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Notice

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

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Preface

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

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

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

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

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

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

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

Table of Decision Numbers

Cite Decisions as 68 Comp. Gen.—

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

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

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Published Decisions of the Comptrollers General

May 1989

B-234196, May 1, 1989

Procurement

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

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of a bid where such small business certification is not required for the type of contract to be awarded.

Matter of: G. Marine Diesel Corp.

G. Marine Diesel Corp. protests the rejection of its low bid as nonresponsive and the award of a contract to Stevens Technical Services, Inc., under invitation for bids (IFB) No. DTCG80-88-B-00066, a total small business set-aside issued by the Coast Guard for drydocking and repair of the vessel "Minue." The agency rejected G. Marine's bid because the firm did not certify that all end items to be furnished under the contract would be manufactured or produced by small business concerns. We sustain the protest.

At bid opening on December 6, 1988, the agency received eight bids; G. Marine was the low bidder. Because G. Marine failed to certify that all end items to be furnished under the contract would be manufactured or produced by a small business concern, the agency found its bid nonresponsive. The contract was awarded to the next low bidder, Stevens, on January 10, 1989. G. Marine filed this protest on January 18. Because the protest was filed within 10 calendar days of the award, the Coast Guard suspended performance of the contract pursuant to 31 U.S.C. § 3553(d)(1) (Supp. IV 1986).

The IFB included the clause set forth at Federal Acquisition Regulation (FAR) § 52.219-1, which contains the end item certification which is in dispute here. According to G. Marine, it filled out the small business certification indicating that "not all end items to be furnished will be manufactured or produced by a small business concern" because some materials, which are to be used in the repair of the vessel, are not available from small businesses. In response, the agency states that the end item to which the representation pertains is the repaired vessel itself, not the individual parts used in performing the repairs. Whether the certification was intended to apply to the vessel itself or to the individual parts used by the contractor is not the dispositive issue, however,

since, as explained below, it is our view that the representation is not required for the type of contract to be awarded under the IFB.

The protester argues, among other things, that the solicitation was one for services, which the standard Notice of Small Business Set-Aside Clause included in the IFB states does not require the end item certification. *See* FAR § 52.219-6(c).

The Coast Guard responds that the contract called for by the solicitation is, in fact, a supply contract so the end item certification does apply.[1] In support of its position, the Coast Guard first refers to 10 U.S.C. § 7299 (1982) which states:

> Each contract for the construction, alteration, furnishing, or equipping of a naval vessel is subject to the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (41 U.S.C. §§ 35-45),[2] as amended, unless the President determines that this requirement is not in the interest of national defense.

The Coast Guard also says that its position that a contract for ship repair is one for supplies is supported by our decision in 42 Comp. Gen. 467 (1963). According to the agency, since in that decision we agreed with the Navy's classification of a contract for the construction or alteration of a naval vessel as the procurement of supply items under the Buy American Act, 41 U.S.C. § 10a-d (1982), the subject ship repair solicitation should also be classified as one for supplies for purposes of the small business certification.

In *Century Marine Corp.*, B-233574, Mar. 3, 1989, 68 Comp. Gen. 290, 89-1 CPD ¶ 235, and *Delta Marine, Inc.*, B-234169, Mar. 31, 1989, 68 Comp. Gen. 361, 89-1 CPD ¶ 348 we recently held that solicitations, like the one here, for drydocking and repair services to Coast Guard and Maritime Administration vessels, by their nature, contemplate the award of contracts for services rather than for supplies. We do not believe that the arguments raised here by the agency show that our conclusion in those decisions was incorrect.

First, 10 U.S.C. § 7299 does not refer to ship repair and the Coast Guard does not explain why a ship repair contract should be considered to fall under 10 U.S.C. § 7299. Further, the purpose of that legislation was to make clear the view of Congress that contracts for the construction or alteration of vessels are subject to the Walsh-Healey Act. *See* 42 Comp. Gen. 467, at 477, *supra.* The legislation does not relate to whether ship repair contracts are to be considered service or supply contracts. Also, in 42 Comp. Gen. 467, *supra,* we addressed the question of whether a contract for the alteration of a vessel should be governed by that portion of the Buy American Act pertaining to public works or to that section pertaining to supplies. The decision did not consider whether a ship repair contract is to be considered one for services or supplies.

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[1] The Coast Guard also argues that this issue—whether the solicitation was one for services as opposed to supplies—is untimely since it was not raised by the protester before bid opening. We need not consider this argument. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(b) (1988), we will consider an untimely protest where, as here, we find on the basis of the fully developed record that a significant issue has been raised by the protester. *See Loral EOS/STS, Inc.*, B-230013, May 18, 1988, 88-1 CPD ¶ 467.

[2] 41 U.S.C. §§ 35-45 is the Walsh-Healey Public Contracts Act, which concerns minimum wages and maximum hours under certain supply contracts.

It is most significant, in our view, that the Coast Guard makes no argument that the classification of such a repair contract as one for supplies is logical. We do not understand how it can be argued that as between the two categories—supplies or services—a contract for the repair of a vessel is classified as one for the vessel itself rather than for the repair services to be performed on that vessel. Since we think the solicitation was properly one for services, the protester's failure to complete the Small Business certification does not affect the responsiveness of the bid. *BCI Contractors, Inc.,* B-232453, Nov. 7, 1988, 88-2 CPD ¶ 451. We therefore conclude that the protester's low bid was improperly rejected and we sustain the protest.

Since the Coast Guard considered the contract here to be one for supplies, the solicitation included clauses and certifications appropriate to a supply contract rather than those for a service-type contract. We recommend that the contract awarded to Stevens be terminated for the convenience of the government and the requirement resolicited as a service contract with the clauses and certifications appropriate to a service contract. In addition, we find G. Marine entitled to recover the reasonable costs of preparing and submitting its bid and the costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988). G. Marine should submit its claim for such costs directly to the Coast Guard.

The protest is sustained.

B-234035, May 3, 1989

Procurement

Negotiation
■ Best/final offers
■■ Modification
■■■ Acceptance criteria

Competition was not conducted on a common basis, and the resulting award was improper, where the contracting agency requested revised best and final offers (BAFOs) limited to revisions in price and delivery schedule, but made award on the basis of a revised BAFO that included significant changes in technical, management and logistics support approach.

Matter of: DynaLantic Corp.

DynaLantic Corp. protests the Department of the Army's award of a contract to MicroSim Inc. under request for proposals (RFP) No. DAAJ09-87-R-1222, for helicopter flight trainers. DynaLantic contends that the Army improperly accepted MicroSim's proposal for award, since it did not conform to the established ground rules for the procurement.

We sustain the protest.

The solicitation, set aside for small business concerns, requested proposals to develop and fabricate helicopter cockpit and emergency procedures trainers for

the UH-60A helicopter; it specified that award would be made to the responsible offeror submitting the low offer evaluated as adequate in three areas: technical merit, management, and logistics. Six offerors responded to the RFP; all were found to have submitted acceptable proposals. After requesting and evaluating best and final offers (BAFOs), the Army made award to the low bidder, Creativision, Inc. DynaLantic offered the second low price of $3,149,686, while MicroSim submitted the high offer of $4,821,837.

When Creativision subsequently failed to perform, the Army terminated its contract for default. To minimize delays in the repurchase of the equipment, which the Army deemed critical to the training of its helicopter flight personnel, the contracting activity did not resolicit the requirement, but instead requested an additional round of BAFOs from the five unsuccessful offerors for the original contract award. Although the previously proposed offered prices had been disclosed, the contracting officer requested each of the remaining offerors to submit a revised "best and final price and delivery schedule" for the procurement, but also advised that contract "negotiations have been concluded."

MicroSim submitted the revised low price of $2,497,428 and enclosed a summary of what it characterizes as six major changes to its original proposal allowing for the substantial reduction of $2,324,409 in price from its prior offer; DynaLantic reduced its price to $2,699,121, or $450,565 less than its initial offer. Agency technical personnel then reviewed MicroSim's revised BAFO to determine whether the identified proposal changes reflected an alteration in MicroSim's original technical approach; they concluded that the changes—which included a new, more advanced computer, replacement of MicroSim trainers with trainers utilizing different technologies, and fabricated by a subcontractor, and a change in logistics support—did not represent a change from MicroSim's original technical design and approach. The contracting officer concluded that MicroSim essentially had only revised its price and delivery schedule, in compliance with the BAFO rules, and thus made award to that firm. DynaLantic thereupon filed this protest with our Office.

DynaLantic disputes the Army's characterization of MicroSim's proposed changes as insignificant, maintaining that they in fact constituted major technical revisions which allowed for a substantial reduction in price. DynaLantic places particular emphasis on two of the six proposed changes: the substitution of a faster, more efficient computer, and transfer of responsibility for fabrication of the trainer cockpit to a subcontractor. DynaLantic maintains that these changes bear on the three evaluation factors (technical merit, management and logistics), and that, had it been afforded the same opportunity to update its technical proposal when preparing its revised BAFO, it likely would have been able to lower its offered price sufficiently to be in line for award.

It is a fundamental principle of federal procurement that a contracting agency must treat offerors equally, and that they must be furnished with identical statements of the agency's requirements in order to provide a common basis for the preparation and submission of competitive proposals. *Computek Inc., et al.*, 54 Comp. Gen. 1080 (1975), 75-1 CPD ¶ 384. When an agency's needs change so

that a material discrepancy is created between the RFP's ground rules and the agency's actual needs, the RFP should be amended and all eligible offerors be given an opportunity to revise their proposals accordingly, *Union Carbide Corp.*, 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134; where an agency's failure to adhere to a ground rule would prejudice one or more offerors, the agency may not properly ignore the rule. *Emerson Electric Co.*, B-213382, Feb. 23, 1984, 84-1 CPD ¶ 233. We find that the Army failed to treat offerors equally here.

As indicated above, the Army specifically requested updated prices and delivery schedules from each of the remaining offerors. While this request for revised BAFOs did not expressly preclude revisions to an offeror's technical approach, the record establishes that the Army intended that this request be limited to the opportunity to update prices and delivery terms, that contracting officials conveyed this intent to DynaLantic and presumably to all other offerors, and that both DynaLantic and MicroSim prepared their respective revised BAFOs with the understanding that this request was limited in scope.[1] In this regard, DynaLantic noted that "in accordance with the instructions" from agency personnel, its revised BAFO consisted "solely of [its] Best and Final pricing and delivery schedule"; MicroSim, in its revised BAFO, described its proposed changes as not affecting its original technical approach or development philosophy; and the Army scrutinized MicroSim's updated offer to ensure that it did not contain technical revisions. Statements made at the informal conference held in connection with this protest confirm that the Army, DynaLantic, and MicroSim each understood that the request for revised BAFOs permitted offerors to update only their prices and delivery schedules; changes to technical approach were neither contemplated nor allowed.

Thus, unlike the situation where vendors were free to submit technical changes in their BAFOs, *see e.g., Systems Group Associates, Inc.*, B-198889, May 6, 1981, 81-1 CPD ¶ 349, the situation here clearly is one where all parties understood that technical revisions were not permissible. This being so, the sole question before our Office is whether the ground rules established for the reprocurement of the helicopter flight trainers were followed by all concerned parties such that the reprocurement was conducted on a fair and equal basis.

MicroSim included in its revised BAFO a list of six changes which it stated allowed for the dramatic, 48 percent reduction in its original price. At least three of the identified changes appear to have represented substantive changes to MicroSim's technical approach, management structure and logistics plan, significantly contributing to MicroSim's reduction in price. First, MicroSim itself acknowledged that its revised BAFO contained two significant hardware changes from its original offer. According to MicroSim, its substitution of one computer for another resulted in "increased performance at a lower purchase price."

