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Notice

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

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Preface

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

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

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

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

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

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

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

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June 1989

B-233393.3, June 1, 1989

Procurement

Bid Protests
■ GAO authority

Procurement

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

On reconsideration, General Accounting Office reverses prior dismissal of protest concerning request for rate tenders from freight carriers issued under the Department of the Army's Military Traffic Management Command's guaranteed traffic program pursuant to the Transportation Act of 1940, and asserts jurisdiction under the Competition in Contracting Act of 1984 over protests concerning such transportation services procured pursuant to the Transportation Act. 65 Comp. Gen. 328 (1986), B-229890, Mar. 3, 1988 and B-233393, Nov. 9, 1988, overruled.

Matter of: Federal Transport, Inc.—Request for Reconsideration

Federal Transport, Inc., requests reconsideration of our decision, *Federal Transport, Inc.*, B-233393, Nov. 9, 1988, 88-2 CPD ¶ 465, dismissing the firm's protest concerning the decision of the Army's Military Traffic Management Command (MTMC) to allow Shuttle Express, Inc., to correct a mistake in its tender under a request for tenders (RFT) for shipment of certain specified cargos from the Defense Depot at Memphis, Tennessee. We reverse our prior dismissal and assume jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 *et seq.* (Supp. IV 1986), over protests concerning RFTs issued under MTMC's guaranteed traffic program pursuant to the Transportation Act of 1940, as amended, 49 U.S.C. § 10721 (1982).

Federal Transport argued in its protest that it had been awarded primary or first alternate motor carrier status for certain regions, and that following correction of Shuttle Express's tender, it lost that status. We dismissed the protest as outside our bid protest jurisdiction because the RFT was issued under the authority of the Transportation Act; the negotiations for the rate tender did not result in a contract; and the document used to obtain the actual transportation would be a government bill of lading (GBL). *See Petchem, Inc.*, 65 Comp. Gen. 328 (1986), 86-1 CPD ¶ 179; *Sam Trucking*, B-229890, Mar. 3, 1988, 88-1 CPD ¶ 425.

Federal Transport now requests reconsideration of our prior dismissal, arguing that the Transportation Act is a procurement statute, that MTMC's rules governing rate tenders are procurement regulations, and that, consequently, our Office should assert jurisdiction over protests concerning transportation services procured pursuant to the Transportation Act because CICA authorizes our Office to decide protests concerning alleged violations of a procurement statute or regulation.

Under the Interstate Commerce Act, 49 U.S.C. §§ 10101 *et seq.* (1982), common carriers by motor vehicle must publish and file with the Interstate Commerce Commission tariffs naming rates and charges for the services offered, and are prohibited from charging, demanding, collecting, or receiving a greater, less or different compensation for transportation. However, pursuant to 49 U.S.C. § 10721, a carrier may transport government property free or at reduced rates. The GBL is the document used by the government for acquiring freight transportation services from common carriers.

MTMC is the agency responsible for the direction, control, and supervision of all functions incident to the acquisition and use of freight transportation services for the Department of Defense (DOD) from commercial transportation companies. The acquisition of these services by GBLs where rates have been negotiated under section 10721 of the Transportation Act is accomplished pursuant to MTMC's own regulations, and is expressly exempt from the Federal Acquisition Regulation (FAR) and the DOD FAR Supplement (DFARS). *See* FAR §§ 47.000(a)(2), 47.200(b)(2), (b)(3) and (e); DFARS § 1.103(b).

MTMC acquires its transportation services pursuant to the Defense Traffic Management Regulation, which provides for MTMC authority over DOD transportation, and the MTMC Inland Freight Traffic Regulation 55-1, which governs negotiations for commercial transportation, tariffs, tenders, rates and routings. Regulation 55-1 provides for carriers' complaints to be handled by the heads of principal staff elements at MTMC headquarters; complaints concerned with policy or those affecting more than one area command are directed to the Commander of MTMC.

MTMC conducts approximately 73 percent of its transportation business, involving 1,346,000 GBLs per year, pursuant to voluntary tenders of one-time routine routings (1986 statistics). The other 27 percent of MTMC's transportation business is acquired through the agency's guaranteed traffic program and involves repetitive movements. As in this case, the tenders for these routes are solicited through the issuance of an RFT by MTMC. The RFT states that MTMC's actual requirements for transportation services will be allocated for the 24-month period of the RFT to the responsive, responsible carrier whose offer conforms to the RFT and will be most advantageous to the government, cost and other factors considered. Alternate carriers for each route are also selected. Any carrier selected by MTMC may cancel its tender provided it gives written notice of not less than 30 days, or a shorter time period upon mutual agreement between the carrier and the government.

Under CICA, 31 U.S.C. § 3552, our Office is authorized to decide protests concerning alleged violations of a procurement statute or regulation. Section 10721 of the Transportation Act is a procurement statute in the broad sense since it authorizes the government to obtain transportation services from common carriers at rates below those in their published tariffs. Further, unlike the issuance of GBLs, where MTMC merely selects a tender for a one-time routing without issuing any type of solicitation or conducting a formal source selection, all the indicia of a procurement are present in MTMC's guaranteed traffic program. MTMC issues a request for rate tenders which provides for award to the responsive, responsible carrier whose offer is most advantageous to the government, cost and other factors considered, for all the traffic for a particular route for a specific period of time. In response to the solicitation, MTMC receives rate tenders that are offers to perform transportation services at stated prices. After evaluation of offers, MTMC accepts the offer of a primary carrier and awards what is in effect a requirements contract to that carrier.

Accordingly, although MTMC does not literally follow the procurement procedures outlined in the FAR and the DFARS, it uses similar provisions in its solicitations for procuring transportation services under the guaranteed traffic program. We conclude, therefore, that the current protest falls within our jurisdiction under CICA and hereby overrule *Petchem, Inc.*, 65 Comp. Gen. 328 *supra,* and *Sam Trucking,* B-229890, *supra.* We find however, that the protest is without merit.

Although the RFT directed that tender rates be expressed in cents per mile without the use of decimals, Shuttle Express's tender was stated in decimals, offering, for example, a rate of 1.24 rather than 124 for a certain route. After MTMC rejected Shuttle Express's and other tenders because of the use of decimals in the rates, Federal Transport was designated primary carrier on certain routes. Shuttle Express then requested MTMC to allow it to correct the mistake in its rates and to reconsider its low tender. On reviewing Shuttle Express's tender, MTMC allowed correction, waiving the firm's use of decimals as a minor irregularity, and designated Shuttle Express primary carrier on certain routes, displacing Federal Transport.

We do not find MTMC's action to be improper. Although the RFT requested that tender rates be stated in cents per mile and included a cautionary statement to offerors not to use decimals, the RFT reserved to MTMC the right to waive informalities and minor irregularities in tendered charges. The irregularity in Shuttle Express's rate was apparent from the face of the tender, since the firm used decimal points, and its offered rates, for example, 1.24 cents, were clearly in error when compared to all other tenders for the routes in question. Moreover, Shuttle Express's rates would have been low with or without waiver of the irregularity. Accordingly, MTMC correctly waived the irregularity in Shuttle Express's tender.

Our prior dismissal is reversed and the protest is denied.

B-231520, June 2, 1989

Civilian Personnel

Travel

■ Temporary duty

■ ■ Determination

Civilian Personnel

Travel

■ Temporary duty

■ ■ Per diem

■ ■ ■ Eligibility

Two Interior Department employees, who were assigned to temporary duty on the Statue of Liberty/Ellis Island project, may be paid per diem even though their assignments may last 2 to 3 years. These assignments can be considered temporary duty given the nature of the duties and the fact that the project is time-limited even though it has encountered unanticipated delays beyond the control of the agency. *See Edward W. DePiazza,* B-234262, dated today.

Matter of: Peter F. Dessauer and Richard E. Wells—Temporary Duty—Long-Term Assignments

This decision is in response to a request by the Department of the Interior concerning per diem payments to two Interior Department employees who have been on long-term temporary duty assignments at the Statue of Liberty/Ellis Island Project Office.[1] We conclude that these two employees may be paid per diem for this assignment; it does not require a permanent change of station.

Background

The two Interior employees involved in this case are Mr. Peter Dessauer, an architect, and Mr. Richard E. Wells, a construction manager. They have been assigned to monitor and inspect the Statue of Liberty/Ellis Island rehabilitation project. Both employees' permanent duty stations are in Denver, Colorado, and they have been on temporary duty travel status since their assignments to this project in 1986 and 1987, respectively.

The request from Interior explains that Messrs. Dessauer and Wells work in the Denver Service Center, a centralized architectural, design, and construction office which serves the entire National Park Service. In many cases, project supervisors from this office move from project to project in continuous travel status, with their official duty stations remaining in Denver, Colorado. However, there are frequent occasions where a project is so large in scope, as in the present case, that employees from this office are required to remain in one location for an extended period of time.

[1] The request was submitted by Mr. Mark D. Hooper, Chief, Branch of Accounts Payable, National Park Service, Department of the Interior, Denver, Colorado.

The Interior Department's submission also states that this project is a temporary project similar to any other construction project, even though this assignment may last 2 to 3 years. When the employees were assigned to this project, the Interior Department reasonably believed that the duration of the assignment would be for a much shorter period. However, there were delays which took place which were beyond the control of Interior Department or these two employees. Interior argues that the delay should not change the essential character of the construction supervision function, which is temporary rather than permanent.

In view of our decisions limiting the length of temporary duty assignments, Interior asks whether these employees' per diem allowances may be continued or whether the employees must be transferred under permanent change-of-station orders to New York.

Opinion

Our decisions have held that whether an assignment to a particular location should be considered a temporary duty assignment or a permanent change of station is a question of fact to be determined from the orders directing the assignment, the duration of the assignment, and the nature of the duties performed. *Bertram C. Drouin,* 64 Comp. Gen. 205 (1985); *Peter J. Dispenzirie,* 62 Comp. Gen. 560 (1983), and cases cited therein.

As discussed above, the character of an assignment must be determined not only from its duration but also from the nature of the duties assigned. In this case considering the temporary nature of the project and of the architectural and construction supervision function, we conclude that the assignments fulfilled a legitimate objective of temporary duty. In addition, we note that the work must be performed at a particular location and it is expected that the employees will return to the permanent duty station (or move to another construction project) at the completion of this assignment. Therefore, we would not object to the payment of per diem to these two employees until the completion of their assignments. *See Edward W. DePiazza,* B-234262, 68 Comp. Gen. 465, dated today.

Finally, Interior asks whether employees who are assigned to one temporary duty site for a legitimate long-term temporary duty assignment and then reassigned to another temporary duty site may continue to receive per diem if they return on temporary duty to the first site. For example, Mr. Dessauer was first assigned to the Statue of Liberty/Ellis Island project in New York during the summer of 1985. From the fall of 1986 to the fall of 1987 he worked on another project in Boston before returning to his first assignment in New York. Interior asks whether Mr. Dessauer is limited to 1 year of per diem in New York or whether he may resume his temporary duty assignment in New York.

Our response to the question is that the length of time on temporary duty does not govern the per diem entitlement. The agency need not compute the months

at each assignment to determine whether the employee has exceeded an arbitrary figure, such as 1 year of per diem payments. Instead, the agency should analyze each long-term assignment based on the criteria set forth above to determine whether the assignment is permanent in nature and should be accomplished by a relocation of the employee, or whether it is temporary in nature and should be performed under temporary duty travel.

Accordingly, the vouchers submitted to our Office and other similar temporary duty vouchers from these two employees may be paid, if otherwise proper.

B-231826, June 2, 1989

Civilian Personnel

Relocation

■ Residence transaction expenses

■ ■ Miscellaneous expenses

■ ■ ■ Reimbursement

An employee became legally obligated to buy a home at his old duty station and subsequently learned he was being considered for a new position in another state. The legal fees incurred in renegotiating the sales contract to include a clause allowing the employee to terminate the contract without loss of the deposit if the employee transferred may not be reimbursed as a real estate expense under 5 U.S.C. § 5724a(a)(4) since he did not acquire an interest in the property. However, the legal fees may be reimbursed as a miscellaneous expense under 5 U.S.C. § 5724a(b), subject to the agency's determination that an administrative intent to offer him the new position had been expressed before the expenses were incurred.

Civilian Personnel

Relocation

■ Residence transaction expenses

■ ■ Litigation expenses

■ ■ ■ Attorney fees

■ ■ ■ ■ Reimbursement

An employee's legal expenses incurred in connection with the preparation and settlement of a claim against his agency for relocation expenses may not be reimbursed since no express statutory authority allows such payment.

Matter of: James K. Payne—Attorney Fees—Relocation

This is in response to a request from the Finance and Accounting Officer for the U.S. Army Corps of Engineers, Baltimore District, for an advance decision concerning a claim by Mr. James K. Payne for reimbursement of $384 in attorney fees incurred in the renegotiation of a contract to purchase a home. Mr. Payne also seeks attorney fees of $120 incurred in the preparation of this claim.

For the reasons stated below, we find that Mr. Payne is not entitled to reimbursement of the attorney fees of $384 as a real estate expense. However, he may be eligible for reimbursement of this amount as a miscellaneous expense of

relocation, subject to an agency determination that there was an administrative intent to offer Mr. Payne a new position at the time the expenses were incurred. Mr. Payne is not entitled to reimbursement of the additional $120 attorney fees.

Background

Mr. Payne was employed at the Naval Air Engineering Center in Lakehurst, New Jersey, in July 1987. On July 25, 1987, Mr. Payne submitted an offer to purchase a home in New Jersey, which the seller accepted on July 27. Two days later, Mr. Payne was informed that he was being considered for a position as a Civil Engineer with the Army Corps of Engineers in Pennsylvania. Mr. Payne immediately engaged an attorney to renegotiate the purchase contract to include an option to terminate in the event he transferred to Pennsylvania. The amended contract was executed on August 5, 1987, and gave Mr. Payne the right to terminate the contract on or before August 20, 1987. On August 17, 1987, Mr. Payne was formally notified of his selection for the position, and he promptly terminated the contract. He received travel orders on September 11, 1987, authorizing his travel from New Jersey to Pennsylvania.

Mr. Payne contends that he should be reimbursed for his legal expenses since they were incurred as a direct result of his official change of duty station to Pennsylvania. He asserts that the action he took to renegotiate the contract actually minimized the ultimate costs to the government, since if he had not renegotiated he would have been forced to forfeit the deposit or resell the property. Mr. Payne also claims reimbursement for the legal expenses incurred in preparing his claim for settlement.

Opinion

The statutory authority for reimbursing an employee for real estate expenses incurred incident to a transfer is 5 U.S.C. § 5724a(a)(4) (1982 and Supp. IV 1986). Paragraph 2-6.1c of the Federal Travel Regulations (FTR) (Supp. 1, Nov. 1, 1981), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1987), implementing that statute, provides that reimbursement of the expenses of selling the old residence may be made if title to the residence is held by the employee prior to the date the employee was first notified of the transfer to the new duty station. *See also David Riddering,* B-223004, Nov. 3, 1986. Since Mr. Payne never acquired title to the property, his claim for legal costs associated with renegotiating the contract may not be paid as a real estate expense.

If Mr. Payne had not incurred the legal fees involved in renegotiating the contract, he would likely have forfeited the $8,250 deposit. This amount also would not have been reimbursed as a real estate expense, since Mr. Payne had obtained no legal interest in the property. *See David D. Lombardo,* B-190764, Apr. 14, 1978. However, we have authorized reimbursement of a deposit made on the purchase of a residence which was later forfeited upon transfer under the au-

thority provided in 5 U.S.C. § 5724a(b) and the implementing regulations in FTR, para. 2-3.1 *et seq.* for the payment of miscellaneous expenses. *See* 55 Comp. Gen. 628 (1976); *Ralph A. Neeper,* B-195920, June 30, 1980. Therefore, had Mr. Payne forfeited his deposit he would have been eligible for reimbursement of the deposit as an item of miscellaneous expense.

In this case, Mr. Payne avoided such forfeiture by negotiating for the inclusion of an option clause allowing him to terminate the contract. In *Steven W. Hoffman,* B-193280, May 8, 1979, we considered a similar claim for legal expenses. In *Hoffman,* the employee, without knowledge of an upcoming transfer, entered into a contract for the construction of a home at his old duty station. Upon receiving notice of his transfer, he engaged the services of an attorney to aid in the rescission of his construction contract and claimed the legal fees. While recognizing that reimbursement could not be made on the basis that the legal fees were real estate expenses since title had not passed to the employee prior to the notification, we permitted reimbursement as a miscellaneous expense pursuant to FTR, para. 2-3.1. We found that there was no meaningful difference between the forfeiture of a deposit in order to be released from a purchase contract and the incurring of expenses in order to accomplish the same objective where the expenses seem reasonable.

Thus, Mr. Payne may be eligible for reimbursement for the legal fees incurred in connection with the renegotiation of the sales contract under FTR, para. 2-3.1. However, reimbursement is contingent upon a finding that the expenses, which in this case were incurred prior to formal notification of his selection for the new position, were based upon a previously existing administrative intent to offer the new position to Mr. Payne. *See* FTR, para. 2-3.2a; *Bernard J. Silbert,* B-202386, Sept. 8, 1981; *Joan E. Marci,* B-188301, Aug. 16, 1977. What constitutes a clear intention to transfer an employee is dependent on the specific circumstances of each case. *Philip H. Postel,* B-187107, Oct. 7, 1976.

We have held in past decisions that verbal notification of a tentative selection for a position may constitute a clear intention to transfer an employee. *Gerald S. Beasley,* B-196208, Feb. 28, 1980, and cases cited. In this regard, we have found that the requisite administrative intention existed where agency personnel orally advised the employee that he had been selected for a position but that his transfer was contingent on the occurrence of a particular event. *James H. Hogan,* B-191912, Apr. 5, 1979; *John J. Fischer,* B-188366, Jan. 6, 1978.

It appears from the record that such administrative intent was present in this case and that it was reasonable for Mr. Payne to have incurred the legal expenses in anticipation of an offer. If the agency determines that such an intent was present, Mr. Payne may be reimbursed for his legal expenses. The amount he is eligible to receive may not exceed the maximum reimbursement for miscellaneous expenses allowable under FTR, para. 2-3.3.

In regard to the attorney fees incurred in the preparation of this claim, we have held that such expenses are not reimbursable. Absent express statutory authority, reimbursement of attorney fees in connection with the settlement of claims

may not be allowed. *Leland M. Wilson,* B-205373, Apr. 24, 1984. *See also Julian C. Patterson,* 61 Comp. Gen. 411 (1982); *Norman E. Guidaboni,* 57 Comp. Gen. 444 (1978).

Accordingly, subject to the agency's determination concerning administrative intent to transfer, Mr. Payne may be entitled to reimbursement as a miscellaneous expense for the attorney fees incurred in the contract renegotiation, but not for the legal expenses incurred in the preparation of this claim.

B-232317, June 2, 1989

Civilian Personnel

Relocation
■ Temporary quarters
■■ Actual subsistence expenses
■■■ Reimbursement
■■■■ Eligibility

A transferred employee, who performed en route travel for more than 24 hours, and arrived at 9 p.m., claims lodging costs for the evening of arrival. The claim is denied. Under paragraph 1-7.5b(2)(c) of the Federal Travel Regulations (FTR), his allowable en route per diem for the last day is limited to the meals and incidental expense (M&IE) rate for the previous day. Since he arrived during the last quarter of the day, the full daily M&IE rate is payable. Under FTR, para. 2-5.2g(1)(a), his temporary quarters eligibility begins with the next calendar day quarter. Since that was the first quarter of the following day, that full day is the first day of temporary quarters eligibility for which 60 days temporary quarters subsistence expenses were reimbursable thereafter.

Civilian Personnel

Relocation
■ House-hunting travel
■■ Travel expenses
■■■ Reimbursement
■■■■ Amount determination

Civilian Personnel

Relocation
■ Temporary quarters
■■ Actual subsistence expenses
■■■ Spouses
■■■■ Eligibility

A transferred employee, who occupied temporary quarters, was joined by his wife for 8 days of househunting during the temporary quarters occupancy period. The employee is entitled to continue receiving temporary quarters subsistence expense for himself during that period, and, under FTR, para. 2-4.1a, to receive reimbursement for his wife's travel expenses and per diem, limited to the meals and incidental expense rate, during the 8 days of househunting. *George L. Daves,* 65 Comp. Gen. 342 (1986).

Matter of: George H. Wolfe—Relocation Travel—Temporary Quarters Inception—Spouse's Househunting Trip

This decision is in response to a request from an Authorized Certifying Officer, Bureau of Reclamation, United States Department of the Interior,[1] concerning the entitlement of an employee to be reimbursed additional temporary quarters subsistence expenses incident to a permanent change of station in January 1988. We conclude that the expenses claimed may be allowed in part, for the following reasons.

Background

Mr. George H. Wolfe, an employee of the Bureau of Reclamation, was transferred from Sacramento, California, to Denver, Colorado, with a reporting date of January 8, 1988. His travel authorization provided for a temporary quarters subsistence expense allowance for up to 60 days, less any househunting trip days performed by him and his wife prior to transfer.

On January 4, 1988, Mr. Wolfe, unaccompanied by his wife, began his en route travel. He arrived in the Denver area at 9 p.m. on January 7, 1988, where he remained in temporary quarters until March 7, 1988. On January 24, 1988, his wife traveled to Denver for an 8-day househunting trip.

The agency disallowed Mr. Wolfe's claims for (1) lodging expense ($63) for the evening of January 7, and (2) temporary quarters for himself for 8 days ($314.15) while his wife was in Denver on the househunting trip. Mr. Wolfe appeals the agency disallowances.

Opinion

Sections 5724 and 5724a of title 5, United States Code, authorize the reimbursement of certain expenses incurred by an employee and his family incident to a permanent change of station. Among those are the expenses of en route travel, temporary quarters subsistence, and a househunting trip. The regulations governing these matters are contained in chapter 1, part 7 and chapter 2, parts 4 and 5 of the Federal Travel Regulations (FTR).[2]

FTR, paragraph 1-7.5b, entitled "Per diem allowance computation," provides in part:

(2) *Travel of more than 24 hours.*

* * * * *

(c) *Day travel ends.*

[1] Sandra L. Inglefield, Denver, Colorado.
[2] *Incorp. by ref.*, 41 C.F.R. § 101-7.003 (1988). *See* Supp. 4, Aug. 23, 1982; Supp. 20, May 30, 1986; and Supp. 24, July 15, 1987.

(i) *Determining applicable rate.* For the day travel ends (when employee . . . arrives at the new official station . . .), the per diem allowable shall be the M&IE [meals and incidental expense] rate applicable to the preceding calendar day prorated. . . .

(ii) *Method of prorating M&IE rate.* The M&IE rate shall be prorated by dividing the day travel ends into 6-hour periods beginning at 12:01 a.m. . . . . For each 6-hour period, or fraction thereof, one-fourth of the applicable M&IE rate shall be allowed.

Since Mr. Wolfe arrived in Denver during the last 6-hour period of January 7, 1988 (9 p.m.), his per diem for that day would be a full day's M&IE at the rate to which he was entitled for January 6, 1988.

