the agency states that both the original and modified systems comply with applicable Navy criteria and National Fire Protection Association standards. Accordingly, the Navy contends that the changes do not affect the quality or nature of the work.

Both the Navy and Lobar take issue with Head's cost estimate, based in part on a differing view of the additional materials required. Head, for example, asserts that, prior to the amendment, it intended to install the exterior sprinkler heads directly into the "wet" pipe system already required for the interior building. (A "wet" sprinkler system is one in which water is contained in the pipe at all times; it is appropriate for a heated area where the pipe is not exposed to the danger of freezing temperatures, such as the interior of the warehouse building. A "dry" system, on the other hand, is one in which water is not permitted into the sprinkler pipes or head unless released by a valve, as needed; it is typically used for areas subject to freezing temperatures, such as the exterior loading dock.) After the amendment, however, Head states that an additional 600 feet of pipe is required to run the exterior length of the building. Lobar, on the other hand, states that its subcontractor for the sprinkler work reports that even prior to the amendment, the additional 600 feet of interior pipe was required to supply the exterior dry sprinklers; under the amendment, it would simply run

outside of the building rather than inside. The Navy agrees that no additional pipe is required by the amendment, and that the cost of installing the sprinklers overhead is in fact lower than that of making multiple penetrations of the building sidewalls, as would have been required with the original sidewall system. The Navy concedes there are some increased sprinkler system costs associated with the amendment, but estimates that the net impact is only $1,100. Lobar places the increased cost even lower, at $853.

We agree with the Navy that the amendment provisions regarding the sprinkler system, viewed in the context of the solicitation as a whole, do not make material changes. This is a comprehensive construction contract for the repair of the warehouse roofs, and only limited aspects of the overall work are affected by the amendment; a new sprinkler system is required only because the existing one must be removed when the old roofs are removed. The main wet-type sprinkler system called for in the IFB (and unaffected by the amendment) protects approximately 240,000 square feet of interior building space. In contrast, the dry system that is affected by the amendment protects only 15,600 square feet of exterior space; that is, only about 6 percent of the protected space is affected at all by the provisions of the amendment relating to the sprinkler system. Moreover, the sprinkler system as a whole constitutes only about 4 percent of the total construction project.

With respect to the small portion of the sprinkler system that is affected by the amendment, furthermore, we find the change negligible. Both the IFB and the amendment provide for a dry system, which is standard in exterior areas subject to freezing. The amendment merely calls for a different configuration of the pipes and hardware required. In effect, we view this change as no more than a minor modification of what was already required by the IFB, and not, as Head suggests, the imposition of a material, new and separate legal obligation. Since even Head's estimate of the cost impact of the amendment is *de minimis* in the context of the contract as a whole and the disparity in the two firms' bid prices, *see Pittman Mechanical Contractors,* B-225486, Feb. 25, 1987, 87-1 CPD ¶ 218, we reject Head's argument that Lobar's failure to acknowledge these provisions renders its bid nonresponsive.

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**Camber**

Head asserts that a sketch included with the amendment provides, for the first time, specific ordinates for the amount of required curvature at 16 designated points along each beam. Head states that the sketch thus sets forth new and significant specifications, and that beams must be custom fabricated to meet the new requirements at an additional cost of about $57,000. In support of its position that the multiple ordinates represent special requirements, Head refers to the American Institute of Steel Construction (AISC) Manual of Steel Construction, which states that camber is ordinarily specified by the ordinate at the midlength of the beam to be curved, and that ordinates at other points should not be specified.

The Navy responds that the camber ordinates shown on the sketch do not specify new requirements, but merely provide more specific guidance to the contractor in erecting the beams; in the absence of the sketch, the contractor would have had to formulate its own camber ordinates in any event. Further, the Navy explains that the specified camber ordinates are all within normal mill tolerances of natural cambering and therefore require no special fabrication; that is, standard steel beams may be used, as produced by the mill, with the normal amount of camber that is present as a result of the routine manufacturing process. The sketch merely indicates how the naturally cambered beams are to be ordinated. Thus, according to the Navy, since custom manufacturing is not necessary, there is no increase in cost associated with this portion of the amendment. The Navy explains that camber is not specified in the sketch in the usual manner described in the AISC Manual (as a single mid-length ordinate) because, under the terms of the IFB, the contractor has the option of splicing beams; specifying a single ordinate in the typical manner thus would be neither practical nor helpful, since the length of beam segments will depend on whether the contractor chooses to splice together shorter beam segments or fewer, longer ones.