[1] While changes to technical proposals generally are permitted in BAFOs, *see SETAC, Inc.*, 62 Comp. Gen. 577, (1983), 83-2 CPD ¶ 121, agencies in conducting reprocurements may use any terms and acquisition method deemed appropriate for the repurchase, provided that competition is obtained to the maximum extent practicable and the repurchase is at as reasonable a price as practicable. *See United States Pollution, Inc.*, B-225372, Jan. 29, 1987, 87-1 CPD ¶ 96.

Second, MicroSim explained that its modifications in the trainer control system and overall exterior design, which were directly attributable to the transfer of the trainer fabrication effort to a subcontractor, enhanced ease of access to the unit's electronics and cabling system and reduced MicroSim's labor and material costs. The transfer of the fabrication effort to a subcontractor also obviously affected MicroSim's management structure and perhaps also the provision of logistics support for the subcontractor equipment. Finally, MicroSim's proposed transfer of the primary responsibility for certain unscheduled maintenance from its own maintenance personnel to Army technicians clearly affected its logistics support plan, and led MicroSim to predict a substantial reduction in cost and required manpower.

In view of the magnitude of the reduction in MicroSim's price, the firm's acknowledgment in its revised BAFO that the proposal changes significantly contributed to the price reduction, and the fact that the changes affected the choice of computer and the basic manufacturing and logistics support structure, we find that MicroSim's proposal incorporated significant technical changes, contrary to the ground rules established for the submission of revised BAFOs. At the same time, the other offerors reasonably followed these instructions and thus, unlike MicroSim, were unable to restructure their proposals or take advantage of advances in technology in an attempt to reduce their prices in what clearly was going to be a price competition.

We therefore sustain the protest on the ground that the Army failed to assure that offerors were competing on an equal basis, and that this failure clearly could have affected the outcome of the competition. Accordingly, by letter to the Secretary of the Army, we are recommending that a third round of BAFOs be solicited on the basis of amended procedures allowing for revisions in technical proposals. If MicroSim is not the successful offeror based on evaluation of the updated offers, MicroSim's contract should be terminated for the convenience of the government, and award made to the low priced, technically acceptable offeror. We also find that DynaLantic is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988).[2]

The protest is sustained.

[2] DynaLantic also has questioned MicroSim's eligibility as a manufacturer under the Walsh-Healey Act, and the firm's intention to perform at least 50 percent of the work (as required where, as here, a procurement is set aside for small business concerns. 15 U.S.C. § 644(o) (Supp. IV 1986)). The Department of Labor currently is reviewing MicroSim's compliance with the WalshHealey Act, and the Small Business Administration has determined that MicroSim will be performing at least 50 percent of the contract.

B-232370, May 10, 1989

Civilian Personnel

Relocation
■ Travel expenses
■■ Privately-owned vehicles
■■■ Multiple vehicles
■■■■ Mileage

An employee, transferred from Fairbanks, Alaska, to Washington, D.C., was initially authorized to drive one privately owned vehicle (POV), to be accompanied by his wife and dependent child, with a second dependent child to travel by air at a later date. His travel authorization was amended to permit delayed relocation travel by his wife using a second POV, to be accompanied by the second dependent child. Employee was allowed mileage only for first POV. Under paragraph 2-2.3e(1) of the Federal Travel Regulations, use of more than one POV in lieu of other modes of personal transportation may be authorized under certain specified conditions. Since the conditions were met and agency approval was granted, mileage for the second POV is allowed.

Civilian Personnel

Relocation
■ Travel expenses
■■ Privately-owned vehicles
■■■ Multiple vehicles
■■■■ Mileage

An employee, transferred from Fairbanks, Alaska, to Washington, D.C., by amendment to his travel authorization, was authorized to use two privately owned vehicles (POV), to transport himself and his immediate family, based on his wife's need to delay her relocation travel. The employee drove one POV and was paid travel per diem at the full rate. His wife, who drove the second POV at a later date, was allowed per diem only at the accompanied rate (75 percent of full per diem). Under paragraph 2-2.2b(1)(b) of the Federal Travel Regulations, per diem at the full rate applies to her since she drove a second POV as an authorized mode of transportation on different days than the employee.

Matter of: Michael T. Green—Relocation Travel—Use of Two Privately Owned Vehicles—Mileage and Per Diem

This decision is in response to a request from an Authorized Certifying Officer, Bureau of Land Management (BLM), Department of the Interior.[1] The question asked is whether an employee may be reimbursed mileage and en route per diem at the full per diem rate on behalf of his wife who performed separate relocation travel by a second privately owned vehicle (POV). We conclude he may be reimbursed for the following reasons.

Background

Mr. Michael T. Green, an employee of BLM, was transferred from Fairbanks, Alaska, to Washington, D.C., in August 1987. He was initially authorized to

[1] Mr. Jerry A. Fries, file reference 1382 (820).

travel by POV, and to be accompanied by his wife and one dependent child. His other dependent child was authorized to travel by air at a later date. By amendment to his travel authorization, Mr. Green was authorized travel by POV, but to be accompanied only by one dependent child. His wife was authorized to travel by a second POV at a later date, to be accompanied by the other dependent child who originally had been authorized air travel. The reason given for amending the travel authorization was to permit Mrs. Green to delay travel because they had not sold their Alaska residence. Mr. Green, on the other hand, could not delay his travel due to other commitments, including the need to arrive at his new duty station before the beginning of the school term so that he could timely enroll his daughter for her senior year in high school.

Mr. Green's claim for per diem on behalf of his wife at the full per diem rate was disallowed by BLM, but he was reimbursed for her per diem as though she had accompanied him (75 percent of the full per diem rate). The reason given by BLM was its policy that only one POV may be transported to and from Alaska and that a POV driven by an employee or member of his family is considered a vehicle transported. Consequently, even though Mrs. Green drove a second POV, the agency concluded that such usage did not qualify her so as to permit payment of per diem at the full rate or mileage for use of the POV as a mode of personal transportation.

Opinion

We do not agree with BLM's determination. The entitlement to transport (ship) a POV at government expense and an employee's entitlement to be reimbursed for his and his immediate family's relocation travel are separate and distinct statutory rights. The law and regulations governing the transportation of a motor vehicle are contained in 5 U.S.C. § 5727 (1982) and chapter 2, part 10 of the Federal Travel Regulations (FTR).[2] In contrast, the laws governing travel and subsistence expense reimbursement for an employee and his immediate family incident to a transfer are contained in 5 U.S.C. §§ 5724 and 5724a (1982), as implemented by chapter 2, part 2 of the FTR. *Debra R. Hammond,* 65 Comp. Gen. 710 (1986). We have held that so long as the use of a second POV for personal travel purposes is approved in lieu of other modes of transportation, and so used, reimbursement for a second POV is authorized on a mileage basis. *David J. Dossett,* B-217691, July 31, 1985.

Paragraph 2-2.3a of the FTR, which authorizes POV use for relocation travel, states that such "use is deemed to be advantageous to the Government." Normally, only the use of one POV as a mode of personal transportation is authorized. However, FTR, para. 2-2.3e(1) provides:

> (1) *When authorized as advantageous to the Government.* Use of no more than one privately owned automobile is authorized under this part . . . except under the following circumstances . . .:
>
> * * * * *

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

(c) If an employee must report to a new official station in advance of travel by members of the immediate family who delay travel for acceptable reasons such as completion of school term, sale of property, settlement of personal business affairs, disposal or shipment of household goods, and temporary unavailability of adequate housing at the new official station;

* * * * *

(e) If, in advance of the employee's reporting date, immediate family members must travel to the new official station for acceptable reasons such as to enroll children in school at the beginning of the term.

Under FTR, para. 2-2.3e(2), where more than one POV is authorized, the mileage rate prescribed in paragraph 2-2.3b, c and d apply to each POV and its occupants.

The reasons given by Mr. Green (the need for his wife to delay travel and his inability to delay travel) were found acceptable by order issuing authority. As a result, his travel authorization was amended to permit the use of a second POV by his wife and the other dependent child. Therefore, since use of a second POV was authorized for travel purposes, Mr. Green may be reimbursed mileage for its use under FTR, para. 2-2.3b at the rate applicable for two occupants.

With regard to per diem entitlement, FTR, para. 2-2.2b(1)(b) provides that if a spouse does not accompany an employee, the spouse is authorized the same per diem as the employee. The only limitation is that when a spouse who is driving a second POV performs travel "on the same days along the same general route" that the employee is driving in another POV, the spouse is entitled only to the accompanied rate of per diem. Clearly, that limitation does not apply in the present situation. Mr. Green began his relocation travel on August 16, 1987, and ended it on August 28, 1987. Mrs. Green did not begin her relocation travel until September 3, 1987. Therefore, Mr. Green is entitled to per diem at the full per diem rate on behalf of his wife computed on the basis stated in the travel authorization, *i.e.,* days in actual travel status, or an average of 350 miles a day, whichever is less.

B-234451, May 10, 1989

Civilian Personnel

Relocation

■ Temporary quarters

■ ■ Actual subsistence expenses

■ ■ ■ Eligibility

■ ■ ■ ■ Extension

To justify an extension of temporary quarters subsistence expenses, there must be a need for an extension due to the circumstances beyond the employee's control and occurring within the first 60 days of temporary quarters. The decision to grant an extension is at the discretion of the agency and the agency acted correctly in denying an extension when it found that the employee's request for an extension did not demonstrate compelling reasons beyond his control.

Civilian Personnel

Relocation
■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Eligibility**
■■■■ **Extension**

An agency properly exercised its discretion by denying a request for a 1-year extension of the 2-year period in which an employee must complete his real estate transaction for purposes of relocation expense reimbursement. The determination to grant an extension is for the agency, and our Office would not object to such determination unless it is found to be arbitrary or capricious.

Matter of: Robert H. Meyer—Extension of Period for Temporary Quarters and Residence Transaction

This matter is before us as a request for a decision submitted by Gary B. Logsdon, Director, Division of Finance, Region IX, Department of Health and Human Services (HHS), concerning the relocation expense claims of Robert H. Meyer, an HHS employee. There are two questions for our opinion: 1) whether the agency correctly denied a 1-year extension of the initial 2-year period which Mr. Meyer has to sell his house at his old station and purchase one at his new station; and 2) whether the agency correctly denied to Mr. Meyer an extension of the period for temporary quarters subsistence expenses. We find that the agency has broad discretion under the applicable regulations to deny both an extension of the residence transaction period and an extension of the period for temporary quarters, and we find no fault with the agency's actions in this case.

Background

Mr. Robert H. Meyer was transferred from Tallahassee, Florida, to Honolulu, Hawaii, and he reported to the Honolulu station on January 5, 1988. His wife remained in Florida to sell their home, and she did not arrive in Honolulu until May 16, 1988. Mr. Meyer delayed the beginning of his temporary quarters until June 1, 1988, and he claimed 60 days through July 30, 1988.

Mr. Meyer requested an extension of the period of temporary quarters, but the agency denied the request and stated that Mr. Meyer had sufficient time in which to locate a permanent residence and that his circumstances did not satisfy the regulatory requirements for an extension of time. In October 1988, Mr. Meyer requested a 1-year extension to the 2-year period in which to claim real estate expenses reimbursement. The agency denied this request, stating that Mr. Meyer had at that time more than a year left to arrange for his new home and that a request for an extension was premature. Mr. Meyer subsequently retired on December 31, 1988, and this was later cited by the agency as additional evidence to support its contention that Mr. Meyer now has more time to resolve his permanent residence situation.

Mr. Meyer states that he and his wife intend their new house in Honolulu to be their retirement home and, therefore, the site selection and construction proc-

esses are necessarily more time-consuming since they want to ensure complete satisfaction with the result. Consequently, according to Mr. Meyer, completion of this "dream" home might not occur until after January 5, 1990, the end of the original 2-year residence transaction period.