With regard to the inception of temporary quarters reimbursement, FTR, para. 2-5.2g provides, in part:

(1) *Claim for temporary quarters when occupancy begins the same day en route travel ends. . . .*

(a) *En route travel of more than 24 hours.* When en route travel is more than 24 hours, the eligibility period for reimbursement for temporary quarters subsistence expenses shall start at the beginning of the calendar day quarter immediately following the calendar day quarter in which en route travel per diem ends.

Under this provision, Mr. Wolfe's temporary quarters eligibility period did not begin until the first quarter day of January 8, 1988. Since he received the full M&IE as his maximum authorized reimbursement for his last day of en route travel on January 7, 1988, he is not entitled under the FTR to be reimbursed the expense of lodging on the evening of January 7. Therefore, the agency action disallowing that lodging cost was correct. *Joseph B. Stepan,* 56 Comp. Gen. 15 (1976); *Nancy D. Doll,* B-198357, Mar. 12, 1981.

We note that Mr. Wolfe was authorized to be reimbursed for up to 60 consecutive days temporary quarters subsistence expenses. He claimed the full 60 days (January 8 through March 7, 1988) and was reimbursed on that basis. The expense claimed on appeal therefore represents, in effect, the cost of lodging for a 61st night which may not be allowed in any event. We are however calling to the attention of the General Services Administration the anomaly created by the application of the regulations to situations such as Mr. Wolfe's.

On the other hand, the agency's action in reducing Mr. Wolfe's period of temporary quarters entitlement by the 8-day period that his wife was present on a househunting trip was not correct. Under FTR, para. 2-4.1a, an employee's roundtrip househunting travel must be fully accomplished before he reports for duty in order to be reimbursed. However, paragraph 2-4.1a goes on to provide:

a. . . . Such a round trip by the spouse . . . may be accomplished at any time before relocation of the family to the new official station but not beyond the maximum time for beginning allowable travel and transportation.

The record shows that Mrs. Wolfe traveled to Denver on January 24, 1988, where she remained until January 31, 1988. Since this was during Mr. Wolfe's authorized temporary quarters period, he was entitled to continue receiving reimbursement for temporary quarters for himself for those 8 days. Additionally, he was entitled to reimbursement for the cost of Mrs. Wolfe's travel to Denver and return, and her househunting per diem during the 8 days. This would be limited to M&IE for her and would not include the lodging portion of per diem,

since Mrs. Wolfe occupied his temporary quarters during the period at no additional cost. *See George L. Daves,* 65 Comp. Gen. 342 (1986).

B-233353, June 2, 1989

Civilian Personnel

Relocation
■ Relocation travel
■■ Dependents
■■■ Eligibility

Civilian Personnel

Relocation
■ Temporary quarters
■■ Actual subsistence expenses
■■■ Dependents
■■■■ Eligibility

A transferred employee was issued travel orders authorizing reimbursement of travel and temporary quarters subsistence expenses for herself, her spouse, and her daughter who was 22 years old. The employee was given a travel advance based on the estimated expenses for herself and the two family members. After she incurred expenses in reliance on the orders and submitted a voucher, the agency realized that the daughter was over 21 years old and precluded by regulation from being considered as a family member of the employee for purposes of relocation expenses. Her claim for travel expenses for her daughter may not be allowed. However, since she incurred expenses for the daughter in reliance on the erroneous orders, her debt for the portion of her travel advance still outstanding is subject to consideration for waiver. Case is remanded to the agency for computation of the debt subject to waiver.

Matter of: Darlene Wyrick—Claim for Per Diem, Mileage and Temporary Quarters Subsistence Expenses—Ineligible Dependent

Ms. Darlene Wyrick, an employee of the Department of Agriculture, appeals the Claims Group's denial of her claim for travel allowances and temporary quarters subsistence expenses for her 22-year old daughter, Kimberly. We sustain the action taken by the Claims Group. However, since the claimant had received erroneous travel orders authorizing her daughter's expenses and she received a travel advance out of which she paid a substantial portion of her daughter's expenses, her indebtedness for the portion of the travel advance outstanding after deducting her allowable expenses of relocation is subject to consideration for waiver.

In early September 1987, Ms. Wyrick transferred from Edina, Missouri, to a GS-9 position in Washington, D.C. Prior to departing from Missouri, she received a travel authorization stating that for herself, her husband, and her child she was authorized a mileage allowance, per diem en route, and temporary quarters subsistence expenses upon arrival at the new duty station. Her child's age was shown clearly on the travel authorization as 22. Ms. Wyrick also received a travel advance of $8,000 to defray the authorized expenses.

Ms. Wyrick arrived at the new duty station on September 9, 1987, with her family and they resided in temporary quarters until November 6, 1987. Ms. Wyrick then filed a voucher seeking $8,366.08 in reimbursable expenses. At this point the agency realized that Ms. Wyrick's daughter had been over 21 years old at the time of transfer and was thereby precluded by regulation from being eligible to be considered as a member of the employee's immediate family. Consequently, Ms. Wyrick was advised that she could not be reimbursed for any expenses she incurred on behalf of her daughter. *See* Federal Travel Regulations, para. 2-1.4d (Supp. 1, Nov. 1, 1981).[1]

Ms. Wyrick appealed the matter to our Claims Group which disallowed the portion of her claim related to her daughter's expenses in view of the applicable regulations.

Ms. Wyrick has appealed the Claims Group's determination, arguing that she relied on the erroneous authorization in her travel orders when she and her family incurred the expenses. She explains that she, her husband and her daughter lived together, pooling their incomes. Had she not been authorized relocation expenses for her daughter, as well as for her husband and herself, she would not have accepted the transfer because she could not have afforded the move. She states that her daughter's income was near the minimum wage, her husband was a salesman whose income was based on his sales and it took several months for him to establish accounts after the move, and her own GS-9 salary was insufficient to support the family, particularly while incurring the extra expenses of living in temporary quarters. Pending our decision, Ms. Wyrick has deferred filing a reclaim voucher with her agency seeking reimbursable expenses for herself and her spouse.

Ms. Wyrick is not entitled to be reimbursed for her daughter's expenses since her daughter did not qualify as an eligible family member under the regulations promulgated pursuant to law. The erroneous travel authorization does not serve to increase her entitlement since the government is not bound by the acts or advice of its agents which are contrary to law. 54 Comp. Gen. 747 (1975). Consequently, to the extent that her allowable expenses for relocation are less than the $8,000 travel advance she received, Ms. Wyrick is indebted to the government.

It appears, however, that Ms. Wyrick's debt is subject to consideration for waiver under 5 U.S.C. § 5584 (1982 and Supp. IV 1986). Under that statute, as amended effective December 28, 1985, we may waive a debt arising out of an erroneous payment of travel and transportation expenses where collection would be "against equity and good conscience and not in the best interest of the United States" and there is no indication of "fraud, misrepresentation, fault, or lack of good faith" on the part of any person having an interest in obtaining a waiver of the claim. A travel advance is erroneous and subject to waiver to the extent it was made to cover the expenses erroneously authorized and the employee actually spent the advance in reliance on the erroneous travel orders.

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

Major Kenneth M. Dieter, 67 Comp. Gen. 496 (1988), *Rajindar N. Khanna,* 67 Comp. Gen. 493 (1988). Waiver, however, is only appropriate to the extent that an employee is indebted to the government for repayment of the amount advanced. Therefore, if an employee has both legitimate expenses and expenses which should not have been authorized, the travel advance must first be applied against the legitimate expenses. Any outstanding amount of the advance may then be applied against the erroneously authorized expenses and that amount could be considered for waiver. *See Khanna,* above.

As a general rule, we presume that expenses incurred in accordance with erroneous orders were made in reliance on those orders, although under certain circumstances we would not presume detrimental reliance. *See Dieter, supra.* In this case in view of Ms. Wyrick's explanation of her family financial situation and her statement that she could not have afforded to accept the transfer had relocation expenses not been authorized for all three family members, it appears that Ms. Wyrick did rely on the erroneous authorization in incurring the travel and temporary quarters subsistence expenses for her daughter. Thus, the present case does present a situation in which consideration should be given to waiver of Ms. Wyrick's indebtedness for the outstanding travel advance to the extent that her indebtedness results from expenses erroneously authorized for her daughter. We cannot determine precisely what the amount of the debt is because of the manner in which Ms. Wyrick's original voucher was prepared.[2]

Accordingly, we are remanding the case to the agency, and the agency, with Ms. Wyrick's assistance, should calculate her precise entitlements and subtract this from her $8,000 travel advance to determine her debt. The agency should then calculate the daughter's expenses that would have been reimbursable had the daughter not been over 21. The matter then should be returned to us for waiver consideration.

[2] For most days, Ms. Wyrick totalled the lodging and meal expenses for herself and her family. She now will have to indicate what portion of these expenses were incurred by her daughter and spouse. Her allowable entitlement appears to be in the range of $6,000 to $6,300 which means that in the absence of waiver she would have to repay $1,700 to $2,000.

B-234262, June 2, 1989

Civilian Personnel

Travel

■ Temporary duty

■■ Determination

Civilian Personnel

Travel

■ Temporary duty

■■ Per diem

■■■ Eligibility

A Navy employee on a long-term temporary duty assignment at a contractor's site may remain on temporary duty until completion of the contract. The employee's duties, flight-testing during the term of a contract, are the type of duties normally handled on a temporary duty basis; the assignment is for a finite period; and the cost to the government of the temporary duty assignment is less than a permanent change of station.

Matter of: Edward W. DePiazza—Long-term Temporary Duty—Nature of Duties

This decision is in response to a request from the Department of the Navy concerning whether it must issue permanent change-of-station (PCS) orders to an employee on a long-term assignment.[1] For the reasons that follow, we agree with the Navy that PCS orders are not required; the employee may continue on temporary duty until the completion of his assignment.

Background

The Navy has entered into an agreement with the Grumman Aerospace Corporation to conduct tests of the F-14D aircraft at Grumman's test facility in Calverton, New York. The flight-testing program began in August 1987 and is scheduled to continue until February 1990.

The Naval Air Test Center, Patuxent River, Maryland, was responsible for providing a Navy test team to monitor the aircraft development and to participate in contractor tests at Calverton. A team consisting of civilian engineers, an aircrew, enlisted personnel, technicians, and contract support personnel was established at Calverton under the supervision of Mr. Edward W. DePiazza, as the Lead Systems Integration Engineer.

Mr. DePiazza was assigned to the project on August 21, 1987, when the test program commenced at the Grumman flight test facility, and he was issued temporary duty travel orders. The Navy viewed the assignment as temporary since it was unique to the contract and finite in time, and since Mr. DePiazza would

[1] The request was forwarded through the Per Diem, Travel and Transportation Allowance Committee and has been assigned PDTATAC Control No. 89-1.

return to the Patuxent River site after completion of his assignment. Mr. DePiazza is receiving a reduced per diem while on temporary duty at Calverton.

Although Mr. DePiazza was originally assigned to the project at Calverton for 17 months, the Navy requires his presence at the site for an additional 14 months since he has the needed expertise to provide continuity for the program and he cannot easily be replaced. Thus, the Navy has requested that Mr. DePiazza be allowed to remain on temporary duty at a reduced per diem for the balance of the time necessary to finish the project.

The Navy is aware of the fact that our decisions rarely sanction temporary duty assignments that exceed 16 months. However, the Navy has prepared a cost comparison between a permanent change of duty station and a temporary duty assignment for Mr. DePiazza. The cost comparison shows that the payment of per diem in lieu of relocation expenses (both to New York and back to Maryland) results in a savings of over $66,000 to the government.

The Navy also points out that temporary duty assignments may be allowed in excess of 6 months when cost savings will result since the Joint Travel Regulations, at Vol. 2, para. C4455-c (Change No. 267, Jan. 1, 1988), state:

> When a period of temporary duty assignment at one place will exceed 2 months, consideration will be given to changing the employee's permanent duty station unless there is reason to expect the employee to return to his permanent duty station within 6 months from the date of initial assignment or the temporary duty expenses are warranted in comparison with permanent change-of-station movement expenses.

The Navy also advises us that it has many other employees who have been performing long-term temporary duty assignments in circumstances similar to Mr. DePiazza's. These other employees have been assigned to various contractor sites, they perform highly-skilled jobs, and they are expected to remain at those sites for a prolonged period of time until completion of a specific fixed-term contract. Therefore, we have also been asked to consider these employees in our decision.

Opinion

Whether an assignment to a particular station is temporary or permanent is a question of fact to be determined from the orders under which the assignment is made, the character of the assignment, its duration, and the nature of the duties. 33 Comp. Gen. 98 (1953); *Erwin E. Drossel,* B-203009, May 17, 1982. Our decisions concerning the length of an assignment have not established any hard and fast rules; however, they hold that the duration should generally be brief. *Bertram C. Drouin,* 64 Comp. Gen. 205 (1985); *Peter J. Dispenzirie,* 62 Comp. Gen. 560 (1983).

The length of Mr. DePiazza's current and projected assignment, standing alone, might suggest that his assignment is permanent in nature. However, as noted above, it is also necessary to consider the character of the assignment and the nature of the employee's duties in reaching our conclusion. In addition, we be-

lieve that cost should be considered in accordance with 2 JTR para. C4455 although cost should not be the sole criterion. *Cf.,* 36 Comp. Gen. 757 (1957); *Dispenzirie, supra.*

Mr. DePiazza's assignment, to work on the flight-testing program for the F-14D aircraft, is the type that is normally handled on a temporary duty basis. Further, the work is to be completed at the contractor's plant and is time-limited to the completion of the contract. *Cf. J. Michael Tabor,* B-211626, July 19, 1983. Mr. DePiazza was issued orders by the Navy for the performance of temporary duty and he is expected to return to Patuxent, Maryland, at the completion of his duties. Finally, the Navy estimates that a temporary duty assignment is much less costly than a permanent change of station. Under these circumstances, we have no objection to Mr. DePiazza's remaining on temporary duty until completion of his assignment.

The Navy should apply the above criteria in addressing other long-term temporary duty assignments. The employees should be notified in advance by competent orders of the length of the assignment, and reduced per diem should be authorized in advance in accordance with 2 JTR para. C4550 (change 274, Aug. 1, 1988). The employees should also be made fully aware of the potential tax liability if their assignment extends beyond 1 year. *See Dispenzirie, supra.*

B-231830, June 5, 1989

Appropriations/Financial Management

Appropriation Availability

■ **Purpose availability**

■■ **Business cards**

The Forest Service, United States Department of Agriculture, may not pay for "identification" cards used by its public affairs officers. The "identification" cards are no different from business or calling cards. The purchase of these cards has always been viewed as a personal expense which may not be paid for with appropriated funds, in the absence of specific statutory authority.

Matter of: Forest Service—Purchase of Information Cards

An authorized certifying officer of the Forest Service, United States Department of Agriculture, has asked for our advance decision on whether he should certify a payment to reimburse a Forest Service employee for the purchase of 1,000 "information" cards "for use in performing his job as a Public Affairs Officer for the Public Affairs Office of the Rocky Mountain Office." He also asks whether he may certify a payment for "information" cards that identify the agency but do not indicate the name and title of any individual. For the reasons indicated below, we conclude that these cards may not be purchased using appropriated funds and that payment should not be certified.

Background

Lynn Young, a public affairs officer for the Rocky Mountain Region of the Forest Service, purchased 1,000 "information" cards to be used in the course of his official business. He has requested reimbursement for the cost of these cards. As explained by Mr. Young, the exchange of information cards is essential to the conduct of public information business. He says that there is an unspoken rule that those who have frequent contact with the public and the media have these cards available for distribution.

The "information" cards purchased by Mr. Young have a gold colored shield of the U.S. Forest Service impressed in one corner, and include his name, title, Forest Service office, address, and both commercial and FTS phone numbers printed on the card.

Some units of the Forest Service have printed "information" cards that do not contain the name or title of any specific individual. Forest Service personnel distribute these cards in the course of their official duties. Many of these employees hand print or stamp their names and titles on the cards before using them. According to the certifying officer, the cards give the public ready access to Forest Service telephone numbers, and serve "as a reminder to the public of who we are and what they can do to assist the Forest Service."

The certifying officer submitted a sample of these cards. The card, printed on wood-grain paper, contains the shield of the Forest Service in one corner and the message "'We Care' Pike & San Isabel National Forests" printed across the top. Then, in large letters, is printed "SOUTH PLATTE Ranger District" and the address and phone number of the office.

Discussion

We have long held that the costs of calling or business cards constitute personal rather than official expenses of the persons using them. Therefore these costs may not be paid with government funds in the absence of specific statutory authority to do so.[1] *See, e.g.,* B-131611, Feb. 15, 1968; 12 Comp. Gen. 565 (1933). We have continued to apply this rule even when it was clear that the cards were being used only for official purposes. *See* B-195036, July 11, 1979; 12 Comp. Gen 565, 566 (1933).[2]

We have frequently considered arguments similar to those presented by Mr. Young in this case, but have consistently ruled that appropriated funds are not available for these cards. *E.g.,* B-195036, July 11, 1979 (agency employee had "extensive contact with public, government, and business officials who frequent-

[1] Such specific authority could be provided, for example, by a line-item agency appropriation for official reception and representation expenses. Calling or business cards are a legitimate means of "representation," and an agency head could determine that their use by certain officials or employees would be a necessary representation expense.
[2] This rule is also recognized in the Joint Committee on Printing's Printing and Binding Regulations, which state: "Printing or engraving of calling or greeting cards is considered to be personal rather than official and shall not be done at Government expense." S. Pub. No. 5, 100th Cong., 1st Sess. 15 (1987).

ly asked him to leave business cards"); B-131611, Feb. 15, 1968 ("the use of business cards was necessary in conducting business in Europe for the National Park Service"); 41 Comp. Gen. 529, 530 (1962) ("it is a well-established practice to exchange business cards" and "initial contacts are unnecessarily marred if the . . . customers are required to solicit information that the business card should provide"); B-131611, May 24, 1957 ("officer is required to make many official visits" to prospective customers and agency "wanted the agricultural officer to have items of this nature where they help him to do his job better"). In our opinion the arguments made by Mr. Young are no more persuasive than the ones we have rejected in the past.

Mr. Young, who is familiar with our earlier decisions, asserts that unlike calling cards, which are primarily for private use and private benefit, his "information" cards are "strictly for official business." In B-149151, July 20, 1962, we addressed a similar contention:

> The cards in question while denominated as "cards of introduction" . . . are actually calling . . . cards. The "cards of introduction" are calling cards issued to the foreign visiting student with his name added at the time of issuance of the card to him. *The card serves the purpose of introducing the bearer to anyone to whom the card is presented. This is a primary function of a calling card.* (Italic added.)

Likewise, Mr. Young's "information" cards serve the purpose of introducing him to those to whom he gives them and are therefore no different than calling cards. Accordingly, he may not be reimbursed for the cost of purchasing the cards.

We reach the same result with respect to the "information" cards printed without names or titles. These cards are generally used for the same purpose as calling cards—introducing the agency official to the person to whom he or she presents them. The fact that the individuals who use these cards generally add their names and titles clearly indicates that they are being used as calling cards. The purchase of these cards, therefore, constitutes a personal expense which may not be paid from government funds. *Cf.* 47 Comp. Gen. 314, 316 (1967) (the cost of seasonal greetings cards were a personal rather than an official expense even though "the names of the officers or employees sending the cards were not included and nothing attached to the cards to indicate the compliments of any individual"); *accord* 37 Comp. Gen. 360 (1957).

B-207731.3, June 7, 1989

Appropriations/Financial Management

Accountable Officers

■ **Determination criteria**

Appropriations/Financial Management

Accountable Officers

■ **Relief**

■ ■ **Physical losses**

■ ■ ■ **User fees**

National Forest Volunteer Collection Agents who sell permits and collect user fees in National Forests are subject to the provisions of 31 U.S.C. § 3527(a) pertaining to relief from liability of accountable officials and agents for certain types of physical losses or deficiencies of public funds. 62 Comp. Gen. 339 (1983) is superseded.

Matter of: Department of Agriculture—Relief of Liability for National Forest Volunteer Collection Agents

The Department of Agriculture has asked us to reconsider 62 Comp. Gen. 339 (1983) which concluded that National Forest Volunteer Collection Agents were ineligible for relief from liability under 31 U.S.C. § 3527(a) for the physical loss of federal funds. Subsequent changes in law and regulations have undermined the rationale on which the conclusions of that case were based. Upon reconsideration, we now conclude that National Forest Volunteer Collection Agents are subject to the relief provisions of 31 U.S.C. § 3527(a). 62 Comp. Gen. 339 (1983) is superseded.

Background

In 1972 Congress enacted the Volunteers in the National Forests Act of 1972, Pub. L. No. 92-300, 86 Stat. 147 (16 U.S.C. §§ 558a-558d) which authorized the Secretary of Agriculture to engage uncompensated volunteers to perform routine duties in the National Forest Program. Such duties included visitor information services, conservation measures and other Forest Service functions. The volunteers were not deemed to be federal employees for purposes of compensation or employee benefits, but were considered to be federal employees for purposes of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, and for purposes of compensation to federal employees for work injuries under the provisions of subchapter I of chapter 81, Title 5 of the United States Code.

In 1982 the Secretary of Agriculture proposed to use some of the volunteers to collect user fees from the public for the use of National Forest facilities. The Secretary requested an opinion from this Office on the proposal. We reviewed the concept and concluded there was no indication in the Volunteers in the National Forests Act of 1972 that Congress intended that volunteers perform collection functions. We further determined that fee collection was an inherent governmental function which must be performed only by government employ-

ees. Accordingly, we were unable to concur in the volunteer collection agent proposal. 62 Comp. Gen. 339 (1983).

The Department of Agriculture continued to be interested in using National Forest Volunteers as collection agents and submitted a legislative proposal to Congress to obtain statutory authorization for this objective. Congress enacted such legislation in section 5201(c) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-266. That provision, codified as 16 U.S.C. § 4601-6a(k), authorizes among other things the use of National Forest Volunteers at designated areas to sell permits and collect fees authorized or established under statutory authority. The provision requires that volunteers receive adequate training in the sale of permits and the collection of fees, and authorizes the Secretary of Agriculture to use federal funds to purchase a required surety bond for any volunteer engaged in the sale of permits or the collection of fees.

When the Department of Agriculture began to plan for the implementation of section 4601-6a(k), it became concerned with an issue raised in 62 Comp. Gen. 339 (1983), namely, the liability of bonded volunteers to the bonding company for the bonding company's payment of non-negligent losses to the government. The legal principle involved here is that sureties on the bond of the volunteer, on being charged with the default of the volunteer, are by virtue of their payment of the loss to the government, equitable assignees and subrogees of the government with respect to its liens, securities, and priorities, for purposes of obtaining reimbursement from the volunteer. Annot., 24 A.L.R. 1497 (1925); 148 A.L.R. 926 (1944). The exposure of volunteers to such liability could deter otherwise willing individuals from serving as collection agents, thereby defeating the purpose of section 4601-6a(k).

