United States General Accounting Office

GAO

Office of General Counsel

July 1989

Decisions of the Comptroller General of the United States

Volume 68

Pages 529-572

PCN 45300680900

Notice

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

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Preface

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

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

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

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

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

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

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

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July 1989

B-234682, July 3, 1989

Procurement

Contractor Qualification

■ Responsibility/responsiveness distinctions

■■ Sureties

■■■ Financial capacity

Individual sureties improperly were found to lack inadequate net worths, and as a result low bidder improperly was rejected as nonresponsible, where agency failed to include sureties' personal residences as assets in net worth calculation; there is no general prohibition against sureties pledging their personal residences under a bid guarantee, and agency did not establish any basis for disregarding personal residences in this case.

Matter of: Romac Building Services, Inc.

Romac Building Services, Inc., protests the rejection of its bid under invitation for bids (IFB) No. GS-02-PPB-SS-089-S036, issued by the General Services Administration (GSA), for the complete janitorial services at federal buildings No. 80, 111, and 178 at JFK Airport, Jamaica, New York. Romac argues it was improperly rejected as nonresponsible based on a finding that the individual sureties on its bid guarantee were unacceptable.

We sustain the protest.

Romac submitted the low bid, with an evaluated price of $1,513,200 (for 1 year plus 2 option years) and Prompt Maintenance Services, Inc., submitted the second low bid of $1,789,197. As the IFB required each bidder to provide a bid guarantee in an amount equal to 20 percent of the first year bid amount, Romac submitted a guarantee, naming two individual sureties, in the amount of $96,000. The IFB required sureties to have net worths at least equal to the penal amount of the guarantee ($96,000), and completed Affidavits of Individual Surety (Standard Form 28) setting forth the information on each surety's net worth.

One of Romac's proposed sureties, Mr. Latham, listed his net worth as $278,000, including a fair market value of $200,000 for his personal residence in New York, subject to a $70,000 mortgage. Romac's other surety, Mr. Bertuglia, listed his net worth as $1,280,000, including a claimed $535,000 in equity in his personal residence in New York, with a fair market value of $565,000 and subject to a mortgage totaling $30,000.

During the pre-award survey, GSA initially found Romac's financial condition to be unsatisfactory, but ultimately found Romac acceptable in this regard. GSA also reviewed the net worths of the individual sureties, however, and concluded that both sureties were unacceptable because their principal assets were their personal residences; it is the contracting officer's view that a personal residence is not a readily marketable asset, and thus could not be included as part of the sureties' net worth for purposes of determining acceptability. Since Mr. Latham lacked sufficient other assets to meet the $96,000 minimum, and Mr. Bertuglia's other listed assets also were questioned, the contracting officer found both sureties unacceptable, and rejected Romac as a nonresponsible bidder. On the same day, the contract was awarded to the second low bidder, Prompt Maintenance. Romac then filed a protest with our Office. The agency, in accordance with 4 C.F.R. § 21.4(a)(2) (1988), has determined that urgent and compelling circumstances exist that require continued performance of the contract pending our decision.

Romac argues that GSA should have considered the sureties' equity in their personal residences in determining their net worth acceptability; this factor alone would be sufficient to render both individuals acceptable since both have equity in excess of $96,000. We agree with Romac.

We are aware of no general prohibition against individual sureties pledging their personal residences in support of a bid guarantee; indeed, we have decided numerous cases in which individual sureties' principal assets were their personal residences. *J&J Eng'g, Inc.*, B-233463.2, Feb. 13, 1989, 89-1 CPD ¶ 147; *see American Constr.*, B-213199, July 24, 1984, 84-2 CPD ¶ 95. GSA has not endeavored to explain why the sureties' residences should not be considered in this case. Rather, GSA concludes without explanation that the individuals' residences are not readily marketable, and mischaracterizes them as "personal property" rather than as real property. We note that Standard Form 28, in providing for the listing of the "fair market value of solely-owned real estate," does not specifically preclude personal residences.

Standard Form 28 does advise individual sureties to exclude property "exempt from execution and sale for any reason including homestead exemption." This exemption protects a personal residence from sale to satisfy certain debts, but under New York law only $10,000 of a debtor's equity in his personal residence is exempt from the satisfaction of a money judgment. N.Y. Civ. Prac. Law and Rules § 5206(a). Subtracting $10,000 from each surety's equity here leaves both with net worths exceeding the $96,000 penal amount.

We conclude that the personal residences of the individual sureties here should have been included as assets for the purpose of determining the sureties' net worths. As both sureties have adequate net worth based solely on their personal residences, the sureties were acceptable and Romac should not have been rejected as nonresponsible on the basis that they were not.

By letter of today to the Administrator, we are recommending that GSA terminate Prompt Maintenance's contract for the convenience of the government and

award a contract to Romac. In addition, we find Romac entitled to recover its costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d).

The protest is sustained.

B-234655, July 5, 1989

Procurement

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

Where record shows that only one source currently is capable of furnishing required equipment and that other firms are developing capability to meet agency requirements, agency should only procure its immediate needs using noncompetitive procedures.

Matter of: Ricoh Corporation

Ricoh Corporation protests request for proposals (RFP) No. DCA200-88-R-0011, issued by the Defense Communications Agency (DCA), for lease of an estimated quantity of 500 high speed digital secure facsimile machines, on an "as required" basis, plus estimated option quantities of 125 machines in each of 4 additional years. The machines will be used to satisfy requirements of the Air Force, Army, Navy, Department of Defense (DOD) agencies and other government agencies. Ricoh essentially contends that a solicitation provision (military standard (MIL-STD)-188-161A) will necessarily result in a *de facto* sole source procurement.

We sustain the protest.

The RFP, issued on September 19, 1988, contemplates a fixed-price requirements contract and required the submission of proposals by October 19. The RFP initially provided that contractors which did not comply with the military standard at time of contract award could request a waiver for a 1-year exemption from compliance. Delivery is required 45 days after receipt of order (ARO).

The military standard was promulgated by the Joint Tactical Command, Control and Communications Agency and was published on July 4, 1988 for industry comment. The basic objective of the military standard is to establish technical parameters and standards to ensure compatibility and commonality among digital facsimile machines. A joint government and industry meeting was held in November 1988 and, as a result of the technical discussions, a "revised change notice" was issued on February 17, 1989, amending MIL-STD-188-161A. A subsequent meeting on March 2 resulted in a "draft version" of MIL-STD-188-161A which was to be published effective March 17, 1989.

In the meantime, amendment 0006 to the RFP was issued on February 6, 1989, which changed the proposal due date to March 1, 1989, and eliminated the 1-year waiver for vendor compliance with MIL-STD-188-161A. On February 28, Ricoh filed this protest. The date for receipt of proposals has since been indefinitely suspended.

Ricoh argues that the elimination of the 1-year waiver for compliance with MIL-STD-188-161A is restrictive of competition because only one company, Cryptek, Inc., is presently able to comply with the standard, and that therefore immediate implementation of the standard will result in a *de facto* sole-source procurement. Ricoh contends that the agency has not allowed sufficient time for industry to modify existing equipment or to manufacture new equipment to meet the military standard which is still "unsettled" and continually changing.

The agency responds that the MIL-STD-188 series addresses telecommunications design parameters and is mandatory for use within DOD under DOD Directive 4640.11. The agency states that the overriding requirement is for compatibility within DOD, among all services and agencies and with NATO allies, especially during times of national emergency. The goal of the agency is to eventually obtain secure facsimile communications whether classified or not. According to DCA, the 1-year waiver was included in the original solicitation as a matter of routine based on a similar solicitation which had been issued earlier. However, the user activity had never requested a waiver, and therefore the waiver provision was ultimately eliminated to prevent the contractor from delivering nonconforming facsimiles and to avoid the possibility of default by the contractor at the end of the waiver period.

We initially note that the record shows that only one firm, Cryptek, is currently prepared or able to furnish facsimile equipment complying with MIL-STD-188-161A so that the agency cannot obtain competition in acquiring the equipment until other firms have additional time to develop conforming products.[1] The record shows that on February 8, 1989, Cryptek wrote a letter to DCA acknowledging that the firm "is the only one with a product which complies with the MIL-STD and that this causes competitive contracting problems." In addition the Army, on January 27, 1989, issued invitation for bids (IFB) No. DAEA08-88-B-0064 incorporating the standard for facsimile machines, with a bid opening date of April 28 and only one responsive bid, from Cryptek, was received.[2]

Whatever the agency's initial expectation for competition for this procurement, it is clear that there is only one source available which can meet the RFP requirements at this time. Thus, while the agency has issued a competitive solici-

[1] Several firms in the industry have joined in Ricoh's protest as interested parties.

[2] DCA argues that under solicitation No. MDA903-89-B-0013, the Defense Supply Service-Washington (DSSW) received three bids on February 23, 1989 (the low bidder was again Cryptek). However, the record shows that the third low bidder submitted an unreasonably high price and cannot meet certain requirements. The second low bidder, Omni, Inc., is an interested party in Ricoh's protest and agrees with the protester that insufficient time has been afforded offerors to comply with the standard which "restricts any competition for this procurement." We denied Ricoh's protest of this DSSW procurement as unduly restrictive of competition because the agency had justified its immediate need for the equipment. *Ricoh Corp.*, B-234617, June 29, 1989, 89-1 CPD ¶ ———.

tation, there is no reasonable expectation of obtaining competition. Although the Competition in Contracting Act of 1984 (CICA) generally requires agencies to obtain full and open competition through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (Supp. IV 1986), noncompetitive purchases are not objectionable when that is the only way the agency's needs can be satisfied. *See Hydro Rig Cryogenics, Inc.*, B-234029, May 11, 1989, 89-1 CPD ¶ 442.

The record shows, however, that at least 4 firms are currently developing a conforming facsimile product, and all of these firms are apparently asking for less than 10 months from June 1989 to complete development of their products. The agency has not disputed that competition will exist in a reasonable time. Consequently, in a situation like this, where competition does not exist but will exist in the near future, we think the CICA mandate requires agencies to purchase, in the noncompetitive environment, only what is necessary to satisfy needs that cannot await the anticipated competitive environment. *Cf. Honeycomb Co. of America*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209.

The agency states that facsimile equipment being acquired under this solicitation will be used by several military departments and other federal agencies. The agency states that the Defense Investigative Agency (DIA) is "representative" of the agencies whose need for secure facsimile equipment will be met by this requirement. According to the agency, DIA "desperately needs secure facsimile equipment" due to expiration of maintenance contracts for leased equipment. DCA further states that "[b]ased on the lack of maintenance at several sites, the DIA has been forced to terminate secure facsimile service." The agency, however, has not alleged, and the record does not show, that the entire basic requirement or the option quantities represent immediate critical agency needs.

We therefore recommend that the agency cancel the RFP and solicit its immediate needs using noncompetitive procedures. We are so advising the Director of DCA by separate letter of today. We also find that Ricoh is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988).

B-235257, July 5, 1989

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Terms
■■■ Liquidated damages
■■■■ Propriety

Provision in a solicitation for operation of a distribution center which authorizes deduction for entire task because of unsatisfactory performance of any one element of the task is unobjectionable, where the task is not divisible by separate elements for purposes of determining an acceptable quality level because partial satisfactory performance will be of little or no value to the agency.

Matter of: Aquasis Services Inc.

Aquasis Services Inc., protests provisions permitting deduction from payments to the contractor for deficient performance under request for proposals (RFP) No. 52WCNA906004DM, issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for services necessary to operate the National Logistics Supply Center distribution center at Kansas City, Missouri. Specifically, Aquasis alleges that the solicitation provisions under the heading "Performance Requirements Summary" (PRS) permit deductions from the contractor's payment for unsatisfactory performance of a performance category, processing standard orders for shipment, which are in excess of the value of tasks actually performed deficiently and, thus, constitute an unenforceable penalty. The closing date for receipt of proposals has been suspended indefinitely pending resolution of this protest.

We deny the protest.

The RFP divides the requirements into four performance categories, which are subdivided into tasks or elements. The processing standard orders category or task that is the subject of this protest, consists of the following elements: (1) providing documentation to the contracting officer's technical representative within 4 hours following receipt of the order, (2) removing the item from shelf and preparing it for shipment, (3) properly marking the packing list, (4) shipping the order in a timely manner, (5) entering the serial number on order form, (6) packing item to preserve contents, and (7) selecting shipping method. Under the RFP, the agency will monitor performance, and, if any of the tasks are not completed properly, the agency may consider the processing of the entire order unacceptable. It then would deduct an amount representing damages of the entire task, even though some elements may have properly been completed, because of deficient performance based on a formula established in the RFP. The RFP also provides for an allowable number of deviations before damages will be assessed.

The protester contends that the agency should distinguish the separate elements under the processing task in evaluating performance so that a pro rata payment could be made taking into account the percentage of successfully performed elements within each order.

We will not object to a damages provision, such as the one involved here, unless the protester can show there is no possible relation between the amounts stipulated for damages and losses which are contemplated by the parties. *Aquasis Services, Inc.*, B-229723, Feb. 16, 1988, 88-1 CPD ¶ 154. In this regard, it is the contracting agency that is most familiar with the conditions under which the services and supplies have been and will be used and therefore in the best position to determine the best method of accommodating its needs.