Opinion

The first issue is whether the agency acted correctly in denying an extension of temporary quarters. The regulations governing temporary quarters are contained in the Federal Travel Regulations (FTR) (Supp. 10, March 13, 1983), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1987).

Under FTR, para. 2-5.2a(2), an agency may authorize payment for an additional period of up to 60 days if the appropriate agency official determines that there are compelling reasons for the continued occupancy of temporary quarters and there is a demonstrated need for the continued occupancy of temporary quarters due to circumstances beyond the employee's control which have occurred during the initial 60-day period. Examples of compelling reasons provided in the FTR include delay of delivery of household goods due to strikes, weather and acts of God, inability to occupy a new residence due to unanticipated problems such as delays in settlement of a new residence, or sudden illness or death of the employee or a family member.

In the present case, the agency acted within its discretion when it found that no circumstances beyond Mr. Meyer's control occurred during the initial period of temporary quarters to justify an extension of the period. Mr. Meyer has failed to provide any evidence of events beyond his control which would cause us to find that the agency's decision was unfounded. On the contrary, his reasons for requesting an extension are based upon circumstances entirely within his own control. These reasons can be summarized as a lack of time to plan and construct what the Meyers consider their "dream" retirement home.

The second issue we must decide is whether the agency correctly denied Mr. Meyer's request for a 1-year extension of the initial 2-year residence transaction period. The reasons cited by Mr. Meyer for this extension are the same as those he has cited above for the extension of the period of temporary quarters. The agency believes that Mr. Meyer's request for an extension is premature since, at the time of the request, he had approximately 1 year and 3 months left in the original 2-year period in which to complete construction of his home.

An agency may grant a 1-year extension of the period in which an employee must complete his residence transaction for purposes of reimbursement of related expenses if the agency makes:

> . . . a determination that extenuating circumstances, acceptable to the agency concerned, have prevented the employee from completing the sale and purchase or lease termination transactions in the initial time frame and that the residence transactions are reasonably related to the transfer of official station. FTR, para. 2-6.1e(2)(c) (Supp. 4, Aug. 23, 1982).

We have consistently held that the determination by an agency to grant an extension in accordance with this provision will not be disturbed unless found to be arbitrary or capricious. *See Simon Mouer,* B-195264, Feb. 12, 1980, and *Ronald F. Houska,* B-191087, Mar. 14, 1978, which interpreted an earlier version of this regulation.

We cannot say that the agency's action in this case was arbitrary or capricious. At the time Mr. Meyer requested a 1-year extension, he had approximately 1 year and 3 months left in the original 2-year period. Nothing in the record indicates that there are circumstances which warrant a 1-year extension. Moreover, the agency does not seem to rule out the possibility that a more timely request by Mr. Meyer based upon discrete extenuating circumstances might be granted.

Accordingly, we sustain the agency's determinations to deny an extension of the period of temporary quarters and an extension of the period to complete the real estate settlement.

B-234060, May 12, 1989

Procurement

Competitive Negotiation
■ Competitive advantage
■■ Privileged information
■■■ Disclosure

Procurement

Contract Management
■ Contract administration
■■ Convenience termination
■■■ Competitive system integrity

Protest is sustained where record shows that awardee improperly obtained source selection sensitive information concerning its competitor's product.

Matter of: Litton Systems, Inc.

Litton Systems, Inc., protests the award of a contract to Loral Systems Manufacturing Company under request for proposals (RFP) No. F33657-88-R-0096, issued by the United States Air Force. The contract is for the production of a total of 673 (basic quantity of 19 plus three option quantities totaling 654) advanced radar warning receivers (ARWR) for the RF-4C and F-16 aircraft. The ARWR is designed to detect enemy radar scanning of the aircraft and to warn the pilot of the significance of the radar scan. Litton contends that information made public to date in connection with Operation Ill Wind, a criminal investigation of alleged improprieties related to a number of Department of Defense procurements, indicates that, at a critical period in the competition, source selection sensitive information concerning Litton's product was improperly disclosed by the Air Force to Loral.

We sustain the protest on the basis that Loral improperly obtained source selection sensitive information concerning Litton's system, as explained below.[1]

In 1981, the Air Force awarded a contract to Litton on a sole-source basis for initial development of the ALR-74 radar warning receiver. The ALR-74 was conceived as a state of the art follow-on to the ALR-69 which was already being supplied to the Air Force by Litton for the F-16 "Falcon" fighter aircraft. In 1984, Litton was awarded an initial production contract for the ALR-74, also on a sole-source basis. Both contracts required Litton to develop a second source for the ALR-74. Litton selected Loral as the potential second source for the ARWR. Due to deficiencies identified during testing, the Air Force concluded that a continued sole-source acquisition was inappropriate. It therefore restructured the procurement in 1984 to permit a competition for development and procurement of the ARWR between Litton and Loral. The agency issued a justification and approval, on the basis of unusual and compelling urgency, authorizing a limited competition between the two firms. Loral was awarded a contract to produce an acceptable design to compete for the ARWR program. Loral at this time was already manufacturing the ALR-56C radar warning system for the F-15 "Eagle" fighter aircraft.

On September 16, 1988, the Air Force solicited proposals for full production of the ARWR from Loral and Litton. The competition was between Loral's ALR-56M, a repackaged version of its existing system, and Litton's updated ALR-74. The RFP provided for award on the basis of an integrated assessment of each responsible offeror's ability to satisfy the RFP requirements. The evaluation criteria, listed in descending order of importance, were technical, unit/life cycle cost, logistics/supportability, and management/manufacturing. The RFP permitted award of the contract on the basis of initial proposals.

Both Loral and Litton submitted proposals on October 31, 1988. Both offerors were determined to be technically acceptable. Loral's evaluated cost was significantly lower than Litton's evaluated cost. The Air Force determined that an award without discussions to Loral, the low offeror, would achieve the lowest overall cost to the government. Award was made to Loral on December 20.

On December 27, the United States District Court for the District of Maryland unsealed an affidavit that had been filed in support of requests for search warrants in connection with the Ill Wind investigation. The affidavit describes improper conduct involving the ARWR competition. After learning of the contents of this affidavit, Litton filed this protest on January 5, 1989. The affidavit, prepared by a special agent of the Federal Bureau of Investigation based on information obtained through wiretaps and other means, reports that the Deputy Assistant Secretary of Acquisition for Tactical Systems provided sensitive procurement information to a private consultant who in turn passed the information to a senior vice-president of Loral in return for money. With respect to the ARWR competition, the affidavit states that the consultant informed Loral of the re-

[1] In its protest and supplement thereto, Litton raises several additional grounds for protest against the award to Loral which we find to be without merit.

sults of the Air Force official's visit to Litton in October 1987 to evaluate Litton's ARWR development. The consultant gave Loral an opportunity to review and copy portions of a "book" [2] describing Litton's methodology which was prepared for a briefing Litton gave the Air Force concerning its ARWR progress. The affidavit also states that the consultant in December 1987 obtained a paper relating to a classified briefing, which the Air Force official attended, that discussed Litton's dynamic electro-magnetic environment simulator (DEES) testing of its ARWR. The affidavit further states that the consultant "has continued to provide . . . [Loral] with information about the competition that he obtains from . . . [the Air Force official]." These disclosures of information began ten months before the production RFP was issued.

Litton asserts that the affidavit indicates that Loral was provided data procurement sensitive to Litton and that the timing of the release of the data was such that it would have permitted Loral to (1) more effectively design its own system, and (2) predict and prepare a cost model of the Litton system. Litton contends that the disclosure of its procurement sensitive data was detrimental to Litton's competitive position and gave Loral an unfair competitive advantage. Under these circumstances, Litton argues that the award to Loral should be terminated.

The Air Force does not dispute the statements contained in the affidavit. Rather, the Air Force argues that remedial action is not required here because Litton has failed to establish that any of the information contained in the "book" is proprietary, or that an Air Force official disclosed it to Loral.[3] We do not agree.

Whether or not the Air Force is correct that the information disclosed is not proprietary, every page of the "book" was marked by Litton "F-16 RWR Competition Source Selection Sensitive" at the direction of the F-16 program manager. The "book" contained 75 pages of detailed explanation of the Litton's system architecture and design features. It is clear that Loral was not entitled to access to this information.

Although the affidavit does not indicate how the consultant obtained a copy of the "book," it nonetheless indicates that after the Air Force official's visit to Litton's facilities, the consultant continued to provide Loral with information about the competition that he obtained from the Air Force official. While the affidavit does not state that the Air Force official gave the consultant the "book," given the close and continual relationship and joint actions between the consultant and the high ranking Air Force official as described in the affidavit, the clear implication in the affidavit is that the "book" was provided by the Air Force official.

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[2] The Air Force official's visit included a briefing for which viewgraphs were made by Litton describing its entire ALR-74 program through the date in early October 1987 when it was prepared. These viewgraphs comprise the "book" that was provided to Loral.

[3] In this regard, the Air Force contends that since the consultant purported to represent both Litton and Loral, the consultant may have provided the information to Loral without the assistance of the Air Force official.

In addition, the affidavit reveals that the consultant received a paper prepared for a classified briefing on the DEES testing which the Air Force official attended. It is clear from the record that only government officials had access to this paper. However, the consultant knew of the briefing from the Air Force official and told Loral that he would obtain the papers concerning the testing from the government official. While the affidavit does not indicate whether Loral received a copy of the DEES testing paper, the affidavit states that the consultant received a copy of this classified information and continued to provide Loral with information about the competition that he obtained from the Air Force official.

In any event, whether or not the Air Force official was involved in the actual release, the record establishes that procurement sensitive documents in the Air Force's possession concerning Litton's product were obtained by Loral.

The Air Force primarily argues that, even if the allegations concerning the potential wrongdoings are true, it is difficult to conclude that Loral was able to take advantage of any improperly acquired information in any manner which affected the government's selection of an ARWR contractor. The Air Force states that it does not appear that Loral changed its fundamental technical approach (particularly in the 10-month time period prior to issuance of the production RFP) in a manner which would suggest that it adopted any Litton technical approach or that Loral was able to "cost model" Litton's approach in any effective manner. The Air Force further argues that there is no evidence of wrongdoing or improper influence concerning the source selection decision.

In this regard, the Air Force cites our holdings in *Aydin Corp.*, B-232003, Nov. 25, 1988, 88-2 CPD ¶ 517 and *Comptek Research, Inc.*, B-232017, Nov. 25, 1988, 68 Comp. Gen. 117, 88-2 CPD ¶ 518, involving the Ill Wind investigation, for the proposition that an improper disclosure of source sensitive information does not require resolicitation in the absence of a showing of prejudice. In these two cases, there was no evidence that the awardees improperly received any source selection sensitive information. Further, the protesters essentially were found outside the competitive range and had no reasonable opportunity of receiving the award. Here, however, the awardee improperly obtained the source selection sensitive information concerning its only competitor which submitted a technically acceptable offer. It may well be, as the Air Force argues, that this information did not give Loral an advantage in the competition. Nevertheless, we do not believe that the propriety of an award decision should turn solely on whether or not the improperly obtained information ultimately proved to be of benefit to the wrongdoer. The propriety of the award must also be judged by whether the integrity of the competitive process is served by allowing the award to remain undisturbed, despite the awardee's misconduct. Judged by this standard, we believe that the integrity of the system would be best served by a termination of the contract.

We therefore recommend that the Air Force terminate Loral's contract. The Air Force should then determine how it can best meet its needs for these systems in a manner which will ensure the integrity of the competitive process.

The protest is sustained.

By separate letter to the Secretary, we are recommending that the Air Force terminate for convenience the contract. We also find that Litton is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988).