The problem of volunteer liability to the bonding company for non-negligent losses could be resolved if the government could relieve volunteers for such losses, and, when so relieved, release the bonding company from its obligation to indemnify the government. The Department of Agriculture has therefore asked this Office to determine whether these Volunteer Collection Agents may be eligible for relief from liability for physical losses of federal funds under the provisions of 31 U.S.C. § 3527(a).

Discussion

The provisions of 31 U.S.C. § 3527 authorize the Comptroller General to relieve an accountable official or agent of an agency responsible for the non-negligent physical loss or deficiency of public money, when the head of the agency decides that the official or agent was carrying out official duties when the loss or deficiency occurred, and the loss or deficiency was not the result of fault or negligence by the official or agent.

The basic question is whether we can consider a National Forest Volunteer Collection Agent an accountable official or agent of an agency for purposes of re-

lieving them of liability for non-negligent losses under the provisions of 31 U.S.C. § 3527(a). In this regard, 16 U.S.C. § 558c specifically provides that a National Forest Volunteer shall not be deemed a federal employee except for statutes involving tort claims against the government and compensation of the volunteer for work related injuries sustained in the line of duty. Accordingly, we cannot classify National Forest Volunteers as officers or employees of the federal government for purposes of 31 U.S.C. § 3527(a).

On the other hand, these volunteers may qualify as agents of the Forest Service for purposes of 31 U.S.C. § 3527(a). In its broadest sense, an "agent" is no more than a person or entity who agrees to act on another's behalf, here the Forest Service, subject to such other person's control and direction. Restatement (second) of Agency § 1(1) (1958); 3 Am. Jur. 2d "Agency" § 1 (1986). Clearly, the statutory authorization coupled with the volunteers' agreement to collect fees for the Forest Service is sufficient to qualify the volunteers as agents of the Forest Service. *See, In re Schulman Transport Enterprises, Inc.,* 744 F.2d 293 (1984). Accordingly, volunteers assigned duties involving permit sales and fee collections under 16 U.S.C. § 4601-6a(k) may be considered as "agents of an agency" for purposes of the relief provisions of 31 U.S.C. § 3527(a). In our opinion, this result is fully consistent with the intent of Congress in enacting 16 U.S.C. § 4601-6a(k). Therefore, our decision in 62 Comp. Gen. 339 (1983) is no longer applicable.

Since the volunteers can be granted relief for non-negligent losses, the bond should not cover circumstances where relief is granted. However, when relief is not granted, the volunteer is liable for the loss and should be afforded the opportunity to reimburse the government. Where the volunteer is unable or unwilling to reimburse the government for the full amount of the loss, the agency should file a claim with the surety of the volunteer for any uncollected amount up to the maximum coverage of the bond. We note that under *7 GAO Policy and Procedures Manual for Guidance to Federal Agencies,* subsection 28.14, agencies are authorized to grant relief for physical losses up to $750.

Subsection 16 U.S.C. § 4601-6a(k)(1) requires that volunteers receive adequate training regarding the sale of permits and the collection of fees. We recommend that such training include appropriate material on the proper handling and safeguarding of funds such as that contained in the *Manual of Procedures and Instructions for Cashiers* promulgated by the Department of the Treasury Financial Management Service and the applicable Forest Service manual. This training should help volunteers reduce the number of incidents involving the negligent loss of federal funds. In addition, we also recommend that the Forest Service prepare a notice of liability to clearly advise volunteers of the risks they assume for federal funds when they undertake the duties of collection agents. The volunteers should be asked to sign the notice and copies should be retained in the files of the agency to rebut any subsequent claims by volunteers that they were unaware of the risks involved in the handling of federal funds.

B-234367, June 8, 1989

Procurement

Bid Protests
■ GAO procedures
■■ Protest timeliness
■■■ Significant issue exemptions
■■■■ Applicability

Protest presents a significant issue justifying consideration on the merits even if it is untimely filed where, based on the fully developed record, it is clear that the issues raised involve improper agency action inconsistent with statute and regulation.

Procurement

Sealed Bidding
■ Invitations for bids
■■ Defects
■■■ Evaluation criteria

Protest is sustained where solicitation for refuse collection and disposal allows either on-post disposal or off-post disposal, but provides for evaluation of cost of additional work for on-post bids, even though work is unrelated to collection and disposal requirement and will have to be performed even if a contract is awarded for offpost disposal; under this evaluation scheme bidders were not competing on equal basis and award did not result in lowest ultimate cost to the government.

Matter of: Reliable Trash Service Co. of MD., Inc.

Reliable Trash Service Co. of MD., Inc., protests the award of a contract to Mark Dunning Industries, Inc. (MDI), under invitation for bids (IFB) No. DAKF24-89-B-0031, issued by the Department of the Army for refuse collection and disposal at Fort Polk, Louisiana. Reliable contends that the Army did not evaluate bids properly. We sustain the protest.

The solicitation contained two alternative schedules on which bids could be submitted: Schedule I, requiring onpost refuse disposal, and Schedule II, requiring off-post disposal. Schedule I provided for a base period (CLIN 0001) of 1 year plus two 1-year option periods (CLINs 0002 and 0003). Four sub-items were listed under the base period: 0001AA, for collection of all solid waste at Fort Polk and its transport to Fort Polk's landfill; 0001AB, for operation of Fort Polk's landfill and disposal of all solid waste into the landfill; 0001AC, for final turfing of final cover areas left unturfed by a previous contractor; and 0001AD, for placement of prefinal and final covers and furnishing and placing turf on areas where the previous contractor placed daily cover only. The two option periods (CLINs 0002 and 0003) each listed two sub-items: 0002AA and 0003AA, for collection and transportation of waste to the landfill; and 0002AB and 0003AB, for operation of the landfill and disposal of waste. Schedule II (off-post disposal) also contained a base period (CLIN 0004) and two 1-year option periods (CLINs 0005 and 0006). Each CLIN required the collection of waste, transportation to an off-post facility, and disposal. Unlike Schedule I, Schedule II did not include subitems for turfing and covering areas left unturfed by the previous contractor.

Finally, the solicitation provided that bids would be evaluated "by adding the total price for all options to the total price for the basic requirement."

Five bids were received as of bid opening on December 17. Reliable submitted the lowest evaluated bid under Schedule I, $2,485,780, including $47,680 for sub-items 0001AC and 0001AD. MDI submitted the lowest evaluated bid under Schedule II, $2,475,000, which was also the lowest overall bid. Reliable initially challenged the evaluation in an agency-level protest denied by the Army on January 27. MDI was awarded the contract on January 30, and Reliable filed this protest with our Office on February 3. A stop work order has been issued pending resolution of the protest.

Reliable protests that the evaluation was improper because different bidders' prices were based on different work. Specifically, Reliable believes its bid on Schedule I improperly was evaluated to include the $47,680 it bid for the work under sub-items 0001AC and 0001AD, which work was unrelated to the refuse collection and disposal services called for, and would have to be performed whether or not the on-post landfill was used; Mark Dunning's Schedule II bid was not required to cover this work and therefore understandably was lower. Reliable's bid would be low if the additional sub-items were not included in its bid.

The Army maintains that Reliable's protest was untimely filed since the IFB clearly indicated the different manner in which the Schedule I and Schedule II bids would be evaluated, but Reliable did not protest the evaluation scheme prior to the bid opening, as required under our Bid Protest Regulations. 4 C.F.R. § 21.2(a) (1988). Reliable asserts that it did not protest prior to bid opening because it read the IFB as not providing for evaluation of sub-items 0001AC and 0001AD.

We need not consider the timeliness of Reliable's protest. Under our Regulations, we have the discretion to invoke the significant issue exception to our timeliness rules at 4 C.F.R. § 21.2(b) when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the interest of the procurement system. *Hunter Environmental Services, Inc.,* B-232359, Sept. 15, 1988, 88-2 CPD ¶ 251. We have held that where the record clearly indicates that there has been a violation of law, invoking the significant issue exception may be warranted. *Adrian Supply Co.— Reconsideration,* 66 Comp. Gen. 367 (1987), 87-1 CPD ¶ 357; *The Department of the Navy; Fairchild Weston Systems, Inc.—Request for Reconsideration,* B-230013.2, B-230013.3, July 29, 1988, 88-2 CPD ¶ 100. We find that such is the case here.

It is a fundamental principle of procurement law that a solicitation must be drafted in such a manner that bids can be prepared and evaluated on a common basis; only if bids are evaluated on a common basis can fairness be assured, and only then can contracting officials determine which bid offers the lowest cost to the government. *Amarillo Aircraft Sales & Services, Inc.,* 63 Comp. Gen. 568 (1984), 84-2 CPD ¶ 269, *aff'd, Amarillo Aircraft Sales & Services, Inc.—Request for Reconsideration,* B-214225.2, Nov. 28, 1984, 84-2 CPD ¶ 582.

Here, the record indicates that the work to be performed under sub-items 0001AC and 0001AD is corrective work left uncompleted by a previous contractor. The work is not related to landfill use by a new contractor for on-post disposal; a new on-post contractor is required by the IFB to turf its own new fill. Thus, as the Army itself points out, subitems 0001AC and 0001AD will have to be performed even if the contract is awarded for off-post disposal. Since the solicitation required only those firms offering on-post disposal to price the unrelated work, such firms were placed at an unjustified competitive disadvantage and bids could not be evaluated on a common basis. In this regard, we note that Reliable's Schedule I (on-post) price, exclusive of the unrelated work that must be completed whichever firm receives the contract, is $36,900 less than MDI's Schedule II (off-post) price. Thus, had Reliable and MDI both been required to bid only on the collection and disposal requirement, Reliable would have been the low bidder.

We conclude that, due to the defective evaluation scheme that resulted in the unwarranted inflation of Reliable's bid price, the award of a contract to MDI for the refuse collection and disposal requirement did not result in the lowest cost to the government. Rather, Reliable's bid was low for the sub-item 0001AA and 0001AB work awarded to MDI. Accordingly, by separate letter to the Secretary, we are recommending that the contracting officer terminate MDI's contract for the convenience of the government and award a contract for the collection and disposal requirement to Reliable based on the firm's bid for sub-items 0001AA and 0001AB, if otherwise appropriate. We also find Reliable entitled to recover its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1); *see Sanford and Sons Co.,* 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266.

The protest is sustained.

B-234449, June 8, 1989

Procurement

Contractor Qualification
■ Responsibility
■■ Contracting officer findings
■■■ Negative determination
■■■■ Pre-award surveys

Preaward survey team acted reasonably in limiting protester to a short oral presentation concerning its corporate capabilities since the protester had already submitted extensive written materials on the subject. Survey team's refusal to visit protester's maintenance facilities was reasonable since solicitation required little in-plant performance.

Matter of: American Systems Corporation

American Systems Corporation protests a determination of nonresponsibility under request for proposals (RFP) No. F09603-88-R-57980, issued by the Air Force for the maintenance of three computer-based training systems. The pro-

tester alleges that the determination was unreasonable because it was primarily based on the unsupported conclusions of a preaward survey.

We deny the protest.

The RFP was issued on March 3, 1988, contemplating a contract for a 1-year base period with 4 option years to maintain the agency's Cryptologic Intelligence Training System (Cryptologic System), Voice Processing Training System (Voice System) and General Imagery Intelligence Training System (Imagery System). Award was to be made to the acceptable offeror with the lowest evaluated price. Further, the solicitation provided that a preaward survey would be conducted to determine the apparently successful offeror's responsibility in a number of areas including technical and production capability.

Five offers were received. Following two rounds of best and final offers, American was the low offeror with an evaluated total price of approximately $4 million. Accordingly, on November 9, the agency contacted American to arrange a preaward survey, which was conducted on November 16.

On December 2, the preaward survey team reported its findings and recommended that American not be awarded a contract because it lacked the requisite technical and production capability to adequately perform. The specific findings which are the subject of this protest are that: (1) American proposed an insufficient number of qualified technicians; (2) it failed to demonstrate that it had made adequate arrangements with computer manufacturers to obtain parts and subscription services to keep updated on the equipment to be serviced; (3) its testing plans were inadequate and indicated that it did not have the necessary testing equipment to perform; (4) the firm did not understand its obligation to keep a ready stock of replacement parts on hand at its own expense; and (5) its purchasing methods were inadequate.[1]

On January 21, 1989, primarily as a result of the negative recommendation of the preaward survey team, the contracting officer determined American to be nonresponsible. Award was made to the next low offeror, AAI Engineering Support, Inc., on January 30 at a total estimated price of $4,668,301.20.

In its protest, American disputes all of the major findings of the preaward survey team, alleging that they lack a basis in fact largely because, in its view, the manner in which the survey was conducted was hurried and haphazard and not designed to provide it with a meaningful opportunity to fully explain its capabilities in a context which would best demonstrate that it was responsible to meet the requirements of the RFP. In this regard, the protester raises such objections as the alleged failure of the survey team to permit a full overview presentation of its corporate capabilities, the team's refusal to tour its maintenance

[1] Other concerns of the survey team involved the protester's management production and control system, its management plan, and its allegedly limited experience in maintaining similar computer systems. The first two concerns appear, in our view, to be derived from the specific findings listed above. The concern about American's allegedly limited maintenance experience does not appear to have been a factor in the contracting officer's nonresponsibility decision and, therefore, will not be discussed further. *See Data Preparation, Inc.*, B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300.

and development facility, the 3-hour duration of the team's visit with the protester's representatives, and deviations from the originally scheduled agenda.

At the outset, we do not agree with American's arguments with respect to the manner in which the survey was conducted. The burden of affirmatively demonstrating its responsibility lies with a prospective contractor, Federal Acquisition Regulation (FAR) § 9.103(c), and, in the absence of information clearly indicating that a prospective contractor is responsible, a contracting officer is required to make a determination of nonresponsibility. FAR § 9.103(b). In view of this burden, we have held that a preaward survey team is not under an obligation, as the protester would have it, to tailor the duration of its facilities visit, the agenda of that visit, or the scope and subject matter of its questioning to suit an offeror's particular sense of what is required under the circumstances. *See Oertzen & Co. GmbH,* B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158. Moreover, insofar as due process considerations do not attach to responsibility determinations because they are administrative in nature, there is no requirement that offerors be afforded special opportunities to demonstrate their abilities to perform. *Firm Reis GmbH,* B-224544, B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72.

American was provided an opportunity to, and did, provide the Air Force with an overview of its corporate capabilities in the 37-page "INFORMATION SUPPLEMENT" to its proposal. Under the circumstances, and notwithstanding the protester's contentions to the contrary, the survey team acted reasonably in limiting American to a short presentation of its own choosing at the beginning of the visit. Moreover, we note that American supplemented its presentation with written materials which the agency received. As far as the team's refusal to visit the protester's maintenance facility, we agree with the Air Force that such a visit was unnecessary in view of the fact that the RFP called for little in-plant repair activity. In any event, the survey team did not downgrade the protester with respect to its facility. The protester also complained that the survey team did not follow the agenda announced on November 9 but instead used a list of questions which were not provided to American. Since the RFP outlined the areas to be covered by a plant survey, no such agenda was required in the first place and the record does not reflect that the team went beyond the outline contained in the RFP. Finally, throughout its own submissions in this matter, the protester refers to discussions and question and answer sessions involving the principal topics in issue. While it is clear that American is displeased with the format of the survey, we are unable to conclude that the format used denied the protester an opportunity to demonstrate its responsibility.

Thus, the issue remaining is whether the agency's findings were reasonable with respect to: the qualifications of American's proposed technicians; its arrangements with equipment manufacturers; its plans to test repaired parts; its understanding of its obligation to stock replacement parts at its own expense; and its purchasing methods. As noted above, the protester disputes the reasonableness of the agency's findings in each of these areas.

Contracting officers have a wide range of discretion and business judgment in reaching nonresponsibility determinations and we will not question those deter-

minations unless the protester can establish that they lacked a reasonable basis. *Omneco, Inc. et al.*, B-218343, B-218343.2, June 10, 1985, 85-1 CPD ¶ 660. Where a nonresponsibility determination is based upon preaward survey findings, it is only when those findings are shown to be unreasonable or unsupported in a number of areas that this Office will recommend that the determination be reconsidered. A difference of opinion between the protester and the agency on a technical issue as to what resources are required of an offeror to adequately perform or as to the best method of determining whether an offeror has those resources does not itself establish that the agency's determination is unreasonable. *Id.*

Personnel Qualifications

The RFP required offerors to provide sufficient personnel to maintain all three systems. With respect to the Voice and Imagery Systems, technicians were required to have a minimum of 12 months of experience maintaining computers and associated peripheral equipment manufactured by Digital Equipment Corporation (DEC). In response to a survey team request, American was asked to identify, from among the 28 resumes it had submitted, five key maintenance personnel with the skill levels required by the RFP. After reviewing the five resumes specifically identified by the protester, as well as the remaining 23 resumes, the Air Force concluded that three technicians possessed the requisite DEC experience and that of these, only two were firmly committed to American's employ. The agency maintains that, even if it considered all three as qualified and committed, three technicians would be insufficient to cover its expected first year requirements because two are necessary for the Voice System, two for the Imagery System and one is necessary as a backup to the others.

American does not dispute the agency's finding that, at most, three of its technicians have the required DEC experience; rather, it contends that, because the Air Force stated that contract performance would commence with only two Voice System technicians, it has in fact met the RFP requirement. The protester also argues that, had it known that the agency was looking for five qualified technicians, it could have provided them from additional persons available to the firm.

It appears that, while American may arguably have proposed a minimally acceptable Voice System staffing level for the very start of contract performance, it did not evidence the staffing necessary to maintain the system for the first year of performance. It did not evidence sufficient staffing for the Imagery System which is a part of the RFP's first requirement. We do not believe that the agency acted unreasonably by gauging the offeror's ability to adequately staff a contract by examining the requirements for the entire base year.

Arrangements With Equipment Manufacturers

By the protester's own account, during the survey American was asked to supply agreements it had with original equipment manufacturers (OEMs) for the major equipment in the systems to be serviced and it identified American Telephone & Telegraph and DEC as firms with which it had such agreements. While American disputes the relevance of such agreements to its responsibility and generally complains about the lack of time given to produce them, it was able to produce agreements from the manufacturers it had identified as being major, and one from another firm, Gould. The Air Force stresses that these agreements only covered a portion of the equipment manufacturers listed in the RFP and notes that, while the protester is correct in asserting that parts can be obtained from various sources without such OEM agreements, only the OEMs can provide the subscription services necessary for a contractor to discharge its obligation under the RFP to keep up-to-date about the equipment it is servicing.

American states that, had it been directly asked for additional OEM agreements or other evidence of its efforts to obtain subscription services, it would have been easy to produce them because part of the information was present in the room where the parties were meeting and the rest was in its corporate files. The protester argues that the controlled structure of the discussion on OEM agreements precluded it from providing the information.

From the record it appears to us that the protester was given ample time and opportunity to provide the OEM agreements and such other evidence it had regarding its efforts to insure a supply of parts and subscription services. The agency did receive and consider the agreements American produced from the suppliers it identified as major together with the third agreement from Gould. Thus, we find it difficult to believe that the protester could not have identified and retrieved other information and presented it to the Air Force for its consideration within 1 day as requested.

Testing Repaired Parts

During the preaward survey, American indicated that once it had repaired parts it intended to use government computers on a third shift to test them before they were used in the systems it would be maintaining. The Air Force states that the contractor is obligated to test all parts on its own equipment prior to reintroducing them into the systems and notes that this procedure comports with computer industry practice. The agency maintains that the RFP does not make government computers available for testing, and contends that testing parts on its computers as proposed could result in system malfunctions and schedule delays.

The protester argues that standard industry practice is to preliminarily test repaired parts on equipment of the type it possesses and then to test it again on the actual system prior to its reintroduction. American argues that the agency made an unreasonable assumption that it lacked the necessary equipment and

argues that the Air Force's suggested method of testing would require special equipment which the RFP states will be supplied by the government.

At the core of this matter is a technical dispute as to which method of final testing is appropriate for repaired parts, and the protester has not shown that the agency's position was unreasonable or inconsistent with the RFP requirements. *Omneco, Inc. et al.*, B-218343, B-218343.2, *supra.* Since American can point to no RFP provision which indicates that the government is obligated to make its facilities available to discharge the contractor's responsibilities to test parts, we find that the agency's findings with respect to this issue were reasonable.

Stocking Replacement Parts

American was asked numerous questions regarding the stocking of parts during the survey and the agency reports that it found it necessary to repeatedly refer the protester to the RFP in order to explain what its responsibilities were in these areas—i.e., that the contractor is responsible at its expense to maintain adequate stocks of such parts to meet a predetermined operational level, and that the government does not pay for the parts until they are installed. From these repeated requests and an uncontradicted agency account that at one point American had to recess to consider the "new" requirements, it is the Air Force's position that the survey team's conclusion as to the protester's misunderstandings was reasonable.

American asserts that it fully understood the RFP requirements and contends that during the survey it was attempting to find out the preexisting levels of stocked parts because it would be cheaper for the agency if it purchased these rather than buying them elsewhere. The agency contends that this argument itself reflects a continuing misunderstanding on American's part because the government stands to save no money by any transaction between the incumbent contractor who owns the parts and its successor, since the agency will not purchase parts until they are installed.

The purpose of the survey was to determine American's ability to perform, and we fail to understand what the protester's repeated questions about the incumbent's level of stocking parts has to do with that subject. In the absence of relevant argumentation, then, we have no basis to question the agency's judgment that the protester did not understand the RFP requirements, especially in light of the apparently protracted discussions and explanations which became necessary with respect to the issue of stocking replacement parts.

Purchasing Methods

During the survey, American described its purchasing procedures as being centralized at its Virginia headquarters. The survey team questioned this practice because, in its view, the lack of an on-site manager with purchasing authority would contribute to unacceptable schedule delays. American states that this

conclusion is unreasonable because it is drawn from a general description of its purchasing practices and, if the Air Force had asked whether its on-site manager had purchasing authority, it would have been informed that he did. Upon review of American's position, the agency has indicated that American's purchasing methods appear to be adequate. The fact that one finding of the survey team may have lacked a reasonable basis does not, however, mean that the nonresponsibility determination which was based upon a number of other findings which are supported by the record, was unreasonable. *Omneco, Inc. et al.*, B-218343, B-218343.2, *supra.*

The protest is denied.

B-234351, June 9, 1989

Procurement

Competitive Negotiation
■ Offers
■ ■ Acceptance time periods
■ ■ ■ Expiration

Procurement

Competitive Negotiation
■ Offers
■ ■ Withdrawal

Where low offer expires and offeror, having sold its business interests through which it could provide the solicitation requirements, purports to withdraw its offer, the contracting agency's acceptance of the offeror's "withdrawal" of its offer is not improper or unreasonable where prior to the expiration of the offer or the agency's acceptance of the "withdrawal" of the offer, the buyer of the business did not assert any possessory interests in the offer and the agency, otherwise, has no basis to conclude that the buyer is a successor in interest.