We find the Navy's position reasonable. That is, the record seems to support the view that the ordinates furnished in the amendment were intended, not to impose a significant new requirement on bidders, but to assist bidders by indicating a set of acceptable ordinates; the multiple ordinates were necessary due to the possibility that beams would be spliced. While we would agree that the ordinates might represent a material change in the requirement if, as Head alleges, they would necessitate expensive, custom fabrication of the beams, this does not appear to be the case. In this regard, the AISC Manual clearly indicates that the specified ordinates are within standard mill tolerances, and Head has presented no persuasive evidence to the contrary. As possibly costly custom fabrication of beams thus apparently is not necessary, we consider this aspect of the amendment a mere clarification of the existing requirement to erect the roof support beams in an acceptable manner. *Pittman Mechanical Contractors*, B-225486, *supra.*

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**Electrical System**

The amendment makes certain changes to the building electrical system that, according to Head, increase the cost of the contract by $34,388. According to Head, the major change, one that constitutes a new legal obligation, is a requirement that the roof ventilator fans and louvers be interfaced with the fire alarm system so that they would shut down automatically in the event of fire. Head characterizes this as a new and major safety feature added by the amendment that must be acknowledged regardless of the impact on cost. We disagree. The IFB specifications, at section 16722-2, paragraph 1.3, and section 15895-7, at paragraph 3.1, require compliance with National Fire Prevention Association (NFPA) standard 90A, which provides that smoke detectors, when activated, shall automatically shutdown the relevant ventilation system in order to cut off

the air supply to the fire. In our view, therefore, this portion of the amendment merely clarifies a pre-existing obligation to conform to a standard (incorporated by reference) by providing more specific information on the electrical design for the required interfacing.

Head maintains that the amendment makes a number of other electrical system changes that, while not as significant as the modifications to the one above, nonetheless impose new obligations on the contractor. For example, the firm states that under the amendment electrical feeder lines must be added to the heater rooms and offices in each warehouse, while the original IFB does not provide for an electrical supply to those areas. According to Head, the agency's decision to add electricity to these areas constitutes a material modification.

Again, we do not agree. While the Navy concedes that the omission of an express requirement for an electrical supply to these areas was an oversight, it also points out that the work was required in any event by section 01011-3, paragraph 14(b), of the IFB. This section specifies that work affected by the construction process must be repaired or replaced so that its condition is as good as before the renovation commenced. Since the areas in question presently are supplied with electricity, which will have to be disconnected in the course of renovating the building, electricity will have to be restored to these areas, even without the amendment, as before the work was done to leave the building in the same functioning condition. The amendment thus makes no material changes to the electrical work already required under the IFB.

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**Other Changes**

For the most part, in its post-conference comments, Head has abandoned other objections that it initially raised in its protest. The protester continues to object, however, to a provision in the amendment that increases from 30 years to 50 years the period of time the contractor is required to maintain complete and accurate medical records of employees exposed to asbestos during the removal of the existing duct work. According to the protester, any modification that requires a contractor to do anything for an additional 20 years must be considered material.

Head's position is without merit. Medical record retention is a minuscule part of the overall scope of the work, and the precise period of time involved (particularly given that the life expectancy of the contractor's business itself is an unknown quantity), is a matter too speculative to characterize as material in the context of this contract. It is our view, moreover, that even if the arrangements required to be in place to satisfy the original 30-year retention period would have entailed a significant or costly effort on the contractor's part, merely extending those arrangements for an additional period does not constitute such a significant change, in terms of increased cost or obligation, that the failure to acknowledge the change renders a bidder ineligible for award.

We conclude that the amendment added no significant requirements materially increasing the contractor's obligation or cost of performing under the IFB, and

that Lobar's failure to acknowledge the amendment therefore properly was waived by the Navy.

The protest is denied.

## B-234063, *et al.*, January 26, 1989

## Procurement

**Special Procurement Methods/Categories**

■ **Service contracts**

■■ **Wage rates**

■■■ **GAO review**

The General Accounting Office does not review Department of Labor wage determinations issued in connection with solicitations subject to the Service Contract Act.

## Matter of: C.N.Y. Enterprises, Inc.; B&R Food Systems, Inc.; ABC Services, Inc.

C.N.Y. Enterprises, Inc., B&R Food Systems, Inc., and ABC Services, Inc. protest the terms, as amended, of invitation for bids (IFB) No. F05600-89-B-0009, issued by the Department of the Air Force for food services at Lowry Air Force Base in Colorado. The solicitation was amended to incorporate a Department of Labor (DOL) wage determination that requires the contractor to credit employees of the predecessor contractor who it hires with unused sick leave accrued under the predecessor contract. The protesters argue that the requirement to credit accrued sick leave places them at a competitive disadvantage relative to the incumbent contractor, since presumably the incumbent has already recovered the cost of the sick leave under the current contract, while any competitor will have to increase its bid price to account for the possibility that the employees will use the accrued sick leave.

We dismiss the protests.