B-234125, May 12, 1989

Procurement

Specifications
■ Brand name/equal specifications
■■ Equivalent products
■■■ Acceptance criteria

Failure of an "equal" product to meet all of the salient characteristics required by solicitation "brand name" requirement properly resulted in the rejection of the bid as nonresponsive.

Matter of: Elastomeric Roofing Associates, Inc.

Elastomeric Roofing Associates, Inc., protests the rejection of its bid under invitation for bids (IFB) No. APHIS-8-039, issued by the United States Department of Agriculture (Animal and Plant Health Inspection Service) for the rehabilitation of the roofs of 17 buildings and for snow guards for two buildings at its New York Animal Import Center. Elastomeric contends that its bid was improperly rejected for failure to submit sufficient information to establish that its silicone roof coating was equal to the brand name product cited in the IFB.

We deny the protest.

The IFB was issued on August 22, 1988. The brand name or equal requirement pertained to silicone roof coating and specified "Dow Corning 3-5000 or equal" coating. The product offered was to meet the following characteristics listed in the IFB:

Property	Test Method	Value
Solids, Contents, % of Volume	ASTM D-2697[1]	58
Tensile Strength, PSI	ASTM D-412	400
Elongation, %	ASTM D-412	150
Permeability, Perm Inches	ASTM E-96-B	2.9
Weatherometer, 6000 hrs	ASTM 526-70	no degradation

[1] This refers to the American Society of Testing and Materials (ASTM) standard to be used to achieve the listed value.

Bidders offering an equal product were required to furnish with their bids all descriptive material necessary to establish compliance with the listed salient characteristics. According to the solicitation, the failure to submit descriptive

literature with the bid or to submit sufficient literature to show compliance with those characteristics would result in the rejection of the bid.

Two bids were received on the September 27 bid opening date. Elastomeric submitted a bid of $167,700 based on offering GCS Coating Inc.'s SILICONE-60-S as an equal silicone coating. The other bidder, Urethane Applications Inc., submitted bid of $197,567, based on supplying the brand name silicone coating.

The technical data submitted with the protester's bid was reviewed by an architect/engineer (A/E) firm chosen by the agency to evaluate the technical aspects of the bids. The evaluation process was lengthy and included a number of requests by the A/E firm for further information including independent laboratory testing of the offered product to determine that it would meet the listed characteristics. Finally, by letter dated December 27 the agency rejected Elastomeric's bid as nonresponsive. As best we can determine from the rather confusing record, the protester's bid was rejected as nonresponsive because the firm was unable to provide literature or test results showing that its product meets the listed minimum requirements for solids content, permeability and weatherometer.

The protester complains that its bid was improperly rejected as nonresponsive and contends that its product has been accepted by other agencies as equal to the brand name product. In this regard, Elastomeric says that it has shown that its product meets the listed characteristics using the same type of "in-house certification" as accepted from the brand name manufacturer.

Bids offering equal products must conform to the salient characteristics of the brand name product listed in the solicitation in order to be regarded as responsive. *Volumetrics, Inc.,* B-228745, Oct. 23, 1987, 87-2 CPD ¶ 391. A bidder must submit with its bid sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics specified in the solicitation. If the descriptive literature or other information reasonably available to the contracting agency does not show compliance with all salient characteristics, the bid must be rejected. *Monitronics,* B-228219, Nov. 30, 1987, 87-2 CPD ¶ 527. Any information used to establish the equality of a product must have been commercially available prior to bid opening and not have been developed afterwards. *Id.* To permit a bidder to submit other than preexisting, commercially available data after bid opening would improperly give the bidder control over the responsiveness of its bid. *Id.*

It appears from the record here that although the IFB did not provide for the testing of the product after bid opening the agency's A/E firm did seek and accept test results and other data that seems to have been developed and submitted after bid opening. As indicated above, the acceptance of such data and information—unless it is preexisting, commercially available material, which neither party contends in the case here—is improper in a sealed bid procurement such as this. Since, however, the agency did not accept the protester's bid based on such information, these improprieties did not impact on the award. Further, since these improprieties only benefited the protester it cannot com-

plain that it was prejudiced by the agency's consideration of its post-bid opening data.

We think that the protester's bid was properly rejected since our review of the data submitted with Elastomeric's bid does not show that its silicone covering meets the solid content requirement as established by ASTM D-2697, the permeability level as established by ASTM E-96-B, and it does not appear to address the weatherometer characteristics as set forth in the IFB. It also appears that the testing methodology used to arrive at the elongation and tensile strength figures was not as required by the IFB. Since the protester does not show in an intelligible fashion that the literature submitted with its bid does establish that the product meets the salient characteristics, we have no basis upon which to object to the rejection of the protester's bid.[2]

As far as whether the characteristics of the brand name item were subject to less rigorous requirements is concerned, we first note that where a firm offers the brand name item in its bid there was no requirement for the submission of description data concerning the listed salient characteristics. Further, to the extent that the protester is arguing that the characteristics listed in the solicitation are in fact more stringent than the brand name item can actually meet, the argument is one concerning the terms of the solicitation which in order to be timely must be raised prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). We will therefore not consider it. Finally, the argument that another agency under a prior procurement may have, as Elastomeric contends, considered SILICONE-60-55 as a equal to the Dow Corning product is irrelevant since the agency here cannot make award based on a bid which does not meet the requirements of this particular solicitation. *Inscom Electronics Corp.*, B-225858, Feb. 10, 1987, 87-1 CPD ¶ 147.

The protest is denied.

B-234161, May 12, 1989

Procurement

Socio-Economic Policies

■ Small business set-asides

■■ Use

■■■ Justification

Protest that contracting officials had agreed, as part of settlement of earlier protest, to conduct unrestricted procurement for support services contract and, therefore, agency's issuance of request for proposals as a set-aside for exclusive small business participation was improper is denied. Inherent in any settlement agreement was that (1) future procurement would be conducted in accord with Federal Acquisition Regulation (FAR) and therefore, (2) in accordance with the FAR, if sufficient

[2] In fact, the Elastomeric in its protest submission admits that it has not yet submitted data showing compliance with the percentage of solids content and weatherometer requirements and that its data concerning permeability was not provided until after the protest was filed.

number of small businesses showed interest in competing for the contract, the procurement would be set aside for exclusive small business participation.

Procurement

Bid Protests

■ Bad faith

■■ Allegation substantiation

■■■ Lacking

Protest alleging that contracting agency officials acted unfairly and in bad faith in setting aside procurement for exclusive small business participation is denied, where there is no evidence that contracting officials intended to harm the protester and the decision to set aside was properly made in accordance with Federal Acquisition Regulation § 19.502-2 which governs small business set-aside determinations.

Matter of: Techplan Corporation

Techplan Corporation protests the Washington, D.C. Naval Regional Contracting Center (NRCC) decision to set aside request for proposals (RFP) No. N00600-89-R-0659 for exclusive small business participation. The RFP solicited offers to provide management support services for the Navy's International Armaments Cooperation Program (IACP). Techplan alleges that, as a result of discussions between Techplan and Navy personnel which resulted in settlement of an earlier protest Techplan had filed with our Office concerning the Navy's procurement of IACP support services, the Navy agreed to conduct a competitive and unrestricted procurement. Techplan asserts that the Navy has failed to meet its commitment to Techplan by setting aside the present procurement using a standard industrial classification that precludes Techplan from competing. We deny the protest.

For a number of years, the Assistant for International Research and Development (designated OP-098F by the Navy), an office under the Chief of Naval Operations, has used contractors to obtain management support services relating to international research and development programs in support of IACP. At the request of the Chief of Naval Operations, the Office of the Chief of Naval Research (OCNR) was the designated contracting activity that procured several such support services contracts. In the early part of 1988, Techplan had been working for the Navy for approximately 10 years under various contracts procured by OCNR and was still under contract to provide support services to OP-098F on a cost-plus-fixed-fee basis. On February 10, OCNR instructed Techplan to stop all work in connection with its IACP support services contract (which had already been extended beyond the original expiration date) and stated that Techplan's contract would not be extended further.

On March 21, 1988, Techplan protested to our Office alleging that OCNR had improperly modified a support services contract between the Navy and BK Dynamics to include work that should have been performed by Techplan under its recently terminated IACP support services contract. The contract with BK Dynamics (designated a "bridge contract" by the parties) was to provide support

services to OP-098F for an interim period of approximately 3 months until OCNR could perfect a follow-on contract with the Small Business Administration (SBA) pursuant to section 8(a) of the Small Business Act. Techplan argued that the modification went beyond the scope of BK Dynamics's original support services contract and, therefore, amounted to an improper sole-source award.

By letter of April 12, 1988, Techplan withdrew its protest, stating that counsel for OCNR had assured Techplan that the bridge contract with BK Dynamics had been terminated, that no additional bridge contracts for IACP support services would be awarded, and that an unrestricted competitive solicitation for the IACP support services would be developed and issued in the future. Accordingly, we closed our file on April 18 without issuing a decision on the merits of Techplan's protest.

On August 5, 1988, NRCC published a notice in the *Commerce Business Daily* (CBD) announcing its intention to procure management support services in support of IACP as a small business set-aside, and solicited inquiries from interested firms. In response, the contracting activity received expressions of interest from 63 firms of which 17 identified themselves as small businesses. After consulting with the small business specialist on the matter, and noting that NRCC "has, in the past, awarded similar contracts for management support services as the result of small business set-asides," the contracting activity decided that the impending procurement should be set aside for exclusive small business participation. Accordingly, on October 27, a second CBD notice was published announcing that the procurement would be set aside for exclusive small business participation using standard industrial classification No. 8742.

On November 18, 1988, the NRCC issued the present RFP, a total small business set-aside, soliciting offers for providing management support services in support of IACP, including: meeting assistance, research in the preparation of various reports and analysis, data generation, data analysis, data maintenance, various levels of program assistance, financial management and international acquisition support. The RFP contemplates award of a time-and-materials, labor-hour contract for a basic period of 1 year with options for 5 additional years. The RFP states that the applicable standard industrial classification is No. 8742, management support services, which restricts consideration to offerors whose average annual receipts for the preceding 3 fiscal years do not exceed $3.5 million.

Techplan states that it is precluded from competing for the contract, because its average annual receipts are above the $3.5 million limitation. The protester contends that the Navy has broken its promise to procure IACP support services by an unrestricted competition. Techplan argues that the Navy should be estopped to deny the existence of its agreement to issue an unrestricted procurement, because Techplan relied upon the Navy's representation to its detriment in withdrawing the earlier protest. Techplan further argues that the Navy has exhibited bad faith and unfair dealing towards Techplan, and therefore, should be required either to cancel the present set-aside procurement and issue a new, unrestricted solicitation or to amend the present RFP to incorporate a new, less re-

strictive standard industrial classification which will allow Techplan to compete for award.

The Navy's position is that, regardless of whether Techplan thought it had a commitment from the Navy to conduct an unrestricted procurement, the contracting officer was required to set this procurement aside for exclusive small business participation under section 19.502-2 of the Federal Acquisition Regulation (FAR). In this regard, the Navy neither admits nor denies that OCNR agreed to conduct an unrestricted procurement for IACP support services in order to settle the earlier Techplan protest. The Navy also points out that, while OCNR used to be the contracting activity responsible for procuring IACP support services, the present procurement was handled by NRCC, an entirely different contracting activity, at the request of OP-098F. Thus, assuming for the sake of argument that personnel representing the original contracting activity did agree to issue an unrestricted solicitation, the Navy argues that the OCNR officials had no authority to commit the new contracting activity to any particular method of procurement, especially where the method of procurement allegedly agreed upon—an unrestricted competition—would contravene express provisions of the FAR.