The agency report reasonably establishes that, if any of the elements required are not performed correctly, the order should be considered improperly processed. For example, the contractor may properly mark and pack an item, but if it ships the item late (or not at all), the value to the agency of the other services

would be negated. The agency also points out that a delay in providing the order documentation to the contracting officer's technical representative (one of the required elements) can cause delays in filling the order.[1] Thus, the record shows that it is essential that all the criteria for processing an order be met for the contractor to be in complete compliance with the performance requirements, and that partial performance will have little or no value to the agency. Based on the interrelationship of the elements in processing an order successfully, we conclude that NOAA has reasonably defined its needs and designated its acceptable quality level accordingly. *See Aquasis Services, Inc.*, B-229723, *supra*.[2]

The protest is denied.

B-233031, July 11, 1989

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Travel time

A nonexempt employee under the Fair Labor Standards Act (FLSA), who drives a government vehicle between a temporary duty site and lodgings during hours outside of the normal 40-hour workweek, is not entitled to overtime pay under the FLSA, even though the driver transports another employee, since use of the government vehicle cannot be considered a requirement of the employee's job.

Matter of: Naval Undersea Warfare Engineering Station—Fair Labor Standards Act—Traveltime as Overtime

This decision is in response to a joint request from the Naval Undersea Warfare Engineering Station, Department of the Navy, Keyport, Washington (agency) and the Bremerton Metal Trades Council (union). This request has been handled as a labor-relations matter under 4 C.F.R. Part 22 (1988).

The issue raised is whether the driver of a government vehicle, while driving between a temporary duty site and lodgings during hours outside of the normal 40-hour workweek, is entitled to overtime pay under the Fair Labor Standards Act (FLSA). We conclude that the driver's traveltime is not compensable hours of work under the FLSA.

[1] If we were to agree with the protester's proposed method of evaluating performance, the contractor would be partially paid where it correctly performs some of the elements, but ships an order late, to the wrong place, or fails to ship the item at all.

[2] In its comments to the agency's report, Aquasis argues that the damages provision in this protest is similar to one which we found objectionable in *D.J. Findley*, B-2215230, Feb. 14, 1985, 85-1 CPD ¶ 197. In that case, we sustained the protest against the damages provision because the agency failed to respond to or rebut the protester's allegation that there was no possible relation between the amounts stipulated for damages and the losses which are contemplated by the parties. Here, however, the agency has explained persuasively the basis for the damages provision.

Background

The agency tests and evaluates underwater weapon systems and their components, which involves the actual firing of weapons on various underwater ranges including a range site at Nanoose, British Columbia, Canada. The weapons which are tested on the Nanoose Range are transported from Washington state to British Columbia by government trucks operated by two employees, whose positions are WG-8 Motor Vehicle Operators. These employees are "nonexempt," *i.e.* covered by the Fair Labor Standards Act (FLSA).

The motor vehicle operators have no duties at the Nanoose Range except when they are unloading or loading the weapons. Thus, the two employees remain at their motel in a temporary duty travel status while awaiting a return load. During this period, they are authorized to have a government vehicle for trips between their motel and the Nanoose Range.

When the motor vehicle operators travel between the Nanoose Range and their motel, one is designated as the driver and the other is a passenger. This travel often occurs outside of the employees' normal 40-hour workweek. Thus, the issue to be resolved is whether the driver of the government vehicle, while driving it between the Nanoose Range and the motel during hours outside of the normal workweek, is entitled to overtime pay under the FLSA.

Opinion

The FLSA is administered with respect to federal employees by the Office of Personnel Management (OPM). *See* 29 U.S.C. § 204(f) (1982). The OPM regulation relevant to this case is 5 C.F.R. § 551.422(a)(2) (1988), which provides:

(a) Time spent traveling shall be considered hours of work if:

* * * * *

(2) An employee is required to drive a vehicle or perform other work while traveling. . . .

Additional guidance is found in the attachment to Federal Personnel Manual (FPM) Letter 551-11, at page 2 (Oct. 4, 1977), which states the general rule that an employee shall not be compensated for normal home to work travel and that the same rule applies to the commuting time of federal employees while assigned to a temporary duty station overnight. Therefore, the time spent commuting between a motel and the temporary duty station is considered home to work travel and is not working time under the FLSA, unless it meets one of the specific conditions discussed in the attachment and in table 1 of the attachment to FPM Letter 551-10 (Apr. 30, 1976). Table 1 in turn states that when the employee drives a government vehicle home as a *requirement* of the agency to transport other employees from home to work or a job site such traveltime is considered "hours of work" under FLSA.

We obtained OPM's views on the application of the FPM Letters to the facts of this case. OPM advised us that, since one employee is required to drive a government vehicle to transport the other employee between the motel and the

temporary worksite and the latter is dependent upon the former to get to and from work, the traveltime of the driver is hours of work for which FLSA overtime is payable. OPM added that, if the passenger had a vehicle at his disposal, he would not be dependent upon the driver and they would both then be engaged in normal home to work travel which is not compensable under FLSA.

The agency maintains that a government vehicle is provided not as a requirement of the job but as an accommodation to the employees. It points out that the Nanoose Range is about 15 miles away from the town where most temporary duty employees stay and where taxis and rental cars are available. The alternative to providing a vehicle to these employees would be for them to rely upon taxis or to catch rides with other employees to their motel or to a rental car office. Therefore, the agency contends that the exception referred to by OPM does not apply and FLSA overtime is not payable.

We agree. The agency simply furnishes a government vehicle to temporary duty personnel as the most convenient and least costly means of transporting them between their worksite and motel. In our view, this arrangement bears little relevance to the provision in FPM Letter 551-10 for overtime when an employee is required to transport other employees between home and work. Clearly, the agency does not furnish a vehicle in order to require one employee to drive others since its reasons for providing the vehicle would apply regardless of whether one or more than one employee was involved. Indeed, we assume that on some occasions a driver makes the trip alone; when this happens, overtime would not be payable even under the FPM Letter. The only time the FPM Letter could apply is when the driver has a passenger, although the presence of a passenger would not add to the driver's time or effort in any way.

Under these circumstances, we conclude that the FPM Letter does not provide a basis for paying overtime.

B-234709, July 11, 1989

Procurement

Contractor Qualification
■ Organizational conflicts of interest
■■ Allegation substantiation
■■■ Evidence sufficiency

Agency is not required to exclude a firm from a procurement because of an organizational conflict of interest where, although the firm previously provided related services to the agency under a forerunner contract, it did not prepare the work statement, or material leading directly, predictably, and without delay to the work statement, under the current solicitation.

Matter of: ETEK, Inc.

ETEK, Inc., protests the anticipated award of a contract to Architectural Energy Corporation (AEC) under Department of Energy (DOE) request for pro-

posals (RFP) No. DE-RP03-89SF17966. ETEK argues that as a result of a contract AEC previously performed for DOE, AEC has an organizational conflict of interest and hence should be disqualified from this competition. We deny the protest.

The RFP solicited proposals to provide support services for Task 12 of the International Energy Agency (IEA) program for solar heating and cooling. Task 12 is part of an ongoing international program under which participating countries are working to design effective and efficient solar energy systems and, more specifically, solar heating, cooling, and day lighting materials, components and systems. Participating countries' representatives will perform work in three basic areas under Task 12: (1) model development, entailing the identification and ranking of those systems potentially offering significant improvements over existing or conventional concepts; (2) model evaluation, entailing the development of procedures for predicting the performance of solar energy systems; and (3) model use, entailing the definition of the potential audience for these systems.

The firm to be selected by DOE under the RFP is to act as operating agent for Task 12. In this capacity, the firm will be responsible for overall management of the task, coordinating the work of the participating countries, and implementing actions required by the IEA's executive committee. The operating agent also is to provide periodic reports to the participating countries and the IEA's executive committee and executive director, and will be responsible for coordinating the United States' participation in this task.

In order to avoid giving any offeror an unfair competitive advantage due to performance of prior contracts, DOE included in the solicitation the standard clause "Organizational Conflicts of Interest Disclosure or Representation," DOE Acquisition Regulation (DEAR) § 952.209-70. This clause requires each offeror to provide a statement of all relevant facts as to its past, present, or future actions bearing on whether it has a competitive advantage in the performance of the solicited work. The clause states that DOE will review this information and may take appropriate action, including the disqualifaction of the offeror, if a conflict of interest resulting from an unfair competitive advantage is found to exist.

The RFP provides that award will be made to the offeror whose proposal is found most advantageous to the government, technical and cost factors considered. The specific technical evaluation factors are (1) qualifications of organization and key personnel to perform the scope of activities, and (2) quality of proposals; the first factor is approximately twice as important as the second. Within the first factor, four subfactors are listed in descending order of importance: (1) organizational experience in supporting and coordinating IEA programs, with specific emphasis on solar building technologies, or comparable experiences with other international groups; (2) knowledge of and familiarity with current IEA solar implementing agreements and annexes; (3) knowledge of and familiarity with solar buildings, energy analysis tools and other relevant programs and projects; and (4) knowledge of and familiarity with DOE and other relevant research institutions.

Two firms, ETEK and AEC, responded to the RFP. AEC previously had been awarded a DOE contract to perform a prior IEA Task (Task 8), for which its president was designated operating agent. Task 8 involved conducting surveys and analyses of design tools for solar energy systems, the evaluation and validation of these tools, and development of test cases for their evaluation. In his capacity as operating agent for Task 8, the president of AEC participated in an IEA workshop on "Advanced Solar Building Design and Analysis," and also provided input concerning analysis and design tools developed by AEC. DOE determined that AEC's involvement in this prior task, and specifically the role of its president, did not afford AEC an unfair competitive advantage with respect to the current procurement. The agency reasoned that Task 8, while a forerunner of Task 12, was but one part of the whole planning process for the subsequent task, and that AEC, and particularly its president, therefore had not actually been involved in the development of the Task 12 statement of work or evaluation criteria. AEC thus was not disqualified from this competition and its offer, as well as ETEK's, is still being considered for award.

ETEK protests that AEC should be disqualified from the current competition in accordance with the solicitation's conflict of interest provision. ETEK contends that AEC's involvement in Task 8 afforded that firm an unfair competitive advantage over other firms with respect to the selection of a contractor for the performance of Task 12. In this regard, ETEK is concerned that Task 8 resulted in the formulation of the statement of work for Task 12 and that AEC's participation in this former procurement provided it with information not available to other competitors. ETEK adds that this competitive advantage is exacerbated by the evaluation factors, which place considerable emphasis on a firm's experience with prior IEA work.

Subpart 9.5 of the Federal Acquisition Regulation (FAR), which governs conflicts of interest, generally requires contracting officials to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantages or conflicting roles that could impair a contractor's objectivity. *See ESCO, Inc.*, 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450. In particular, the FAR provides that firms involved in the preparation of a solicitation's work statement, defined broadly as including the furnishing of information leading directly, predictably, and without delay to the work statement, generally may not be awarded a contract to supply the requested system or services. FAR § 9.505-2(b)(1). This restriction is intended to avoid putting a contractor in a position to favor its own capabilities. *Coopers & Lybrand*, 66 Comp. Gen. 216 (1987), 87-1 CPD ¶ 100.

On the other hand, the mere existence of a prior or current contractual relationship between the government and a firm does not in itself create an organizational conflict of interest for that firm. *Ross Bicycles, Inc.*, B-217179, B-217547, June 26, 1985, 85-1 CPD ¶ 722, *aff'd on reconsideration*, B-219485.2, July 31, 1985, 85-2 CPD ¶ 110. A particular offeror may possess unique advantages and capabilities due to its prior experience, and the government is not required to attempt to equalize competition to compensate for this advantage

where it did not result from preferential treatment or other improper action. *Id.*

We find that DOE properly included AEC in the competition here. DOE has provided an affidavit by the project manager involved in the development of Task 12 and the planning of the resultant DOE solicitation, stating that the statement of work for the RFP was prepared and reviewed exclusively by DOE staff, without outside assistance of any kind from AEC or other firms. The record contains no other evidence to the contrary. Similarly, ETEK's assertion that AEC's president, as operating agent under Task 8, was in a position to influence the drafting of this RFP or, at a minimum, to obtain confidential information not otherwise available, is unsupported in the record. The president's (and AEC's) input into Task 12 was no different from that of other contractors and government agencies that had previously performed work for IEA's solar energy program. The involvement of each of these organizations was limited to providing background information on the results of the work it performed under a particular task; the IEA then used this information to develop Task 12.

Specifically, although AEC's president was the Task 8 operating agent, as discussed above, his and AEC's work under Task 8 extended only to overseeing the development of a methodology for determining the effectiveness of solar energy system designs, and then advising the IEA of the final results. The work under Task 12, on the other hand, entails the development of actual model solar energy systems. This work appears to be related to that under the prior tasks only in that it represents a separate step in a progression of tasks that ultimately are to lead to the manufacture of effective solar energy systems.