As a general matter, our Office does not review wage rate determinations under the Service Contract Act, 41 U.S.C. § 353(c) (1982). Rather, any challenge to a wage determination contained in the solicitation must be processed through the administrative procedures established by the DOL. *See* 29 C.F.R. § 4.55 (1988); *A&C Building and Industrial Maintenance Corp,* B-230839, July 21, 1988, 88-2 CPD ¶ 67; *Kime-Plus, Inc.,* B-229990, May 4, 1988, 88-1 CPD ¶ 436.

In any case, we point out that the Act requires that successor contractors pay service employees any "accrued wages and fringe benefits" provided for in a collective bargaining agreement, reached as a result of arms-length negotiations, to which the employees would have been entitled if they were employed under the predecessor contract. 29 C.F.R. § 4.1b(a); *see generally, Leamington Motor Inn—Request for Reconsideration,* B-227927.2, Aug. 20, 1987, 87-2 CPD ¶ 189. As the Air Force has informed us that the requirement to credit accrued sick leave

is in accordance with a collective bargaining agreement between the incumbent contractor and its employees' union, it appears that the Act would require a successor contractor to credit the accrued sick leave. There is no requirement that the agency eliminate any resulting competitive advantage in favor of the incumbent. *See also University Research Corp.*, B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636 (government has no duty to equalize position of competitors unless competitive advantage results from a preference or unfair action by the government).

The protests are dismissed.

## B-233365, January 27, 1989

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Bid guarantees**
**■■■ Justification**

## Procurement

**Sealed Bidding**
**■ Invitations for bids**
**■■ Terms**
**■■■ Performance bonds**

Bonding requirements for laundry services contract are justifiably imposed to protect the government's interest where the government will provide the contractor with a considerable amount of equipment for the performance of the contract and the continuous provision of laundry services is essential to the operation of two medical centers including operating rooms.

## Matter of: Govern Service, Inc.

Govern Service, Inc. (GSI), a small business, protests the bonding requirements under invitation for bids (IFB) No. 594-88-28, issued by the Veterans Administration (VA) for laundry services at medical centers in Lake City and Gainesville, Florida. GSI contends that the bonding requirements are unreasonable and unduly restrictive of competition.

We deny the protest.

The IFB was issued pursuant to Office of Management and Budget (OMB) Circular No. A-76 in order to provide VA with a cost comparison for the purpose of determining whether it will be more economical to perform the required work inhouse or by contract.[1] The IFB, which was amended to eliminate a small busi-

[1] OMB Circular No. A-76 establishes federal policy regarding the operation of commercial activities and sets forth the procedures for determining whether commercial activities should be operated under contract with commercial sources or in-house using government facilities and personnel.

ness restriction, requires bids for a base year and four 1-year option periods for an estimated annual workload of 3,542,050 pounds of laundry. The IFB advises that the laundry services will be provided at a government-owned/contractor-operated (GOCO) laundry facility located at the Lake City medical center. The IFB requires a bid guarantee in an amount not less than 20 percent of the bid price, but not to exceed $3,000,000, by the time set for bid opening, and a performance bond for 100 percent of Bid Item 1, which covers laundry services for the contract's base year. Performance bonds are also required for each of the option years, if the option is exercised.

GSI contends that the bonding requirements will eliminate 99 percent of potential small business bidders who lack the $500,000 in liquid assets which bonding companies require for this solicitation. GSI maintains that notwithstanding 35 years of experience in providing laundry services to the government and GSI's ongoing satisfactory performance of two GOCO service contracts, its firm will be precluded from submitting a bid in response to the IFB because of the restrictive bonding requirements.

Although a bond requirement may result in a restriction of competition, it nevertheless can be a necessary and proper means of securing to the government the fulfillment of the contractor's obligation under the contract in appropriate situations. *D.J. Findley, Inc.*, B-221096, Feb. 3, 1986, 86-1 CPD ¶ 121. While generally contracting agencies should not require performance bonds for other than construction contracts, the Federal Acquisition Regulation (FAR) recognizes that there are situations in which bonds may be necessary for nonconstruction contracts in order to protect the government's interest. *See* FAR §§ 28.103-1, 28.103-2(a). A bid bond may be required where a performance bond is required. FAR § 28.101-1.

We find that VA's decision to impose the bonding requirements was reasonable. The use of government property by the contractor is one of the specifically enumerated justifications for requiring a performance bond for nonconstruction contracts. FAR § 28.103-2(a)(1). Here, VA states that the performance bond is required to protect the government's interest in approximately 90 pieces of equipment, valued in excess of $900,000, which will be provided to the contractor for the performance of the contract.