We find the Navy's position to be basically correct. When the circumstances giving rise to the alleged agreement between Techplan and the Navy are taken into account—an allegedly improper sole-source award to be followed by a section 8(a) award—we think it is reasonably clear that the Navy would have been agreeing to abandon the sole-source and section 8(a) approaches and to seek competition consistent with law and regulation. Indeed, it would have been improper for the agency to agree to anything other than to adhere to the applicable statutes and regulatory provisions. Thus, inherent in any agreement was that the future procurement would be conducted in strict accord with the FAR.[1]

The FAR, of course, requires that, if two or more responsible small businesses show interest in competing for the contract and the contracting officer can expect to receive reasonable prices, the procurement be set aside for exclusive small business participation. FAR § 19.502-2. Also, as the FAR is published in the Federal Register and the Code of Federal Regulations, all parties, including the protester, are on constructive notice of its provisions. FAR § 1.104-1(a); *All Destinations,* B-233505.3, Dec. 29, 1988, 88-2 CPD ¶ 640. Accordingly, while the record contains no evidence that either the Navy's or Techplan's representatives even considered the possibility that there would be sufficient small business interest to warrant a set-aside, when that interest appeared the Navy had no choice but to operate within the parameters prescribed by the FAR and set aside the procurement.

Since, in our view, it was implicit in any agreement between the parties that any future procurement would be conducted in accordance with the require-

[1] The FAR is issued under authority of the Office of Federal Procurement Policy Act, 41 U.S.C. § 401 *et seq.* (Supp. IV 1986), and contracting officers are bound by its directives. FAR § 1.102(a); *see International Line Builders,* 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345; *see also Northwest Forest Workers Ass'n—Request for Reconsideration,* B-218193.2, Apr. 19, 1985, 85-1 CPD ¶ 450.

ments of the FAR, and since the record indicates that pursuant to the FAR the Navy properly determined that a small business set-aside was appropriate based on the circumstances at the time the solicitation was issued, we find without merit Techplan's argument that the Navy was estopped from conducting the procurement on anything but an unrestricted basis. *See Whitco Industrial Corp.*, B-202810, Aug. 11, 1981, 81-2 CPD ¶ 120. Moreover, to the extent that Techplan contends that the standard industrial classification in the RFP should be changed to one which would permit Techplan to compete, the protest raises an issue for review solely by SBA. *See* 4 C.F.R. § 21.3(m)(2) (1988).

Lastly, Techplan alleges that the Navy has acted in bad faith and has treated it unfairly in setting this procurement aside for small businesses. In order to prove bad faith on the part of procurement officials, the protester would have to show that their actions were done with the specific intent to harm the protester. *Seaward International, Inc.*, 66 Comp. Gen. 77 (1986), 86-2 CPD ¶ 507. The record contains no evidence of any such intent, and, in view of our finding above that the set-aside determination was properly made in accord with the FAR, we cannot agree that the Navy's treatment of Techplan was unfair.

The protest is denied.

B-234233, May 15, 1989

Procurement

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

Protest concerning rejection of quotation filed more than 10 working days after protester was orally advised that the product it proposed was unacceptable is untimely.

Procurement

Bid Protests
■ GAO procedures
■ ■ Protest timeliness
■ ■ ■ Apparent solicitation improprieties

Protest that technical specifications were unduly restrictive of competition is untimely where this alleged impropriety is apparent from the request for quotations but is not filed prior to the closing time for receipt of quotations.

Small Purchase Method
■ Quotations
■■ Modification
■■■ Acceptance time periods

Agency's request for clarification of a firm's quotation and acceptance of revised quotation is not legally objectionable under the informal procedures permitted for a small purchase. The language requesting quotations by a certain date cannot be construed as establishing a firm closing date for the receipt of quotations absent a late quotation provision expressly providing that quotations must be received by that date to be considered.

Matter of: ACCESS for the Handicapped

ACCESS for the Handicapped protests the rejection of its quote and the issuance of a purchase order to Del-Val Driving Aids, Inc., under request for quotations (RFQ) No. N62269-89-Q-3056, issued by the Department of the Navy for furnishing and installing wheel chair lifts.

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

Three quotes were submitted by the December 14, 1988, closing date under the RFQ, which was issued under the small purchase procedures of Part 13 of the Federal Acquisition Regulation. The high quoter was excluded from consideration on the basis of price. On December 16, the Navy telephonically advised ACCESS that the "Carrier Lift" model it offered was unacceptable because it was battery-powered and did not meet the specification requirement for an AC-powered unit. ACCESS indicated that it had two other products that would meet the requirements, and the Navy asked for descriptive literature. By letter dated December 16, ACCESS submitted descriptive literature on these products, and by telefax of December 19, submitted pricing. The Navy requested clarifications from Del-Val and ACCESS. By telefaxed letter of December 20, Del-Val provided the necessary clarification and reduced its price. ACCESS provided the necessary clarification by telefax dated December 21.

The Navy found Del-Val's and ACCESS's responses technically acceptable and awarded a purchase order on December 21 to Del-Val, which had submitted the lowest quote. The Navy notified ACCESS of the award on January 6, and ACCESS protested to our Office on January 23.

ACCESS protests that its quote for the "Carrier Lift" model was low and should not have been rejected because the model complies with the Navy's requirements and is superior to the model chosen for award.

The Navy responds that this protest basis is untimely because ACCESS knew from its December 16 telephone conversation that its battery-driven system was unacceptable. According to the Navy, ACCESS demonstrated its knowledge in its December 16 letter to the Navy offering two alternate products and explaining that they both had the "220± Volt AC single phase or three phase power that you requested." The letter further stated: "We strongly recommend, and urge you to consider the 'Carrier Lift' that we originally proposed. However, if

you insist, we will be happy to provide any of the other products." ACCESS comments that it was not aware of a definite adverse decision when writing its December 16 letter, but rather understood that the Navy was still reviewing and studying bids.

We find this basis of protest untimely. Our Bid Protest Regulations provide that a protest must be filed within 10 working days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). ACCESS was informed by telephone on December 16 that its quote was unacceptable because the Carrier-Lift model was battery-powered and did not meet the specification. Oral notification is sufficient to place a protester on notice of its protest bases, and a protester may not delay filing its protest until receipt of written notification confirming the existence of protestable issues. *Servidyne, Inc.*, B-231944, Aug. 8, 1988, 88-2 CPD ¶ 121. Also, while a protester may choose to continue pursuing a matter with the contracting agency instead of filing a protest, even after the agency has advised that it rejects the firm's position, but doing so does not toll the 10 working day period for filing a protest with our Office. *St. Joseph Motor Lines*, B-230211.2, May 6, 1988, 88-1 CPD ¶ 442. Here, ACCESS was told explicitly by the Navy that its battery-powered approach was unacceptable, and while its December 16 letter requested continued consideration of its approach, it clearly knew of the agency's position by that date. Accordingly, it was required to protest the Navy's rejection of its proposed approach within 10 days of December 16. Since it did not do so, the protest on this issue is untimely.

ACCESS further protests that the Navy's specifications were, in most part, copied word-by-word from the specification sheets of the model chosen for award, and included a feature that is unique to that model. These alleged improprieties were apparent on the face of the RFQ. Our Bid Protest Regulations require protests of alleged improprieties in a solicitation which are apparent prior to the closing date for initial quotations to be filed before that time. 4 C.F.R. § 21.2(a). Since ACCESS's protest on this issue was filed after the date for receipt of quotations, it is untimely and will not be considered. *See Herman Miller Inc.*, B-230627, June 9, 1988, 88-1 CPD ¶ 549.

ACCESS also protests that the Navy acted unfairly in allowing Del-Val to lower its price on December 20. ACCESS complains that the Navy went the extra mile to see that ACCESS did not get the contract. We do not find the Navy's actions here objectionable. The RFQ was issued pursuant to the small purchase procedures, which are less formal than those usually followed in government procurement. Small purchase procedures set forth abbreviated competitive requirements designed to minimize administrative cost that otherwise might equal or exceed the cost of relatively inexpensive items. Moreover, a quotation, unlike a sealed bid or an offer (submitted in response to a request for proposals), is not a legally binding offer that can be accepted by the government to form a binding contract. The ensuing order from the government is the offer which the proposed supplier can accept, either through performance or by formal acceptance of the government's offer. FAR § 13.108. It follows then, that a quotation sub-

mitted under the government's small purchase procedures (which do not contain a "late" submission clause) can be revised prior to the time the government issues an order, because the language requesting quotations by a certain date cannot be construed as establishing a firm closing date for the receipt of quotations absent a late quotation provision expressly providing that the quotations must be received by that date to be considered. *See Oregon Innovative Products,* B-231767, Aug. 2, 1988, 88-2 CPD ¶ 110. Thus, we do not find it legally objectionable that the contracting officer permitted Del-Val to revise its quote.

Further, we find that the protester has provided no proof in support of its allegation that the Navy was biased against it, and there is no evidence of bias in the record. Since ACCESS has not met its burden of proof, we regard its allegation as mere speculation. *Contracting Programmers & Analysts, Inc.,* B-233377.2, Feb. 22, 1989, 89-1 CPD ¶ 190.

The protest is dismissed in part and denied in part.

B-232431.5, May 16, 1989

Procurement

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

Request for reconsideration is denied where protest presents no statement of facts or legal grounds warranting reversal, but merely restates arguments considered, and rejected, by the General Accounting Office in denying the original protest.

Procurement

Sealed Bidding
■ Invitations for bids
■ ■ Terms
■ ■ ■ Liquidated damages
■ ■ ■ ■ Propriety

Agency's failure to adhere to executive branch guidance in formulating deduction provision does not render the provision improper; guidance was not binding and provision was unobjectionable because it did not establish impermissible penalty for defective performance.

Matter of: Crown Management Services, Inc.—Reconsideration

Crown Management Services, Inc., requests reconsideration of our decision *Crown Management Services, Inc.,* B-232431.2, B-232431.3, Jan. 24, 1989, 89-1 CPD ¶ 64, in which we denied the firm's protest that various solicitation provisions were deficient in invitation for bids (IFB) No. M00681-88-B-0019, issued by the United States Marine Corps for laundry and dry cleaning services at Camp Pendleton, California.

We deny the request.

The firm's protest included an allegation, at issue here, that the solicitation improperly permitted deductions from contract payment for deficient performance in excess of the value of the tasks actually performed, and thus constituted a punitive deduction, prohibited by the Federal Acquisition Regulation (FAR), subpart 12.2 ("Liquidated Damages"). The specific deduction provisions complained of were for maintenance of government-furnished equipment and hazardous waste handling and disposal. Crown argued that the only proper element of cost for consideration when establishing the deduction provision should have been labor cost, and that the agency improperly considered the criticality of the services to be performed and the value of the government-furnished equipment to be maintained.

We denied the protest, generally finding the deduction provision unobjectionable, on the ground that the deduction formula provided for contract price deductions proportional to the number of defects in the sample, and not flat deductions for any defects. For example, the deduction provision for maintenance permitted a maximum deduction of 22 percent of the monthly contract invoice price if the acceptable quality level (AQL) was exceeded and the entire sample inspected was found defective, but also provided that if less than 100 percent of the sample was found defective, a correspondingly smaller deduction would be made. We further found nothing improper in the agency's consideration of elements other than labor cost in computing the value of the service foregone in establishing the deduction percentage. We thus determined that the deduction provision was not a punitive deduction.

In its request for reconsideration, Crown argues that our decision erroneously considered only the propriety of deduction percentages provided for the maintenance and hazardous waste services, and not the deductions for the remaining 16 required services. Crown also specifically alleges that there is no indication in our decision that we considered the applicable guidance, cited in its protest, on the subject of payment deduction analysis, contained in "A Guide for Writing and Administering Performance Statements of Work for Service Contracts," October 1980, Office of Federal Procurement Policy Pamphlet No. 4, Supplement No. 2 to Office of Management and Budget Circular No. A-76. The protester maintains that according to this guidance labor cost should be the sole basis for determining how much each specific service costs in relation to the total job in computing the value of the service foregone, and the corresponding deduction percentage for the particular service.