While AEC may enjoy some competitive advantage because of its prior involvement in IEA's solar energy program, this advantage is no different than that enjoyed by all other previous participants in the program and, in our opinion, is not the sort of advantage that mandates the firm's exclusion from the procurement. As stated above, the pertinent conflict of interest regulations do not automatically exclude a firm with prior involvement in an ongoing program from competing for successor contracts, but rather only disqualifies those firms that were in a position to influence, for their own benefit, the development of the statements of work for the follow-on contracts. *See Coopers & Lybrand,* 66 Comp. Gen. 216, *supra.* We do not think this was the case here since, again, AEC had no involvement in the preparation of the actual work statement for Task 12, but simply furnished background information regarding its prior work effort.

We conclude that AEC did not perform services that led "directly, predictably, and without delay" to the RFP's statement of work, and was not in a position to influence this competition; accordingly, DOE was not required to exclude AEC from consideration for award. *See Associated Chemical and Environmental Services, et al.,* 67 Comp. Gen. 314 (1988), 88-1 CPD ¶ 248.

Moreover, we do not think DOE was under an obligation to equalize any advantage enjoyed by AEC due to background information it may have gathered during performance of Task 8, *see S.T. Research Corp.,* B-233309, Mar. 2, 1989,

89-1 CPD ¶ 223; any such advantage was due solely to AEC's status as a prior contractor. In any case, although ETEK complains that DOE has not provided it with all relevant information in a timely manner, it appears from the record that DOE has in fact released all such information, and that firms other than AEC thus were afforded a meaningful opportunity to compete for this procurement. *Id.*

ETEK argues that the solicitation's evaluation factors essentially ensured award to AEC by placing undue emphasis on a firm's experience with IEA's solar energy program. In this regard, ETEK notes that one of the subfactors under the most important evaluation factor measured a firm's experience in the IEA solar program, while another addressed a firm's knowledge of the IEA solar implementing agreement.

Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of a particular factor so long as it reasonably relates to the agency's needs in choosing a contractor that will best serve the government's interests. *See Hydro Research Science, Inc.*, B-230208, May 31, 1988, 88-1 CPD ¶ 517. Here, the record reveals that DOE selected the two subfactors at issue because it determined that firms experienced with the IEA solar program or with the efforts of related international organizations would more likely perform the work in a successful manner than ones that did not. We think this clearly was a reasonable factor to consider, and there is no evidence that the evaluation factors actually were structured to benefit AEC or other similarly situated firms. Accordingly, we find nothing improper in DOE's use of these two subfactors to ascertain the offeror most advantageous to the government. *See Transco Contracting Co.*, B-228347.2, July 12, 1988, 88-2 CPD ¶ 34.

The protest is denied.

B-235228, July 11, 1989

Procurement

Socio-Economic Policies

■ Small business set-asides

■■ Use

■■■ Administrative discretion

Agency determination that it could not expect to receive offers from two responsible small business concerns, based solely on outdated information regarding a solicitation issued 4 years ago, and therefore not to set the procurement aside for small business, was an abuse of discretion where 14 small business concerns responded to the *Commerce Business Daily* synopsis of the procurement.

Matter of: FKW Incorporated Systems

FKW Incorporated Systems protests a determination by the Food and Drug Administration (FDA) not to set aside for exclusive small business competition request for proposals (RFP) No. 222-89-2001 for the operation and maintenance of

facilities at the National Center for Toxicological Research, Arkansas. FKW contends that the contracting officer had sufficient expectation of small business interest to require a set-aside.

We sustain the protest.

As a preliminary matter, an acquisition of services, such as here, is to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price. Federal Acquisition Regulation (FAR) § 19.502-2 (FAC 84-40). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. *Universal Hydraulics, Inc.,* B-232144, Oct. 31, 1988, 88-2 CPD ¶ 417.

FDA reports that the prior solicitation for these services was issued in March 1985. The earlier solicitation was issued on an unrestricted basis and responses were only received from three large businesses, one of which was determined to be technically unacceptable. Prior to issuing the current solicitation, the contracting officer, relying solely on the 4-year old information regarding the earlier solicitation, determined that there was no reasonable expectation that offers from at least two responsible small business firms would be received and that award would be made at a reasonable price. He therefore issued this RFP on an unrestricted basis. This decision was concurred in by the FDA small business utilization specialist.

The record shows, however, that before issuing the solicitation, FDA published a synopsis in the *Commerce Business Daily* (CBD) on December 20, 1988, to announce the procurement. Fourteen of the 50 firms responding to the CBD notice indicated that they were small businesses. The RFP was issued on March 7, 1989, with an original closing date for receipt of proposals of April 6, 1989.[1] On March 9 and 10, two small business firms, FKW and J&J Maintenance, contacted the agency and asked if the requirement was a set-aside and were advised that it was not. On March 22, three of nine firms that attended the pre-proposal conference were small business firms. During the pre-proposal conference, J&J Maintenance requested the contracting officer to reconsider his decision not to set aside the procurement for small business. On April 4, FKW also requested the contracting officer to reconsider his decision based on the small business attendance at the preproposal conference. However, on April 12, the contracting officer responded that, at the time of his determination and based on the previous solicitation, there had been no reasonable expectation that two responsible small businesses would submit offers. He further stated that "[a]t this point in time several firms have put a lot of effort into their solicitation preparation and it would not be equitable to change the solicitation status." He then determined to continue the procurement on an unrestricted basis.

[1] The revised closing date for receipt of proposals was May 7, 1989.

The protester asserts that the agency's reliance on information collected over 4 years ago does not justify the decision not to set aside this procurement. We agree.

The record indicates that the agency decision not to set aside was based exclusively on a single solicitation issued 4 years ago. While the FAR provides that past acquisition history is always important, the FAR also states that it is not the only factor to be considered in determining whether a reasonable expectation of obtaining two small business offers exists. *See* FAR § 19.502-2. The agency failed to consider the fact that in response to the CBD notice, 14 small business firms expressed interest in the procurement. Despite this small business interest, the agency neither conducted a market survey nor investigated the ability to perform the proposed contract of those small businesses that expressed interest in the procurement. Under these circumstances, especially given the number of small business firms that showed an interest in this procurement, we think the contracting officer acted unreasonably in determining, based solely on the outdated procurement history, that there was no reasonable expectation that offers from at least two responsible small business concerns would be received, without at least investigating the interest demonstrated.

The agency also argues that at the time FKW requested that the procurement be set aside (after the issuance of the solicitation), several firms had expended considerable effort toward responding to the solicitation and that it would have been inequitable to change the solicitation status at such a late stage.

The record shows that the agency knew or should have known of considerable small business interest prior to issuance of the solicitation since 14 of the 50 firms responding to the CBD notice of December 20, 1988, indicated that they were small businesses. The agency has not explained why these small business responses did not put the contracting officer on notice of small business interest prior to solicitation issuance. Rather, the agency, in its report, simply ignores this fact.

The protest is sustained. By separate letter to the Secretary of Health & Human Services, we are recommending that the contracting officer investigate the responsibility of the small business firms that have expressed interest in the procurement, and if two responsible small business concerns show sufficient interest (and if award can be made at a reasonable price), the solicitation should be amended to set aside the procurement for small business. We also find that FKW is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1988).

B-234298, July 12, 1989

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■■ Specific purpose restrictions

■■■ Entertainment/recreation

U.S. Department of the Interior appropriations for the operation of the National Park System may be used to reimburse the Golden Spike National Historic Site imprest fund for the cost of musical entertainment provided at the Site's 1988 Annual Railroader's Festival. Under 16 U.S.C. § 1a-2(g), the Secretary of the Interior may contract for interpretive demonstrations at Park Service sites. The Golden Spike National Historic Site commemorates the 1869 completion of the first U.S. transcontinental railroad and the musical entertainment was representative of nineteenth century railroad and western U.S. music. We have no basis for questioning the agency's judgment that there was a meaningful nexus between the music and the purpose of the Golden Spike site. Further, the music was part of a program determined by the agency to advance the commemoration of Golden Spike, and was not elaborate or extravagant.

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■■ Specific purpose restrictions

■■■ Entertainment/recreation

Music and other artistic events may constitute interpretative demonstrations at National Park Service (NPS) sites for which appropriated funds may be used. While our decisions provide some criteria for determining the propriety of entertainment expenses, we do not believe that a single rule can delineate the circumstances under which music and other artistic events constitute interpretative demonstrations. Rather, whether a particular event sufficiently interprets an NPS site must be determined on a case-by-case basis. Therefore, to assist NPS units in determining when entertainment may constitute an interpretative demonstration for an NPS site, we recommend that the NPS adopt guidelines consistent with our decisions.

Matter of: Golden Spike National Historic Site—Request for Imprest Fund Reimbursement for Musical Entertainment

The Acting Chief of the Division of Finance for the Rocky Mountain Regional Office, U.S. Department of Interior, National Park Service (NPS), has asked for an advance decision on whether a $300 imprest fund reimbursement voucher submitted by the Golden Spike National Historic Site ("Golden Spike") should be certified for payment. The voucher covers an expense for musical entertainment provided to the general public at the 1988 Annual Golden Spike Railroader's Festival. For the reasons stated below, this voucher may be paid.

Background

On August 13, 1988, Golden Spike held its twelfth annual Railroader's Festival. According to the Superintendent of Golden Spike, the festival celebrates the role of railroading in the settlement and development of the western United States. The annual festival was an "open house" with the public admitted to

Golden Spike free of charge. The 1988 Festival featured reenactments of the 1869 completion of the first U.S. transcontinental railroad, railroad track laying demonstrations, the World Champion Spike Driving Contest, and various games and contests typifying recreational events of the period. The 1988 Festival also included two and one-half hours of musical entertainment by a band which specializes in railroad and nineteenth century western American music.

On October 13, 1988, a $300 bill submitted by the band was paid out of Golden Spike's imprest fund. The Superintendent of Golden Spike then submitted a voucher to NPS' Rocky Mountain Regional Office to reimburse the imprest fund for this expense. The voucher submitted by the Superintendent would charge the entertainment expenses to an account for interpretation activities within the Department of Interior's appropriation for operation of the National Park System. According to the Division of Finance for the NPS' Rocky Mountain Regional Office, NPS interpretation activities at a park site involve educating and presenting information about—and trying to foster public appreciation of—the park site's purpose and/or resources.

In light of our decisions which generally prohibit use of an agency's appropriated funds for entertainment, the Division of Finance asked two questions. First, the Division asked for our opinion on whether the specific voucher may be paid. Second, the Division asked for:

> a ruling as to whether live music or similar artistic events can be considered a necessary interpretation expense in the absence of clear statutory authority where there does appear to be a connection between the artistic event and the mission of the NPS unit.

Legal Analysis

Our Office has long held that agencies must have statutory authorization in order to use their appropriated funds for entertaining individuals. *E.g.,* 64 Comp. Gen. 802 (1985). Our decisions have specifically classified live musical performances as entertainment which is subject to the general rule. *See* 58 Comp. Gen. 202 (1979), *overruled on other grounds* 60 Comp. Gen. 303 (1981). Thus, there must be a statutory basis for NPS having contracted for the music performed at Golden Spike in order for this voucher to be paid.

The Secretary of the Interior is authorized by 16 U.S.C. § 1a-2(g) to "enter into contracts . . . with respect to . . . interpretive demonstrations" at NPS sites.[1] Since the NPS' interpretation activities and contracts in support of those activities generally are authorized, the issue of whether the voucher should be certified for payment depends upon whether this entertainment should be considered a demonstration interpreting the significance of Golden Spike under 16 U.S.C. § 1a-2(g).

In B-226781, January 11, 1988, we concluded that some entertainment will not be considered proper NPS interpretation activities. That case involved two types

[1] The Secretary of the Interior is directed to effectuate the national policy of preserving historical sites "for the inspiration and benefit of the people of the United States" through NPS. 16 U.S.C. §§ 461, 462 (1982).

of expenses, those used to decorate an historic ranch house for the Christmas season and those used to conduct an open house (including refreshments and a visit from Santa Claus). Although we agreed that decorating the ranch properly interpreted how the ranch celebrated Christmas during the frontier era, we stated that the goal of generally attracting visitors to an NPS site through the open house had only an indirect and conjectural bearing upon the NPS' interpretation mission. We concluded that the expenses for the open house were not allowed under the general rule against paying for entertainment.

On the other hand, the legislative history of 16 U.S.C. § 1a-2(g) makes clear that some entertainment will be proper interpretation activities. According to the House Report on the bill which became section 1a-2(g), Congress contemplated that the Secretary of the Interior would use the power to contract for interpretive activities to "enter into cooperative agreements to permit the presentation of programs and performances at areas like Wolf Trap Farm Park and Ford's Theater." H. Rep. No. 1265, 91st Cong., 2d Sess. 5 (1970). Wolf Trap Farm Park was created specifically as a park for the performing arts. 16 U.S.C. § 284 (1982). Also, the legislative history of Public Law 91-288, which established the Ford's Theatre National Historical Site, states that Ford's Theatre was intended to be a living exhibit accommodating live theater performances. H. Rep. No. 1099, 91st Cong., 2d Sess. 2 (1970). Thus, where the statute authorizing a National Park Service unit, and/or the statute's legislative history, expressly states that the unit will be interpreted through entertainment, we will allow expenses for the entertainment contemplated.