Matter of: Heuga USA

Heuga USA protests the agency's action in excluding from consideration for award the offer submitted by the Bigelow Division of Fieldcrest Cannon, Inc. (FCI), in response to request for proposals (RFP) No. FCNH-88-F501-N, issued by the General Services Administration (GSA). The RFP, issued for various types of carpet, contemplated a requirements contract for 63 special item numbers (SINs). Heuga's protest concerns SINs 31-54 a and b for carpet tiles and corresponding (color coordinated) broadloom carpet, respectively. Heuga contends it is the successor in interest to the offers submitted by FCI for those items.

We deny the protest.

Facts

As we indicated above, FCI had submitted an offer under this RFP. On December 30, 1988,[1] FCI sold to Heuga International, B.V. (a Netherlands company which does business in the United States as Heuga USA) its fifty percent interest in the Bigelow/Heuga Company, which was a joint venture[2] between FCI and Heuga International, B.V., established for the purpose of manufacturing and selling carpet tiles such as those required by the RFP. Also on December 30, after several prior extensions of the period of acceptance in accordance with the agency's requests, FCI's offers on SINs 31-54 a and 31-54 b expired. Prior to the expiration of FCI's offer on December 30, GSA had failed to request that the firm again extend its acceptance period on the subject items. On the other hand, FCI itself had taken no action to extend the acceptance dates of its offers. Thus, the offers for those items expired on the same date FCI sold to Heuga its interest in the joint venture through which its Bigelow Division would have serviced the underlying contract.

The record shows that on January 4, during the conduct of business with the agency's contracting office concerning another procurement, the vice president for marketing and authorized negotiator for the Bigelow Division of Fieldcrest Cannon (the offeror) informally advised the contracting office that in the event its offers for SINs 31-54 a and b should "come in line for award," it would need to withdraw its offers because the company was no longer in the carpet tile business.

On or about January 23, the agency and an executive of a marketing firm representing FCI on a contingent fee basis (for the purpose of securing the contract for FCI) who was authorized to negotiate on behalf of FCI for this RFP, became aware of the probability that the offers submitted by FCI for the subject solicitation items were in line for award. According to the record, on January 23, the marketing firm executive advised the contracting officer that the joint venture of BigelowHeuga (through which FCI provided carpet tiles) had been sold to Heuga and was no longer associated with the Fieldcrest Cannon companies. The record further indicates that during this January 23 conversation with the contracting officer, the FCI marketing representative inquired as to whether "there could be a novation agreement or a joint venture established or some other way that Heuga could win this contract." The contracting officer requested a copy of the bill of sale and any other documentation that would substantiate the information provided by the marketing representative.

Also on January 23, the same marketing representative who was authorized to negotiate for FCI under the subject RFP for SINs 31-54 a and b received the authorization of Heuga USA to act as its sales representative to secure for

[1] We note that some of the protest documents refer to the date of sale as December 31, 1988; however, since the Agreement for Purchase and Sale and the Assignment and Bill of Sale show December 30 as their date of execution, for purposes of this decision December 30, 1988, is referenced as the date of sale.

[2] Some of the protest documents refer to the Bigelow/Heuga entity as a "partnership," while others refer to it as a joint venture. Since, as the agency observes, the entity referred to itself as a joint venture in the (separate) offer it submitted in response to the subject solicitation, we will here also refer to the entity in that manner.

Heuga USA the same contract. On January 24, the contracting officer informed FCI's manager for government sales, who was also an authorized negotiator for the corporation, that FCI's offers had expired and requested that he reinstate the offers and either extend them for 30 days or withdraw them if the firm wished to do so.[3] In compliance with GSA's request, on January 25 FCI telefaxed to the contracting office a request to extend its offers for items 31-54 a and b through February 28, and on January 26 telefaxed a letter to the contracting officer withdrawing the offers. On February 7 and February 9, respectively, FCI confirmed (provided a "hard copy" of) the telefaxed extension and withdrawal of its offers.

However, by letter dated January 25, addressed to the contracting officer on FCI letterhead, the FCI marketing representative stated, with reference to the FCI offers for items 31-54 a and b:

> We want to and intend to service this contract but are at this stage somewhat undecided as to whether a novation designed to make Heuga the primary party to the contract might not more fairly reflect the realities of the situation. We are exploring this possibility with [Heuga] and with our attorneys. . . .

According to the record, a letter dated January 27, addressed to the contracting officer and bearing the signature of that same marketing representative stated:

> The fax signed by [FCI's manager for government sales/authorized negotiator] . . . withdrawing our offer on Item 31-54 was based on misunderstanding and should be considered void and of no effect.

Clearly, there was a conflict between the communications the agency had received from FCI's manager for government sales/authorized negotiator (January 26) and its vice president for marketing/authorized negotiator (January 4)—both of whom had indicated FCI was withdrawing from the procurement—and its marketing representative (January 25 and 27) who indicated to the contrary. In view thereof, the contracting officer, on January 30 and February 1, inquired of FCI officials—including the manager for government sales/authorized negotiator—concerning the company's intentions regarding the withdrawal of its offers. The company officials responded that FCI remained firm in the withdrawal of its offers for items 31-54 a and b. On January 30, GSA notified FCI's marketing representative that in reference to his January 25 and January 27 letters, FCI's offers for the items in dispute had been withdrawn, and FCI was, therefore, no longer under consideration for the award of these items.

Subsequently, this protest of "GSA's January 30, 1989 letter" to FCI's (and Heuga's) marketing representative was filed in our Office "on behalf of Heuga [USA]." The agency has withheld award of the items in dispute pending the resolution of this protest.

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[3] We note in this connection that the contracting officer's request that FCI first reinstate its expired offers and then withdraw them if the firm was no longer interested in receiving the award was unnecessary since FCI actually needed to do nothing regarding its expired offer if it did not wish to be considered for award. Although the agency had not requested that FCI extend its offer acceptance period prior to its expiration, we have held that the offeror is also responsible for extending its offer prior to its expiration if it is still interested in competing for award of the contract. *Native American Trading Corp.*, B-234107, May 19, 1989, 89-1 CPD ¶ 482; *Arsco International*, B-202607, July 17, 1981, 81-2 CPD ¶ 46.

The protester's position is that because Heuga purchased FCI's interest in Bigelow/Heuga and, by implication, because that was the entity through which FCI would have provided the required goods, Heuga is the "successor party in interest" of FCI's low offer for items 31-54 a and b and intended to hold open "its" offers for those items until contract award. Therefore, Heuga contends, since FCI had sold its interest in the company through which it marketed carpet tile, it was without authority to withdraw the offers.

The protester expresses the view that, at best, FCI's withdrawal of the offer was only "a withdrawal of [FCI's] interests in these SINs" but had no effect upon Heuga's interest in them. Alternatively, Heuga maintains, in essence, that to the extent FCI did have authority to withdraw its offer "on Heuga's behalf," the withdrawal was a "mistake based upon a misunderstanding by a . . . representative [of FCI] of the relationship between Heuga and [FCI]," which, when discovered, "*Bigelow* [FCI] acted promptly to rescind the withdrawal notice" (italic added) through the marketing representative's January 27 letter.[4]

The protester alleges that GSA was on "constructive" notice, prior to receiving FCI's withdrawal of its offers, that FCI had sold its joint venture interest in the carpet tile business to Heuga and "considered Heuga to be its successsor in interest" to its offer for SINs 31-54 a and b. On the basis of this allegation, Heuga contends the agency improperly accepted FCI's withdrawal of its offers without ascertaining FCI's "status as an offeror," and refused to reinstate the offers as requested by the marketing representative.

Heuga states that in view of the conflicting expressions of intent (received from FCI officials on one hand, and from FCI's marketing representative on the other hand), the agency had a duty to request and obtain clarification from the offeror and to resolve "ambiguities" concerning FCI's intent to withdraw its offer. The protester suggests that because the agency did not rescind FCI's withdrawal of its offers, it failed in these duties, and in so doing, violated federal procurement regulations requiring full and open competition. The protester also alleges that GSA improperly accepted FCI's telefaxed withdrawal of its offers and that these allegedly improper actions on the part of the agency are prejudicial to Heuga's "contract rights" under the solicitation.

Heuga requests a ruling that GSA's exclusion of the offers submitted by FCI from further consideration based on FCI's withdrawal of them is arbitrary and unreasonable, and that GSA should reverse its determination in this regard and "reinstate *Bigelow* as an offeror." (Italic added.)

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[4] In this connection, we note that in stating its case, the protester interchangeably refers to the actions of officials of the offeror—the Bigelow Division of Fieldcrest Cannon (FCI)—and FCI's marketing representative for this solicitation, as one and the same "Bigelow," in a manner that is suited to the protester's representation of the facts. Thus, for example, the protest is worded in a manner that conveys the inaccurate impression that the offeror, which it refers to as "Bigelow," acknowledged in the marketing representative's January 25 letter that Heuga was "the real party in interest" to the FCI offers, but by letter dated January 26 (signed on behalf of FCI's manager for government sales and authorized negotiator) "erroneously" withdrew them, and after recognizing its "mistake" corrected it by "rescinding" the January 26 notice of withdrawal by the marketing representative's letter dated January 27, who, as previously stated, the record indicates was also retained on February 23 as a sales representative for securing award of items 31-54 a and b for Heuga.

Discussion

The issue central to Heuga's protest is the propriety of GSA's acceptance of FCI's withdrawal of its offers for SINs 31-54 a and b. Heuga's protest is based upon its contention, in essence, that as purchaser of FCI's 50 percent interest in its carpet tile business—the joint venture of Bigelow/Heuga—Heuga is or would be the successor in interest to FCI's low offers for the subject SINs, but for GSA's acceptance of FCI's withdrawal of the offer.

In our view the very posture of Heuga's protest bespeaks its merits. The record shows that the transfer of FCI's interests in the Bigelow/Heuga joint venture to Heuga took place on December 30, the same day that the subject FCI offer expired. Furthermore, prior to the date when the parties became aware that FCI's offers were in line for award (on or about January 23), neither Heuga nor FCI manifested any interest in maintaining the viability of the offers, pending award. Indeed, there has been no showing of record that between those dates Heuga exercised or manifested any possessory interests with respect to the offers in which it now claims to have a contractual right by virtue of the December 30 transaction, even though the acceptance period of the offers had expired.

This assessment of Heuga's position with respect to the FCI offers is supported by the agency's telephone contact record of a January 23 telephone conversation between the marketing representative and one of the contracting officials. According to the contact record the marketing representative called to advise the contracting officials of the sale of Bigelow/Heuga. The contact record goes on to state, "[The marketing representative] asked if there could be a novation agreement or a joint venture established or some other way that Heuga could win this contract. . . ." It would appear that if, as Heuga now contends, the FCI offer had properly been a part of the December 30 transfer of interests from FCI to Heuga such that Heuga was the successor in interest to the offers, there would have been no need for Heuga to devise some procedure by which "Heuga could win this contract."

On the other hand, the actions of the FCI officials with respect to that firm's offers are clearly indicative of its authority and desire to be excluded from consideration for award. First, although not recognized by the agency as an official withdrawal of its offer, on January 4, the vice president for marketing of the Bigelow Division of Fieldcrest Cannon informally advised the contracting office that it would withdraw its offer for SINs 31-54 a and b if it became eligible for award because the company was "no longer in the tile business." When on January 24 the contracting officer requested that FCI extend its offer acceptance dates if it was interested in the contract award or, in the alternative, withdraw the offers, an FCI official who was also an authorized negotiator for the firm complied with the contracting officer's request by giving the requested extension of the acceptance period to effectuate a revival of the offers.

Consistent with FCI's prior expressions of its desire to withdraw its offers, however, on the next day after it purportedly revived its offers, a letter signed for

the same official who extended the acceptance period was telefaxed to the contracting officer withdrawing FCI's offers "effective immediately."[5] Contrary to Heuga's contentions, on February 1 and February 7, the agency obtained, respectively, oral and written confirmation from FCI officials of its intention to withdraw its offers.

In our view, the agency's action in excluding FCI's offers from further consideration for award was not improper, arbitrary or unreasonable. The expiration of an offer operates to preclude the government's creation of a contract with the offeror by acceptance of the offer, and it confers on the offeror the right to refuse to perform any contract awarded to it. *MKB Mfg. Corp.*, B-208451, Mar. 1, 1983, 83-1 CPD ¶ 204. However, an offeror may waive its right to refuse to perform a contract if, following the expiration of its acceptance period, the offeror is still *willing* to accept award of the contract on the basis of the offer as submitted. *See* 57 Comp. Gen. 228, at 230 (1978), 78-2 CPD ¶ 59; *International Logistics Group, Ltd.*, B-223578, Oct. 24, 1986, 86-2 CPD ¶ 452. Although, in response to the contracting officer's request, FCI by letter dated January 25 stated it would extend the period during which it would accept award, since the offeror had given the agency to understand that it was no longer interested in the award because the manufacture and sale of carpet tile required by the solicitation was no longer a part of its business, it is clear that the action FCI took to revive the offers was only for the purpose of subsequently withdrawing it—an action which as we have noted previously was unnecessary. *See John Bankston Construction and Equipment Rental, Inc.—Request for Reconsideration*, B-225711.2, Mar. 31, 1987, 87-1 CPD ¶ 372.

Under the circumstances of this case, it is our view that FCI's actions demonstrated that on January 25 when it purportedly extended its acceptance period, it was not *willing to accept* award of the contract—one of the conditions required for an offeror to revive its expired offer or waive its right of refusal to perform the contract. There is, in fact, no evidence of record that FCI would have been willing, or was even capable, to perform the contract if it received the award. Thus, the actions by which FCI purportedly revived its offers on January 25 were void and of no effect because it was not done for the purpose of enabling FCI to receive the award but supposedly for the purpose of enabling it to withdraw its offers. Since the revival was of no effect, there were no FCI offers for the subject requirement after December 30 and, therefore, Heuga could not have been a "successor party in interest" to its offers.

Even if it is considered that FCI validly revived its offers on January 25, it effectively withdrew them on January 26. Heuga argues two points against the validity of FCI's withdrawal. First, Heuga maintains that the withdrawal letter was invalid because it was "based on a misunderstanding." However, FCI officials confirmed the withdrawal of its offers at least twice after its intent to withdraw was contradicted by the firm's marketing representative and, other-

[5] The record indicates that the FCI official/authorized negotiator for whom the withdrawal letter was signed was out of town (as he had previously informed the contracting officials he would be) and was, therefore, unable to sign the letter at the time of its issuance.

wise, its actions in no way suggest that it intended to accept award of and perform the contract. Further, the contractual agreement between FCI and its marketing representative provides that the representative "shall not incur . . . obligations for, or on behalf of, FCI" and further, that "FCI reserves the right . . . to cancel a submitted bid [here, offer] for any reason." These contract clauses indicate that final decisions and actions on behalf of FCI with respect to the firm's contractual commitments were to be made by the corporate officials, not by the marketing representative. We, therefore, conclude that the marketing representative's decisions and actions were superseded by those of the FCI officials, particularly those officials who are also designated authorized FCI negotiators. Since the record does not corroborate the marketing representative's statement that the withdrawal letter should be considered void and of no effect, we conclude that the marketing representative's January 27 letter was ineffective to rescind the January 26 withdrawal of the FCI offers.

Secondly, Heuga contends the January 26 telefaxed withdrawal was invalid on the bases that the telefax did not satisfy the solicitation requirement for withdrawal by written notice and the withdrawal notice was not actually signed by the FCI official whose name appears in the letter as signatory, but by the individual who prepared the letter. Concerning the first of these objections, since the telefaxed withdrawal was properly confirmed by written notice, it met the requirements of FAR § 52.215-10(g) (FAC 84-5). With respect to the fact that the withdrawal was signed for the FCI authorized negotiator by the preparer of the letter, since the telefaxed withdrawal was subsequently confirmed by the signatory, it may properly be considered to have been ratified by that official. On this issue, we conclude that if FCI's offer was validly revived, it was also validly withdrawn, effective January 26, and the marketing agent's representations to the contrary are of no consequence with respect to reviving the withdrawn offer. We, therefore, further find on this basis that following these events there was no FCI offer before GSA for the subject items to which Heuga could be successor in interest.

Finally, we recognize that the parties have set forth arguments concerning whether Heuga, as purchaser of Bigelow/Heuga, meets the federal procurement requirements (*see CC Distributors, Inc.,* 66 Comp. Gen. 344 (1987), 87-1 CPD ¶ 312) to qualify as an assignee of the FCI offers. However, based on the record before us, it is our view that it not necessary that we reach a determination on whether Heuga is acceptable to the agency as the assignee of FCI's offer based on the assets of the Bigelow/Heuga joint venture that were transferred. Rather, the record indicates that prior to GSA's determination that it would no longer consider FCI for award, Heuga had not provided GSA with the necessary documentation to prove its status as a successor in interest to the offer. Since GSA had no information to confirm Heuga's representation of itself as successor in interest to the offers, it had no basis to recognize Heuga as such or to conclude that the withdrawal of the offers by FCI officials was without authority.

The protest is denied.

B-234642.2, B-234690, June 9, 1989

Procurement

Bid Protests

■ Moot allegation

■■ GAO review

Procurement

Contractor Qualification

■ De facto debarment

■■ Non-responsible contractors

Protest alleging *de facto* debarment because agency repeatedly failed to refer protester's nonresponsibility to the Small Business Administration (SBA) for a certificate of competency is dismissed as academic where, subsequent to the filing of the protest, agency takes corrective measures including referral of nonresponsibility determinations to SBA which cure earlier procedural errors.

Procurement

Contractor Qualification

■ De facto debarment

■■ Non-responsible contractors

Protester's allegation that agency, to avoid awards to firm, acted arbitrarily in proposing firm for debarment is denied where agency offers sufficient evidence to show that its actions were reasonable.

Matter of: Far West Meats

Far West Meats protests the award of three contracts under request for proposals (RFP) No. DLA137-89-R-0801 (0801) issued by the Defense Logistics Agency (DLA) for the acquisition of various meat products. Far West also requests reconsideration of our previous decision, *Far West Meats,* B-234642, Mar. 31, 1989, 89-1 CPD ¶ 350, in which we dismissed Far West's protest against the award of two contracts under RFP No. DLA13H-89-R-2501 (2501), also issued by DLA for the acquisition of various meat products. We initially dismissed Far West's protest against the awards under RFP No. 2501 because DLA advised that Far West had been proposed for debarment and was ineligible for award. Far West argues in both cases that DLA has improperly instituted a *de facto* debarment against the firm and that DLA has arbitrarily instituted formal debarment proceedings against it.

We dismiss in part and deny in part the protests.

RFP No. 0801 contemplated the award of one or more contracts for some 42 different lots of meat products. As to that solicitation, Far West's protest concerns only the awards made for 6,000 pounds of diced pork, 1,000 pounds of beef knockwurst and 18,000 pounds of frankfurters. Far West timely submitted the apparent low offers for all three items.

As to RFP No. 2501, Far West's protest concerns the award of contracts for 15,000 pounds of pork sausage patties and 10,000 pounds of frankfurters. Far West submitted the apparent low offer for the pork patties.[1]

DLA apparently found Far West nonresponsible under RFP No. 0801, and, in late February, awarded three separate contracts to the second-low offerors for those items. Although Far West was a small business, the Far West nonresponsibility determinations were not referred to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). However, on March 1 and 3, DLA terminated for the convenience of the government the three contracts which had been awarded. Also on March 1, DLA sent a letter to counsel for Far West which notified the firm that a recommendation for debarment had been forwarded by the regional contracting activity to DLA headquarters.

The agency subsequently conducted a preaward survey on Far West and formally found the firm nonresponsible for the contracts at issue under RFP No. 0801. DLA forwarded the nonresponsibility determination to the SBA on March 16 for possible issuance of a COC. Thereafter, on March 24, DLA issued a formal notice of proposed debarment to Far West in accordance with Federal Acquisition Regulation (FAR) § 9.406-3(c) (FAC 84-43). This debarment notice basically reports that, based on United States Department of Agriculture (USDA) test reports, Far West, on numerous occasions, supplied meat to the government which did not conform to specifications and repeatedly was late in delivering products under its contracts. By letter dated April 14, the SBA notified Far West that it was ineligible for a COC because the firm appeared on the suspended and debarred bidder's list dated April 7.

Under RFP No. 2501, the agency awarded a contract for the one item at issue to the second-low offeror on February 16. Subsequent to Far West's protest, DLA, on March 13, terminated for the convenience of the government the contract award and canceled the requirement.

Far West first asserts that, after the SBA's refusal to issue a COC in connection with a prior solicition for meats, DLA refused to consider Far West's offers on the two solicitations at issue in these protests. According to Far West, this continuing course of action, all of which occurred before Far West was proposed for debarment, constituted an improper *de facto* debarment.

DLA has admitted that it made an error in rejecting Far West as nonresponsible without referring the nonresponsibility determinations to the SBA. However, it reports that it took corrective action which renders Far West's protest academic. We agree. First, as to RFP No. 2501, DLA has terminated the contract and canceled that requirement (an action which has not been challenged by Far West). This action renders Far West's protest academic regarding RFP No. 2501.

[1] Although Far West's original protest alleged that it was the apparent low offeror on the lot for frankfurters, the agency has informed our Office that Far West made a mathematical error in its calculations and was not therefore the apparent low offeror. Far West does not dispute this. We therefore dismiss this aspect of Far West's protest on grounds that the firm is not an interested party to maintain the protest. 4 C.F.R. § 21.0(a) (1988).

See Aquasis Services, Inc., B-232053, Sept. 22, 1988, 88-2 CPD ¶ 278. Second, as to DLA's actions with regard to RFP No. 0801, DLA's termination of these contracts as well as its subsequent referrals of the nonresponsibility determinations to SBA renders academic the protester's allegation of *de facto* debarment. Consequently, we dismiss as academic Far West's allegation of *de facto* debarment in connection with RFP Nos. 2501 and 0801. *See Spectrum Enterprises,* B-221202, Dec. 31, 1985, 86-1 CPD ¶ 5 (small business firm not *de facto* debarred despite repeated nonresponsibility determinations where each determination is referred to SBA for COC review).

Turning therefore to Far West's allegation of arbitrary and capricious action in connection with DLA's formal debarment action, the protester argues that the various specific grounds for debarment cited by DLA (tendering of mislabeled and/or adulterated meat products, tendering of meat products containing excess water and fat, tendering of other nonconforming meat products, substitution of pork for beef, and late deliveries) are either not supported by the evidence or merely represent deviations which are the industry norm.

For example, as to the delivery of mislabeled and/or adulterated meat products and the alleged substitution of pork for beef, DLA's allegations concern the delivery by Far West of frankfurters which allegedly contained heart muscle, salivary glands or pork (in cases where all beef was required). Far West argues that the evidence in support of this allegation is inconclusive because, in products which are significantly processed, it is virtually impossible to identify distinguishable tissues such as heart muscle or salivary glands. Far West also argues that less than half of the laboratory reports on this issue show the presence of these substances and that this tends to cast doubt upon the reliability of such reports since the tests were conducted on a single lot. Further, Far West asserts that the presence of beef heart tissue was an isolated incident which occurred because a beef heart had been caught on a conveyor mechanism and that proper equipment cleaning procedures have eliminated the problem. Far West argues that, as to the alleged substitution of pork for beef, the error resulted from improper species control procedures which have subsequently been corrected by the firm under the specific guidance of the USDA.