Bonds also may be required where the continuous operation of critically needed services is absolutely necessary. *Galaxy Custodial Services Inc., et al.*, 64 Comp. Gen. 593 (1985), 85-1 CPD ¶ 658. In this case, the agency states that the bond is required to ensure the continuous provision of laundry services critical to the operation of the two medical centers. Specifically, VA states that operating rooms and surgical service at the medical centers would have to shut down if clean surgical drapes, scrubs and uniforms were not available, and the lack of clean pajamas, sheets, blankets and towels would directly affect the physical well-being of the patients.

GSI argues that the bonding requirements are unreasonable because seven Department of Defense activities have acquired virtually identical laundry services

under GOCO contracts without requiring performance or bid bonds. GSI's assertion does not establish the unreasonableness of the VA's imposition of the bonding requirements here, given our conclusion that they were justified to protect the government's interest in its equipment and ensure continuity of a critical service.

GSI also argues that the bonding requirements are unreasonable because there is no history of contractor defaults or nonperformance justifying the imposition of bonds since VA has not previously awarded a contract for laundry services at the two medical centers. We disagree, since there is no requirement that there be a history of performance problems before bonds may be required. *Intelcom Support Services, Inc.*, B-222560, July 18, 1986, 86-2 CPD ¶ 82.

Finally, GSI argues that the bonding requirements contravene the intent and purpose of OMB Circular No. A-76, which GSI maintains is designed to assist small businesses in obtaining contracting opportunities. The protester has misstated the OMB Circular's purpose, which is to encourage agencies to rely on commercially available sources, rather than just small businesses, if a product or service can be procured more economically from a commercial source. In any event, given that VA reasonably determined that the bonding requirements are necessary to protect the government's interest, there is no merit to GSI's contention that the agency's decision represents an improper attempt to retain performance of the services in-house.

The protest is denied.

## B-232562.2, January 30, 1989

## Procurement

**Competitive Negotiation**
**■ Contract awards**
**■ ■ Shipment schedules**
**■ ■ ■ Modification**
**■ ■ ■ ■ Propriety**

Contracting agency may not award a contract with the intention of significantly modifying it after award. Where record shows agency relaxed delivery terms contemporaneous with contract award, and protester could have offered significantly better terms if it had known that delivery schedule would be modified, so that competition would have been materially different from that originally obtained, award was improper and another round of best and final offers is recommended.

## Matter of: Falcon Carriers, Inc.

Falcon Carriers, Inc. protests the award of contracts to Texaco Refining and Marketing, Inc. and OMI Bulk Transport, Inc. under request for proposals (RFP) No. N00033-88-R-1703, issued by the Military Sealift Command (MSC). The protester alleges that the agency materially and improperly relaxed a mandatory

delivery requirement after best and final offers (BAFOs) were received. The protester also alleges that the cost evaluation performed by the agency was flawed.

We sustain the protest.

On June 24, 1988, the agency issued the RFP for the charter of one or more vessels for worldwide trading, transportation and storage of Department of Defense petroleum cargoes in bulk. The RFP required delivery of the vessel or vessels between August 1 and November 30. The RFP was originally intended to replace tonnage of the charter for the Falcon Leader (owned by Falcon) which was expiring in August 1988. The RFP permitted multiple awards. The RFP requested potential offerors to furnish firm-fixed prices per day with fuel and port charges reimbursable at cost by the government for chartering of vessels for a basic period of 17 months, with two 17-month option periods.

The RFP also provided for evaluation of factors affecting overall cost to the government, including the cost of hiring the vessel, cargo capacity, speed and fuel consumption. The RFP further stated that award would be made to the responsible offerors whose offers would be in the best interest of the government, "price, technical acceptability and other factors considered."

Offerors submitted initial proposals on July 25, 1988. The agency held discussions with all offerors and on August 19 requested submission of BAFOs by August 30. In its BAFO, Falcon proposed two ships, the Falcon Leader and Falcon Champion. The Falcon Leader was available to meet the required delivery period. The Falcon Champion was under charter to MSC and was not available until January 1989. However, the RFP also provided that offerors could propose vessels currently under charter with MSC. Falcon offered the unencumbered Falcon Leader as a separate, one-ship offer and proposed alternatively the Falcon Leader and Falcon Champion on a two-ship, all-or-none basis.[1] Three other offerors, including Texaco and OMI, submitted BAFOs. The agency then began to evaluate BAFOs.