The expense at issue here, however, is distinguishable from the clearly allowable entertainment expenses at Wolf Trap or Ford's Theatre and the unallowable open house expenses in B-226781. First, the statute authorizing the creation of the Golden Spike National Historic Site does not expressly authorize interpretation through entertainment. Act of July 30, 1965, Pub. L. No. 89-102, 79 Stat. 426 (1965). Further, the legislative history of the statute does not show Congress's contemplation that Golden Spike would be interpreted through entertainment. Thus, interpreting Golden Spike through entertainment does not have direct legislative support like interpreting Wolf Trap or Ford's Theatre does.

Second, the expense at issue here is also distinguishable from the expenses in B-226781. The purpose of Golden Spike is to commemorate the completion of the first U.S. transcontinental railroad. 79 Stat. 426. The expense was for musical entertainment which, according to the Superintendent of Golden Spike, was representative of railroad and western U.S. music at the time that the railroad was completed. Unlike the Christmas open house expense in B-226781, this expense has more than an indirect and conjectural bearing upon interpreting Golden Spike's purpose. Thus, this expense does not fall squarely within the type of entertainment expense which we considered unallowable in B-226781.

Our research has not uncovered any dispositive guidance on how to evaluate entertainment expenses which (like the expenses here) fall between the two extremes discussed above. The legislative history of 16 U.S.C. § 1a-2(g) does refer

to performances "at areas *like* Wolf Trap Farm Park and Ford's Theatre." H. Rep. No. 1265, 91st Cong., 2d Sess. 2 (1970) (Italic added). However, the report does not describe the salient features which will define which other areas were like those two. The report only states that the performances "would be consistent with the park programs contemplated at these areas," would be "compatible with the Government's development, investment and park programs," and that they "will operate so as to complement and supplement the park programs at their respective areas." *Id.* at 5–6. The most that can definitely be concluded from these comments is that Congress has contemplated some level of entertainment as an appropriate means of interpreting for the public the significance of at least some NPS units. Without any more specific legislative guidance, we must look to our own decisions on entertainment expenses to determine if this expense should be allowed.

As the Division of Finance notes, we considered a similar question of whether entertainment could be considered an appropriate expense in our decisions at 58 Comp. Gen. 202 (1979) and 60 Comp. Gen. 303 (1981). In 58 Comp. Gen. 202, we considered whether ethnic music and dance presentations could be paid for by appropriated funds when the presentations were a part of an agency's Equal Employment Opportunity ("EEO") education program. We noted that the educational entertainment was very similar to the kinds of activities which are considered unallowable appropriation expenses. 58 Comp. Gen. at 206. We concluded that while we would not question past agency characterizations of entertainment as part of EEO programs, future EEO entertainment would not be allowable unless the entertainment conformed with statutory or regulatory guidelines to ensure that it was in fact a proper EEO education expense. 58 Comp. Gen. at 207.

In 60 Comp. Gen. 303, we reconsidered the question in light of Office of Personnel Management specific guidelines on how ethnic entertainment could be included in EEO programs. After reviewing these guidelines, we stated that:

> [W]e now take the view that we will consider a live artistic performance as an authorized part of an agency's EEO effort if, as in this case, it is a part of a formal program determined by the agency to be intended to advance EEO objectives, and consists of a number of different types of presentations designed to promote EEO training objectives of making the audience aware of the culture or ethnic history being celebrated.

60 Comp. Gen. at 306.

Entertainment as part of Golden Spike's interpretation of the completion of the first U.S. transcontinental railroad is analogous to entertainment as part of agency EEO programs. In both cases, the entertainment can be an integral part of the educational purpose of helping the audience understand the event, culture, or resource being commemorated. For example, a dramatic reenactment of the completion of the transcontinental railroad is entertaining, but it also is a clear aid to the public's understanding of the event which Golden Spike commemorates. This can be distinguished from entertainment which is only intended to entertain, or which is so loosely connected with an educational purpose that it becomes a mere public relations tool. It is this latter form of entertain-

ment which our previous decisions have held is not an appropriate expense. *E.g.* B-205292, June 2, 1982.

For the reasons discussed below, we conclude that the music performed at Golden Spike can be considered an interpretative demonstration and not mere entertainment. First, there is nothing in the record or other materials we reviewed which causes us to question NPS' judgment that a meaningful nexus exists between the nineteenth century railroad and western music and the completion of the transcontinental railroad. Second, the music was one part of a full day of interpretive and commemorative events. Thus, the music here, as in 60 Comp. Gen. 303, was part of a program involving different types of activities determined by the agency to advance an authorized objective. Finally, the music was not elaborate or extravagant and cannot reasonably be viewed as an isolated event designed solely to entertain or attract visitors to the site. Therefore, in response to the first question raised by the Division of Finance, we will allow the $300 voucher in this case to be paid.[2]

The Division of Finance also asked us to rule generally on whether live music or similar artistic events are proper interpretation expenses when there is a connection between the artistic event and the mission of the NPS unit. Our decision here reflects our judgment that music and other artistic events may constitute interpretative demonstrations under 16 U.S.C. § 1a-2(g) for which appropriated funds may be used. However, while this decision and the other decisions cited herein provide some criteria for determining the propriety of entertainment expenses, we do not believe that a single rule can delineate the circumstances under which music and other artistic events constitute interpretative demonstrations. Rather, whether a particular event sufficiently interprets an NPS site must be determined after examination of the particular facts involved. Therefore, to assist NPS units in determining when entertainment may constitute an interpretative demonstration for an NPS site, we recommend that the NPS adopt guidelines consistent with the criteria contained in this and the other decisions issued by our Office.

B-231762, July 13, 1989

Civilian Personnel

Leaves Of Absence

■ Annual leave

■■ Lump-sum payments

■■■ Computation

In August 1987, immediately before beginning a 90-day temporary appointment with the Army, the claimant was notified that she had prevailed in an equal employment opportunity complaint against the Veterans Administration (VA). As a result, she was reinstated as a VA employee with backpay

[2] We emphasize, however, that our conclusion in B-226781 is still applicable. Entertainment which only has an indirect and conjectural bearing upon interpreting an NPS unit cannot be reasonably characterized as a proper interpretation expense.

and restoration of leave from February 1984 until she started working for the Army. In view of her reinstatement by VA, she is treated as an employee who is transferred from one agency to another. Consequently, she first became entitled to a lump-sum leave payment at the end of her 90-day temporary appointment, and the Army must pay her for her full annual leave balance, including restored leave.

Matter of: Priscilla M. Worrell—Lump-Sum Leave Payment

Lieutenant Colonel L. M. Hacker, Finance and Accounting Officer, U.S. Army, Fort Campbell, Kentucky, requests an advance decision regarding the Army's liability for a lumpsum leave payment due Ms. Priscilla M. Worrell who held a 90-day temporary nursing assistant position with the Army. We hold that the Army is liable for the payment.

Ms. Worrell was selected to fill a 90-day temporary position, commencing on August 31, 1987, as a nursing assistant, GS-04, at the Blanchfield Army Community Hospital, U.S. Army Medical Department Activity, Fort Campbell, Kentucky. After her selection for the position, she produced a letter from the Veterans Administration (VA), Beckley, West Virginia, dated August 20, 1987, informing her that the Equal Employment Opportunity Commission had favorably decided her discrimination complaint and that the VA had reinstated her effective February 25, 1984. She was given until September 20, 1987, to report for duty with the VA or be terminated. She was awarded backpay and benefits, including annual and sick leave, from February 25, 1984, as if she had remained on the rolls.

Ms. Worrell accepted the Army position which effectively resulted in her being transferred from VA to the Army as of August 31, 1987. As of that date, she had 342 hours of annual leave, 368 hours of sick leave, and 100 hours of restored leave that were transferred to her leave accounts with the Army.

When Ms. Worrell's temporary appointment expired on November 28, 1987, she was paid by the Army for the 36 hours of annual leave accrued during her employment there. The Army refused, however, to pay the annual and restored leave with which she had been credited as a result of her complaint against the VA. The Army contends that it should not be responsible for paying a leave settlement of such magnitude resulting from VA's wrongful actions against Ms. Worrell. Moreover, the Army emphasizes that it had no knowledge of Ms. Worrell's large leave balance when she was hired.

The statutory provisions governing annual leave are in chapter 63 of title 5, United States Code (1982). The implementing regulations provide that when an employee moves from one position to another under the same leave system without a break in service, the annual leave account is certified to the employing agency for credit or charge. 5 C.F.R. § 630.501(a); FPM chapter 630-13, subchapter 5-1a(1). Here, Ms. Worrell was reinstated to the VA as if she had never left and when she began her appointment at Fort Campbell, she moved from a position with the VA to another one with the Army without a break in service. Her leave balances were properly transferred with her and she was not entitled

to an accrued leave settlement at that time. *See Willie W. Louie,* 59 Comp. Gen. 335, 337 (1980).

Under 5 U.S.C. § 5551, an employee is entitled to receive a lump-sum payment for annual leave balances only when the employee is separated from the service. Ms. Worrell's separation from federal service took place at Fort Campbell on November 28, 1987. That is when her entitlement to an accrued leave settlement vested, and the Army must pay it. *See* 33 Comp. Gen. 85 (1953); *John L. Swigert, Jr.,* B-191713, May 22, 1978.

While the specific factual situation in this case is unusual, the general situation is merely one in which an agency must pay the leave balance of a transferred employee who earned the leave in another agency. If, for example, an employee with 240 or more hours of leave transfers to another agency and then leaves federal service after a brief period, the new agency would have to pay the employee for the full annual leave balance due.

Accordingly, the Army must pay Ms. Worrell for the 342 hours of accumulated annual and the 100 hours of restored leave credited to her account as a result of her successful discrimination complaint against the VA. The voucher submitted to us is returned for payment.

B-231776, July 13, 1989

Civilian Personnel

Relocation
■ Temporary quarters
■ ■ Actual subsistence expenses
■ ■ ■ Reimbursement
■ ■ ■ ■ Amount determination

A transferred employee occupied temporary quarters for 60 days and claimed meal costs at an average daily rate of $35.05. The agency reduced the claim to $10.39 per day based upon an analysis of the meal expenses claimed by other employees in that work area. The claim is returned to the agency for consideration of the reasonableness of the amounts claimed for meals based on valid statistical references from the Bureau of Labor Statistics or the Runzheimer Index.

Matter of: R. Alex Martinez—Reasonableness of Meal Expenses

This decision is in response to a request by the Forest Service for a decision to determine the reasonableness of the average daily costs of meals incurred by an employee of the agency while occupying temporary quarters incident to a permanent change of official station.[1] For the reasons stated below, we are returning the claim to the Forest Service to determine the reasonableness of the claimed meal expenditures based on valid statistical references of costs at this location.

[1] The request was submitted by Mr. James Turner, Authorized Certifying Officer, Forest Service, United States Department of Agriculture.

Background

Mr. R. Alex Martinez, a Forest Service employee, was transferred to the Lake Wenatchee Ranger District, Wenatchee National Forest, in February 1986. He was authorized and occupied temporary quarters for a period of 60 days. Mr. Martinez submitted a voucher which listed his daily expenses for lodging, meals or groceries, laundry, and tips, and he claimed meal expenses of $2,103.35 at an average daily cost of $35.05. The Forest Service reduced the claim for meal costs to $623.40, an average daily cost of $10.39, based upon an analysis of the claimed meal expenses by other employees of the Wenatchee Ranger District while occupying temporary quarters during the prior two fiscal years.

At the time of his transfer, the temporary quarters rate for Forest Service employees was $50 per day for the first 30 days of temporary quarters occupancy and $37.50 per day for the second 60 days. The Forest Service says that it is not reasonable to reimburse an employee at the standard $23 daily rate for meals since the agency would normally reduce the meal allowance to $15 per day for employees on long-term details.

Opinion

Under 5 U.S.C. § 5724(a)(3) (1982), and the implementing regulations contained at chapter 2, part 5, of the Federal Travel Regulations (FTR), a transferred employee may be reimbursed subsistence expenses for a period of up to 60 days while occupying temporary quarters.[2] These regulations authorize reimbursement only for the actual subsistence expenses incurred provided they are incident to the occupancy of temporary quarters and are reasonable as to amount. FTR, para. 2-5.4a.

It is the responsibility of the employing agency, in the first instance, to determine that subsistence expenses are reasonable. Where the agency has exercised that responsibility, our Office will not substitute its judgment for that of the agency, in the absence of evidence that the agency's determination was clearly erroneous, arbitrary, or capricious. *See Jesse A. Burks,* 55 Comp. Gen. 1107 (1976); *reconsidered and amplified,* 56 Comp. Gen. 604 (1977). An evaluation of the reasonableness of the amounts claimed must be made on the basis of the facts in each case. *Harvey P. Wiley,* 65 Comp. Gen. 409 (1986); *Marilyn L. Dean,* B-234768, May 16, 1989.