With regard to the delivery of meat products containing water and fat in excess of USDA maximum percentages, Far West argues that the product was manufactured at a time when, unknown to the firm, it had a broken scale and calibrating device. According to Far West, the equipment has been repaired and, thus, the problem was an isolated incident and insufficient to support DLA's debarment efforts.

Further, concerning the supplying of armbone chuck roasts which contained excess fat, bones, cartilage, backstrap, blood clots and foreign substances including hair, Far West reports that these violations did not cause DLA to reject the goods and, in any event, did not present a health hazard.

As to the late deliveries, Far West, while admitting to late deliveries, argues that its record in this regard is no more egregious than any other firm engaged in contracting with DLA for meat products.

In sum, Far West argues that the evidence presented by DLA in support of its proposed debarment is either inconclusive, or the result of isolated incidents which were corrected by the firm. Additionally, Far West argues that DLA is legally precluded from proposing it for debarment unless it submits many of its competitors for debarment as well.

In response, DLA argues simply that the evidence upon which it relies for the proposed debarment is sufficient. In this connection, DLA has submitted letters from USDA officials attesting to the accuracy and methodology of the testing relied upon by the agency. DLA has also submitted a statistical analysis of Far West and its competitors which it believes illustrates that, from a comparative point of view, Far West has been cited for substantially greater nonconformance than any of its competitors. DLA also argues that whether or not a health threat is posed by these instances of nonconformance is not relevant to the question of whether tendered products meet the requirements called for in a given contract.

Our Office will consider protests of allegedly improper suspensions and debarment occurring during the pendency of an award decision to ensure that the contracting agency is not acting arbitrarily in order to avoid making award to a firm which is otherwise entitled to award and also to ensure that minimal due process standards have been met. *See N.W. Ayer, Inc.,* B-225632, Jan. 16, 1987, 87-1 CPD ¶ 68; *S.A.F.E. Export Corp.,* 65 Comp. Gen. 530 (1986), 86-1 CPD ¶ 413, *aff'd on reconsideration,* B-222308.2 *et al.,* July 8, 1986, 86-2 CPD ¶ 44; *Spectrum Enterprises,* B-221202, *supra.* We point out, however, that the scope of our review is restricted to a consideration of whether the agency has put forth sufficient evidence to show the reasonableness of its decision not to make an award to the firm and whether it has followed proper procedure in suspending the firm. Simply stated, our Office is not the appropriate forum to consider the weight or sufficiency of evidence for purposes of the ultimate debarment decision or to consider whether an agency has acted properly in proposing one firm but not another firm for debarment.

Applying this standard, we conclude that DLA has made a showing sufficient to support its decision not to award to Far West and has also followed proper procedure in proposing the protester for debarment. In particular, the record contains numerous reports of nonconformance. These reports show that Far West has supplied a substantial number of deliveries which did not conform in one way or another to contract specifications. Also, the fact that the government made a business decision not to reject certain nonconforming deliveries does not affect the nonconforming nature of those deliveries vis-a-vis the contract specifications. Far West does not rebut the essential fact that it has at times supplied nonconforming meats, but rather submits that these were "isolated occurrences" caused by problems which were corrected. Far West further admits to late deliveries, but states its record is better than other meat supply firms. In

our view, the number of instances of nonconformance, the types of nonconformance, late deliveries, and the fact that Far West does not dispute that these problems occurred, is sufficient to support the proposed debarment action. Far West's contention that other firms may have similarly poor performance does not detract from the sufficiency of the record for the proposed debarment of Far West.

As to procedure, while DLA did previously err in failing to refer several nonresponsibility determinations to the SBA, its subsequent corrective action and the proper service of adequate notice to Far West of its proposed debarment satisfies us that the firm has been afforded adequate due process.

Under these circumstances, we cannot conclude that DLA acted unreasonably in not awarding these contracts to Far West.

The protest is dismissed in part and denied in part.

B-234870, June 9, 1989

Procurement

Sealed Bidding
■ Bid guarantees
■■ Responsiveness
■■■ Contractors
■■■■ Identification

Contracting agency's rejection of bid as nonresponsive because of uncertainty as to the identity of the actual bidder is proper where bid was submitted by an entity that certified itself as both a joint venture and a corporation, characterized its corporate status as "other corporate entity," and used the employer's identification number of one member of the purported joint venture, a corporation.

Matter of: Syllor, Inc./Ease

Syllor, Inc./Ease, a purported joint venture of Syllor, Inc., and Ease Chemical, protests the rejection of its bid and the award of a contract to any other bidder under invitation for bids (IFB) No. DLA400-88-B-0100A, issued by the Defense Logistics Agency (DLA).

We deny the protest.

DLA issued the IFB on November 25, 1988, for hydraulic fluid and lubricating oil. The solicitation provided for multiple awards for 29 line items. It also provided for application of a 10 percent evaluation preference for small, disadvantaged business concerns (SDBs). Seven bidders responded by the January 31, 1989, closing date. The protester was the low bidder for one line item after application of the SDB evaluation preference.

The contracting officer made an initial determination of nonresponsibility based on a negative pre-award survey conducted on both Syllor, Inc./Ease under a prior solicitation. Since the protester had certified that it was a small business,

the agency referred the matter to the Small Business Administration (SBA) for review under its certificate of competency procedures. According to the agency, as a result of inquiries from the SBA about the nature of the relationship between the two firms, it reviewed the protester's bid again. The contracting officer then determined that the bid was ambiguous concerning the bidder's legal status and identity and rejected the bid as nonresponsive.

Syllor, Inc./Ease maintains that it is a valid joint venture. The protester argues that the agency relied on the wrong information in making its determination of nonresponsiveness and complains that the agency did not question it on this matter or give it an opportunity to respond.

The record shows that Syllor, Inc./Ease completed the "Type of Business Organization" clause in its bid by marking both the corporation and joint venture boxes. In addition, the protester completed amendment No. 1 with an address that differed from that given for the bidder in the bid itself, and characterized its corporate status as "other corporate entity." The agency also states that the employer's identification number (EIN) provided in the bid is that of Syllor, Inc.

To be responsive, a bid must constitute an equivocal offer to provide without exception exactly what is required at a firm-fixed price. *Sess Construction, Inc.*, 64 Comp. Gen. 355 (1985), 85-1 CPD ¶ 319. The determination as to whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. *Haz-Tad, Inc., et al.*, 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486. Further, an award to an entity other than that named in the bid constitutes an improper substitution of bidders. *Id.*

We believe the agency rejection of the bid as ambiguous was proper based on the protester's unexplained marking on the bid form that it was both a corporation and a joint venture, its use of different addresses on the bid and on amendment No. 1, its characterization of its status as "other corporate entity," and its insertion of the EIN of Syllor, Inc. First, the bidder's identity cannot be both a corporation and a joint venture, an ambiguity which was compounded by the differing addresses and the protester's own characterization of its status. Second, the certification of the bidder as a joint venture is inconsistent with the use of one company's EIN. Thus, since Syllor, the corporation, and Syllor, Inc./Ease, the purported joint venture, are separate legal entities, we believe this contradictory information in the bid made the protester's bid ambiguous. *See Future Electric Co.*, B-212938, Feb. 22, 1984, 84-1 CPD ¶ 216.

Because the bidding entity's identity is unclear, acceptance of the bid would not result in a binding commitment by a specific, clearly identified bidder, and the bid is therefore nonresponsive. *Griffin Construction Co.*, 55 Comp. Gen. 1254 (1976), 76-2 CPD ¶ 26. Although the protester complains that the agency did not allow it to correct the ambiguity, since responsiveness is determined from the face of the bid at bid opening, post-bid opening explanations are unacceptable and cannot be used to cure a nonresponsive bid. *Schlumberger Industries*, B-232608, Dec. 27, 1988, 88-2 CPD ¶ 626.

Syllor, Inc./Ease further asserts that DLA is not complying with the spirit and intent of the SDB programs in rejecting its bid as nonresponsive. The record demonstrates, however, that DLA included the SDB 10 percent evaluation preference in the solicitation[1], and, by virtue of its application, Syllor, Inc./Ease displaced another firm to become the low bidder. Accordingly, since Syllor, Inc./Ease was properly rejected as nonresponsive for a reason unrelated to its SDB status and would have received award as the low bidder only as a result of the application of the SDB evaluation preference if its bid had not been rejected, we find no support for Syllor, Inc./Ease's allegation.

The protest is denied.

B-230909, June 12, 1989

Procurement

Payment/Discharge
■ Cooperative agreements
■ ■ Subcontractors

Since UMTA does not have privity of contract with the subcontractor, there is no basis upon which to pay a claim made by a subcontractor when the claim has not been made with the consent and in the name of the recipient of the cooperative agreement that entered into the subcontract.

Matter of: Urban Mass Transportation Administration—Cooperative Agreement—Claim of Subcontractor

We have been asked by the Urban Mass Transportation Administration (UMTA) whether it may release remaining funds allotted for a cooperative agreement to an unpaid subcontractor who has what is perceived to be a legitimate claim for compensation against the recipient of the cooperative agreement. As explained below, the government may not pay the claim made by the subcontractor since it is made without the contractor's consent and is not in the contractor's name.

Background

On September 29, 1986, the Urban Mass Transportation Administration (UMTA) entered into a cooperative agreement with the Bonding Assurance Fund, Inc. (BAF) in the amount of $300,000 to help locate disadvantaged business enterprises for a Demonstration Bonding Program. Subsequently, BAF subcontracted with Hill International, Inc. to evaluate the capabilities and qualifications of prospective contractors seeking bond guarantees. We have been in-

[1] This SDB preference was incorporated into the solicitation pursuant to an interim rule, effective March 21, 1988, issued by the Department of Defense (DOD) to implement section 1207 of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973, and section 806 of Pub. L. No. 100-180, 101 Stat. 1019, 1126 (the DOD Authorization Act for fiscal years 1988 and 1989). *See* 53 Fed. Reg. 5114, 5126 (1988) (to be codified at 48 C.F.R. § 219.7000).

formed that Hill was reluctant to enter into the subcontracting agreement with BAF and did so only because UMTA was involved.

The work done by Hill was well received by UMTA. In fact, UMTA made extensive use of the information supplied by Hill. As compensation for its services, Hill, under a contractual agreement, billed BAF $37,552. BAF has yet to pay Hill.

On May 6, 1987, UMTA exercised its option to terminate its relationship with BAF. For various reasons, UMTA decided that the purposes of the agreement could not be advanced by continuing to provide federal financial assistance to BAF. This decision was made after UMTA had paid a total of $144,988 to BAF under the terms of the cooperative agreement.

Subsequent to terminating the cooperative agreement, UMTA deobligated $100,000 of the $300,000 originally awarded BAF. Thus, there is a current unexpended balance of $55,012 [$300,000 − (144,988 + $100,000)] for any unpaid claims arising under the terminated agreement. This balance would cover the claim of Hill for $37,552.

We are uncertain of BAF's status at this point. UMTA has had difficulty communicating with BAF; yet, BAF has not filed for bankruptcy nor gone through dissolution and still appears legally to exist. UMTA has not paid BAF for the services performed by Hill, and some question exists as to whether the last bill submitted to UMTA by BAF includes an amount that will be used to pay Hill.

In addition to questions regarding BAF's status are questions concerning BAF's financial accountability. We have been informed that UMTA considers BAF's financial records unauditable in their current state and refuses to make any further payments to the corporation. Thus, even if BAF is now requesting payment for Hill, UMTA considers payment to BAF impossible due to their lack of financial accountability.

Analysis

In our opinion, UMTA may not pay Hill directly for services rendered under the subcontract with BAF. Although UMTA believes that Hill rendered a valuable service for which it should be compensated, we cannot find a basis for payment since there is no evidence of privity of contract between UMTA and the subcontractor. *See* B-160329, November 7, 1966; *Erickson Air Crane Company of Washington, Inc. v. United States,* 731 F.2d 810, 813 (Fed. Cir. 1984). We think that the claim by Hill may best be resolved if BAF cooperates with the subcontractor by allowing it to pursue the claim through and in BAF's name.

In analogous cases involving government contracts, we have said that a subcontractor may bring a claim in its own name against the government if it can show that it has privity of contract. *See* 62 Comp. Gen. 633 (1983); *Universal Aircraft Parts, Inc.,* B-187806, January 11, 1979, 79-1 CPD ¶ 14. There are a number of ways to prove privity in addition to the most obvious case of an express contract which binds the two parties. We have recognized that privity of

contract may be created in limited circumstances under common law theories that could make a contractor the agent of UMTA, make a subcontractor a third party beneficiary, or recognize an implied contract between the government and a subcontractor. *See Universal Aircraft Parts, Inc., supra,* and cases cited therein.

Of these three theories, only the implied contract theory seems to have any potential application under the facts as presented in this case. The facts indicate that Hill would not have subcontracted with BAF had it not been for the presence of UMTA. Further, UMTA received full benefit from the product supplied by Hill and has expressed the desire that Hill be compensated for its outstanding work. If such a benefit is left uncompensated, it would mark a windfall for UMTA.

However, a review of our decisions indicates that more is needed to create an implied contract than is present in this case. In B-171255, September 3, 1971, we held that even if the government is instrumental in inducing a subcontractor to perform, no implied contract is created unless the evidence indicates that the government also took steps to assume the obligation to pay. The obligation to pay remained with the prime contractor in that case. In inducing the subcontractor to perform, the government's representative merely promised to look into the subcontractor's financial concerns if it made further shipments to the prime contractor.

In B-171868, August 20, 1971, we did determine that the Defense Supply Agency assumed the obligation to pay a subcontractor when its Administrative Contracting Officer (ACO) made assurances to the subcontractor that he would take steps to see that payment would be made upon receipt of the requested supplies. To achieve this end, the ACO established a special account from which he could make payments to the subcontractor. But we determined that privity existed between the government and subcontractor only with regard to the contracts fulfilled after the assurances were made and the accounts established.

We have applied the same principles under an assistance relationship. In B-181332, December 28, 1976, the direct claim of the subcontractor of a grantee was disallowed against the Office of Economic Opportunity (OEO) because there was no "privity of contract" between the subcontractor and the government agency.

After the initial claim was disallowed, the grantee, Monmouth Community Action Program, Inc. (MCAP), authorized the subcontractor to file its claim in the name of MCAP for and on behalf of the subcontractor. MCAP admitted liability to the subcontractor "only to the extent to which the Government of the United States is determined to be liable to MCAP." Upon disposition of the issues presented, we allowed payment by OEO of all amounts claimed by the subcontractor under the grant agreement. *See also,* 66 Comp. Gen. 604 (1987). In light of our prior cases, the facts in the case before us do not establish the existence of privity between UMTA and Hill.

Conclusion

Without privity of contract, there is no legal basis for a direct claim by Hill against UMTA. Without the participation of the contractor there is no way to know whether it recognizes Hill's claim nor is it possible to evaluate any defenses it might have against the claim. Despite the apparent unfairness to Hill, the risk to the government in making direct payments to subcontractors is unacceptable unless it is able to clearly extinguish its liability to the contractor for that payment.

B-233346, June 12, 1989

Civilian Personnel

Relocation

■ Household goods

■■ Commuted rates

■■■ Weight certification

■■■■ Evidence sufficiency

An employee's claim for reimbursement on the commuted rate basis for the transportation of household goods in his pickup truck, which he used to travel to his new official duty station, was disallowed because it was supported only by an estimate of weight rather than actual scale weight. On appeal from the disallowance, the claimant submitted copies of weight certificates obtained more than 4 years after the transportation occurred by reloading and weighing the truck. The claim may not be allowed since scales were available during transportation and the weight certificates obtained years after the transportation occurred are not sufficient evidence.

Matter of: Jack K. Huffman III—Household Goods—Available Scales—Constructive Weight

An employee claims reimbursement for transportation of household goods under the commuted rate system incident to a permanent change of station. For reasons to be explained, the claim may not be allowed.

Background

In May 1983, Jack K. Huffman III, an employee of the Department of the Army, traveled from his old duty station at Fort Lee, Virginia, in his privately-owned pickup truck, to his new duty station at Fort Hood, Texas. He states that the truck was loaded with items of household goods, such as kitchen equipment, small appliances, and personal items, that he considered would be needed at his new duty station until he could move his family and the remainder of his household goods.[1] Mr. Huffman did not weigh his truck, although scales were available.

[1] Mr. Huffman explains that the anticipated relocation of his family and household goods never occurred because of a change in his marital status.

The Army paid Mr. Huffman a monetary allowance in lieu of transportation for his travel, but denied his claim for $594.30 as reimbursement for the transportation of his household goods in his pickup truck based on the commuted rate applied to his weight estimate of 700 pounds. The Army forwarded the claim to our Claims Group as doubtful[2] because under the Joint Travel Regulations, vol. 2, para. C8000-2d (Change 208, Feb. 1, 1983), reimbursement on the commuted rate basis could not be made in the absence of weight certificates where adequate scales were available.

Our Claims Group disallowed the claim, concluding that there was insufficient evidence of weight, but indicated that some precedents of this Office permit claimants, who have moved themselves, to obtain weight certificates after completion of the transportation.[3] In his appeal Mr. Huffman requests reimbursement for the transportation of 1,180 pounds (rather than the original 700 pounds). He supports his appeal with weight certificates, dated in September 1987, when, according to his statement, he reloaded his pickup truck with most of the items he had moved (more than 4 years earlier) in the same vehicle. He also furnished a list of the items he weighed.

Discussion

Our precedents, accepting weight certificates obtained after transportation occurred, are limited to very narrow facts. B-172979, July 9, 1971, and B-169117, Mar. 16, 1970. In *Paul C. Warner,* B-180897, Apr. 21, 1975, we explained that such certificates can be considered only where the transportation presented difficulties in determining the weight and when the weights were obtained within a relatively short period of time after the transportation.

Neither fact exists here. The weight certificates were not obtained until more than 4 years after the transportation, and Mr. Huffman states that he simply "forgot" to weigh the shipment during transportation.

Since scales were available to Mr. Huffman during transportation, his case is controlled by *Phillip Rogers,* B-199803, Mar. 25, 1981, which denied a claim for reimbursement under the commuted rate system in similar circumstances.

Accordingly, the disallowance of Mr. Huffman's claim is sustained.

[2] The matter originated with the accounting and finance officer, Headquarters III Corps and Fort Hood, Texas.
[3] Settlement Certificate Z-2863312, March 23, 1987.

B-234517, June 15, 1989

Procurement

Socio-Economic Policies

■ Small businesses

■ ■ Disadvantaged business set-asides

■ ■ ■ Eligibility

■ ■ ■ ■ Determination

Protest is sustained where procuring agency awarded a contract set aside for small and disadvantaged business (SDB) concerns to a firm which was determined by the Small Business Administration (SBA) not to be socially or economically disadvantaged. Since SBA determined that the awardee was a concern which was ineligible for award because it was not controlled by a qualifying disadvantaged person, the continued performance of the contract is inconsistent with the purpose of the SDB set-aside program.

Matter of: Fidelity Technologies Corporation

Fidelity Technologies Corporation protests the award of contracts at four sites to Gray Multitech, Inc., under request for proposals (RFP) No. DAEA08-88-R-0008, a total small disadvantaged business (SDB) set-aside, issued by the Army for telecommunications services in the Southwest region. Fidelity asserts that Gray does not qualify as a socially or economically disadvantaged firm for this procurement, and that the Army prejudiced Fidelity's right to challenge Gray's SDB status by failing to provide unsuccessful offerors the required preaward notification of the intended award to Gray.

We sustain the protest.

The RFP, issued on March 4, 1988, called for proposals to provide telecommunications services at six different Army installation sites. Eight firms submitted proposals and Gray was determined to be the low-priced, technically acceptable offeror at four of the six sites. Fidelity was next-in-line at one of these four sites. On December 1, 1988, without providing advance notice to any of the unsuccessful offerors, the Army awarded these four site contracts to Gray, and the remaining two site contracts to Communications International, Inc. (CII). The awards are for a base year ending September 30, 1989, with 4 option years. On December 1, 1988, the same day, the Army notified Fidelity of the award. On December 2, Fidelity complained to the contracting officer that the preaward notice had been omitted, and that it believed that Gray was a "front" operation which did not qualify as an SDB. The contracting officer advised Fidelity that it could file a protest regarding the awardee's SDB status with the Army, which would be forwarded to the Small Business Administration (SBA) for resolution.

While the Army initially took the contrary position in its report on the protest, the Army now concedes (in its supplemental report) that during these discussions the contracting officer also advised Fidelity that, in the event of an SBA determination that Gray did not qualify as an SDB, the Army would terminate the four contracts with Gray. On December 5, Fidelity filed its protest with the Army that Gray did not qualify as an SDB. The Army forwarded the protest to

the SBA, but permitted Gray to continue to perform. On January 4, 1989, SBA determined that Gray did not qualify as an SDB for the purposes of this procurement. SBA found that the individual who purportedly controlled Gray's management and daily business operations, and upon whom Gray based its SDB eligibility, did not possess the necessary management and technical expertise to control the day-to-day activities of the firm for the purposes of the referenced solicitation. SBA further determined that these skills rested with a non-disadvantaged Gray employee, who was also the highest compensated employee of the firm. The Army appealed the decision on January 13 and, on January 27, SBA denied the appeal.

On February 7, the Army advised Fidelity that the SBA determination that Gray did not qualify as an SDB did not apply to the instant procurement and that the Army would not terminate the extant base year contract awards. However, the Army further indicated that it would not exercise Gray's options and that it would recompete those requirements as SDB set-asides. Fidelity timely protested this notice with our Office on February 15.

The Army concedes that it improperly failed to provide preaward notice to Fidelity of the apparently successful SDB offeror, as is required under section 219.302(2) of the Department of Defense Federal Acquisition Regulation Supplement (DFARS). The Army states that this omission resulted from its "error" in failing to realize that such notice was required for SDB set-asides. There was no written determination that the urgency of the requirement necessitated award without delay. Further, while the Army report indicates that by December 1 the incumbent had already been performing for an extended period at terms "unfavorable" to the government, and had begun to phase out and was not obligated to resume performance, the record does not establish that the contracting officer could or would have made an urgency determination had he realized that such a determination was necessary to avoid the notice requirement. The Army indicates that it will not exercise any of the options under the protested awards and will resolicit these requirements, but contends that because the awards were made in good faith the protest should be denied. We disagree.

The notice requirement under the DFARS is clearly intended to permit unsuccessful offerors to timely protest the SDB qualification of the apparently successful offeror in a time frame which will permit relief in the event that the challenge is found meritorious by the SBA. *See Hamilton Enterprises, Inc.*, B-230736.6, Dec. 20, 1988, 88-2 CPD ¶ 604. Section 219.302(4) of the DFARS requires that upon receipt of an SDB status protest, the contracting officer shall withhold award and forward the protest to the SBA. Award may be made only if the contracting officer determines in writing that an award must be made to protect the public interest, or if the SDB certifies that within the 6 months preceding submission of its offer it was determined to be socially and economically disadvantaged by SBA and no circumstances have changed to vary that determination. In this case, neither criterion was met.