The record shows that the agency evaluated vessels in two modes: a storage mode, that is, stationed at sea and on call for contingencies, and a point-to-point transportation mode, using one hypothetical 30-day trip from Bahrain to Subic Bay. The agency evaluated the storage mode costs on the basis of a cost per ton for an 8-1/2 month period and evaluated the transportation mode on a cost per ton basis for a 1 month trip. The agency first evaluated total storage cost per ton for the entire 8-1/2 month period. This figure was then added to the evaluated cost per ton for the transportation mode which represented only 1 month of transportation services. These two figures were then added together and di-

[1] The protester states that it did not propose the Falcon Champion on a one-ship basis because the vessel was already under charter with the agency until January 1989, at rates much higher than reasonably could be proposed under this solicitation. According to the protester, if Falcon had proposed this vessel, the firm would have lost the additional revenue that was guaranteed the firm under its existing charter.

vided by two to obtain an average cost. Thus, the agency only evaluated performance for 9-1/2 months of the 17 month basic contract period.[2]

On September 6, the agency orally notified Texaco of its selection for award to replace the Falcon Leader, the vessel charter which was shortly to expire. This was confirmed by telex on September 7. Furthermore, the agency decided to award a second contract to OMI to replace the Falcon Champion, the charter which was due to expire in mid-January 1989, based on a determination that prices offered under this solicitation would probably be lower than might be offered under a subsequent solicitation. On September 6, the agency orally notified OMI of this second award and, contemporaneously, the agency and OMI conducted oral discussions during which the agency and OMI agreed to a relaxed delivery schedule. The agency, by telex dated September 7, "confirmed" its acceptance of OMI's charter based on the previous day's conversations. While the original RFP required delivery of the vessel between August 1 and November 30, the agency awarded this second contract to OMI on a basis that postponed the required delivery to January 15-February 15, 1989, a 4 month unilateral extension of the RFP's delivery schedule. This protest followed.

Initially, the protester argues that the agency's relaxation of the delivery terms for OMI was improper because the agency did not afford other offerors the same opportunity to submit an offer on the basis of the revised delivery terms. Falcon states that Falcon Champion's charter expired in January and would have been available at that time. Falcon points out that it was not informed of this change in delivery requirements or afforded an opportunity to propose its vessel on this relaxed delivery schedule. Falcon specifically contends that the relaxation of the delivery schedule constituted improper post-BAFO discussions with only one offeror concerning a material RFP requirement. Falcon argues that, despite MSC's oral notification of award to OMI on September 6, the contract was awarded by the September 7 telex, and thus the oral discussions conducted on September 6, in which the parties agreed to extend the delivery dates, constituted improper post-BAFO discussions.[3]

MSC argues that, under maritime law, the contract was awarded on September 6 based solely on the oral notification to OMI by the contracting officer. Thus, according to MSC, any further discussions by the contracting officer with OMI after oral notification of award constituted modification to an existing contract and were not post-BAFO discussions.

We find that, even assuming that the agency awarded the OMI contract orally on September 6 and then immediately modified the delivery terms, the agency's

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[2] For illustration purposes, if the cost per cargo ton per month was $20, this figure was, in effect, multiplied by 8-1/2 to arrive at a total cost of $170. If the transportation cost for 1 month was $30, this cost was added to the $170 per ton figure for a total of $200 per ton and divided by two for an average cost of $100 per ton. Thus, the storage mode costs were weighted 8-1/2 times the transportation mode costs.

[3] The protester also argues that since the RFP stated that award would be made based on price, technical acceptability and "other factors," the agency was obligated to consider other technical factors such as the unique capabilities of the Falcon vessels in its award decision. Our Office has, however, consistently held that where "other factors" are not set forth in the solicitation, such a provision clearly provides for award to the low, technically acceptable offeror. *Essex Electro Engineers,* B-229491, Feb. 29, 1988, 88-1 CPD ¶ 215.

action was improper. If the integrity of the competitive bidding system is to be maintained, agencies may not award contracts with the intention of significantly modifying them after award; rather, an award must be based on the requirements stated in the solicitation. *Ingersoll-Rand,* B-225996, May 5, 1987, 87-1 CPD ¶ 474; *American Television Systems,* B-220087.3, June 19, 1986, 86-1 CPD ¶ 562. If we find that the competition for the contract as modified would be materially different from the competition originally obtained, then we generally will conclude that the award was improper and recommend resolicitation under revised specifications. *Ingersoll-Rand,* B-225996, *supra.*

Here, the record shows that prior to contract award to OMI, the agency planned a second award to replace the charter expiring in January. The record further shows that the change in delivery terms to reflect the agency's need for a replacement charter in January was raised with OMI contemporaneously with the oral notification of award on September 6. This change in delivery terms was confirmed in the telex notice of award of September 7. Thus, even if award was made on September 6, as the agency asserts, we are persuaded by the award and immediate modification of the delivery terms that the award was made with the intention of modifying the delivery terms. In this regard, delivery generally is considered to be a material solicitation term. *See Industrial Lift Truck Co. of New Jersey, Inc.; Doering Equipment, Inc.,* B-230821, B-230821.2, July 18, 1988, 67 Comp. Gen. 525 88-2 CPD ¶ 61.