In our decisions we have accepted determinations by the agency to deny reimbursement for excessive costs for meals or groceries, and we have looked to valid statistical references such as figures from the Bureau of Labor Statistics or the Runzheimer Index as an appropriate measure for an agency to determine the reasonable cost of meals. *Eric E. Shanholtz,* 66 Comp. Gen. 515 (1987); *F. Leroy Walser,* B-211295, Mar. 26, 1984; *Dennis L. Kemp,* B-205638, July 30, 1982. The experiences of other employees under similar circumstances and any other

[2] FTR (Supp. 10, Nov. 14, 1983) *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1988).

unusual circumstances may also be relevant in the determination of the reasonableness of the amounts claimed. *Shanholtz, supra.*

In the present case, there is no evidence that the Forest Service utilized statistical references in determining the reasonableness of Mr. Martinez's meal expenses. In informal discussions with officials from the General Services Administration, we have learned that the range for daily meals costs at locations near Mr. Martinez's duty station (Yakima and Spokane, Washington) was approximately $27-31, based on Runzheimer Index figures for January 1986. While these figures would not support the employee's claim of $35 per day for meals, the figures similarly would not support the agency's determination to limit Mr. Martinez to slightly over $10 per day for meals.

Accordingly, we are returning this claim to the Forest Service for a reexamination of the amounts claimed by Mr. Martinez in the light of available statistical references.

B-232092, July 14, 1989

Civilian Personnel

Relocation
■ Residence transaction expenses
■■ Cooperative apartments
■■■ Title transfer
■■■■ Fees

A transferred employee may not be reimbursed the amount paid for a cooperative apartment transfer fee since it is not specifically authorized in the Federal Travel Regulations, nor is it analogous to other items for which reimbursement is authorized.

Matter of: Robert M. Weinberg—Real Estate Expenses—Cooperative Transfer Fee

This decision is in response to a request from an authorized certifying officer, Internal Revenue Service (IRS), concerning the reimbursement of a 6 percent cooperative transfer fee incurred by an IRS employee incident to his permanent change of station. We hold that he is not entitled to reimbursement for the following reasons.

Background

Mr. Robert M. Weinberg, an IRS employee, was transferred from New York City to Washington, D.C. He owned a cooperative apartment in New York City, and he sold his interest in it to Chem Exec, a relocation services company under contract to the IRS to provide relocation services for its employees.[1]

[1] Cooperative ownership of real property is a form of ownership that qualifies for reimbursement for real estate expenses. *Nathaniel E. Green,* 61 Comp. Gen. 352 (1982).

The by-laws of this cooperative corporation provide that a transfer fee of 6 percent of the selling price is due the corporation at the closing of a sale. Chem Exec assessed Mr. Weinberg $4,410 for a transfer fee and deducted such amount from his net proceeds on the sale. Mr. Weinberg subsequently requested reimbursement of that amount from the IRS on the basis that the fee is similar to a brokerage fee which is an allowable expense under the Federal Travel Regulations, FPMR 101-7, *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985) (FTR). The IRS denied his claim on the basis that the fee was not reimbursable since it was part of the cost of sale for which IRS paid Chem Exec under the terms of the contract.

Opinion

An employee who uses a relocation service contractor may not be reimbursed for real estate expenses which are analogous or similar to expenses that the agency has paid for under the relocation services contract. FTR, para. 2-12.5b (Supp. 11, Aug. 27, 1984); *James T. Faith,* 67 Comp. Gen. 453 (1988). In this particular case, Chem Exec deducted the cooperative sales fee from the purchase price due Mr. Weinberg in order to pay the cooperative corporation. Thus, Mr. Weinberg is not requesting reimbursement for a service for which Chem Exec was paid under the terms of its contract; rather he is claiming reimbursement for the fee which he was required to pay at settlement with Chem Exec under the terms of the cooperative's by-laws.

As to whether the fee is otherwise reimbursable under the FTR, we note that under para. 2-6.2d(1) (Supp. 4, Aug. 23, 1982), certain miscellaneous expenses are reimbursable in connection with the sale of a residence. However, none of these reimbursable items are analogous to a cooperative transfer fee; nor is such a fee specifically listed. Moreover, we have denied reimbursement for analogous fees imposed by cooperative associations in connection with other sales of cooperative units. *See Ethan F. Roberts,* B-230741, Sept. 19, 1988, and *William D. Landau,* B-226013, Oct. 28, 1987, involving resale waiver fees or "flip taxes" paid by the seller for the opportunity to sell the unit to the public at the market price rather than to the cooperative association for the original purchase price.

Accordingly, Mr. Weinberg's claim for reimbursement of the cooperative transfer fee is denied.

B-233161, July 14, 1989

Civilian Personnel

Relocation

■ Temporary quarters

■■ Determination

■■■ Criteria

A transferred employee and his immediate family moved into a house which he owned at the new duty station. He had rented it out for 3 years prior to transfer, and has currently listed it for sale. The employee claims entitlement to 60 days subsistence expenses for temporary occupancy of the residence, asserting that it is unsuitable for children and that he intends to move to permanent quarters closer to his worksite as soon as it is sold. His claim may not be allowed. The asserted unsuitability for children and the plan to move as soon as it is sold are too vague and indefinite to establish that the house qualifies as temporary quarters.

Matter of: Jerrold Cooley—Temporary Quarters Subsistence Expenses-Residence Owned by Employee

This decision is in response to a request from the Chief, Pre-Audit Unit, Administrative Office of the United States Courts, concerning an employee's entitlement to be reimbursed temporary quarters subsistence expenses while occupying a residence owned by him. We conclude that the employee may not be reimbursed, for the following reasons.

Background

Mr. Jerrold Cooley, an employee of the United States Probation Office, was transferred from Cheyenne, Wyoming, to Missoula, Montana, with a reporting date of April 11, 1988. On transfer, Mr. Cooley, his wife and two young children moved into a three bedroom residence owned by him in Lolo, Montana, approximately 11 miles from Missoula. He had purchased this residence (approximately 1500 square feet of living space) before his children were born and had rented it out for 3 years. In March 1988, the tenant left and Mr. Cooley put the house up for sale because, in his judgment, it was not suitable for children. According to Mr. Cooley, he intended to occupy the residence only until it was sold and then purchase another residence in Missoula as his permanent quarters. We understand that, as of May 1989, the residence had not been sold and that the employee and his family are still residing there.

Opinion

The authority for payment of subsistence expenses while in temporary quarters is contained in 5 U.S.C. § 5724a(a)(3) (1986), as implemented by chapter 2, part 5 of the Federal Travel Regulations (FTR) (Supp. 4, Aug. 23, 1982).[1] Paragraph 2-5.2c of the FTR defines "temporary quarters" as:

[1] *Incorp. by ref.*, 41 C.F.R. § 101-7.003 (1988).

. . . any lodging obtained from private or commercial sources to be occupied temporarily by the employee or members of his/her immediate family who have vacated the residence quarters in which they were residing at the time the transfer was authorized.

We have consistently held that a determination as to what constitutes temporary quarters must be made based on the facts of each case. If it is determined that the employee clearly intended to occupy leased or rented quarters on a temporary basis when he and his family moved into a residence, we have allowed payment even though the quarters could be occupied permanently or did, in fact, become permanent. *Robert D. Hawks,* B-205057, Feb. 24, 1982. Further, the fact that the employee owned the residence would not necessarily preclude temporary quarters subsistence expense reimbursement. *George R. Staton,* B-201574, Aug. 24, 1981. *See also Allan L. Franklin,* B-222136, Sept. 19, 1986. However, we have also held that an employee's failure to show that efforts were made to acquire other quarters as permanent quarters for a protracted period mitigates against reimbursement. *David R. McVeigh,* B-188890, Nov. 30, 1977. *See also Saundra J. Samuels,* B-226015, Apr. 25, 1988 (execution of a 1-year lease as an indication that occupancy of quarters was intended on other than a temporary basis).

In the present case, Mr. Cooley, his wife, and two children, ages 3 and 2, moved into a residence in the vicinity of his new duty station which they had purchased several years before his transfer. The assertion that the residence is only temporary because they have been attempting to sell it and intend to purchase another residence in Missoula as soon as it is sold, is too vague and indefinite to qualify that residence as temporary quarters for subsistence expense reimbursement purposes. The size of the residence (approximately 1500 square feet of living space with three bedrooms), and the fact that the Cooley family has lived there for more than 1 year, indicate that occupancy of those quarters has been other than temporary as defined in FTR, para. 2-5.2c.

Accordingly, based on the record before us, payment for temporary quarters subsistence expenses may not be allowed.

B-233987, B-233987.2, July 14, 1989

Procurement

Special Procurement Methods/Categories

■ Architect/engineering services

■■ Definition

Amendment to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 541 (1982) (the Brooks Act), clarifying the definition of architectural and engineering services subject to specialized Brooks Act procedures modifies prior General Accounting Office decisions interpreting the scope of the definition.

Matter of: Forest Service, United States Department of Agriculture-Request for Advance Decision

The Forest Service, United States Department of Agriculture, has requested an advance decision from our Office on the proper interpretation of the revised definition of architectural and engineering (A-E) services contained in Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988) and Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988), amending 40 U.S.C. § 541 (1982) (the Brooks Act).[1] The principal question raised by the Forest Service is whether various services enumerated in the new definition of A-E services, including mapping and surveying, require the use of specialized A-E procedures prescribed by the Brooks Act when those services are not being procured incidental to or in conjunction with traditional A-E projects.

Background

With the enactment of the Brooks Act in 1972, Congress established specialized procedures for the procurement of A-E services. Specifically, the Brooks Act requires the mandatory use of special procedures to procure A-E services encompassed by the definition contained in the act. Under these procedures, requirements and evaluation criteria are publicly announced, the qualifications of interested firms are evaluated, discussions are held, and the three most qualified firms are ranked in order of preference. Negotiations then are conducted with the highest ranked firm. If an agreement cannot be reached on a fair price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee. *AAA Engineering and Drafting, Inc., et al.,* 66 Comp. Gen. 436 (1987), 87-1 CPD ¶ 488. While contracts are required to be awarded at fair and reasonable prices on the basis of demonstrated competence and qualifications, the Brooks Act procedures effectively eliminate price competition for these professional services. Prior to the 1988 amendment, A-E services were defined at 40 U.S.C. § 541(3) (1982) as "those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform."

Interpreting this language in our decisions, we developed a two-pronged test for determining when Brooks Act procedures apply: (1) where the controlling jurisdiction requires an A-E firm to meet a particular degree of professional capability in order to perform the desired services, or (2) where the services "logically or justifiably" may be performed by a professional A-E firm and are "incidental" to professional A-E services (i.e., as part of an A-E project and provided in the course of furnishing A-E services for that project). *See Mounts Engineering,* B-230790; B-230791, Apr. 13, 1988, 88-1 CPD ¶ 365; *AAA Engineering and Drafting, Inc., et al.,* 66 Comp. Gen. at 440; *Ninneman Engineering—Reconsideration,* B-184770, Mar. 9, 1977, 77-1 CPD ¶ 171.

[1] These two Acts, passed within two days of each other, contain identical provisions revising the definition of A-E services.

In *Ninneman*, we explained that the first prong of the test was based primarily on the fact that the Brooks Act requires the procurement of "architectural or engineering services" to be from an A-E firm, which was defined in the act as "any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering." 40 U.S.C. § 541(1). We quoted the legislative history of the act as follows:

> This definition requires utilization of the selection provided in the bill for the procurement of architectural and engineering services, or also when the scope and the nature of the proposal, to a substantial or dominant extent, logically falls within the unique expertise of these professions.

S. Rep. No. 1219, 92d Congress, 2d Sess. 8 (1972); H.R. Rep. No. 1188, 92d Congress, 2d Sess. 10 (1972). Thus, we concluded that the first part of the Brooks Act definition, "professional services of an architectural or engineering nature," refers to "services which uniquely, or to a 'substantial or dominant extent' logically require performance by a professionally licensed and qualified 'architectengineer.'" *Ninneman Engineering—Reconsideration*, B-184770, *supra*. We noted that this definition would consist essentially of design and consultant services procured by federal agencies in connection with construction programs.

The second part of the definition of A-E services included "incidental services that members of these (A-E) professions and those in their employ may logically or justifiably perform." 40 U.S.C. § 541. We interpreted this language as meaning that Brooks Act procedures are applicable where the services may "logically or justifiably" be performed by A-E firms and where such services are "incidental" to other professional A-E services. Thus, as stated above, we interpreted the Brooks Act as requiring incidental services to be procured with Brooks Act procedures only when provided by an A-E firm in the course of providing other A-E services and as part of an A-E project. *AAA Engineering and Drafting, Inc., et al.*, 66 Comp. Gen. at 440.