It was not clear from Crown's protest that the firm was challenging the deduction percentages for all 18 required services. However, the deduction amounts under the other 16 remaining services also appear to be unobjectionable. In this regard, just as we found in our decision that Crown had not shown that the percentages for the maintenance and hazardous waste services were improper, Crown also presented no evidence that would lead us to object to the percentages for the remaining 16 services; Crown also has not presented such evidence in connection with this reconsideration request. Thus, we conclude, as we did in

our original decision, that the deduction provision, including the percentages for each of the services, is unobjectionable; it provides for deductions based both on the number of defects in a sample and, as we find here, on the importance of a particular service relative to the overall contract.

As for the guidance referenced by the protester, we did review it in reaching our prior decision, but in the final analysis the agency's alleged failure to adhere to it was not dispositive of the protest. While the guidance could be instructive to the agency, it was in no way binding, *i.e.,* there is nothing in the Guide or in applicable regulations that required the agency to develop a deduction provision with reference to the Guide. Rather, as indicated in our decision, the propriety of the deduction provision turned solely on whether the provision was punitive in nature; we determined it was not.

In any event, the Guide does not prohibit consideration of relevant elements other than labor cost in computing the value of services foregone for the purpose of establishing a deduction percentage for a particular service. In our decision, we determined that under the circumstances presented in the record it was clear that the value of the services foregone would represent more than just labor and repair, as suggested by the protester; proper maintenance of the laundry facility was considered critical since it was the only facility available to support all Marine Corps activities in southern California, and much of the equipment, valued in excess of $1 million, was nearly new and the agency wished to ensure proper maintenance to extend its projected service life. It remains our view that these considerations properly may be for factored into the deduction formula. While Crown obviously disagrees with our conclusion, it has not established that our conclusion is incorrect. *See* Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1988); *R.E. Scherrer, Inc.—Request for Reconsideration,* B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

The request for reconsideration is denied.

B-234905.2, May 16, 1989

Procurement

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

Request for reconsideration is denied where the requester fails to show that the dismissal of its protest was based on any error of fact or law or information not previously considered.

Procurement

Bid Protests

■ GAO procedures

■■ Interested parties

United States-Canada Free-Trade Agreement does not provide jurisdictional basis for the General Accounting Office (GAO) to consider protest by Canadian firm that is not an interested party under the Competition in Contracting Act of 1984 and GAO's Bid Protest Regulations.

Matter of: Dunlop Construction Products, Inc.—Request for Reconsideration

Dunlop Construction Products, Inc., requests that we reconsider our April 7, 1989, dismissal of its protest against the contracting officer determining that its roofing materials did not comply with the Buy American Act under contract No. N62470-85-C-5321, which was let by the Department of the Navy for construction on the Seal Team Operations Facilities at the Naval Amphibious Base, Little Creek, Virginia Beach, Virginia. We deny the request.

The Navy awarded the contract to R.E. Lee & Son, Inc., the prime contractor, on June 30, 1988. Dunlop, a Canadian manufacturer of single-ply roofing membrane, is a supplier to a subcontractor supplying materials to a subcontractor in privity with the prime contractor. We dismissed the protest because our Office will only decide a protest filed by an interested party, which our Bid Protest Regulations defines as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract." *See* 4 C.F.R. § 21.0(a) (1988) and 31 U.S.C. § 3551(2) (Supp. IV 1986). A prospective subcontractor or supplier, not being selected by or for the government, as in Dunlop's case, does not have the requisite interest to maintain a protest under our Regulations. *See* 4 C.F.R. § 21.3(m)(10).

In the initial protest, Dunlop argued that the United States-Canada Free-Trade Agreement between the United States and Canada, which is implemented by the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988), exempted Canadian manufactured products from the requirements of the Buy American Act. In requesting reconsideration of the dismissal, Dunlop argues that the Free-Trade Agreement requires each country to establish and maintain a reviewing authority for deciding bid challenges by potential suppliers of eligible goods and that our Office is the appropriate forum to review its protest.

Although Dunlop contends that the Free-Trade Agreement grants standing to file a protest to any potential supplier, our jurisdiction to review protests is derived from the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556, and our implementing Bid Protest Regulations in 4 C.F.R. §§ 21.0 to 21.12, not the Free-Trade Agreement, and there is no basis to conclude that our jurisdiction was modified by this Agreement. *See* United States-Canada Free-Trade Agreement Implementation Act of 1988, § 102(a), *supra.* Moreover, the Canadian government, which specifically established the Procurement

Review Board to review protests based upon the Free-Trade Agreement, has defined, consistent with our Regulations, a "potential supplier" to be an actual or prospective bidder whose direct economic interests would be affected by the award or the failure to award a particular contract. *See* Procurement Review Board Operating Guidelines, *reprinted in* 51 Federal Contract Reporter 622 (1989). Therefore, we again find that Dunlop is not an interested party.

Since Dunlop has not presented any evidence which shows that our dismissal was based on any error of fact or law or information not previously considered, which is the standard upon which we grant reconsideration, there is no basis for reconsidering our dismissal. *See* 4 C.F.R. § 21.12(a); *Hi-Tech Communications, Inc.—Request for Reconsideration,* B-233664.2, Dec. 21, 1988, 88-2 CPD ¶ 616.

The request for reconsideration is denied.

B-235166, May 16, 1989

Procurement

Bid Protests
■ GAO procedures
■■ Protest timeliness
■■■ Delays
■■■■ Agency-level protests

Where protester waits 8 months to receive the procuring agency's final decision on its agency-level protest, before filing a protest at the General Accounting Office and in the interim performance is completed under the contract, the protest is untimely because the protester failed to diligently pursue the protest.

Matter of: Morey Machinery Co., Inc.

Morey Machinery Co., Inc., protests the award of a contract to Davis-Taylor-Forster, under request for proposals No. N00600-88-C-1590, issued by the Naval Regional Contracting Center, Washington, D.C., for milling machines. Morey contends that Forster's machine did not meet the IFB's Buy American Act requirement and that the Navy improperly amended the IFB's requirements after the receipt of initial proposals.

We dismiss the protest as untimely.

The award was made to Forster on July 27, 1988, and the Navy advises that Forster has completed delivery under the contract. Morey's protest was filed in our Office on April 12, 1989. Apparently, Morey did not protest the award to Forster until after it received a final resolution of its agency-level protest, which the Navy issued on March 29. Morey filed the agency-level protest on August 9, 1988.

When a protest initially has been filed with the agency, the protester is not permitted to delay filing a subsequent protest with our Office until it eventually

receives a final decision on the merits from the agency. The protester may wait only a reasonable length of time for an agency's response before filing a protest here. We have held that where a protest is filed with an agency and more than 4 months elapses without any response, the protest to our Office is untimely because the protester did not diligently pursue the protest. *See REACT Corp.*, B-219642, Aug. 22, 1985, 85-2 CPD ¶ 215; *Experimental Pathology Laboratories, Inc.*, B-211282, July 28, 1983, 83-2 CPD ¶ 136. Accordingly, we find Morey's protest to be untimely for lack of diligent pursuit, since it was filed approximately 8 months after the agency-level protest.

The protest is dismissed.

B-233493.2, May 18, 1989

Procurement

Sealed Bidding
■ Hand-carried bids
■■ Late submission
■■■ Acceptance criteria

Hand-carried bid which was brought to the designated place for hand-carried bids and placed in the Navy's control at the exact time, 2 p.m., called for in the solicitation and prior to any declaration that the time for receipt of bids had passed is not late as the Federal Acquisition Regulation does not require that a bid be submitted prior to the time called for in the solicitation but rather not later than the exact time set for opening bids.

Matter of: Amfel Construction, Inc.

Amfel Construction, Inc., protests the rejection of its bid as being late under invitation for bids (IFB) No. N62474-87-B-7688, issued by the Naval Facilities Engineering Command, Western Division, for hospital modification, Building 500, Naval Hospital, Oakland, California.

The protest is sustained.

Bid opening was scheduled for 2 p.m., on November 2, 1988. The IFB instructed that "all hand delivered bids must be deposited in the bid box of the Contract Office, Western Division, Naval Facilities Engineering Command (Code 02), Bldg. 208, 1st Floor, San Bruno, CA 94066-0720 prior to the time and date set for bid opening. Any bids submitted by hand after the time set for receipt will not be accepted."

Amfel contends that its employee arrived at the designated place for receipt of hand-carried bids at 1:59 p.m., but the bid envelope was too large to be placed in the time/date stamp machine on the bid box and no one was at the bid box to receive the bid. Amfel states that a Navy employee subsequently walked over to the Amfel employee, took the bid package, and then walked over to a nearby secretary's desk to request a piece of paper. Amfel states that since the secretary was on the phone it took in excess of one minute for the Navy employee to

interrupt the secretary, get a piece of paper and return to the time clock by which time the paper was stamped 2:01 p.m.

The bid opening officer accepted Amfel's bid and opened it along with the two other bids received. Amfel's bid was found to be low. After an agency-level protest was filed by the second low bidder, R.J. Lanthier Company, the Navy rejected Amfel's bid as being late and awarded the contract to Lanthier.

The Navy has submitted affidavits from several of its employees as well as the two other bidders' representatives who attended the bid opening in support of the Navy's conclusion that Amfel's bid was late. The Navy contends that Amfel submitted its bid after the exact time specified for receipt. In this regard the bid recorder stated she was standing 5 feet from the bid box and could clearly see the bid box and the time clock of the time/date stamp which was on top of the bid box. She stated that two other bidders' employees were standing to her right 5 to 6 feet from the bid box. When the clock face showed 2 p.m., the bid recorder saw Amfel's employee come through both sets of doors and enter building 208 holding a bid envelope. The bid recorder stated that she approached Amfel's representative, took the bid from her, immediately walked over to a secretary's desk 10 feet away and without speaking to her, took a piece of paper from the top of her note pad, walked back to the time/date stamp and stamped in the piece of paper. The bid recorder stated that it took approximately 15 seconds to obtain the piece of paper and stamp it in at 2:01 p.m.

The two other bidders' representatives who declared they had observed both the time/date stamp clock and the Amfel employee's arrival in building 208 stated that Amfel's employee arrived about 20-40 seconds after the clock face "clicked" from 1:59 p.m. to 2 p.m. (the third low bidder's employee's affidavit) or 35 to 50 seconds after the clock face clicked to 2 p.m. (Lanthier's employee's affidavit).

The Federal Acquisition Regulation (FAR) provides that bids shall be submitted so that they will be received in the office designated in the invitation for bids not later than the exact time set for opening of bids. FAR § 14.302(a) (FAC 84-11). Bids received in the office designated in the invitation for bids after the exact time set for opening are "late bids." FAR § 14.304-1 (FAC 84-11).

Bids that are in the hands of the bid opening officer or any designated official by the scheduled opening time may be considered for award. *See Hyster Co.,* 55 Comp. Gen. 267 (1975), 75-2 CPD ¶ 176. The time when a bid is submitted is determined by the time that the bidder relinquishes control of the bid. *Chestnut Hill Construction, Inc.,* B-216891, Apr. 18, 1985, 85-1 CPD ¶ 443.