The Army's decision not to terminate Gray's contracts after it received SBA's decision was based on its belief that SBA's determination regarding Gray's SDB

status was inapplicable to the instant procurement because it was received by the Army after award had been made. In its report the Army now concedes the applicability of the SBA determination to this procurement.

DFARS § 219.302(6) does provide that if the SBA determination is not received by the contracting officer within 15 business days after the SBA's receipt of the protest, it shall be presumed that the challenged offeror is socially and economically disadvantaged. However, the regulation also provides that this presumption may not be used as a basis for award without first ascertaining when a determination can be expected from SBA and, where applicable, waiting for the determination unless further delay in award would be disadvantageous to the government. Here, the SBA did take slightly longer than 15 business days to issue its decision. However, this did not provide the contracting officer with a basis for making the award since he neither checked with the SBA nor made the additional required determination.

Accordingly, the Army consistently treated Fidelity's protest of Gray's SDB status as timely, never took any steps which would justify an award notwithstanding the protest, and also caused the protester to reasonably believe that the Army would cancel Gray's contracts if the SBA found that Gray did not qualify as an SDB. Under these circumstances, whether or not the Army acted in good faith is of no consequence.

The Army contends that no purpose would be served by requiring it to terminate the contract awards to Gray. We disagree. The purpose of the SDB set-aside program is for the Department of Defense (DOD) to place a fair proportion of its acquisitions with SDB concerns and to maximize the number of such entities participating in DOD contracts. DFARS § 219.201(a). The SDB set-aside regulations were promulgated in response to section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986), which established a DOD goal of awards to SDBs of 5 percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988 and 1989. Here, the SBA finding with respect to Gray constitutes a clear and unequivocal final determination (not subject to review by our Office) that Gray is not an eligible socially and economically disadvantaged firm because it is controlled by an individual who does not meet the requisite criteria. In our view, permitting an award to remain in place for the base year with a non-SDB concern which erroneously self-certified under a total SDB set-aside in which seven other apparently qualified SDB concerns competed would serve to undermine the primary purpose of the SDB set-aside program.

The Army also argues that termination would have a serious and adverse effect on the government. However, the Army offers no support other than to indicate that the services are necessary. The Army points out that a 30-day phase-in period is provided under the solicitation to acclimate new employees and to familiarize these new employees with the equipment. The Army offers no specific basis for this time period and Fidelity states that its employees could be on site within 24 hours and that the telephone equipment in question is conventional and requires minimal familiarization time—a matter of several days. CII, which

is next-in-line for award at two of the sites in question, appears to be performing the services satisfactorily at the sites where it was awarded contracts, and states that it would have no difficulty taking over performance at other sites in an expeditious and non-disruptive manner. Under the circumstances, we find that the Army should determine whether Fidelity is otherwise eligible for award, and whether Fidelity's and CII's prices are reasonable for those sites where they are next-in-line. Where these determinations are affirmative, we recommend termination of Gray's base year contracts and award to Fidelity and CII. In the absence of any information concerning the offeror next-in-line for the fourth site in question, we recommend that Gray be permitted to complete that base year contract, but that the options not be exercised and the requirement be recompeted under a new solicitation. In addition, since Gray has already performed a substantial portion of the services—more than one-half of the work under the base year contract—and Fidelity will be unable to compete for that portion of the award because of the Army's improper actions, we find that Fidelity is entitled to the costs of preparing its proposal, as well as to the costs of filing and pursuing the protest, including attorneys' fees. *Hydro Research Science, Inc.—Reconsideration,* B-228501.2, Apr. 29, 1988, 88-1 CPD ¶ 418. Fidelity should submit its claims for these costs directly to the Army. 4 C.F.R. § 21.6(f).

The protest is sustained.

B-225159, June 19, 1989

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■ ■ Specific purpose restrictions
■ ■ ■ Personal expensesfurnishings
■ ■ ■ ■ Utility services

Civilian Personnel

Compensation
■ Compensation restrictions
■ ■ Off-site work
■ ■ ■ Utility services
■ ■ ■ ■ Reimbursement

In the absence of statutory authority, appropriated funds may not be used for items that are the personal expenses of an employee. Exceptions to this rule have been permitted where the item primarily benefits the government. IRS employees participating in a work-at-home program may not be reimbursed for the incremental costs of utilities associated with the residential workplace, because such costs cannot be said to primarily benefit the government.

Matter of: Utility Costs under Work-at-Home Programs

The Chief of the Fiscal Management Branch, North Atlantic Region, Internal Revenue Service (IRS) asks whether work-related utility costs incurred by certain IRS employees voluntarily participating in a work-at-home program, hereinafter referred to as a flexiplace program, may be reimbursed. The utilities involved are used to run government-furnished equipment and to illuminate, heat or air condition the residential workplace. If any of these costs are allowable, the IRS wants to know how they should be computed and whether such reimbursement is optional or mandatory. We conclude that absent legislation authorizing such expenditures, incremental utility costs associated with the residential workplace may not be allowed.

Background

The IRS has been interested in the flexiplace concept for several years. In the middle 1980s the North-Atlantic Region experimented with a flexiplace program for approximately three years involving criminal investigators in New York City. These agents normally worked in the field near their homes. The IRS installed computers and dedicated telephone lines in their homes, where the agents wrote their reports and transmitted them to the IRS Office. IRS terminated the experiment about two years ago when it determined that the highly-skilled agents in the flexiplace program were needed in the IRS Office to train and supervise less experienced investigators.

Currently, the IRS is experiencing a serious shortage of data transcribers due to intense competition from the private sector. In an effort to attract and/or retain data transcribers, the IRS would like to initiate a flexiplace program to permit such employees to perform their work in their homes. The flexiplace program is considered a desirable fringe benefit by many employees who would like the convenience of remaining at home, and depending on their circumstances, would like to avoid child care costs andor the time and expense involved in daily commuting.

As contemplated by the IRS, the flexiplace program would be entirely voluntary. The IRS would arrange for the installation of government-furnished data transcription and telecommunications equipment and facilities in the employees' residences. The cost of the installation and telephone line charges would be billed directly to the government. The IRS would like to reimburse flexiplace program employees for the added increment of utility costs for workplace lighting, heating, air conditioning and electrical power consumed by the government-furnished equipment incurred by virtue of their workplace being in their homes. The IRS has sought our opinion on whether it may expend its appropriations for the reimbursement of these utility costs.

Acceptability of the Flexiplace Program

As a threshold matter, we must consider the permissibility of work-at-home programs and the installation of telephone line facilities in private residences. In the interest of fiscal accountability, our Office has approved the compensation of employees for work done at home only when: (1) the agency demonstrates that it will be able to verify and measure the performance of the assigned work against established quantity and quality norms; (2) a substantial amount of the employee's work is amenable to performance at the employee's home; and (3) there is a reasonable basis to justify the use of the home as a workplace. *See* 65 Comp. Gen. 826 (1986) and B-214453, Dec. 6, 1984.

The proposed data transcription program satisfies these criteria. The data transcription equipment automatically measures productivity by recording the amount of work accomplished within a given time period, thereby permitting verification of measurable work. Upon the installation of the requisite equipment, the employees can perform all their data transcription duties from the home workstation. Administrative matters generally can be handled over the phone or by periodic visits to the IRS Office. Finally, IRS adequately justifies the home workplace as an important fringe benefit to attract and/or retain competent data transcribers, who are in short supply in certain metropolitan areas and heavily recruited by private sector firms which frequently offer higher compensation. Accordingly, we conclude that the flexiplace program proposed by IRS satisfies the criteria set forth in our prior decisions.

The IRS proposal raises a second threshold issue concerning the general prohibition contained in 31 U.S.C. § 1348(a)(1) (1982) on the use of appropriated funds to install telephones in private residences. The purpose of this provision is to insure that the government does not bear the cost of private use of telephone equipment by government employees. We have permitted exceptions to the prohibition in circumstances consistent with the statute's purpose. These exceptions include situations where adequate safeguards against private misuse exist and where the service was essential. *See* 61 Comp. Gen. 214, 216 (1982). For example, we did not object to the installation of telephone lines in criminal investigators' homes in New York City in connection with the IRS flexiplace experiment. We concluded that the telephone service was essential and, subject to the establishment of safeguards to prevent misuse, approved the installation. 65 Comp. Gen. 835 (1986).

The circumstances surrounding the telephone service for the data transcriber flexiplace program is almost identical to the criminal investigator flexiplace experiment. The IRS will be able to establish safeguards to detect or prevent any private use of the telephone line by the data transcriber employees. In this regard, the IRS will require employees to maintain their own personal telephone lines in their residences and will be able to screen the monthly bills for the government-furnished lines to determine if any unauthorized long-distance calls were made. Accordingly, we conclude that the exception to section 1348 recognized in 65 Comp. Gen. 835 (1986) is equally applicable to the data transcriber flexiplace program.

The principal issue for resolution is whether IRS may reimburse flexiplace program employees for the incremental increase of residential utility costs associated with having their workplace in their homes. IRS appropriations contained in the Treasury Department Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721, do not specifically provide for utility costs, but do provide for "necessary expenses of the Internal Revenue Service, not otherwise provided." 102 Stat. 1725. As a general rule, appropriations for "necessary expenses" of any agency may be used for purposes not specifically set forth in the appropriations act, if the expenses in question are for the direct support of the agency's mission. *See* 27 Comp. Gen. 679 (1948) and 54 Comp. Gen. 1075, 1076 (1975).

Utility costs associated with office space for government workers typically would be one of the costs satisfying the necessary expense rule. However, residential utility costs normally are considered the personal expenses of federal employees. An agency may not use appropriated funds to pay for items of personal expense unless there is specific statutory authority. 63 Comp. Gen. 296 (1984). We have allowed exceptions to this rule only where there is clear and convincing evidence that the expenditure that would ordinarily be a personal expense primarily benefits the government. For example, the Department of the Navy was authorized to use appropriated funds to reimburse a university employee for the cost of a physical examination required by Naval regulations in order for her to participate aboard ship in a Naval exercise as an official invitee. The physical examination was primarily for the benefit of the government to minimize the possibility of having to divert the ship, on which she was a passenger, from its mission. 65 Comp. Gen. 677 (1986).

We are not persuaded that the government would primarily receive the benefit of the incremental cost of utilities, such as heating, air conditioning, lighting, and the operation of government-furnished data processing equipment occasioned by the employee using his residence as his work place. It is difficult to apportion such utilities between those for which the employee is clearly responsible and any added increment attributable to having the workplace in the residence. These apportionment difficulties also apply to the cost of electricity to operate government-furnished data processing equipment when the employee can use such equipment both for his own personal benefit and for official business. In addition to the apportionment problem, the use of utilities fluctuates over time in response to numerous factors such as the number, age, and health of the residential occupants, the season of the year, and short-term weather cycles. Other computational difficulties result from the different energy sources used to heat or cool residences plus regional cost variations of energy sources. In view of these problems we do not think it is possible to accurately establish the benefit let alone the amount thereof that would inure to the government.

Apart from the above concerns, we think that the expenses an employee incurs as a result of participation in a flexiplace program should not be viewed in isolation. Balanced against these expenses are potential savings to the employee resulting, for example, from reduced commuting, child care, meal and/or cloth-

ing expenses. How the balance should be struck, if at all, between the potential costs and savings to an employee participating in a flexiplace program is a legislative judgment. This, together with our earlier concerns, leads us to conclude that these utility costs may not be allowed as an exception to the general rule on personal expenses.

If the IRS considers the payment of costs to employees important to the success of a flexiplace program, we think it should seek legislation authorizing the payment of these costs.[1] If proposed, we think such legislation should be comprehensive, addressing all potential work-at-home costs associated with such programs. In this regard, the legislation could be modeled on 5 U.S.C. §§ 5704 and 5707 (1982) which permits the General Services Administration to promulgate regulations and establish a fixed rate of reimbursement per mile of travel when a government employee uses his own vehicle for official travel.

Since we have determined that these costs are unallowable, we need not address the issues raised by IRS concerning the computation of such costs and whether such payments are mandatory or discretionary.

Summary

In the absence of specific legislative authority, we conclude that the IRS may not use appropriated funds for the reimbursement of employees for incremental utility costs for heating, air conditioning, lighting, and the operation of government-furnished data processing equipment associated with the residential workplace, because such costs cannot be said to primarily benefit the government. Accordingly, they may not be allowed as an exception to the general rule on personal expenses.

B-228501.3, June 19, 1989

Procurement

Bid Protests

■ GAO procedures

■ ■ Preparation costs

■ ■ ■ Burden of proof

Amounts claimed for costs of filing and pursuing protest and for proposal preparation may be recovered to the extent that they are adequately documented and not shown to be unreasonable. To the extent that the claim is not adequately documented, claimant is not entitled to recovery.

[1] Representative Frank Wolf recently introduced H.R. 2435, 101st Congress, 1st Session, to authorize federal agencies to test flexiplace work arrangements for their employees. As introduced, H.R. 2435 does not address the reimbursement of utility expenses of flexiplace employees.

Procurement

Bid Protests

■ GAO procedures

■■ Preparation costs

■■■ Amount determination

Where improperly awarded contract is terminated and protester has opportunity to compete for remaining contract work, recovery of proposal preparation costs is limited to that amount that relates to the portion of the contract work for which protester was deprived of the opportunity to compete.

Procurement

Bid Protests

■ GAO procedures

■■ Preparation costs

Request for payment of costs of pursuing claim is denied since such costs are not reimbursable.

Matter of: Hydro Research Science, Inc.—Claim for Costs

Hydro Research Science, Inc., requests that the General Accounting Office (GAO) determine the amount it is entitled to recover from the United States Army Corps of Engineers for proposal preparation costs under request for proposals (RFP) No. DACW07-87-R-0049 and for the costs of filing and pursuing its protest. We determine that Hydro is entitled to recover total costs of $40,031.22 as discussed below.

In its initial protest, Hydro protested the award of a contract to Hydronetics, Inc., for the operation and maintenance of the San Francisco Bay/Delta Model. Hydro argued that the Corps improperly evaluated proposals, failed to follow the RFP evaluation scheme, improperly awarded a contract to the high-priced offeror and was biased against Hydro. An agency report and comments were subsequently filed with our Office. We dismissed the protest as academic, because, before we could resolve the matter, the Corps informed us that due to flaws in the procurement it would terminate the contract and competitively resolicit the RFP requirements. Upon reconsideration, we found that the protest should not have been dismissed since the protester was entitled to the recovery of its proposal preparation and protest costs, because it had lost the opportunity to compete for a significant portion of the work performed under the terminated contract. *Hydro Research Science, Inc.—Reconsideration,* B-228501.2, Apr. 29, 1988, 88-1 CPD ¶ 418.

The protester seeks a total of $63,334.10, consisting of $42,606.01 in protest costs and attorneys' fees, $13,553.36 in proposal preparation costs, and $7,174.73 in the costs of pursuing its claim. The Corps offered to pay Hydro the amount of $9,262 in reimbursement of Hydro's proposal preparation and protest costs. Because the agency and the protester have been unable to reach any agreement

concerning the amount of Hydro's claim, Hydro requested that we determine the amount it is entitled to be reimbursed. 4 C.F.R. § 21.6(f) (1987).[1]

The Corps argues that Hydro is only entitled to recover $9,262, which is the amount of profit Hydro would have received on the portion of the contract award for which Hydro was deprived of competing. The Corps reasons that since we found Hydro to be entitled to the award of costs because Hydro had been deprived of the opportunity to compete for a significant portion of the contract award, Hydro should only be allowed to recover the profit it would have received on that portion of the award. The Corps contends that it would be unreasonable for Hydro's recovery of costs to exceed this amount.

We do not agree that Hydro's recovery of reasonable protest and proposal preparation costs is limited to its lost profits on the portion of the contract for which the protester lost the opportunity to compete. The reasonableness of claimed costs is determined in the context of what a prudent person would incur in the preparation of a proposal and pursuit of a protest. *See* Federal Acquisition Regulation (FAR) § 31.201-3 (FAC 84-26). However, we conclude that Hydro is not entitled to recover all of its costs of proposal preparation because Hydro had the opportunity to compete for the remaining contract requirements under the resolicitation. Our purpose in awarding proposal preparation costs is to compensate an offeror who had incurred costs in proposal preparation but had not had a fair opportunity to compete for award. Here, Hydro had the opportunity to use its proposal to compete for award of the remaining contract work. However, since Hydro lost the opportunity to compete for a portion of the work performed under the terminated contract, we find Hydro to be entitled to recover its reasonable costs of proposal preparation that relate to that completed portion of the contract work.

We do not find that Hydro's recovery of protest costs is similarly limited. The recovery of protest costs is allowed in order "to relieve parties with valid claims of the burden of vindicating the public interests which Congress seeks to promote." *See Computer Lines,* GSBCA No. 8334-C, Oct. 9, 1986, 86-2 BCA ¶ 19,403. By awarding Hydro that portion of its reasonable costs of proposal preparation that relates to the portion of the contract work for which it was deprived, we have placed Hydro in as good a position as it was prior to the original competition. However, the opportunity to compete for the remaining contract work would not compensate Hydro for its out-of-pocket expenses in filing and pursuing its protest. Thus, we see no purpose in restricting the award of protest costs to the proportion of the award for which the protester was deprived of competing.

[1] The protest, out of which this claim arose, was filed on October 13, 1987, prior to the effective date of our current Bid Protest Regulations.

Protest Costs

Of the $42,606.01 claimed for the costs of filing and pursuing the protest, Hydro requests reimbursement of $15,544.96 for its attorneys' fees. The claimed attorneys' fees are documented by total monthly billing statements and summary statements, which identify the specific time spent on the protest. Of the $15,544.96 requested, the Corps has questioned costs in the amount of $1,225.06. The Corps argues that these costs represent time spent before the award of the contract to Hydronetics and attorney time spent in conferences with Hydro's congressman. The Corps does not otherwise question the hours or hourly rates of Hydro's attorneys.

We agree with the Corps that Hydro should not be reimbursed for attorney time expended prior to the award of the contract to Hydronetics when Hydro did yet not have a basis for protest. We also find that Hydro should not be reimbursed for attorney time spent other than in pursuing the protest at GAO. Accordingly, we find that Hydro is not entitled to recover $1,225.06 in reimbursement of these claimed costs. Further, we question an additional $265.33 of costs which appear to relate to Hydro's protest on the resolicitation of the RFP requirements. *See Hydro Research Science, Inc.*, B-230208, May 31, 1988, 88-1 CPD ¶ 517. Accordingly, we find Hydro is entitled to reimbursement of $14,054.57 for its attorneys' fees.

Hydro claims an additional $27,061.05 for the costs of pursuing the protest. This amount consists of $25,603.55 for salaried employees, $1,237.50 for an outside consultantwriter, and $220 for documentation. Hydro calculated the costs of its salaried employees by identifying the hours worked by each employee, developing an hourly rate for each employee, and then burdening the product of the hours worked multiplied by the hourly rate. Hydro applied an indirect costs burden rate of 137.67 percent for Overhead/general and administrative (G&A) and 33 percent for fringe benefits.

The Corps does not question Hydro's hourly rates or that the hours claimed were actually incurred but argues that the number of hours claimed for Hydro's employees is unreasonable. Hydro responds that the number of hours is reasonable considering the procedural history of the protest. We conclude from our review of the record that Hydro is entitled to recover 296 hours of the 342 hours it claims for employees' time in supporting its lawyers in the pursuit of the protest. We calculated that Hydro was entitled to reimbursement for these hours by reviewing the employees' time sheets to determine when the hours were incurred and for what purposes.

We disallow reimbursement for 46 hours of direct labor, consisting of 23.5 hours that were incurred before Hydro had a basis for protest and 22.5 hours that were incurred in relation to Hydro's protest of the resolicitation of the contract requirements. *See Hydro Research Science, Inc.*, B-230208, *supra.* We note that 88 hours were incurred by Hydro's president and vice president at times during the protest that caused us to question whether a prudent person would incur costs of this nature and amount in the pursuit of its protest. For example, the

president incurred 60 hours between the date Hydro filed its bid protest and the date Hydro received the agency report. However, the record reflects that Hydro's legal counsel had consultations with the protester's president and vice president during this period, and the agency does not question the nature and amount of these costs other than to generally assert that Hydro's claim for employees' time is excessive. Accordingly, we have allowed the 88 hours as a part of the 296 hours that Hydro is entitled to recover for its employees' time in pursuit of the protest. *See Princeton Gamma-Tech, Inc.—Claim for Costs,* B-228052.5, Apr. 24, 1989, 68 Comp. Gen. 400, 89-1 CPD ¶ 401.

The Corps also questions Hydro's indirect cost rates. The Corps states that Hydro has failed to show what portion of the indirect cost rates can be attributable to the preparation of its proposal. However, indirect costs are not costs which are allocable to a single objective, such as proposal preparation. *See* FAR § 31.203(a). Hydro's accountant states that the indirect cost rates used represent the actual historical rates for the year incurred and that all costs directly related to the preparation of the proposal and the pursuit of the proposal, such as staff and management labor, have been removed from the indirect costs rate. We find that 137.67 percent for overhead/G&A and 33 percent rate for fringe benefits is reasonable.

We find that Hydro is entitled to be reimbursed the amount of $22,967.35 for the costs of its employees in pursuing the protest. We calculated that Hydro is entitled to be reimbursed the sum of $8,485.37 for the direct salary costs of its employees, consisting of $6,258 for the costs of its president, $1,020 for the costs of its vice president and $1,207.37 for the costs of its staff employees. We burdened the $8,485.37 by indirect costs at the rate of 137.67 percent for overhead/G&A and 33 percent for fringe benefits to arrive at the $22,967.35 figure that Hydro is entitled to recover.

We find that Hydro is not entitled to be reimbursed for the $1,237.50 in costs of its consultant/writer or the $220 in documentation costs. Hydro has not provided documentation describing or explaining the services rendered by this consultant in the pursuit of the protest. In addition, Hydro has not submitted any documentation to support its claim for $220 in documentation costs. The burden is on the protester to submit sufficient evidence to support its claim, and this burden is not met by unsupported statements that the costs have been incurred. *Malco Plastics,* B-219886.3, Aug. 18, 1986, 86-2 CPD ¶ 193.

Accordingly, we find that Hydro, for its cost of filing and pursuing its protest, is entitled to recover a total of $37,021.92 consisting of $14,054.57 for attorneys' fees and $22,967.35 for the costs of employees.

Proposal Preparation Costs

Hydro also requests reimbursement of $13,553.36 for the costs of proposal preparation. Hydro calculated this amount by finding that it had incurred salary costs in the amount of $4,345.94, which it burdened at the rate of 137.67 percent

for overhead/G&A and 33 percent for fringe benefits to total $11,763.16 for its labor costs. To this amount, Hydro added $1,675 for the costs of a consultant/writer and costs of $115.20 for photographs and proposal copying.