The 1988 Amendment

As stated above, the definition of A-E services was recently amended by two separate but identical provisions of law. These statutes, Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988), and Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988), amended the Brooks Act definition at 40 U.S.C. § 541 to establish three separate and independent categories of A-E services, as follows:

> (3) The term "architectural and engineering services" means—
>
> (A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;
>
> (B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
>
> (C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs,

plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manual, and other related services.

The legislative history of Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988), indicates that the amendment is intended to clarify the definition of A-E services in response to General Accounting Office decisions issued since the enactment of the Brooks Act, "which have had the effect of narrowing the application of the law, particularly in the field of surveying and mapping." 134 Cong. Rec. H10058 (daily ed. Oct. 12, 1988) (statement of Mr. Myers). *See also* H.R. Rep. No. 911, 100th Cong., 2d Sess. 24 (1988) concerning Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988), which also notes the interpretation of the act by our Office.

The conference report (H.R. Rep. No. 100-1070, 100th Cong., 2d Sess. 89 (1988)) also clearly recognizes that the new definition of A-E services does not impair an agency's discretion to decide (on a case-by-case basis) what type of services should be performed by an A-E firm as opposed to a construction contractor.

Discussion

The definition of A-E services as stated in the 1988 amendment requires us to modify the two-pronged test enunciated in our prior decisions. Clause (C) of the 1988 amendment includes in the definition "other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform . . . ." The statute then lists services such as surveying and mapping which fall into this category. Thus, the revised definition now makes it clear that "incidental services" means types of services which are incidental to (part of) A-E services, and not, as we previously have held, incidental to an A-E project. The test to be applied in making this determination, then, is not whether the service is incidental to a traditional A-E project; rather, it is first, whether the service is the type which is incidental to professional services of an architectural or engineering nature, and if so, whether the service is one which members of the architectural and engineering profession may logically or justifiably perform.

Effective March 31, 1989, an interim rule implementing this new definition was promulgated which amends the definition of A-E services in the Federal Acquisition Regulation (FAR). The revised FAR definition (subsection (c) of section 36.102 (FAC 84-45)) states, consistent with our interpretation of the amendment, that A-E services include:

Other professional services of an architectural or engineering nature (including surveying and mapping, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that the contracting officer determines should logically or justifiably be performed by members of the architectural and engineering professions (and individuals in their employ).

Thus, the FAR revision provides that a contracting officer, in determining whether particular services are subject to the Brooks Act procedures, must de-

termine whether the services, independent of any project, are of an A-E nature which should logically or justifiably be performed by A-E professionals.

The Forest Service requests our decision on specific services for which it commonly contracts.[2] The agency states that several of the services are done as work preliminary to road, trail, or bridge construction. To the extent that they are part of an A-E project and are services which apparently should be performed by traditional A-E firms, we note that they are considered A-E services under FAR § 36.102(d) as well as section 36.102(c). However, with regard to other specific services not associated with a specific A-E project that are mentioned by the Forest Service, the determination of Brooks Act applicability should be made initially on a case-by-case basis by the contracting officer in accordance with the definition provided in the 1988 amendment and the FAR, since, as indicated in the conference report, this initial decision is within the discretion of the contracting agency. See H.R. Rep. No. 100-1070 at 89. We will review such determinations where it is alleged that the contracting officer has abused his discretion or made the determination in bad faith.

B-233372.2, B-233372.3, July 24, 1989

Procurement

Bid Protests
■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Adequacy

Prior decision is affirmed despite the agency's contention that protester was not prejudiced where the record remains unclear as to what selection decision would have been made if the awardee had submitted a factually accurate final offer concerning the availability and number of its proposed key personnel.

[2] The services listed by the Forest Service for our consideration in addition to mapping and surveying are property line marking services, preliminary surveys, construction surveys, construction sampling and testing, map scribing, map digitizing, map aerotriangulation, map compilation, mapping photolab activities, and value analysis engineering studies.

Procurement

Bid Protests
■ GAO procedures
■ ■ Preparation costs

Procurement

Competitive Negotiation
■ Offers
■ ■ Preparation costs

Award of protest costs is affirmed where, upon learning during the course of the protest that awardee misrepresented the availability and number of its key personnel, the agency elected to treat the matters as immaterial instead of taking prompt corrective action.

Matter of: Omni Analysis; Department of the Navy—Requests for Reconsideration

Omni Analysis and the Navy request reconsideration of our decision, *Omni Analysis,* B-233372, Mar. 6, 1989, 68 Comp. Gen. 300, 89-1 CPD ¶ 239, sustaining a protest against the award of a contract to Advanced Technology, Inc. (ATI), for training support services under request for proposals (RFP) No. N60921-88-R-0113. The Navy argues that the protest should not have been sustained because Omni was not prejudiced by the award. The agency also questions the award of protest costs, and both parties request modification of our recommended corrective action to recompete the Navy's requirements for the option periods.

We affirm our prior decision.

The RFP required offerors to propose a minimum of 18 key personnel; in addition, signed letters of intent were required for key personnel who were not in an offeror's employ. Proposals were to be evaluated in accordance with criteria placing more emphasis on technical considerations than cost, and personnel was one of the most heavily weighted technical evaluation factors. ATI's initial proposal was evaluated on the basis of the 18 employees it designated as key personnel and, as a result, it outscored Omni by 75 points out of 1000 possible. In its best and final offer (BAFO)—which was not rescored—ATI did not disclose that two of its proposed key personnel had left its employ and, in fact, gave assurances that its original personnel team remained intact.

Upon learning that several of ATI's key personnel had departed after the firm received evaluation credit for them, the Navy took the position that these departures were immaterial. In holding that the award to ATI was improper, we found that position to be unreasonable because, among other things, it ignored the fact that, in effect, ATI proposed only 16 key personnel, while the RFP required a minimum of 18. It also ignored the fact that the awardee continued to receive full evaluation credit for a lesser number of employees in a closely scored competition with Omni, who proposed a full personnel slate. Moreover, we held that by effectively misrepresenting the number and availability of its

key personnel, ATI had compromised the validity of the technical evaluation and the integrity of the procurement process.

The Navy contends that Omni was not prejudiced because it would not have received the award in any event. As support for this proposition, the agency relies on an RFP clause which provided that estimated cost could increase in importance as an evaluation factor as the degree of equality of technical competence between competing proposals increased. Noting that ATI's evaluated cost was lower than Omni's, the Navy argues that even if the awardee's technical score had been reduced as a result of its misrepresentations, the firm "most likely would have received the award" by operation of this clause.

Our earlier decision specifically considered ATI's 75-point technical scoring advantage and the fact that its evaluated costs were about 7 percent less than Omni's. However, in concluding that it was not clear from the record whether ATI would have received the award if it had submitted a factually accurate BAFO, we noted that the evaluators thought highly of the two employees who departed after evaluation and were not available to perform, and that they were impressed with the "fact" that ATI had proposed a readily available slate of 18 of its own employees. Moreover, we noted that the RFP simply did not provide for offers to be evaluated on the basis of fewer than 18 key personnel. In addition, although not specifically cited in our earlier decision, we were aware of the RFP language now relied upon by the agency in its request for reconsideration and, thus, we remain unpersuaded that the misrepresentations in ATI's proposal were not prejudicial to Omni.

The Navy also questions the award of protest costs to Omni. While no longer disputing the underlying impropriety of ATI's actions in submitting a factually inaccurate BAFO, the agency argues that, since it had no pre-award knowledge of the firm's misrepresentations, there is no basis for our Office to determine that the award did not comply with statute or regulation—a prerequisite to the award of protest costs. *See* Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1) (Supp. IV 1986).

We recognize that the award was made by the Navy without prior knowledge of the misrepresentations in ATI's proposal. However, the Navy was aware of ATI's factually inaccurate BAFO as early as its receipt of Omni's initial letter of protest where the issue was first raised—9 days after award and before contract performance was scheduled to begin. The issue was more fully argued in the protester's comments on the agency report, and the Navy was provided by this Office with an opportunity to file a supplemental report in response. Instead of taking the corrective action it now suggests may be appropriate—*i.e.*, conducting another evaluation and soliciting another round of BAFOs— the Navy elected to treat the matter as immaterial and maintained this position throughout our consideration of Omni's protest. In these circumstances, we believe that the protester is entitled to be reimbursed for the reasonable costs of pursuing its protest. *Cf. Storage Technology Corp.*, B-235508, May 23, 1989, 89-1 CPD ¶ 495 (holding that the award of protest costs is inappropriate where an agency takes prompt corrective action to remedy a defective award selection

brought to its attention by a protester, and thereby obviates a decision on the merits).

The Navy also argues that we should limit Omni's entitlement to only those costs incurred in pursuing the one issue on which it prevailed, as we did in *Interface Flooring Sys., Inc.—Claim for Attorneys' Fees,* 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106, and in *Ultra Technology Corp.,* B-230309.6, Jan. 18, 1989, 89-1 CPD ¶ 42. For the reasons discussed below, we disagree.

As a general rule, we consider a protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails, since they are intertwined parts of a successful protest of one contract award. *See Princeton Gamma-Tech, Inc.—Claim for Costs,* B-228052.5, Apr. 24, 1989, 68 Comp. Gen. 400, 89-1 CPD ¶ 401.

Interface Flooring, cited by the Navy, is an exception to the general rule involving protests in which there are unsuccessful challenges to line items which are awarded separately from those which are successfully challenged; as we specifically noted in that decision, protests involving separately awarded items stand in contrast to protests where, as here, several grounds of objection to the same award are raised.

In the other case cited by the Navy, *Ultra Technology,* we limited the recovery of costs where we sustained a protest solely because the record disclosed a "possibility" that the agency had made an improper award. It was subsequently determined that the award was proper. *See Ultra Technology Corp. et al.—Requests for Reconsideration,* B-230309.7, B-230309.8, June 6, 1989, 89-1 CPD ¶ 528.

Finally, in lieu of our recommendation to recompete the option requirements, Omni requests that we modify our decision to recommend termination of ATI's contract and immediate recompetition, while the Navy suggests that it may be appropriate to conduct another evaluation and solicit another round of BAFOs on the original procurement. Since the agency reports that it has already undertaken to recompete the option requirements in accordance with our recommendation, and in view of the short time remaining on ATI's contract, we do not believe that termination for convenience and recompetition are feasible. As to the agency's suggestion for another evaluation and another round of BAFOs, as discussed above, the appropriate time for such corrective action has passed.

The prior decision is affirmed.

B-235000, July 24, 1989

Procurement

Bid Protests
■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Procurement

Competitive Negotiation
■ Contract awards
■■ Propriety
■■■ Corporate entities

Generally, firm that is owned or controlled by federal employees is not eligible for award of contract and is not an interested party to protest since it would not be in line for award even if its protest were sustained. Firm is an interested party, however, where federal employees that own and control firm were eligible to retire and indicated in their proposal their willingness to retire from government employment before award, since date of award is the critical time at which, in order to be eligible for award, an offeror may not be owned or controlled by government employees.

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Terms
■■■ Ambiguity allegation
■■■■ Interpretation

Where there is a dispute between the protester and the agency as to the meaning of provisions of a solicitation, GAO will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation.

Matter of: Wildcard Associates

Wildcard Associates protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 7FXI-D5-89-S018-N, issued by the General Services Administration (GSA) for a review of GSA's Southwestern Distribution Center to be used in an Office of Management and Budget (OMB) Circular A-76 review.

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

The solicitation indicated that award was to be made to the responsible offeror whose offer conforms to the solicitation and is most advantageous to the government, price and technical factors considered. On the solicitation cover page and under the evaluation scheme, the RFP indicated that proposals which showed no evidence of prior A-76 project experience would be considered unacceptable and would be rejected. The evaluation scheme, which indicated that demonstrated A-76 experience was the most important factor, included five technical evaluation factors. The first factor required that offerors list A-76 projects completed and give sufficient information for evaluation and verification. The second

factor indicated that more recent A-76 projects would receive greater consideration and the third factor requested information on A-76 projects completed, such as whether deliverables were provided in accordance with the contract and accepted by the government. The fourth factor indicated that an offeror's project manager, management analyst and cost analyst must have certain specified experience; for example, among other things, the project manager was required to have directed or supervised at least three A-76 reviews. The fifth factor requested information on the offeror's approach to the study.

After evaluating the initial proposals submitted under the RFP, GSA determined that Wildcard's offer was unacceptable since it did not show evidence of organizational experience with prior A-76 projects. Specifically, the evaluation panel noted that the firm has completed no A-76 studies itself and that the only A-76 experience listed in the Wildcard proposal was gained by individual Wildcard employees in their capacity as government employees.

The agency further explains that Wildcard's employees did not meet the individual employee experience requirements of the solicitation since, according to Wildcard's proposal, the experience of the firm's personnel was gained "as managers of functions under A-76 study and in personnel operations associated with those studies." By letter of March 14, the contracting officer notified Wildcard that its proposal was technically unacceptable and would not be considered further.

Wildcard protested to this Office on March 30, contending that its proposal met the requirements of the solicitation, since employees of the firm have extensive experience in conducting A-76 studies as federal government employees. According to the protester, the GSA solicitation simply required experience in A-76 commercial activity studies and did not specify that the experience must have been gained as a private business.