As a general rule, a bidder is responsible for delivering its bid to the proper place at the proper time. Late delivery of a bid requires its rejection, even if it is the lowest bid, in order to maintain confidence in the integrity of the government procurement system. *Hi-Grade Logging, Inc.,* B-222230, B-222231, June 3, 1986, 86-1 CPD ¶ 514. Generally, only a time/date stamp on the bid wrapper or other documentary evidence of receipt maintained by the government installation is acceptable evidence of the receipt of a bid by the government. *See* FAR

§ 14.304(c). We have held, however, that where the issue is whether a hand-carried bid was timely received, all relevant evidence in the record may be considered. *Boniface Tool & Die, Inc.,* B-226550, July 15, 1987, 87-2 CPD ¶ 47. Statements by government personnel, for example, are competent evidence of the time of receipt. *Id.*

We need not decide whether Amfel's employee arrived at the bid box at 1:59 p.m., as the fact remains that the Navy admits that Amfel arrived there at 2 p.m. Although the Navy argues that for Amfel to have submitted its bid on time it must have submitted its bid at 1:59 p.m., our reading of the FAR does not lead us to this result.

While the solicitation contained both the phrases "prior to the time" and "after the time set for receipt," these phrases must be read consistent with the FAR, which states that a bid is late if received "after" the time set for opening. We have uniformly interpreted this and similar regulatory language as meaning that bids could be submitted up to the time the contracting or bid opening officer announces that the time set for bid opening has arrived. *See, e.g.,* 40 Comp. Gen. 709 (1961); *Hi-Grade Logging, Inc.,* B-222230; B-222231, *supra; K.L. Conwell Corp.,* B-220561, Jan. 23, 1986, 86-1 CPD ¶ 79. Here, the IFB stated that bid opening was scheduled for 2 p.m. Even though Amfel's bid was not stamped in until 2:01 p.m., the evidence shows that Amfel's bid was in the Navy's control at 2 p.m. when the Amfel employee handed it to the bid recorder. Since the bid opening officer had not declared the time for receipt of bids closed at that point, we find that Amfel's bid was not late despite the fact that it took the bid recorder until 2:01 p.m. to actually stamp the bid in. *Cf. Chattanooga Office Supply Company,* B-228062, Sept. 3, 1987, 87-2 CPD ¶ 221, in which submission of bids by 10 a.m. was required but we found that a bid, delivered 15-30 seconds after 10 a.m. on the bid opening clock, was late because the bid opening officer had already declared bid opening time.

Accordingly, we conclude that Amfel's bid was timely received and should have been considered for award. We therefore sustain the protest, and recommend that the Navy terminate for convenience its contract with Lanthier and make an award to Amfel if otherwise proper.

B-234245, May 18, 1989

Procurement

Socio-Economic Policies
■ Small businesses
■■ Responsibility
■■■ Negative determination
■■■■ Effects

Under the Small Business Act a contracting agency is required to refer its nonresponsibility determination regarding a small business offeror to the Small Business Administration for certificate of competency consideration, even though the solicitation was issued under small purchase procedures.

Matter of: J. Johnson Enterprise

J. Johnson Enterprise protests the rejection of its quotation under request for quotations (RFQ) No. 46-00-9-028, issued by the Farmers Home Administration (FmHA), United States Department of Agriculture, for the repair of a single-family dwelling. Johnson, the low-priced offeror, was rejected as nonresponsible by the FmHA, a determination which Johnson protests is not supported by the evidence and which FmHA failed to refer to the Small Business Administration (SBA) for consideration under certificate of competency (COC) procedures.

We sustain the protest without resolving the responsibility issue, because the FmHA failed to refer the matter to the SBA as required by statute.

In response to an RFQ which was issued pursuant to the small purchase procedures in Federal Acquisition Regulation (FAR) Part 13, eight firms submitted quotations with Johnson the low quoter at $5,690. Because of insufficient information concerning its creditworthiness, the FmHA determined that Johnson was nonresponsible and rejected its quotation. Thomas W. Glick & Co., the second low offeror, was awarded the contract at $6,389.

Johnson asserts that it is creditworthy and challenges both the FmHA's determination of nonresponsibility and the agency's failure to refer the matter to the SBA. We sustain this protest, without reaching the merits of FmHA's nonresponsibility determination, because the agency failed to refer the matter of the firm's responsibility to the SBA for consideration under its COC procedures as required by the Small Business Act, 15 U.S.C. § 637(b)(7) (1982 and Supp. IV 1986). *See Vycor Corp.,* B-232711, Dec. 8, 1988, 88-2 CPD ¶ 573.

We would normally recommend that the matter now be referred to the SBA for COC consideration, but such corrective action is not practical in this case since the contract has already been fully performed. Accordingly, since FmHA failed to follow the statutory COC procedures, Johnson is entitled to recover the reasonable costs of preparing its quotation and of pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988). Johnson's claim for such costs should be submitted directly to FmHA. 4 C.F.R. § 21.6(e).

The protest is sustained.

B-234490, May 26, 1989

Procurement

Competitive Negotiation

■ **Requests for proposals**

■ ■ **Cost proposals**

■ ■ ■ **Submission methods**

A solicitation provision requiring a cost proposal to be submitted on a computer disk is not unduly restrictive of competition where experience has shown that the requirement reduces the time and

errors in evaluating cost proposals containing numerous bid items, and complying with the requirement involves a minimal amount of expense and effort.

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Evaluation criteria
■■■ Sufficiency

Where evaluation factors are clearly set forth and their relative importance is specified, solicitation is consistent with applicable regulations requiring adequate specificity in evaluation scheme.

Procurement

Competitive Negotiation
■ Use
■■ Criteria

Use of negotiated rather than sealed bid procedures in procuring maintenance services is unobjectionable where consolidation of numerous, diverse services into one contract created a complex procurement that agency determined necessitated discussions to determine offerors' management and administrative capabilities, as well as their technical understanding of the work.

Matter of: W.B. Jolley

W.B. Jolley protests provisions in request for proposals (RFP) No. DACW56-89-R-0004, issued by the Army Corps of Engineers for maintenance services at Pat Mayse Lake, Texas. Specifically, Jolley protests that cost proposals should not have to be submitted on computer disks; the solicitation improperly does not include measurable, minimum requirements for each evaluation factor; and the Army improperly is conducting the procurement on a negotiated rather than a sealed bid basis.

We deny the protest.

Computer Disk

Jolley contends that only offerors possessing existing computer capabilities could meet the solicitation requirement that offerors submit their cost/price proposals on floppy computer disks using Lotus 1, 2, or 3 programs on IBM or IBM compatible computers, and that this requirement therefore unduly restricts competition.

When a protester alleges that specifications unduly restrict competition, the agency bears the burden of presenting *prima facie* support for its position that the specifications are necessary to meet its actual minimum needs. *Chi Corp.*, B-224019, Dec. 3, 1986, 86-2 CPD ¶ 634. This requirement reflects the agency's obligation to formulate specifications to maximize competition. *Id.* Once the agency establishes support for the challenged specifications, however, the burden shifts to the protester to show that the specifications clearly do not rep-

resent the government's minimum needs. This requirement reflects our view that the agency is in the best position to determine the government's minimum needs and the best means of accommodating those needs. *Id.*

We find the Army has made a *prima facie* showing that the computer disk requirement reasonably reflects the government's needs. The Army imposed the requirement to reduce the time and errors made in preparing and evaluating cost proposals and unit price extensions for the consolidated services RFP, which contains approximately 500 line items. The requirement is based on recent Army experience with similar solicitation schedules, which indicated that the requirement both facilitates the offerors' computation of item prices and reduces the number of mistakes made in evaluating the numbers.

It is the agency's view, moreover, and we must agree, that the computer disk requirement really does not even restrict competition in any significant way. The Army furnished the disks to offerors at no cost; the 500 items were preformatted and programmed on the disk so that offerors merely had to type in their individual item prices in the appropriate spaces. For those offerors that did not have direct access to computers, the Army advised that most commercial typists or computer programming companies provide this service for a fee as low as $25. Jolley has not attempted to rebut the Corps' explanation, and the record contains no other evidence supporting the firm's contention that the disk requirement restricts competition. We conclude that the requirement is unobjectionable.

Measurable Evaluation Standards

Jolley contends that the solicitation violates Federal Acquisition Regulation (FAR) § 15.605(e) because it does not include evaluation factors informing offerors of a measurable minimum standard for each evaluation factor. Jolley contends, for example, that the FAR required the solicitation to include as an evaluation factor a minimum acceptable number of years of experience in an area of work, as opposed to merely stating that offerors' experience in that area will be evaluated. Jolley contends that the absence of measurable minimum standards deprives offerors of adequate notice of the evaluation requirements, and leaves the contracting officer with no quantifiable, objective criteria against which to evaluate the proposals.

Jolley's argument is founded on a misunderstanding of the regulation. Section 15.605(e) of the FAR provides that:

> The solicitation shall clearly state the evaluation factors, including price or cost and any significant subfactor, that will be considered in making the source selection and their relative importance . . . The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

We think the Army's solicitation here is fully compliant with this provision. The solicitation specifies the factors that will be considered in selecting a contractor as management/technical and cost/price. The solicitation also advises offerors of the factors' relative importance, stating that the manage-

ment/technical factor is the most important element in the evaluation process, and listing the four separate management/technical subfactors (technical requirements, management requirements, experience and safety) in descending order of importance.

Contrary to Jolley's interpretation of FAR § 15.605(e), the contracting officer is not required to formulate minimum standards (such as minimum acceptable experience levels) where the agency has no need for a contractor meeting certain objective standards; indeed, including such standards with no justification, would be improper in that the solicitation requirements improperly would exceed the government's minimum needs. *See Skyland Services, Inc.,* B-229700, Feb. 9, 1988, 88-1 CPD ¶ 129. We thus read FAR § 15.605(e) as requiring disclosure of minimum requirements only where such requirements are deemed necessary by the agency and will be used in the evaluation. Here, minimum standards were not necessary, as the contracting officer determined that the best evaluation method was to compare proposals against each other, not against an objective minimum standard.

Solicitation Method

Jolley challenges the Army's decision to conduct this procurement under negotiated, rather than sealed bid, procedures. Jolley contends that the Army was required to use an IFB instead of an RFP because all of the conditions listed in the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(2) (Supp. IV 1986), as making sealed bidding appropriate, have been met. We disagree.

CICA eliminated the previous statutory preference for sealed bidding, and required instead that agencies obtain full and open competition using the competitive procedure best suited under the circumstances of the procurement. 10 U.S.C. § 2304(a)(1). CICA does provide that sealed bidding is to be used if (1) time permits; (2) the contract award will be based on price and other price-related factors; (3) it is not necessary to conduct discussions with offerors; and (4) there is a reasonable expectation of receiving more than one bid. 10 U.S.C. § 2304(a)(2)(A); FAR § 6.401. The determination regarding which competitive procedure is appropriate, however, ultimately involves the exercise of business judgment by the contracting officer, *T-L-C Systems,* B-225496, Mar. 27, 1987, 87-1 CPD ¶ 354, and we will question a determination that sealed bidding is inappropriate due to the need to evaluate and discuss technical proposals only where the protester shows that the determination was unreasonable. *A.J. Fowler Corp.; Reliable Trash Service, Inc.,* B-233326; B-233326.2, Feb. 16, 1989, 89-1 CPD ¶ 166.

We find no basis to object to the Army's use of negotiated procedures here, since award is not to be based solely on price or price-related factors, and the Army determined that discussions are required. Although Jolley contends that discussions are not necessary since each individual maintenance service required in the RFP is for routine work, the contracting officer found it necessary to conduct discussions with the offerors about their demonstrated ability in manage-

ment, experience, administrative procedures, and technical understanding, because the RFP consolidated numerous, diverse maintenance services into one contract, which created an innovative and complex procurement requiring a well-managed effort from the successful offeror. In these circumstances, we think the Army's decision to use negotiated rather than sealed bid procedures was reasonably aimed at the selection of the overall best-qualified contractor. Use of negotiated procedures therefore is unobjectionable.