The Corps only questions $69.80 of employee costs, which were incurred after the date on which proposals were due. We agree with the Corps that this amount should not be allowed. We find that Hydro's reasonable cost of proposal preparation consists of $11,574.23, which represents $4,276.14 for the salary costs of its employees burdened by its indirect cost rates. We do not find Hydro to be entitled to the $1,675 of costs for its consultant/writer or the $115.20 costs for proposal copying and photographs because these costs are not sufficiently documented. *Malco Plastics,* B-219886.3, *supra.*

As noted above, Hydro is only entitled to recover its reasonable costs of proposal preparation that relate to the portion of the contract work for which Hydro lost the opportunity to compete. Since Hydro lost the opportunity to compete for 26 percent of the contract work, *see Hydro Research Science, Inc.—Reconsideration,* B-228501.2, *supra,* we conclude that Hydro is entitled to reimbursement of 26 percent of its reasonable proposal preparation costs or $3,009.30.

Claim Costs

Hydro also claims $7,174.73 for the costs of pursuing its claim. We have found, however, that the costs of pursuing a protester's claim for costs are not reimbursable. *Introl Corp.,* 65 Comp. Gen. 429 (1986), 86-1 CPD ¶ 279.

Conclusion

Based on the foregoing, we determine that Hydro is entitled to recover total costs of $40,031.22, consisting of $37,021.92 for the costs of filing and pursuing its protest and $3,009.30 for the costs of its proposal preparation.

B-234558, June 21, 1989

Procurement

Competitive Negotiation
■ Requests for proposals
■ ■ Evaluation criteria
■ ■ ■ Cost/technical tradeoffs
■ ■ ■ ■ Technical superiority

Source selection decision to award to the lowest cost, but lowest technically evaluated offeror, is not supported by the record, where the solicitation provided that technical merit was the most important evaluation factor, and the agency source selection justification does not explain why the offeror's lowest cost offsets its relatively low technical and high risk rating, considering the protester's technical rating was significantly higher.

Matter of: TRW, Inc.

TRW, Inc., protests the award of a contract to GTE, Government Systems Corporation under request for proposals (RFP) No. F01620-88-R-0002, issued by Gunter Air Force Base, Alabama, for a combination cost-plus and firm-fixed price contract for modernization of software for the Air Force Command and Control Systems (AFC2S). TRW contends that the Air Force used cost as the predominant source selection factor, even though cost was secondary to technical considerations under the RFP. TRW also contends that GTE's subcontractor, Evaluation Research Corporation International (ERCI), had an organizational conflict of interest which should disqualify GTE from award.

We sustain the protest on the first ground.

The RFP called for nonpersonal technical services to modernize software and for providing hardware necessary to support modernization of the current AFC2S. GTE, TRW, and two other concerns submitted proposals in response to the RFP.

The RFP advised offerors that this was "a technical competition with cost considered subordinate to other factors." Offerors were also advised that "[a]lthough pricecost is listed last, cost reasonableness, cost realism, and cost risk will be significant considerations for award as part of an integrated assessment with other evaluation areas." The RFP explained that cost realism would be evaluated by comparing proposed costs with the government's independent cost estimate including an evaluation of the extent to which proposed costs "indicate a clear understanding of, and sound approach to, the requirements of the program." Realism was also evaluated by development of most probable cost estimates.

The Air Force used a color rating and risk assessment scheme for evaluating technical proposals. "Blue" was considered "exceptional" and was defined as exceeding specified performance or capability with high success probability and no significant weakness. "Green" was considered "acceptable" and was defined as meeting standards with good probability of success and weaknesses which could be readily corrected. "Yellow" was considered "marginal" and was defined as failing to meet standards, with low probability of success and significant but correctable deficiencies. "Red" was considered "unacceptable." Risk assessments were defined according to the potential a proposal had for causing risk of disruption of schedule, increase in cost, or degradation of performance. "High" risk was defined as being "likely" to cause "significant serious risk," "moderate" risk as "potentially" causing "some" risk, and "low" risk having "little potential" for causing risk.

The eight technical subfactors were listed in descending order of importance: (1) "Management Approach," most important; (2) "Requirements Analysis and Integration," (3) "Software Design, Development, and Integration," and (4) "Implementation," of equal value and next in importance; (5) "AFC2S Modernization Support Environment" and (6) "Data Base Management Environment," of equal

value; and next in importance; and (7) "Logistics" and (8) "Corporate and Personnel Qualifications," of equal value and last in importance.

The Air Force evaluated each offeror's technical and cost proposals and conducted three rounds of discussions, including clarification requests, deficiency reports, and face to face discussions with each offeror. All four offerors were included in the competitive range and best and final offers (BAFOs) were obtained from each. TRW was rated by the evaluation team as the highest technically of the offerors, receiving "blue" ratings for subfactors 3, 4, 5, and 6 and "green" ratings for the other 4 subfactors. The risk assessment of TRW's proposal was "low" on five evaluation factors, moderate on two factors and high on one factor.

GTE was the lowest technically rated of the four offerors with "yellow" ratings in subfactors 4, 5, and 6 and an overall "very high" cost risk with "high" risk assessments for half of the subfactors. The evaluation team found that GTE had "failed to meet standards in 3 technical items" and was the only offeror whose costs were "judged to be unrealistic." The team concluded:

This offeror has significant technical deficiencies and is considered high risk for several items. The deficiencies of this offeror are considered potentially correctable . . . . However, attempting to correct this offeror's deficiencies would immediately delay the AFC2S program. Further, attempted correction of this offeror is likely to significantly increase [GTE's] actual costs, making them at least as expensive as the other offerors.

The government's independent cost estimate was $498,815.50. As evaluated for cost realism, TRW's evaluated most probable cost was $444,043,200, while GTE's evaluated most probable cost was $259,168,400. The other two offerors' evaluated costs each exceeded $400 million.

The source selection authority was briefed on the relative strengths, weaknesses, and risks of the various offerors. In part because he was concerned with the significant cost disparity between GTE and the other offerors, the selection authority requested that the various cost risk assessments be quantified and added to the most probable cost figures for each offeror.

This analysis was accomplished in a three-step process in which the offerors' costs were first normalized with regard to expected needs. Second, the relative technical ratings were normalized by calculating and adding the expected cost impact of correcting "yellow" ratings to "green." The third step involved a so-called "Monte Carlo" risk model[1] to determine the relative confidence in each offeror's cost estimate that the contract could be successfully performed at that cost. The "Monte Carlo" analysis showed a confidence of 92 percent for TRW's evaluated most probable cost of $444 million and 90 percent confidence in an estimate of $439.1 million. For GTE, a confidence level of 0 percent was estimated for its $259,168,400 evaluated most probable cost and a 90 percent confidence level for a figure of $413.9 million.

[1] This cost risk analysis model is generally used for quantifying the lowest and highest possible costs of weapons systems, based upon estimated costs of various components.

In his source selection decision selecting GTE for award, the selection authority listed various GTE strengths identified by the evaluation team in technical factors 1, 2, 3, and 8, and concluded that GTE offered "the best overall value" based upon an "integrated assessment," but provided no reasons for this conclusion.

In a negotiated procurement, the contracting agency's selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. *DLI Engineering Corp.*, B-218335, June 28, 1985, 85-1 CPD ¶ 742, *aff'd, DLI Engineering Corp.—Reconsideration,* 65 Comp. Gen. 34 (1985), 85-2 CPD ¶ 468. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation criteria. *Id.* An agency may award to a lower priced, lower scored offeror if it determines that the cost premium involved in awarding to a higher rated, higher priced offeror is justified given the acceptable level of technical competence at the lower cost. *Dayton T. Brown,* B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321. However, award to a lower priced, technically "average" proposal over technically superior proposals, where cost is secondary to technical considerations, requires an adequate justification. *See DLI Engineering Corp.,* B-218335, *supra,* at 6; *see also DynCorp,* B-232999, Feb. 14, 1989, 89-1 CPD ¶ 152.

Here, the source selection statement only listed the various GTE strengths identified by the evaluation team in technical factors 1, 2, 3, and 8, but did not mention the more numerous corresponding identified weaknesses, nor any strengths or weaknesses for factors 4, 5, 6, and 7, despite the fact of GTE's substandard "marginal" (yellow) ratings for factors 4, 5, and 6. While he stated that GTE's cost proposal was reasonable and fair, and "provided the lowest evaluated cost," no mention was made of cost realism or risk, despite GTE's evaluated high risk. Finally, the source selection authority did not discuss the technical ratings of the other proposals, including TRW's significantly superior bluegreen proposal. The report indicates that the source selection statement also relied upon the "Monte Carlo" risk model which indicated that GTE's proposal could be upgraded to "green" and still be the low cost offeror.

While the selection authority states that he made an "integrated assessment" and that his decision considered technical risks and costs, these statements fall far short of the requirement to justify cost/technical tradeoff decisions. *See DLI Engineering Corp.,* B-218335, *supra.* In view of the significant evaluated technical superiority of TRW and specific evaluated weaknesses (yellow ratings and overall high risk assessments in GTE's proposal), the absence of a justification indicates that no tradeoff analysis was made and that the Air Force effectively made cost more important than technical considerations, notwithstanding the RFP statement that technical factors were most important.

The "Monte Carlo" risk analysis cannot here be relied upon to justify the selection. Although we do not question that risk analysis can be a useful evaluation tool, it does not take the place of a cost/technical tradeoff analysis. As is recognized in the Air Force's own instructions for use of this model, the results must

be carefully interpreted, since the input does not account for all factors involved and thus the results "demand subjective evaluation." Here, for example, the Air Force's risk analysis of GTE's marginal, high risk proposal only indicates what the eventual cost of GTE's proposal might be in the event of an award, if corrections are necessary. The risk analysis does not reveal whether GTE's lower-priced, technically inferior proposal is more advantageous to the government than TRW's technically superior proposal. Moreover, the assumptions underlying risk analysis are extremely speculative and may be unreliable. For example, although the "Monte Carlo" model was designed to provide costs necessary to bring technical deficiencies (yellows) to acceptable levels (greens), the fact remains that GTE's proposal did not change. Its approach still warranted the yellow-high risk ratings and there is no indication in the record that GTE was required to adopt the Air Force solutions necessary to achieve acceptability.

Moreover, even if we accept the assumptions and results of the "Monte Carlo" analysis, it only indicates a 6 percent cost difference between GTE's hypothetically upgraded proposal and TRW's technically superior proposal at the point where the analysis indicated a 90 percent confidence level that the firms would be able to successfully perform the contracts. Given the admonition concerning the use of the "Monte Carlo" results, this could well be within the range of statistical error.

Although TRW's cost is more than 50 percent higher than GTE's evaluated most probable cost, the source evaluation team documentation reveals that it had significant concerns with GTE's "high risk," lower-rated proposal, even after conducting three rounds of discussions. Even though these deficiencies were considered "potentially correctable," the evaluation team believed that GTE's unrealistically low costs would ultimately approximate those of the other offerors. Where, as here, the awardee's low cost is far below both the government's own estimate and the other offers submitted, the great difference may be less indicative of a cost premium for technical superiority and more indicative of the low offeror's lack of understanding of the government's needs. *DLI Engineering Corp.*, B-218335, *supra.*

It is true that the source selection authority is not bound by the ratings and recommendations of the source evaluation team. *See Associations for the Education of the Deaf, Inc.*, B-220868, Mar. 5, 1986, 86-1 CPD ¶ 220. Nevertheless, he is required to have a reasonable basis for the award selection which is not apparent here. *See DLI Engineering Corp.*, B-218335, *supra.* In particular, the source selection decision does not explain how GTE's low cost offsets its relatively low technical and high risk ratings. Consequently, in the absence of any comments in the source selection statement concerning relative technical merit, it appears that the source selection decision was based on the lowest proposed cost. That technical factors had predominant weight under the RFP evaluation scheme was repeatedly emphasized to TRW during discussions.[2] In short, the

[2] We do not agree with TRW that the discussions conducted with it were less than meaningful or misleading, inasmuch as (1) the RFP also clearly indicated that technical merit was the predominant evaluation factor; (2)
Continued

record provides no assurance that the award to GTE was consistent with the terms of the solicitation, which assigned primary importance to technical considerations and we sustain the protest on this basis. *DynCorp,* B-232999, *supra; DLI Engineering Corp.,* B-218335, *supra.*

Accordingly, we recommend that the agency conduct and document a cost/technical tradeoff to determine whether TRW's technical superiority is insufficient to justify the cost premium of accepting its offer and whether an award to GTE in the face of its low technical scores and high risk is justified. If the Air Force determines that TRW's (or another offeror's) evaluated cost premium is justified, then the contract with GTE should be terminated for the convenience of the government.

TRW also had contended that GTE should be excluded from the competition due to an alleged conflict of interest on the part of GTE's subcontractor, ERCI. As a subcontractor on a Department of Energy contract, ERCI produced a draft statement of work for the software modernization program which the Air Force revised and rewrote before including it in the RFP. Prior to the issuance of the RFP, the contracting officer determined that ERCI could nevertheless compete for the AFC2S contract. TRW maintains that not all aspects of ERCI's prior performance were considered in that determination. In particular, TRW claims that ERCI had access to inside information which assisted GTE in preparing its proposal.

We believe it is clear that TRW suffered no prejudice from ERCI's alleged conflict of interest, inasmuch as GTE apparently was given no great insight since it was ranked last in technical merit. Moreover, we note that TRW was aware of the potential for ERCI's conflict of interest and the Air Force decision clearing its participation for nearly a year before filing this protest, which it only did after being apprised it did not receive the award. Under the circumstances, and in the absence of credible evidence showing an actual conflict (*see Petro-Engineering, Inc.,* B-218255.2, June 12, 1985, 85-1 CPD ¶ 677), we find no merit to this protest basis.

In any event, since we have found that the Air Force selection decision was flawed, we find that TRW is entitled to the reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

TRW's costs were considered reasonable for its technical approach; and (3) deficiencies and corrections were extensively pointed out in the three rounds of discussions.

B-233348, June 26, 1989

Civilian Personnel

Travel

■ Actual subsistence expenses

■■ Fraud

■■■ Allegation substantiation

■■■■ Evidence sufficiency

Civilian Personnel

Travel

■ Travel expenses

■■ Fraud

■■■ Effects

An employee represented on a travel voucher that he lodged for 64 days at Saarbrucken during temporary duty in Germany, when, in fact, he lodged in Homburg, where the applicable per diem rate was lower than in Saarbrucken. In the absence of a satisfactory explanation for the discrepancy, there was sufficient evidence to support the agency's finding of fraud, and the employee may not be allowed subsistence expenses for those days.

Matter of: Fraudulent Per Diem Claim

A civilian employee of the Department of the Army claims refund of $2,937.87, plus interest, that the Army deducted from his pay for alleged fraud relating to a travel claim. For the reasons stated below, the amount should not be refunded.

Background

The employee, upon completion of temporary duty in Miesau, Federal Republic of Germany (FRG), presented a travel voucher showing among other things, that from September 1 to November 4, 1982, he lodged in Saarbrucken, FRG. On that representation the Army paid him the maximum per diem rate of $52 or $3,328 for 64 days. Subsequently, another employee informed the Army Criminal Investigation Division (CID) that the subject employee did not lodge in Saarbrucken, but in Homburg, which would have authorized per diem of $45. This produced a daily difference of $7 and a total of $448 less than the employee was paid.

A CID investigation followed in which an interview with the owner of the Burgenhof Hotel in Homburg disclosed that the employee had lodged there from September 1 to November 4, 1982. The employee admitted this fact in a statement to the CID. He also admitted that he knowingly placed Saarbrucken on the voucher as his place of lodging. His statement contains the following colloquy with the CID investigator:

Q: Did you know at the time that you were filling out the travel voucher that you did not reside in Saarbrucken from the period 1 Sep 82 thru 4 Nov 82?

A: Yes.

Q: Were you aware that Saarbrucken was a higher cost of living area?

A: I don't know, I don't believe, as I never saw a JTR until just recently and it is about $7.00 more per day.

Q: How much time do you spend TDY with your job?

A: About 4 months a year when I was station (sic) in the States and since I have been in Germany I spend about 10 days a month TDY.

The CID concluded that the employee committed fraud in submitting the voucher reflecting that he lodged in Saarbrucken when, in fact, he lodged in Homburg and collected $448 to which he was not entitled. Based on the CID report, the Letterkenny Army Depot, Chambersburg, Pennsylvania, where the employee is permanently stationed, informed him that the fraud tainted all 64 days of lodging; as a result, he was indebted to the United States for $3,328. The Army deducted the amount of $3,385.87 (with interest) from his pay.

The Mainz Army Depot, in Wiesbaden, FRG, however, as a result of an interview with the employee, concluded that he committed an "honest mistake." The employee contends that the CID misinterpreted his statement. He claims that he was not aware of different per diem rates between Saarbrucken and Homburg and that he selected Saarbrucken to avoid confusion that may have resulted if he used Homburg, since there is also a municipality in Germany named Hamburg. He also pointed out that Saarbrucken and Homburg were only 12 kilometers apart.

The employee filed a claim with the U.S. Army Finance and Accounting Center for refund of $2,937.87, which, in turn forwarded the claim to our Claims Group as a doubtful claim. When our Claims Group disallowed the claim[1] he presented this appeal, referring for support to the opinion of the Mainz Army Depot that he had made an "honest mistake." He contends that the record does not contain sufficient evidence of fraud to overcome the presumption of honesty and fair dealing.

Discussion And Conclusion

The general legal principles applicable to cases of alleged travel fraud are contained in 57 Comp. Gen. 664 (1978). The burden of establishing fraud rests on the party alleging it, and it must be proven with sufficient evidence to overcome the presumption of honesty and fair dealing. Where discrepancies on vouchers are minor, small in total dollar amounts, or are infrequently made, a finding of fraud would not normally be warranted, absent the most convincing contrary evidence. Where discrepancies are glaring, or involve large sums of money, or are frequently made, a finding of fraud can be made absent a satisfactory explanation by the claimant.

We conclude that the voucher submitted by the employee in this case contains a glaring discrepancy, the incorrect lodging location, which the claimant has not satisfactorily explained. The circumstances are very similar to those involved in

[1] Settlement Certificate, Z2864878, Feb. 29, 1988.

Fraudulent Travel Voucher, B-217989, Sept. 17, 1985. There, we held that evidence indicating that the employee placed an incorrect lodging location on his voucher sustained the agency's burden of proof of fraud. In that case, as in this one, another employee as well as hotel records provided the undisputed evidence of the claimant's actual lodging location. We concluded there that the employee's claim was properly disallowed.

Here the employee's explanation of the discrepancy is not satisfactory. The statement that he was not aware of different per diem rates conflicts with the uncertainty expressed to the CID investigator on that point. In light of the substantial amount of TDY that he performs, his travel experience justifies an inference that he was at least aware that different per diem rates may apply to different locations. The fact that Saarbrucken and Homburg may be only 12 kilometers apart is of questionable relevance in light of the fact that they are distinct municipalities and the employee has acknowledged that he knew he stayed in Homberg, not Saarbrucken.

Where an employee submits a travel voucher on which claims are based on fraud, each day is considered separately, and fraud on any day taints the entire claim for that day. *See* B-217989, *supra.* Since the employee's claims for lodging on each of the 64 days were based on fraud, the Army properly collected the entire amount of per diem that would have been authorized in addition to the overpayment.

Accordingly, disallowance of the employee's claim for refund is sustained.

B-234239, June 26, 1989

Civilian Personnel

Relocation
■ Residence transaction expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Property titles

A transferred employee purchased a residence at his new duty station with his nondependent brother, and the employee claims real estate expense reimbursement based on his 95 percent interest in the property. Since title to the property was in both their names as tenants-in-common and specifically designated their respective financial interests, the employee may be reimbursed 95 percent of the total allowable expenses. *Cf. Bernard Mowinski,* B-228614, Dec. 30, 1987.

Matter of: Mazhar-Ul Haque—Real Estate Expenses—Title Requirements

This decision is in response to a request from an Authorized Certifying Officer, National Finance Center, Department of Agriculture, concerning the entitlement of an employee to be reimbursed real estate transaction expenses where the employee shared title to the property with his nondependent brother. We

conclude that the employee may be reimbursed in the amount that corresponds to his interest in the property.

Background

Mr. Mazhar-Ul Haque, an employee of the Food Safety and Inspection Service, was transferred from El Dorado, Arkansas, to Hyattsville, Maryland, in January 1987. When he attempted to purchase a residence in the vicinity of his new official station, he was unable to obtain financing without a co-borrower. His brother, Qazi A. Haque, agreed to co-sign the loan, and this financing was approved by the lender.

The deed of trust executed for the loan described the employee and his brother as joint tenants. However, the recorded deed to the property identified their holding as tenants-in-common and delineated their financial interest as an undivided 95 percent in the employee and an undivided 5 percent in his brother. The employee sought reimbursement of his real estate expenses based on that interest, but the agency limited his reimbursement to 50 percent of the total amount allowable based on our decision in *James A. Woods*, B-184478, May 13, 1976. The employee contends that since the deed shows that his brother only has a 5 percent interest, he should be reimbursed for the full 95 percent of the total allowable real estate expenses.

Opinion

The provisions governing reimbursement for real estate expenses incident to a transfer of duty station are contained in 5 U.S.C. § 5724a (1982) and regulations contained in part 6 of chapter 2, Federal Travel Regulations (FTR).[1] Paragraph 2-6.1c of the FTR follows the statutory language and requires that:

> [t]he title to the residence . . . at the old or new official station . . . is in the name of the employee alone, or in the joint names of the employee and one or more members of hisher immediate family.

Paragraph 2-1.4d(1) of the FTR defines "immediate family" to include:

> (d) Dependent brothers and sisters . . . of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support.

Since there is nothing in the record to suggest that the employee's brother is a dependent of the employee, he will be considered to be not a member of the immediate family for the purposes of this decision.

We have consistently held that where an employee holds title to a residence with an individual who is not a member of his immediate family, the employee may be reimbursed only to the extent of his interest in that residence. *Woods*, B-184478, *supra; James C. Bowers*, B-195652, Apr. 1, 1980; *Anthony Stampone III*, B-223018, Sept. 30, 1986.

[1] FTR (Supp. 1, Sept. 28, 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1987).

In *Bernard Mowinski,* B-228614, Dec. 30, 1987, we considered a situation where an employee, who held title to a residence with his brother as joint tenants, sought reimbursement based on a two-thirds interest because the recorded deed of title to the property identified him as a married man. After analyzing the nature of joint tenancy, we concluded that since the employee's wife was not named in the deed, the property was owned only by the employee and his brother in individual equal shares. Thus, we limited the employee's reimbursement to 50 percent. *Mowinski, supra.*

In the present situation, the recorded deed of title, while only in the names of the employee and his brother, identifies their ownership as tenants-in-common and specifies their respective financial interests in the property. This form of ownership is unlike property held in joint tenancy. Title to property held as tenants-in-common can be held upon any agreed to division of ownership interest.[2]

Since the employee, Mr. Mazhar-Ul Haque, had a 95 percent interest in the residential property, he may be reimbursed that percentage of the total allowable real estate expenses incurred incident to purchase.