As a preliminary matter, GSA argues that Wildcard is not an interested party for purposes of filing a protest. Under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988), a party must be "interested," that is, must have a direct economic interest in the award or failure to award a contract in order to have its protest considered by our Office. Generally, a party will not be deemed to have the necessary direct economic interest to be considered an interested party where it would not be in line for award even if its protest were sustained, and we will dismiss a protest under these circumstances. *Prison Match, Inc.*, B-233186, Jan. 4, 1989, 89-1 CPD ¶ 8. Since Wildcard is owned and controlled by federal government employees, GSA maintains that under Federal Acquisition Regulation (FAR) § 3.601, the contracting officer could not award a contract to the firm and, under the circumstances, we should not consider its protest.

FAR § 3.601 provides that a contracting officer shall not knowingly award a contract to a government employee or to a firm that is substantially owned or controlled by government employees. Under that provision, which is intended primarily to avoid any actual conflicts of interest and the appearance of possible favoritism or preferential treatment by the government toward its employ-

ees, the date of award is the critical time at which, in order to be eligible for award, an offeror may not be a government employee or be owned or controlled by government employees. *Big Sky Resource Analysts, et al.,* B-224888, B-224888.2, Jan. 5, 1987, 87-1 CPD ¶ 9.

Here, Wildcard's proposal indicated that two of its partners were still government employees but "[u]pon contract award, each partner will be retired and will work full-time on this contract." The record indicates that those individuals were eligible to retire at any time. Since the date of award is the critical time at which the firm could not be owned or managed by government employees, and Wildcard's partners could retire before the award, a contract award to the firm would not have been prohibited by FAR § 3.601 if, in fact, they resigned their government positions before the award. *Big Sky Resource Analysts, et al.,* B-224888, B-224888.2, *supra* (award of contract to former government employee who resigned government position 1 day before award is not prohibited by FAR § 3.601). Thus, since Wildcard would be eligible for award, the firm is sufficiently interested to file a protest.

On the merits of the protest, GSA says that the RFP required offerors to detail both organizational and individual employee experience with A-76 projects. According to GSA, Wildcard's proposal did not meet the organizational A-76 experience requirements because Wildcard, a start-up firm, listed in its proposal no A-76 projects completed by the firm. As explained above, Wildcard maintains that the solicitation did not require an offeror to have A-76 experience as a firm.

Where, as here, there is a dispute as to the requirements of a solicitation, we read the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. *System Development Corp.,* B-219400, Sept. 30, 1985, 85-2 CPD ¶ 356. Reading the RFP as a whole, we conclude that it was clear that the agency was seeking a firm with A-76 project experience as a firm, not simply a firm that employs individuals with A-76 experience.

First, section L of the RFP stated that an offeror's technical proposal "must fully describe *the offeror's* . . . previous experience . . ." (Italic added) and that failure to provide evidence of prior A-76 experience will cause the rejection of the proposal. The evaluation factors also stated that "[o]fferors should list all A-76 projects completed," and should specify whether "deliverables" were provided in accordance with the contract and accepted by the government, in our view, all clear references to prior performance by the firm submitting the proposal, not the firm's employees. In our view, these proposal requirements indicate that the agency's concern was with the offerors' qualifications as firms and not just the experience *of* individuals employed by the firms.

In addition, the fact that the fourth evaluation factor specifically required detailed experience for individual members of the proposed project team is a further indication that the solicitation contemplated both organizational and individual A-76 experience. This provision, which required the listing of individual employees' experience, would have been redundant if the other factors noted

above also referred only to employee experience rather than organizational experience.

Thus, we think that it was clear from the solicitation that, to be considered technically acceptable, offerors were required to show evidence of organizational A-76 project experience. *See Norfolk Ship Systems, Inc.*, B-219404, Sept. 19, 1985, 85-2 CPD ¶ 309. As a result, we have no basis to question the agency's decision to reject Wildcard's proposal, since it included no evidence that the firm itself has completed any A-76 studies. In fact, it is clear on the face of the proposal that the firm could not have such experience since the proposal indicates that Wildcard is a recently started firm.

Since we agree with the agency's rejection of Wildcard's proposal because it did not include evidence of the required organizational experience, we need not consider whether the firm's proposal also failed to include evidence that the proposed employees met the individual personnel experience requirements.

Finally, to the extent that Wildcard protests that the solicitation requirement of organizational A-76 experience was restrictive of competition, this issue is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation must be protested prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(a)(1). Here, as explained, it was clear that the solicitation required organizational A-76 project experience; yet Wildcard did not protest until March 30, after the March 3 closing date. Thus, we will not consider this issue.

The protest is denied in part and dismissed in part.

B-234920, B-234920.2, July 27, 1989

Procurement

Competitive Negotiation

■ Offers

■ ■ Cost realism

■ ■ ■ Evaluation

■ ■ ■ ■ Administrative discretion

Agency cost realism analysis had a reasonable basis where the agency reviewed awardee's responses to agency cost discussions, verified labor categories, labor mix, labor hours proposed and burden rates, verified other miscellaneous direct costs, and verified awardee's overhead and general and administrative rates with the Defense Contract Audit Agency.

Procurement

Competitive Negotiation
■ Offers
■■ Cost realism
■■■ Evaluation errors
■■■■ Allegation substantiation

Protest that agency did not conduct a proper cost realism analysis of awardee's proposal is denied where, even though agency accepted awardee's zero percent general and administrative rate, under the contract awarded the firm waived its right to recover these costs throughout the life of the contract and agreed that these costs will not be allocated to any other government contract.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Technical acceptability

Protester's contention that the contracting agency improperly evaluated its technical proposal is denied where record shows that agency's evaluation of protester's proposal was reasonable and in accordance with the evaluation criteria.

Matter of: Raytheon Support Services Company

Raytheon Support Services Company protests the award of a cost-plus-award-fee contract to Burnside-Ott Aviation Training Center, Inc., under request for proposals (RFP) No. N68520-87-R-0018, issued by the Naval Aviation Depot Operations Center. The RFP was issued in connection with a cost comparison under Office of Management and Budget (OMB) Circular No. A-76. In its initial protest, Raytheon contends that the Navy did not properly evaluate the cost realism of Burnside-Ott's cost proposal and, in a supplemental protest, Raytheon argues that the Navy did not properly evaluate Raytheon's technical proposal. We deny the protests.

The RFP contemplates the award of a cost reimbursement contract for aircraft intermediate level maintenance repair and overhaul services at six Naval Air Stations. The contract is for a 6-month base period with four 1-year options. The RFP listed, in descending order of importance, the evaluation criteria of program requirements, organization/experience, management, transition and cost. Offerors were informed that the first factor was four times as important as the fourth factor. The RFP provided that cost was not as critical as the technical factors but its degree of importance would increase with the degree of equality of the proposals. Cost was to be evaluated on the basis of realism and, for purposes of award, the total cost of the basic requirements was to be evaluated together with the total cost for all options. The RFP also provided that award would be made to the offeror whose proposal offers the greatest value and is most advantageous to the government and reserved the right to the Navy to award on the basis of cost, if offerors' technical proposals in the competitive range were deemed substantially equal.

Eight timely proposals, including offers from Raytheon and Burnside-Ott, were received in response to the RFP. As the result of the initial technical and cost evaluations, a competitive range was established including five of these offerors. Based on initial evaluation, Raytheon's technical score was 877 points; its cost was $78,254,742. Burnside-Ott received 839 points; its cost was $81,722,058. Discussions were conducted with the competitive range offerors. Revised offers were submitted and evaluated. The technical evaluation committee found that, after revised submissions, both Burnside-Ott and Raytheon rated somewhat lower technical scores in some areas because of their responses to discussion questions. Raytheon was scored 840 points, Burnside-Ott 836 points. However, it was determined from the evaluation of the revised proposals that Raytheon, Burnside-Ott and a third company submitted proposals that were superior to the other offers and that these proposals were "essentially technically equal." Best and final offers (BAFOs) were requested from these three offerors.

Since Burnside-Ott, in its BAFO submission, proposed the lowest cost at $73,597,515, compared to $73,852,230 proposed by Raytheon, the Navy evaluated its cost first. The Navy found Burnside-Ott's cost to be realistic. Because Burnside-Ott's evaluated cost did not exceed the cost of either Raytheon's offer or the third offeror's proposal, and since the Navy anticipated only upward adjustments in the other proposals, based on proposed manning levels, the Navy did not evaluate the other offerors' proposed BAFO costs. The Navy determined that award to Burnside-Ott, as the lowest proposed/evaluated cost offeror, would be most advantageous to the government. Award of a contract to Burnside-Ott has not been withheld based upon the agency's determination that urgent and compelling circumstances exist which would not permit awaiting our determination in the matter. 31 U.S.C. § 3553(d)(2) (Supp. IV 1986); 4 C.F.R. § 21.4(b) (1988).

Raytheon first protests to our Office that the Navy failed to conduct a proper cost realism analysis of Burnside-Ott's unrealistically low cost proposal. Raytheon's cost realism allegation is based primarily on the fact that Burnside-Ott proposed a staffing level approximately 20 percent greater than Raytheon's proposed staffing. Raytheon argues that Burnside-Ott's larger staff could not be realistically evaluated at a lower estimated cost to the government. In support of its contention that the Navy's cost realism was improper, Raytheon raises three allegations. First, Raytheon argues that Burnside-Ott proposed direct labor at the very bottom of the wage scale and that the Navy's cost realism analysis accepted Burnside-Ott's contention in its BAFO that it would be able to employ highly skilled personnel at wages markedly less than the wages its competitor would pay. Second, Raytheon argues that the Navy failed to consider the impact of Burnside-Ott's proposal to allocate no General and Administrative (G&A) expenses and only some overhead expenses in conducting its cost realism analysis of Burnside-Ott's BAFO. Lastly, Raytheon objects to the Navy's decision to only perform a cost analysis on Burnside-Ott's BAFO and not the other offerors in the competitive range.

Initially, we note that the evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency involved. This is so because the agency is in the best position to assess "realism" of cost and technical approaches and must bear the difficulties or additional expenses resulting from a defective cost analysis. Since the cost realism analysis is a judgment function on the part of the contracting agency, our review is limited to a determination of whether an agency's cost evaluation was reasonably based and not arbitrary. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325; *Quadrex HPS, Inc.*, B-223943, Nov. 10, 1986, 86-2 CPD ¶ 545.

The record (portions of which were not released to the protester but which we have reviewed *in camera*) indicates that the Navy conducted a detailed cost analysis of Burnside-Ott's initial and BAFO proposal. The Navy initially performed a cost realism analysis on the five offerors in the competitive range. In its initial cost realism analysis, the Navy relied upon information from the cognizant Defense Contract Audit Agency (DCAA) auditors for verification of labor and burden rates proposed and from the requiring activity for verification of labor categories, labor mix and labor hours proposed. This analysis resulted in upward adjustments to both Raytheon's and Burnside-Ott's proposed costs. Both Raytheon and Burnside-Ott were advised of the deficiencies in their initial cost proposals during discussions and both submitted revised cost proposals in response to the discussions.

As previously stated, since Burnside-Ott proposed the lowest BAFO cost, its BAFO cost proposal was evaluated first for cost realism. With the exception of the proposed G&A expense and proposed fee, Burnside-Ott's BAFO was unchanged. Based on information from the technical evaluation team and the DCAA auditor, the agency determined all labor hours, labor mix, labor rates, labor escalation, staffing levels and burden rates proposed by Burnside-Ott in its BAFO remained acceptable. The record also shows that, contrary to Raytheon's contention that Burnside-Ott only proposed labor rates at the low end of the scale, Burnside-Ott's labor rates with respect to the individual categories were comparable to Raytheon's and, in fact, Burnside-Ott's total direct labor costs were greater than Raytheon's.

Additionally, because Burnside-Ott, in its BAFO, proposed no charge for G&A expenses throughout the life of the contract, the Navy discussed the matter with DCAA to determine the acceptability of this strategy. The Navy was advised that, although the proposed no-charge for G&A expense was not consistent with Burnside-Ott's Cost Accounting Standards Board's disclosure statement filed with DCAA which sets forth the company's accounting methods, since the contract itself contains a provision wherein Burnside-Ott waives the G&A charges and agrees that the G&A will not be allocated to any other contract, the offer could be accepted. We find nothing improper with the Navy's acceptance of Burnside-Ott's offer of no G&A charges, since G&A is not reimbursable under the contract and is not a cost the government will pay. *See, e.g., Support Systems Assoc., Inc.*, B-232473, B-232473.2, Jan. 5, 1989, 89-1 CPD ¶ 11. The record further indicates the Navy intends to monitor this contract and other

Burnside-Ott contracts to insure that these expenses are not applied to this procurement or to any other effort.