In our view, the relaxation of the delivery schedule thus constitutes a material change which should have been communicated to all offerors, and required another round of BAFOs. The record shows that Falcon, for legitimate business reasons, did not propose the Falcon Champion on a one-ship basis because, as the agency knew, the ship was under charter until January 1989. Falcon alleges, and the agency does not dispute, that the firm would have proposed this vessel on a one-ship basis had the agency advised Falcon of the relaxed delivery schedule which coincided with the expiration of the existing Falcon Champion charter in January. Falcon also asserts that it could have offered several additional vessels under the revised delivery terms which were unavailable under the original delivery schedule. Further, we find, as explained below, that had Falcon been allowed to propose the Falcon Champion on a one-ship basis, such an offer potentially could have been in line for award of the second contract. We therefore find prejudice to Falcon because the competition for the contract as modified could have been materially different than the competition originally obtained. *See Ingersoll-Rand,* B-225996, *supra.*

Specifically, based on this record, we conclude that Falcon's potential offer of the Falcon Champion, on a oneship basis, properly evaluated, could have been in line for the second award as the low offeror. We first note, as the protester argues, that the agency's initial evaluation of proposals (giving 8-1/2 times the weight to storage costs than transportation costs) was improper because the record shows that such an evaluation bears no reasonable relationship to the agency's minimum needs, and that such a weighting of transportation and storage modes distorts the accurate relationship between these two costs for evalua-

tion purposes. Specifically, the record shows that under a recent solicitation, storage and transportation services were weighted equally based on the agency's belief that during the charter period there was an essentially equal chance that the vessel would be in either mode. In fact, the agency, based on its experience, reports that its best estimate is that the storage mode will account for one-half of the charter term.[4] The agency does not explain why it departed from the equal weighting of the two services for evaluation purposes which was previously used and which apparently properly reflects its minimum needs. Further, the agency does not contend that less than equal weighting of these two services reflects anticipated performance, but merely states that the disproportionately unequal weighting was "assumed" solely for evaluation purposes. Based on this record, we think that equal weight of 8-1/2 months for each mode reasonably reflects the agency's minimum needs during contract performance, and as such should have been used for evaluation purposes.

While the agency concedes that the original evaluation scheme was "inherently imprecise," the agency nevertheless argues that Falcon was not prejudiced by this faulty evaluation, since Falcon's two offers would not have been low in any event even if equal weight were properly given to the storage and transportation modes. In this regard, the agency has submitted a cost analysis indicating that Falcon's two offers would not be low even if equal weight were given each mode of service.

As stated above, Falcon offered the Falcon Leader on a one-ship basis and the Falcon Leader and Falcon Champion on a two-ship, all-or-none basis. Based on the agency's cost evaluation figures (with equal weight given to the storage and transportation modes), as provided to us, the record clearly shows that Falcon's two offers as submitted would not be in line for award. However, the agency has failed to show, and we cannot find with any assurance, that Falcon, had it been given an opportunity to propose Falcon Champion on a one-ship, unencumbered basis under the relaxed delivery schedule, would clearly not have been low under one of the two contract awards. *See Greenleaf Distribution Services, Inc.*, B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422.

Specifically, Falcon's two-ship evaluated price is lower than the evaluated price for the charter awarded to Texaco. While this two-ship price may or may not be an average price for the two ships, it reasonably suggests that Falcon was capable of matching the two-ship price for at least one vessel. This is especially so since the record indicates that Falcon's potential price for the Falcon Champion at the later January date could have been reduced because of additional earnings and credits of $400,000-$800,000 received for the ship under Falcon's existing charter which only expired at that time. Had Falcon's offer of the Falcon Champion closely approached or been below the two-ship offer, Falcon would

[4] The agency states that the cost of each vessel in the storage mode "was estimated using a period of 258.4 days (or one-half of the time charter term) [which is consistent] with MSC's use of its time chartered fleet." This rough estimate was supported by an affidavit from the Director, Transportation Directorate, which has operational responsibility for the cargo fleet.

have been in line for the second contract ahead of Texaco.[5] We also cannot discount the possibility, as Falcon alleges, that the firm could have restructured its proposal to offer additional vessels or to lower its price for general business reasons. *See Greenleaf Distribution Services, Inc.*, B-221335, *supra*. Because of the agency's improper actions, we are left to speculate how much lower Falcon's price would have been for the Falcon Champion on an unencumbered, one-ship basis. We therefore conclude that the record establishes the possibility of competitive prejudice to Falcon because of the agency's actions. Thus, we sustain the protest on this ground. *See E.C. Campbell, Inc.*, B-222197, June 19, 1986, 86-1 CPD ¶ 565.