B-230869, June 29, 1989

Military Personnel

Relocation
■ Household goods
■■ Weight restrictions
■■■ Liability
■■■■ Waiver

Married enlisted members sharing the same residence in Belgium were each entitled to a household goods transportation allowance of 7,000 pounds for their return to the United States to be discharged from the Army. Although the husband initially intended a combined allowance of 14,000 pounds, the wife, who was in the hospital with serious injuries, did not have the opportunity to authorize use of her allowance for pickup of the household goods. The Army, therefore, allocated all 8,592 pounds of the pickup to the husband's 7,000-pound allowance, resulting in his purported indebtedness for excess weight. But after their discharge, they shared a residence in the United States when the household goods were delivered, and neither of them sought to have the Army reship the household goods because of misdelivery. Consequently, by acceptance of the delivery they demonstrated that they intended the shipment to be made under a combined allowance of 14,000 pounds, and there is no indebtedness to the government for excess weight.

Matter of: Kurt L. Carlsen—Household Goods—Excess Weight

In this action, the United States Army initiated a debt claim of $1,496.04, plus interest, against Kurt L. Carlsen for 1,592 pounds excess weight of household goods shipped in March 1979. By letter of January 21, 1988, our Claims Group determined that this amount is owed, and Mr. Carlsen has appealed. On the

[2] Maryland Real Property Code, § 14-107(a) (1974). *Balderston v. Balderston,* 388 A.2d 183 (Ct. Spec. App. Md. 1978).

basis of newly submitted evidence, we conclude that because there was no excess weight, there is no debt and collection from Mr. Carlsen should be terminated.

Background

Kurt Carlsen and his wife, Sandra Carlsen, as United States Army enlisted members sharing an off-base residence in Belgium, were each entitled to ship at government expense a maximum of 7,000 pounds of household goods upon their return to the United States to be discharged from the Army. Rather than allocating the 8,592 pounds shipped to a combined weight allowance of 14,000 pounds to avoid excess weight, the local military transportation office in Belgium treated the entire 8,592 pounds solely as Kurt Carlsen's shipment, thereby exceeding his allowance by 1,592 pounds and creating his purported indebtedness to the government.

Kurt Carlsen states that he never authorized the entire 8,592 pounds to be allocated to his weight allowance. In fact, he says that after receipt of his travel orders on February 27, 1979, the local transportation office informed him that the entire shipment would be allocated to a combined allowance of 14,000 pounds, covering both his and Sandra Carlsen's separate entitlements of 7,000 pounds each. Evidently the local transportation office allocated the amount shipped solely to his weight allowance because during the period the office arranged for the transportation, Sandra Carlsen was in the hospital with serious injuries suffered in an automobile accident. Her travel orders were not formally issued until March 9, 1979, after the mover picked up the items at the residence on March 8, 1979. According to Kurt Carlsen, the local transportation office was aware of Sandra Carlsen's situation, but it did not believe the amount shipped would exceed his weight allowance, and it did not recognize that Sandra Carlsen's allocation would be needed to avoid the excess weight.

Discussion

Transportation of a military member's personal property is an entitlement personal to the member, who has the right to authorize and designate the household goods to be shipped under his or her travel orders. *See Shipment and Storage of Household Goods for Divorced Service Members,* 61 Comp. Gen. 180 (1981), holding that it is for the member to determine whether or not to ship household goods to a former spouse. In the absence of statute or regulation to the contrary, the same independent right of transportation applies to husband and wife who are military members.

Consistent with a married member's independent right to authorize shipment of household goods, the Army observed in a letter of June 11, 1987, pursuant to a Congressional inquiry that if Sandra Carlsen was unable to arrange for her shipment because she was hospitalized, "the transportation officer should have acted in her behalf to assure that no commingling of the household goods oc-

curred." Further, the Army in its administrative report of September 25, 1987, to our Claims Group stated that although Kurt and Sandra Carlsen were married at the time of the shipment, they later divorced at a date unknown to the Army. The administrative report concluded that it had not been established that Sandra Carlsen's household goods created the excess weight.

Now, however, Kurt Carlsen has submitted evidence showing that Sandra Carlsen and he resided together at the time of the delivery and for a considerable period thereafter. Additionally, he has provided evidence that they were not divorced until 1983. We have no evidence of them departing from the usual practice of a combined weight allowance for married members sharing the same residence before and after relocation. *See* Joint Travel Regulations (JTR), Vol. 1, Para. M8003-3 (Change No. 309, November 1, 1978). Our records contain no information indicating that the delivery was contrary to their intent. We conclude that both Kurt and Sandra Carlsen accepted the delivery of the commingled shipment under a combined weight allowance which was first authorized by Kurt Carlsen in Belgium and then ratified by Sandra and him upon its delivery in the United States. The 8,592 pounds shipped was 5,408 pounds less than their combined maximum allowance of 14,000 pounds.

The record is silent as to whether Sandra Carlsen shipped household goods or unaccompanied baggage in addition to the 8,592 pounds picked up by the movers from the residence in Belgium on March 8, 1979. However, we have no reason to believe that she shipped in excess of 5,408 pounds so as to exceed the maximum combined weight allowance of 14,000 pounds.

Accordingly, we conclude that the shipment of household goods did not exceed the combined weight limits and that Kurt Carlson is not indebted for shipping household goods in excess of his weight limitation.

B-235119, June 30, 1989

Procurement

Sealed Bidding

■ Bids

■ ■ Error correction

■ ■ ■ Low bid displacement

■ ■ ■ ■ Propriety

Correction of a bid which results in the displacement of a lower bid is permissible where it is clear from the face of the bid that the bidder mistakenly totaled its price for the first three items in the blank for the fourth item and where bidder's intention not to charge for the fourth item is ascertainable from the solicitation itself.

Procurement

Socio-Economic Policies
■ Small businesses
■ ■ Preferred products/services
■ ■ ■ Certification

Bidder's failure under a small business set-aside to certify that it is a small business does not require rejection of its bid as nonresponsive since information regarding a bidder's size is not required to determine whether a bid meets the solicitation's material requirements.

Procurement

Socio-Economic Policies
■ Small businesses
■ ■ Preferred products/services
■ ■ ■ Certification

Bidder's failure under a small business set-aside to certify that all end items to be furnished will be manufactured or produced by a small business does not require rejection of its bid as nonresponsive where bidder is obligated by operation of another solicitation clause to furnish only small business end items in its performance of the contract.

Matter of: Concorde Battery Corporation

Concorde Battery Corporation protests the proposed award by the United States Army Troop Support Command of a contract to F. Floyd Smith & Associates under invitation for bids (IFB) No. DAAK01-88-B-0208, a total small business set-aside for the purchase of storage batteries. Concorde argues that the Army improperly permitted Smith to correct a mistake in its bid, thereby displacing the protester as the low bidder. Concorde also argues that Smith's bid should have been rejected as nonresponsive because Smith failed to certify in the solicitation's Small Business Concern Representation clause that it was a small business and that all end items to be furnished under the contract would be manufactured or produced by a small business concern. We deny the protest.

The IFB contemplated the award of a firm, fixed-price requirements contract for an estimated total of 6,943 batteries to be delivered over a 3-year period. Under item No. 0001AA, bidders were to submit a unit price for an estimated 2,143 batteries to be ordered during the first contract year; under item No. 0002AA, they were to submit a unit price for an estimated 2,300 batteries to be ordered during the second contract year; and under item No. 0003AA, bidders were asked for a unit price for an optional quantity of 2,500 batteries to be delivered during a third year. Item No. 0004 required the submission of a total price for the data items listed on the Contract Data Requirements List, which was attached to the solicitation. The IFB advised that bids would be evaluated for award purposes by adding together the prices for the four items.

Concorde's bid of $280,334.56 was the lowest of the seven received at the October 28, 1988, bid opening; Smith's bid of $534,352.98 was second low. On November 8, Smith requested that the agency permit it to correct its bid price to $267,176.49. Smith explained that it had mistakenly entered its total price for

item Nos. 0001AA-0003AA in the blank opposite item No. 0004. Smith further noted that it had intended to bid "No Charge" for the data items. The agency permitted Smith to make the correction, thereby displacing Concorde as the low bidder.

Concorde argues that Smith should not have been permitted to correct its bid since the bid itself did not contain clear and convincing evidence of Smith's intended price for the data items, as required by Federal Acquisition Regulation (FAR) § 14.406-3(a).

The regulation permits the correction of a bid which would result in the displacement of one or more lower bids only where both the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. The protester principally contends that it was not clear from the face of Smith's bid that Smith had in fact intended to bid "No Charge" for the data items. Concorde also questions whether Smith's bid is responsive because, as corrected, it did not include a price for the data items.

The agency's determination to permit the correction of Smith's bid notes that the price Smith inserted in item No. 0004 did indeed reflect the total of its prices for item Nos. 0001AA-0003AA and points out that of the seven bids received, five others contained the same error. Further, the agency states that Concorde, the only bidder not using item No. 0004 for its total price for the batteries, inserted "No Charge" for the data items. The agency also says that the data item to be supplied—a material safety data sheet—was a minor matter involving inconsequential expense.

In regard to the lack of price for the data item, the agency argues that Smith's intent to bid "No Charge" was ascertainable from the face of its bid. Specifically, the agency points to subparagraph L-12.b of the IFB, which provides that:

> If an offeror fails to price or to enter a specific response to any data item requested to be furnished, it will be considered that the data is being furnished as part of the contract consideration at no additional cost to the Government.

We think that the agency's determination to permit correction here was reasonable. Clearly, the fact that the price inserted for item No. 0004 is the total of the other three line items and that the data requirement involves only minimal cost indicates that the item No. 0004 entry was not Smith's intended bid for that item, but rather was simply the total of the first three line items. Correcting the bid to delete the inserted amount for item No. 0004 takes care of the obvious error that was made. That, of course, leaves item No. 0004 without any price at all. On this record, however, given that (1) item No. 0004 is reported to involve nominal cost, (2) the solicitation recognized the possibility that a price might not be provided for a data item but obligated the builder to furnish the data anyway, and (3) Smith totaled its bid prices without including any amount that could represent an intended price for item No. 0004, we think it is also obvious that Smith did not intend to charge for the item. We therefore have no basis upon which to object to the correction of Smith's bid.

Since, as indicated above, pursuant to subparagraph L12.b of the IFB Smith was bound to furnish the data items for which it did not submit a price, Smith's bid is responsive. *See Delta International Machinery Corp.,* B-229800, Mar. 3, 1988, 88-1 CPD ¶ 228.

Concorde argues secondly that Smith's bid should have been rejected as nonresponsive since Smith failed to certify in the solicitation's Small Business Concern Representation clause that it was a small business and that all end items to be furnished under the contract would be manufactured or produced by a small business.

The solicitation contained the standard Small Business Concern Representation clause, set forth at FAR § 52.219-1, in which a bidder certifies that it is, or is not, a small business concern and that all, or not all, end items to be furnished will be manufactured or produced by a small business concern. Smith failed to complete either portion of the representation. The IFB also incorporated by reference FAR § 52.219-6, "Notice of Total Small Business Set-Aside," which provides in part that:

> A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

With regard to Smith's failure to complete the small business size status portion of the representation, a bidder's failure to certify under a small business set-aside that it is a small business does not affect the bid's responsiveness because information as to the bidder's size is not required to determine whether a bid meets the IFB's material requirements. *Insinger Machine Co.,* B-234622, Mar. 15, 1989, 89-1 CPD ¶ 277. In contrast, we have generally held that a bidder's failure to complete the end item certification does require rejection of its bid as nonresponsive, since to be responsive, a bid on a total small business set-aside must establish a bidder's obligation to furnish only end items manufactured or produced by a small business. *J-MAR Metal Fabricating Co.,* B-2217224, Mar. 21, 1985, 85-1 CPD ¶ 329.

We do not think that a bidder's failure to certify that it will furnish only end items manufactured or produced by a small business concern requires rejection of its bid as nonresponsive, however, where, despite its failure to complete the certification, the bidder would still be obligated to furnish only small business end items. Here, the IFB incorporated FAR § 52.219-6, which provides that the bidder "agrees to furnish" only small business end items in its performance of the contract. Since Smith submitted a bid which did not take exception to any of the solicitation terms, including those contained in FAR § 52.219-6, that firm would be obligated to provide batteries manufactured or produced by small businesses. *See Ibex Ltd.,* B-230218, Mar. 11, 1988, 88-1 CPD ¶ 257. It is therefore

our view that the agency properly declined to reject Smith's bid as nonresponsive.[1]

Finally, the protester asks that we require the agency to substantiate that the end items that Smith intends to furnish under the contract are in fact manufactured by a small business. Concorde contends that the fact that Smith is legally obligated to furnish only small business end items is of little value if the agency does not take steps to assure that the bidder will satisfy its obligation.

Whether a firm actually complies with its obligation to furnish a small business end item is a matter of contract administration, which is the primary responsibility of the contracting agency and not for consideration by our Office. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1988); *Food Tech Industries Co., Inc.*, B-232791, Oct. 25, 1988, 88-2 CPD ¶ 392. We therefore decline to take the action that the protester requests.

The protest is denied.

[1] This case is distinguishable from *Delta Concepts, Inc.*, 67 Comp. Gen. 522 (1988), 88-2 CPD ¶ 43, in which we held that the Place of Performance clause could not be used to cure a bidder's failure to certify that all end items would be manufactured or produced by a small business. In *Delta Concepts*, we reasoned that a bidder could not be said to have assumed an obligation to furnish a product manufactured by a small business merely by virtue of listing a small business concern in the Place of Performance clause. Our decision pointed out that the clause is for informational purposes and as such relates to responsibility rather than responsiveness. Here, in contrast, Smith is expressly obligated by the solicitation's incorporation of FAR § 52.219-6, to which it did not take exception, to furnish only small business-manufactured end items.

Appropriations/Financial Management

Civilian Personnel

Compensation
■ Compensation restrictions
■■ Off-site work
■■■ Utility services
■■■■ Reimbursement

In the absence of statutory authority, appropriated funds may not be used for items that are the personal expenses of an employee. Exceptions to this rule have been permitted where the item primarily benefits the government. IRS employees participating in a work-at-home program may not be reimbursed for the incremental costs of utilities associated with the residential workplace, because such costs cannot be said to primarily benefit the government.

502

Relocation
■ Household goods
■■ Commuted rates
■■■ Weight certification
■■■■ Evidence sufficiency

An employee's claim for reimbursement on the commuted rate basis for the transportation of household goods in his pickup truck, which he used to travel to his new official duty station, was disallowed because it was supported only by an estimate of weight rather than actual scale weight. On appeal from the disallowance, the claimant submitted copies of weight certificates obtained more than 4 years after the transportation occurred by reloading and weighing the truck. The claim may not be allowed since scales were available during transportation and the weight certificates obtained years after the transportation occurred are not sufficient evidence.

497

■ Residence transaction expenses
■■ Litigation expenses
■■■ Attorney fees
■■■■ Reimbursement

An employee's legal expenses incurred in connection with the preparation and settlement of a claim against his agency for relocation expenses may not be reimbursed since no express statutory authority allows such payment.

456

■ Residence transaction expenses
■■ Miscellaneous expenses
■■■ Reimbursement

An employee became legally obligated to buy a home at his old duty station and subsequently learned he was being considered for a new position in another state. The legal fees incurred in renegotiating the sales contract to include a clause allowing the employee to terminate the contract

without loss of the deposit if the employee transferred may not be reimbursed as a real estate expense under 5 U.S.C. § 5724a(a)(4) since he did not acquire an interest in the property. However, the legal fees may be reimbursed as a miscellaneous expense under 5 U.S.C. § 5724a(b), subject to the agency's determination that an administrative intent to offer him the new position had been expressed before the expenses were incurred.

456

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

A transferred employee purchased a residence at his new duty station with his nondependent brother, and the employee claims real estate expense reimbursement based on his 95 percent interest in the property. Since title to the property was in both their names as tenants-in-common and specifically designated their respective financial interests, the employee may be reimbursed 95 percent of the total allowable expenses. *Cf. Bernard Mowinski,* B-228614, Dec. 30, 1987.

519

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Dependents**
■■■■ **Eligibility**

A transferred employee was issued travel orders authorizing reimbursement of travel and temporary quarters subsistence expenses for herself, her spouse, and her daughter who was 22 years old. The employee was given a travel advance based on the estimated expenses for herself and the two family members. After she incurred expenses in reliance on the orders and submitted a voucher, the agency realized that the daughter was over 21 years old and precluded by regulation from being considered as a family member of the employee for purposes of relocation expenses. Her claim for travel expenses for her daughter may not be allowed. However, since she incurred expenses for the daughter in reliance on the erroneous orders, her debt for the portion of her travel advance still outstanding is subject to consideration for waiver. Case is remanded to the agency for computation of the debt subject to waiver.

462

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee, who performed en route travel for more than 24 hours, and arrived at 9 p.m., claims lodging costs for the evening of arrival. The claim is denied. Under paragraph 1-7.5b(2)(c) of the Federal Travel Regulations (FTR), his allowable en route per diem for the last day is limited to the meals and incidental expense (M&IE) rate for the previous day. Since he arrived during the last quarter of the day, the full daily M&IE rate is payable. Under FTR, para. 2-5.2g(1)(a), his temporary quarters eligibility begins with the next calendar day quarter. Since that

was the first quarter of the following day, that full day is the first day of temporary quarters eligibility for which 60 days temporary quarters subsistence expenses were reimbursable thereafter.

459

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Spouses**
■■■■ **Eligibility**

A transferred employee, who occupied temporary quarters, was joined by his wife for 8 days of househunting during the temporary quarters occupancy period. The employee is entitled to continue receiving temporary quarters subsistence expense for himself during that period, and, under FTR, para. 2-4.1a, to receive reimbursement for his wife's travel expenses and per diem, limited to the meals and incidental expense rate, during the 8 days of househunting. *George L. Daves,* 65 Comp. Gen. 342 (1986).

459

Travel
■ **Temporary duty**
■■ **Determination**

■ **Temporary duty**
■■ **Per diem**
■■■ **Eligibility**

A Navy employee on a long-term temporary duty assignment at a contractor's site may remain on temporary duty until completion of the contract. The employee's duties, flight-testing during the term of a contract, are the type of duties normally handled on a temporary duty basis; the assignment is for a finite period; and the cost to the government of the temporary duty assignment is less than a permanent change of station.

465

■ **Temporary duty**
■■ **Per diem**
■■■ **Eligibility**

Two Interior Department employees, who were assigned to temporary duty on the Statue of Liberty/Ellis Island project, may be paid per diem even though their assignments may last 2 to 3 years. These assignments can be considered temporary duty given the nature of the duties and the fact that the project is time-limited even though it has encountered unanticipated delays beyond the control of the agency. *See Edward W. DePiazza,* B-234262, dated today.

454

■ **Travel expenses**
■■ **Fraud**
■■■ **Effects**

An employee represented on a travel voucher that he lodged for 64 days at Saarbrucken during temporary duty in Germany, when, in fact, he lodged in Homburg, where the applicable per diem rate was lower than in Saarbrucken. In the absence of a satisfactory explanation for the discrepancy, there was sufficient evidence to support the agency's finding of fraud, and the employee may not be allowed subsistence expenses for those days.

517

Military Personnel

Relocation

■ Household goods

■■ Weight restrictions

■■■ Liability

■■■■ Waiver

Married enlisted members sharing the same residence in Belgium were each entitled to a household goods transportation allowance of 7,000 pounds for their return to the United States to be discharged from the Army. Although the husband initially intended a combined allowance of 14,000 pounds, the wife, who was in the hospital with serious injuries, did not have the opportunity to authorize use of her allowance for pickup of the household goods. The Army, therefore, allocated all 8,592 pounds of the pickup to the husband's 7,000-pound allowance, resulting in his purported indebtedness for excess weight. But after their discharge, they shared a residence in the United States when the household goods were delivered, and neither of them sought to have the Army reship the household goods because of misdelivery. Consequently, by acceptance of the delivery they demonstrated that they intended the shipment to be made under a combined allowance of 14,000 pounds, and there is no indebtedness to the government for excess weight.

521

Procurement

Bid Protests

■ **GAO authority**

■ **GAO procedures**

■ ■ **GAO decisions**

■ ■ ■ **Reconsideration**

On reconsideration, General Accounting Office reverses prior dismissal of protest concerning request for rate tenders from freight carriers issued under the Department of the Army's Military Traffic Management Command's guaranteed traffic program pursuant to the Transportation Act of 1940, and asserts jurisdiction under the Competition in Contracting Act of 1984 over protests concerning such transportation services procured pursuant to the Transportation Act. 65 Comp. Gen. 328 (1986), B-229890, Mar. 3, 1988 and B-233393, Nov. 9, 1988, overruled.

451

■ **GAO procedures**

■ ■ **Preparation costs**

Request for payment of costs of pursuing claim is denied since such costs are not reimbursable.

507

■ **GAO procedures**

■ ■ **Preparation costs**

■ ■ ■ **Amount determination**

Where improperly awarded contract is terminated and protester has opportunity to compete for remaining contract work, recovery of proposal preparation costs is limited to that amount that relates to the portion of the contract work for which protester was deprived of the opportunity to compete.

507

■ **GAO procedures**

■ ■ **Preparation costs**

■ ■ ■ **Burden of proof**

Amounts claimed for costs of filing and pursuing protest and for proposal preparation may be recovered to the extent that they are adequately documented and not shown to be unreasonable. To the extent that the claim is not adequately documented, claimant is not entitled to recovery.

506

■ **GAO procedures**

■ ■ **Protest timeliness**

■ ■ ■ **Significant issue exemptions**

■ ■ ■ ■ **Applicability**

Protest presents a significant issue justifying consideration on the merits even if it is untimely filed where, based on the fully developed record, it is clear that the issues raised involve improper agency action inconsistent with statute and regulation.

473

■ Invitations for bids
■■ Defects
■■■ Evaluation criteria

Protest is sustained where solicitation for refuse collection and disposal allows either on-post disposal or off-post disposal, but provides for evaluation of cost of additional work for on-post bids, even though work is unrelated to collection and disposal requirement and will have to be performed even if a contract is awarded for offpost disposal; under this evaluation scheme bidders were not competing on equal basis and award did not result in lowest ultimate cost to the government.

473

Socio-Economic Policies
■ Small businesses
■■ Disadvantaged business set-asides
■■■ Eligibility
■■■■ Determination

Protest is sustained where procuring agency awarded a contract set aside for small and disadvantaged business (SDB) concerns to a firm which was determined by the Small Business Administration (SBA) not to be socially or economically disadvantaged. Since SBA determined that the awardee was a concern which was ineligible for award because it was not controlled by a qualifying disadvantaged person, the continued performance of the contract is inconsistent with the purpose of the SDB set-aside program.

499

■ Small businesses
■■ Preferred products/services
■■■ Certification

Bidder's failure under a small business set-aside to certify that it is a small business does not require rejection of its bid as nonresponsive since information regarding a bidder's size is not required to determine whether a bid meets the solicitation's material requirements.

524

■ Small businesses
■■ Preferred products/services
■■■ Certification

Bidder's failure under a small business set-aside to certify that all end items to be furnished will be manufactured or produced by a small business does not require rejection of its bid as nonresponsive where bidder is obligated by operation of another solicitation clause to furnish only small business end items in its performance of the contract.

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