Raytheon's primary basis for questioning the agency's cost realism analysis of Burnside-Ott's cost proposal is the fact that Burnside-Ott proposed 20 percent greater staffing than Raytheon at a total cost (including indirect costs) lower than Raytheon proposed. However, the record shows that Burnside-Ott's direct labor costs were significantly higher than Raytheon's proposed costs and that Burnside-Ott's cost proposal did reflect the cost of its larger staff. The agency also found that the labor rates proposed by both offerors were comparable and reasonable. Burnside-Ott's offer to waive G&A and to offer a lower labor overhead rate, which the agency found acceptable, resulted in Burnside-Ott's slight cost advantage in the competition. Under these circumstances, we conclude that the agency's determination that Burnside-Ott's evaluated cost was low was reasonable.[1]

To the extent that the protester contends that Burnside-Ott's waiver of G&A is an attempt to "buy in," we have held that in a cost-reimbursement situation, an alleged "buy-in" (offering cost estimates less than anticipated costs with the expectation of increasing costs during performance) by a low-cost offeror furnishes no basis to challenge an award where, as here, the agency reasonably determines the realistic estimated cost of contractor's performance before award and makes award based on that knowledge. *See Bell Aerospace Co., et al.,* 54 Comp. Gen. 352 (1974), 74-2 CPD ¶ 248.

Raytheon next argues that the Navy improperly evaluated its technical proposal. In particular it argues that the Navy in conducting the technical evaluation of BAFOs improperly reduced Raytheon's evaluated technical score. Raytheon specifically alleges that the Navy improperly downgraded Raytheon in three evaluation areas, involving the maintenance function and drug/alcohol prevention program,[2] that were not the subject of negotiations. Raytheon further argues that the Navy also used an undisclosed evaluation factor, personal delay and fatigue time (employee productive time) in its evaluation of manning and did not uniformly apply it to all offerors.

First, as indicated above, the Navy did not perform a technical evaluation of Raytheon's BAFO. The initial technical evaluation established a point score for each offeror and these scores were adjusted (both upward and downward) to reflect the offerors' responses during discussions. After discussions were concluded, technical proposals were rescored and BAFOs requested. Raytheon did not revise the technical portion of its BAFO.

With regard to the Navy's downgrading Raytheon in the two technical evaluation areas pertaining to the maintenance function, the Navy states that these

[1] We find no merit to Raytheon's argument that the Navy should have made downward adjustments to its cost proposal for Raytheon's "inadvertent" failure to take into consideration any "productivity" or "learning curve" reductions in its cost proposal. The burden is on the offeror to submit a cost proposal that takes into consideration all aspects of its technical approach and the agency has no duty to prepare or revise an offeror's proposal.

[2] Since the agency only reduced Raytheon's drug/alcohol program evaluation one point after discussions, we find the reduction in this area did not prejudice Raytheon.

areas assess a contractor's capability to assure and control maintenance work flow. The Navy asserts that two discussion questions specifically related to the maintenance function and alerted Raytheon to the fact that the Navy perceived its staffing to be insufficient in this area which directly relates to Raytheon's ability to successfully perform. The Navy states that, while Raytheon's plan to perform the maintenance function was excellent, the evaluation team believed the number of productive manhours proposed, as a result of discussions, posed some risk regarding the successful performance of the plan they proposed.

The governing provision of the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(B) (Supp. IV 1986), as reflected in Federal Acquisition Regulation (FAR) § 15.610(b) (FAC 84-16), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. *Price Waterhouse,* 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, *aff'd on reconsideration,* B-220049.2, Apr. 7, 1986, 86-2 CPD ¶ 333. However, where a proposal is considered to be acceptable and in the competitive range, an agency is not obligated to discuss every aspect of the proposal that receives less than the maximum possible score. *Varian Assocs., Inc.,* B-228545, Feb. 16, 1988, 88-1 CPD ¶ 153.

Our review of the record shows no support for the protester's assertion that these areas were not brought to its attention during discussions. The record indicates that, during discussions, the Navy indicated to Raytheon that its proposed manning was considered to be insufficient. Raytheon, however, argues that the discussion questions as posed related to the organization/experience evaluation factor and not the program requirements, that is the type of work to be done, that are at issue here. We disagree. Specifically, Raytheon was asked to provide rationale for its proposed staffing for the maintenance/material function at two locations. Raytheon was also advised that its total overall manning was insufficient to satisfactorily perform all program requirements. Thus, the discussion questions clearly indicated the agency's concern that Raytheon's staffing and organization was insufficient to meet the program requirements. The record shows that Raytheon's revised technical proposal, submitted in response to the discussion questions, was still considered a risk because of the manning proposed and thus the Navy reasonably reduced Raytheon's score in these areas affected by manning.

Raytheon further argues that since Raytheon's revised proposal was submitted and evaluated prior to the request for BAFOs, it should have been given the opportunity to correct the stated deficiencies. An agency is not required to help an offeror by conducting successive rounds of discussions until deficiencies are corrected. *Realty Ventures/Idaho,* B-226167, May 18, 1987, 87-1 CPD ¶ 523. Accordingly, we find no merit to the protester's contention that the Navy should have reopened negotiations to discuss the inadequate proposed manning that had previously been brought to Raytheon's attention.

Raytheon also contends that its score was reduced in several areas concerning staffing because the Navy used a previously undisclosed evaluation factor, employee productive time. The agency reports that in evaluating staffing it did use

the employee productive time factor which Raytheon itself introduced as a factor in its proposal by stating in its revised technical proposal that its efficiency rate was 87 percent. As a result, Raytheon was downgraded in those areas.

Although employee productive time was not a stated evaluation factor, in this type of labor intensive contract the number of productive manhours is extremely important and the selection of a contractor which can best perform this contract involves close scrutiny of the labor mix and labor quantity. While technical evaluations must be based on the stated evaluation criteria, the interpretation and application of such criteria often involve subjective judgments. Thus, we will not object to the use of an evaluation factor not specifically stated in the RFP where, as here, it is reasonably related to the specified criteria and the correlation is sufficient to put offerors on notice of the additional criterion to be applied. *See Consolidated Group,* B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21 at 7, 8. We do not think that the agency's evaluation of staffing using the employee productive time factor submitted by Raytheon was unreasonable. Further, after considering the employee productive time, the agency reasonably concluded that Raytheon's staffing proposal was more risky than initially evaluated, and thus downgraded Raytheon based on its revised proposal.

Finally, even accepting Raytheon's argument that its initial technical score should not have changed, or its score should have been raised after discussions, the protester has not established that the Navy's conclusion that the three offers in the competitive range were technically equal was unreasonable and that the Navy's award to Burnside-Ott, as having submitted the most advantageous offer to the government, was improper. *Structural Analysis Technologies, Inc.,* B-228020, Nov. 9, 1987, 87-2 CPD ¶ 466.

The protests are denied.

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■ ■ Specific purpose restrictions

■ ■ ■ Entertainment/recreation

Music and other artistic events may constitute interpretative demonstrations at National Park Service (NPS) sites for which appropriated funds may be used. While our decisions provide some criteria for determining the propriety of entertainment expenses, we do not believe that a single rule can delineate the circumstances under which music and other artistic events constitute interpretative demonstrations. Rather, whether a particular event sufficiently interprets an NPS site must be determined on a case-by-case basis. Therefore, to assist NPS units in determining when entertainment may constitute an interpretative demonstration for an NPS site, we recommend that the NPS adopt guidelines consistent with our decisions.

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■ Purpose availability

■ ■ Specific purpose restrictions

■ ■ ■ Entertainment/recreation

U.S. Department of the Interior appropriations for the operation of the National Park System may be used to reimburse the Golden Spike National Historic Site imprest fund for the cost of musical entertainment provided at the Site's 1988 Annual Railroader's Festival. Under 16 U.S.C. § 1a-2(g), the Secretary of the Interior may contract for interpretive demonstrations at Park Service sites. The Golden Spike National Historic Site commemorates the 1869 completion of the first U.S. transcontinental railroad and the musical entertainment was representative of nineteenth century railroad and western U.S. music. We have no basis for questioning the agency's judgment that there was a meaningful nexus between the music and the purpose of the Golden Spike site. Further, the music was part of a program determined by the agency to advance the commemoration of Golden Spike, and was not elaborate or extravagant.

544

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Travel time

A nonexempt employee under the Fair Labor Standards Act (FLSA), who drives a government vehicle between a temporary duty site and lodgings during hours outside of the normal 40-hour workweek, is not entitled to overtime pay under the FLSA, even though the driver transports another employee, since use of the government vehicle cannot be considered a requirement of the employee's job.

535

Leaves Of Absence
■ Annual leave
■■ Lump-sum payments
■■■ Computation

In August 1987, immediately before beginning a 90-day temporary appointment with the Army, the claimant was notified that she had prevailed in an equal employment opportunity complaint against the Veterans Administration (VA). As a result, she was reinstated as a VA employee with backpay and restoration of leave from February 1984 until she started working for the Army. In view of her reinstatement by VA, she is treated as an employee who is transferred from one agency to another. Consequently, she first became entitled to a lump-sum leave payment at the end of her 90-day temporary appointment, and the Army must pay her for her full annual leave balance, including restored leave.

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Relocation
■ Residence transaction expenses
■■ Cooperative apartments
■■■ Title transfer
■■■■ Fees

A transferred employee may not be reimbursed the amount paid for a cooperative apartment transfer fee since it is not specifically authorized in the Federal Travel Regulations, nor is it analogous to other items for which reimbursement is authorized.

552

■ Temporary quarters
■■ Actual subsistence expenses
■■■ Reimbursement
■■■■ Amount determination

A transferred employee occupied temporary quarters for 60 days and claimed meal costs at an average daily rate of $35.05. The agency reduced the claim to $10.39 per day based upon an analysis of

the meal expenses claimed by other employees in that work area. The claim is returned to the agency for consideration of the reasonableness of the amounts claimed for meals based on valid statistical references from the Bureau of Labor Statistics or the Runzheimer Index.

550

■ **Temporary quarters**
■■ **Determination**
■■■ **Criteria**

A transferred employee and his immediate family moved into a house which he owned at the new duty station. He had rented it out for 3 years prior to transfer, and has currently listed it for sale. The employee claims entitlement to 60 days subsistence expenses for temporary occupancy of the residence, asserting that it is unsuitable for children and that he intends to move to permanent quarters closer to his worksite as soon as it is sold. His claim may not be allowed. The asserted unsuitability for children and the plan to move as soon as it is sold are too vague and indefinite to establish that the house qualifies as temporary quarters.

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Procurement

Bid Protests
■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Competitive Negotiation
■ Contract awards
■■ Propriety
■■■ Corporate entities

Generally, firm that is owned or controlled by federal employees is not eligible for award of contract and is not an interested party to protest since it would not be in line for award even if its protest were sustained. Firm is an interested party, however, where federal employees that own and control firm were eligible to retire and indicated in their proposal their willingness to retire from government employment before award, since date of award is the critical time at which, in order to be eligible for award, an offeror may not be owned or controlled by government employees.

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■ Offers
■■ Cost realism
■■■ Evaluation
■■■■ Administrative discretion

Agency cost realism analysis had a reasonable basis where the agency reviewed awardee's responses to agency cost discussions, verified labor categories, labor mix, labor hours proposed and burden rates, verified other miscellaneous direct costs, and verified awardee's overhead and general and administrative rates with the Defense Contract Audit Agency.

566

■ Offers
■■ Cost realism
■■■ Evaluation errors
■■■■ Allegation substantiation

Protest that agency did not conduct a proper cost realism analysis of awardee's proposal is denied where, even though agency accepted awardee's zero percent general and administrative rate, under the contract awarded the firm waived its right to recover these costs throughout the life of the contract and agreed that these costs will not be allocated to any other government contract.

567

■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Adequacy

Prior decision is affirmed despite the agency's contention that protester was not prejudiced where the record remains unclear as to what selection decision would have been made if the awardee had

Contractor Qualification

■ Organizational conflicts of interest

■■ Allegation substantiation

■■■ Evidence sufficiency

Agency is not required to exclude a firm from a procurement because of an organizational conflict of interest where, although the firm previously provided related services to the agency under a forerunner contract, it did not prepare the work statement, or material leading directly, predictably, and without delay to the work statement, under the current solicitation.

537

■ Responsibility/responsiveness distinctions

■■ Sureties

■■■ Financial capacity

Individual sureties improperly were found to lack inadequate net worths, and as a result low bidder improperly was rejected as nonresponsible, where agency failed to include sureties' personal residences as assets in net worth calculation; there is no general prohibition against sureties pledging their personal residences under a bid guarantee, and agency did not establish any basis for disregarding personal residences in this case.

529

Socio-Economic Policies

■ Small business set-asides

■■ Use

■■■ Administrative discretion

Agency determination that it could not expect to receive offers from two responsible small business concerns, based solely on outdated information regarding a solicitation issued 4 years ago, and therefore not to set the procurement aside for small business, was an abuse of discretion where 14 small business concerns responded to the *Commerce Business Daily* synopsis of the procurement.

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Special Procurement Methods/Categories

■ Architect/engineering services

■■ Definition

Amendment to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 541 (1982) (the Brooks Act), clarifying the definition of architectural and engineering services subject to specialized Brooks Act procedures modifies prior General Accounting Office decisions interpreting the scope of the definition.

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