Regarding potential remedies, we initially note that the agency made a written determination that it was in the best interests of the government to permit performance of Texaco's charter. The agency did suspend performance of OMI's charter. In such circumstances, where a best interest finding is made to continue performance, our Office is empowered to make its recommendation for corrective action without regard to any cost or disruption from terminating, recompeting or reawarding the contract. 4 C.F.R. § 21.6(c) (1988). Further, we may recommend the remedies which we deem appropriate under the circumstances. 4 C.F.R. § 21.6(a).

The record shows that, under a proper evaluation giving equal weight to the transportation and storage modes, OMI was the low offeror, by a substantial margin, for one of the contracts under the original delivery schedule. As stated above, the record indicates that Falcon reasonably could have been in line for award for the second contract. Since the agency's needs changed, the agency should have awarded the first contract to OMI under the original delivery terms, reopened the competition for the second contract based on the revised delivery schedule, and requested a new round of BAFOs. We think it should do so now by requesting BAFOs from Texaco and Falcon for the contract with Texaco which should have been competed on the basis of the revised delivery schedule. We are not disturbing the award to OMI.

Accordingly, by separate letter to the Commander, Military Sealift Command, we are recommending that another round of BAFOs be solicited from all offerors.[6] The contracting officer should reevaluate the new proposed costs based on equal weighting of storage and transportation modes. We further recommend that the contract of Texaco be terminated for the convenience of the government if it is not the low evaluated offeror after evaluation. Further, we award Falcon the cost of pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

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[5] We note that the agency modified the OMI contract but could have modified the Texaco contract since the vessels are fungible. Therefore, we find that it is not relevant which contract was in fact modified.

[6] We note that the evaluated prices have not been revealed and that reopening of the solicitation for another round of BAFOs would not result in an auction situation.

## B-233317, January 31, 1989

## Procurement

**Bid Protests**

**■ GAO procedures**

**■ ■ Interested parties**

Since the government is generally precluded from contracting with its employees, even those not employed by the contracting agency, protester who is a government employee is not an interested party to file a protest.

## Matter of: Tamara L. Wolf

Tamara L. Wolf, protests the contract between the National Institute of Standards and Technology (NIST) and Richard S. Foti, for barber shop/beauty salon services in the NIST administration building. Wolf contends that NIST's contract with Foti is a sole-source procurement which violates competition requirements in the Federal Acquisition Regulation (FAR).

The protest is dismissed.

It has come to our attention that Wolf is employed by the United States Army at Fort Detrick. Under FAR § 3.601 (FAC 84-18), a contracting officer shall not knowingly award a contract to a government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees except where the agency head finds that a compelling reason, such as the government's needs cannot otherwise reasonably be met, requires such an award. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their government duties, and to avoid the appearance of favoritism or preferential treatment by the government toward its employees. *Id. Friends of the Waterfront Inc.*, 66 Comp. Gen. 190 (1987) 87-1 CPD ¶ 16. Moreover, the conflict of interest policy applies to firms owned or controlled by any government employee, not just the employees of the contracting agency. *Cooley Container Corp.*, B-220801, Jan. 31, 1986, 86-1 CPD ¶ 114.

In light of this policy NIST would be precluded from awarding any contract to Wolf. Accordingly Wolf is not an interested party for the purpose of filing a protest since Wolf could not be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. §§ 21.0(a) and 21.3(m) (1988).

The protest is dismissed.

# Appropriations/Financial Management

**Appropriation Availability**

**■ Time availability**

**■■ Bona fide needs doctrine**

**■■■ Applicability**

**■■■■ Multi-year appropriation**

The Defense Technical Information Center does not violate the *bona fide* needs rule by charging purchases to a 2-year appropriation during the second year of its availability. Requisitions by the Defense Technical Information Center represented *bona fide* needs arising within the 2-year period for which the appropriation was intended and obligations may be made to the extent funds remain available.

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**■ Time availability**

**■■ Time restrictions**

**■■■ Fiscal-year appropriation**

**■■■■ Multi-year appropriation**

The Defense Technical Information Center may use 2-year funds appropriated for fiscal year 1987 for obligations properly incurred in fiscal year 1988. As the appropriation was specifically made available for obligation until September 30, 1988, it could be obligated during the entire 2 years of its availability.

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# Civilian Personnel

**Travel**

**■ Government vehicles**

**■■ Accidents**

**■■■ Government liability**

If a vehicle being operated by a federal employee in the performance of official business is involved in a collision due to the employee's negligence and a member of the family who is accompanying the employee as a passenger is injured, that a passenger may seek damages. Since the right of recovery under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), is predicated on the law of the place of occurrence, the government's liability might be increased by permitting the family member to accompany the employee.

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**■ Government vehicles**

**■■ Use**

Under the provisions of 31 U.S.C. §§ 1344 and 1349 (1982 Supp. IV 1986), a government-owned or leased vehicle may only be used for the performance of official business. It does not violate those statutes, however, for an agency to allow a dependent of an employee to accompany the employee as a passenger in such vehicle. 57 Comp. Gen. 226 (1978).

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# Military Personnel

**Relocation**
**■ Relocation travel**
**■ ■ Dependents**
**■ ■ ■ Post differentials**
**■ ■ ■ ■ Eligibility**

**■ Relocation travel**
**■ ■ Post differentials**
**■ ■ ■ Dependents**

The Joint Federal Travel Regulations may be changed to allow the payment of station allowances for service members' dependents who are moved to a designated place outside of the continental United States in Alaska, Hawaii, Puerto Rico, or in any territory or possession of the United States when the service members are transferred from their duty stations inside the continental United States to a restricted area in the same circumstances that would allow payment of the dependents' transportation to the place upon the authorization or approval of the Service Secretary concerned. 49 Comp. Gen. 548 (1970) and *Lieutenant Colonel Charles D. Robinson*, 56 Comp. Gen. 525 (1977), are modified.

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# Procurement

**Bid Protests**
**■ GAO procedures**
**■■ Interested parties**

Since the government is generally precluded from contracting with its employees, even those not employed by the contracting agency, protester who is a government employee is not an interested party to file a protest.

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**■ GAO procedures**
**■■ Protest timeliness**
**■■■ 10-day rule**

Where the agency's and the protester's versions of the facts conflict concerning when the protester was orally notified that part of its offer was considered unacceptable, the General Accounting Office will resolve doubt over whether the protest was timely filed within 10 days of that notification in the protester's favor.

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**Competitive Negotiation**
**■ Contract awards**
**■■ Personnel**
**■■■ Substitution**
**■■■■ Propriety**

**■ Contract awards**
**■■ Shipment schedules**
**■■■ Modification**
**■■■■ Propriety**

Contracting agency may not award a contract with the intention of significantly modifying it after award. Where record shows agency relaxed delivery terms contemporaneous with contract award, and protester could have offered significantly better terms if it had known that delivery schedule would be modified, so that competition would have been materially different from that originally obtained, award was improper and another round of best and final offers is recommended.

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**■ Requests for proposals**
**■■ Evaluation criteria**
**■■■ Subcriteria**
**■■■■ Disclosure**

Contention that protester could have proposed items with improved overall performance had it been advised of new, higher optical density standard is without merit where (1) protester should have been on notice of new optical density standard from incorporation by reference in solicitation, and (2) solicitation provided for evaluation based on items previously submitted that were furnished

under prior, lower standard, and did not contemplate modifications to the technology of those items; thus, even had protester been aware of higher standard, evaluation still would have been based on items furnished under the prior, lower standard.

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■ **Requests for proposals**
■■ **Terms**
■■■ **Interpretation**

Protester's interpretation of a clause in a solicitation for dental services as allowing substitution of dentists initially proposed by the protester with dentists proposed by other offerors is reasonable where the solicitation does not specifically prohibit such practice.

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**Contract Management**
■ **Contract administration**
■■ **Default termination**
■■■ **Propriety**
■■■■ **GAO review**

General Accounting Office will not consider the propriety of the procuring agency's decision to terminate a contract for default, since this is a matter for the procuring agency's board of contract appeals under the contract disputes clause.

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**Noncompetitive Negotiation**
■ **Contract awards**
■■ **Sole sources**
■■■ **Propriety**

■ **Use**
■■ **Justification**
■■■ **Urgent needs**

Where agency properly determines due to urgent circumstances that it must use noncompetitive procedures provided for under the Competition in Contracting Act, agency properly may limit the number of sources to those firms it reasonably believes can promptly and properly perform the work. Agency reasonably determined protester was not a potential source for a 12-month, emergency contract where protester, who was terminated for default on the previous contract for the solicited services, had encountered problems in an aspect of performance critical to the emergency contract.

**Special Procurement Methods/Categories**

**■ Computer equipment/services**

**■■ Federal supply schedule**

**■■■ Non-mandatory purchases**

Purchase under non-mandatory automatic data processing schedule contract from firm which agency reasonably determines to be only source available to supply the desired product is not objectionable where procurement was conducted in accordance with applicable regulations and protester has not shown that there is no reasonable basis for the sole-source award.

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**■ Federal supply schedule**

**■■ Price adjustments**

**■■■ Reduction**

A contractor under a General Services Administration (GSA) non-mandatory automatic data processing schedule contract may offer a price reduction at any time and by any method without approval by GSA, and under the contract's terms the price reduction generally will remain in effect for the remainder of the contract.

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**■ Service contracts**

**■■ Wage rates**

**■■■ GAO review**

The General Accounting Office does not review Department of Labor wage determinations issued in connection with solicitations subject to the Service Contract Act.

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