The protest is denied.

B-234540, May 31, 1989

Procurement

Bid Protests
■ GAO authority

Procurement

Contracting Power/Authority
■ Federal procurement regulations/laws
■■ Applicability

Even though Bonneville Power Administration is engaged in contracting activities pursuant to its own procurement authority, it is nonetheless subject to General Accounting Office's (GAO) bid protest jurisdiction pursuant to the Competition in Contracting Act of 1984 (CICA), since Bonneville comes within the statutory definition of a federal agency subject to GAO's CICA jurisdiction.

Procurement

Specifications
■ Minimum needs standards
■■ Competitive restrictions
■■■ Allegation substantiation
■■■■ Evidence sufficiency

Procurement

Specifications
■ Minimum needs standards
■■ Competitive restrictions
■■■ Design specifications
■■■■ Justification

Protest that specification is unduly restrictive is denied where agency offers reasonable justification for specification and protester fails to rebut agency's showing.

Matter of: Fluid Engineering Associates

Fluid Engineering Associates (FEA) protests the terms of invitation for bids (IFB) No. DE-FB79-89BP96843 issued by the Bonneville Power Administration (BPA) for the acquisition of a quantity of skid-mounted vacuum pump systems.

FEA argues that a portion of the IFB's specifications overstate BPA's minimum needs and are unduly restrictive of competition.

We deny the protest.

The IFB called for bids on two skid-mounted vacuum pump systems comprised of a "roughing/backing" pump and a "booster" pump. The systems are portable and are used to maintain electrical equipment. Specifically, the pumps are used in a cryogenic drying process employed to remove moisture from cellulose-based insulation in high voltage electrical equipment. The electrical equipment is essential to the transmission by BPA of electric power throughout the Pacific Northwest. The specifications provide that the roughing/backing pump shall be capable of operating independently from the booster pump and that, when operating alone, the roughing/backing pump shall be capable of producing a 10 millitorr pressure differential which provides the minimum vacuum to ensure that the insulation will be dried properly. Since the maintenance of the electrical equipment requires the shut-off of power for a period of time, the BPA requires, in order to avoid protracted power interruption, that the pump perform the drying in the event the booster pump mechanism fails. The specifications also permit the use of either a piston-type or vane-type roughing/backing pump.[1]

FEA had originally filed a letter of protest with the BPA on January 27, 1989, requesting that BPA revise the specifications to eliminate the requirement for the roughing/backing pump's independent operation. On February 10, the protester received a facsimile transmission from the BPA stating that the protest review board had met and denied FEA's protest and that the BPA protest review board's written decision would be immediately forthcoming. FEA's letter of protest to our Office followed on February 17, and the BPA protest review board issued its written decision on March 13.

As a threshold matter, the BPA argues that our Office does not have "subject matter" jurisdiction to consider BPA bid protests. In this connection, BPA argues that, while the Competition In Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (Supp. IV 1986), conferred jurisdiction upon our Office to consider bid protests filed against "federal agencies," that jurisdiction is limited to a consideration of whether a federal agency has violated "procurement statutes or regulations." In this latter regard, BPA argues that, under CICA, Congress intended only that we review bid protests which allege a violation of particular "procurement statutes or regulations," specifically the Federal Property and Administrative Services Act (FPASA), as amended, 40 U.S.C. §§ 471-474 (Supp. IV 1986) and the Armed Services Procurement Act (ASPA) as amended, 10 U.S.C. §§ 2301-2305 (Supp. IV 1986). According to the BPA, its unique procurement authority which is contained primarily in its organic legislation, 16 U.S.C. §§ 832a(f) and 832g (1982), vests it with plenary power regarding all aspects of its contracting, including the exclusive, non-judicial resolution of its bid protests.

[1] The specifications of a previous solicitation which was cancelled permitted only the use of piston-type pumps. FEA had protested that specification requirement to BPA because the firm manufactures vane-type pumps.

We disagree. As we noted in *International Line Builders,* 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345, the enactment of CICA has rendered Bonneville's position regarding its exclusive bid protest jurisdiction untenable. Under the provisions of 31 U.S.C. § 3551(3), our bid protest authority extends to federal agencies as that term is defined in section 3 of the Federal Property and Administrative Services Act of 1949 (Property Act), 40 U.S.C. § 472 (1982). The Property Act defines a federal agency as "any executive agency," and, in turn, defines an executive agency as "any executive department or independent establishment in the executive branch of the Government, including any wholly-owned Government corporation." 40 U.S.C. § 472(a). The office of the Administrator of the Bonneville project is an office in the Department of Energy, 16 U.S.C. § 832(a), and the Department of Energy is an executive department. 42 U.S.C. § 7131 (1982). Therefore, Bonneville, albeit a separate and distinct organizational entity within the department, 42 U.S.C. § 7152(a)(2), falls within the above definition.

In addition, we have consistently held that our bid protest jurisdiction under CICA is based upon whether the protest concerns a procurement of property or services by a federal agency, and not whether an agency has violated the provisions of the FPASA or the ASPA. *See Gino Morena,* 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121; *River Salvage, Inc.,* B-228896, Dec. 15, 1987, 87-2 CPD ¶ 596. Thus, while BPA conducts its procurement activities pursuant to its own statutory authority, as implemented by the Bonneville Acquisition Guide, we think the protest issue raised here is clearly within the scope of our review. We recognize that the BPA is not subject to the requirements of the FPASA or the ASPA in the conduct of its procurements. Nonetheless, it is, in our view, subject to our bid protest jurisdiction which, by virtue of the enactment of CICA, extends to a consideration of bid protests arising in circumstances where a federal agency is procuring property or services, regardless of the statutory authority relied upon, absent an express exemption from federal procurement laws. Here, we do not read BPA's statute, which gives BPA basic contracting authority, as providing an affirmative exclusion from our CICA jurisdiction, as was granted, for example, to the Postal Service. *See* 39 U.S.C. § 410 (1982). Consequently, our Office has jurisdiction to decide bid protests involving Bonneville procurements.

Turning to the merits of the protest, FEA argues that the requirement that the roughing/backing pump operate independently, that is, without the booster pump, at 10 millitorrs, is unduly restrictive of competition and overstates the BPA's minimum requirements. FEA also argues that no vane-type roughing/backing pump, such as the one it supplies, can produce the required 10 millitorr pressure differential when operated alone.

The BPA responds that the requirement of independent operation of the roughing/backing pump at a 10 millitorr pressure differential is necessary to meet its essential needs. According to BPA, pumps previously used in the field have experienced failure of their booster pumps and that such failure is unacceptable given the extremely tight schedule of operation of the pumping systems to perform the cryogenic drying of the electrical equipment which requires temporary power shut-off. In this latter regard, BPA points out that limited

power outages are scheduled far in advance throughout the Bonneville power system for purposes of performing cryogenic drying on equipment and that pump system failure may result in unacceptable protracted power outages throughout the power system.

The Bonneville Acquisition Guide, § 10.002, requires BPA to draft specifications in a manner designed to achieve "maximum effective competition" while at the same time allowing BPA to acquire goods and services which will satisfy the BPA's essential needs. We read this standard as basically the same as that articulated in the Federal Acquisition Regulation (FAR) § 10.002 (FAC 84-39), which requires agencies to issue specifications which promote full and open competition and reflect agency minimum needs. Thus, we see no reason not to adopt an analysis similar to that employed in our cases involving allegedly restrictive specifications under the FAR. In those cases, we have required contracting agencies to establish support for their position that the specifications, as written, are necessary to fulfill the agency's minimum needs. *See, eg., Abel Converting, Inc.,* B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130. Once the agency establishes such support for its position, the burden of proof shifts to the protester to show that the challenged specification is unreasonable. *Information Ventures, Inc.,* B-221287, Mar. 10, 1986, 86-1 CPD ¶ 234. In addition we have consistently noted that the determinative consideration of whether a challenged specification is unduly restrictive is not whether it is *per se* restrictive of competition but whether it reasonably relates to an agency's minimum needs. *See G.S. Link and Assocs.,* B-229604, B-229606, Jan. 25, 1988, 88-1 CPD ¶ 70.

We think that the BPA has reasonably justified its requirement that the roughing/backing pump be independently operable and FEA has failed to rebut that showing. The stringency of BPA's schedule for the employment of the equipment, coupled with the past failures of booster pumps in systems currently utilized is, in our opinion, sufficient to justify the requirement. Since the record shows that any delay in performing the required drying could affect the overall delivery of power, we think the agency reasonably can require what is, in effect, a workable back-up system in the event of booster pump failure. The fact that the requirement may potentially restrict competition does not provide a valid basis of protest where, as here, the agency has established that the specification is reasonably related to its minimum needs. *Repco, Inc.,* B-227642.3, Nov. 25, 1987, 87-2 CPD ¶ 17. Under the circumstances, we cannot conclude that the challenged specification is improper.

The protest is denied.

Civilian Personnel

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

An agency properly exercised its discretion by denying a request for a 1-year extension of the 2-year period in which an employee must complete his real estate transaction for purposes of relocation expense reimbursement. The determination to grant an extension is for the agency, and our Office would not object to such determination unless it is found to be arbitrary or capricious.

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■ Temporary quarters
■■ Actual subsistence expenses
■■■ Eligibility
■■■■ Extension

To justify an extension of temporary quarters subsistence expenses, there must be a need for an extension due to the circumstances beyond the employee's control and occurring within the first 60 days of temporary quarters. The decision to grant an extension is at the discretion of the agency and the agency acted correctly in denying an extension when it found that the employee's request for an extension did not demonstrate compelling reasons beyond his control.

419

■ Travel expenses
■■ Privately-owned vehicles
■■■ Multiple vehicles
■■■■ Mileage

An employee, transferred from Fairbanks, Alaska, to Washington, D.C., by amendment to his travel authorization, was authorized to use two privately owned vehicles (POV), to transport himself and his immediate family, based on his wife's need to delay her relocation travel. The employee drove one POV and was paid travel per diem at the full rate. His wife, who drove the second POV at a later date, was allowed per diem only at the accompanied rate (75 percent of full per diem). Under paragraph 2-2.2b(1)(b) of the Federal Travel Regulations, per diem at the full rate applies to her since she drove a second POV as an authorized mode of transportation on different days than the employee.

417

■ Travel expenses
■■ Privately-owned vehicles
■■■ Multiple vehicles
■■■■ Mileage

An employee, transferred from Fairbanks, Alaska, to Washington, D.C., was initially authorized to drive one privately owned vehicle (POV), to be accompanied by his wife and dependent child, with a second dependent child to travel by air at a later date. His travel authorization was amended to

permit delayed relocation travel by his wife using a second POV, to be accompanied by the second dependent child. Employee was allowed mileage only for first POV. Under paragraph 2-2.3e(1) of the Federal Travel Regulations, use of more than one POV in lieu of other modes of personal transportation may be authorized under certain specified conditions. Since the conditions were met and agency approval was granted, mileage for the second POV is allowed.

417

Procurement

Bid Protests
■ Bad faith
■■ Allegation substantiation
■■■ Lacking

Protest alleging that contracting agency officials acted unfairly and in bad faith in setting aside procurement for exclusive small business participation is denied, where there is no evidence that contracting officials intended to harm the protester and the decision to set aside was properly made in accordance with Federal Acquisition Regulation § 19.502–2 which governs small business set-aside determinations.

429

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Request for reconsideration is denied where protest presents no statement of facts or legal grounds warranting reversal, but merely restates arguments considered, and rejected, by the General Accounting Office in denying the original protest.

435

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Request for reconsideration is denied where the requester fails to show that the dismissal of its protest was based on any error of fact or law or information not previously considered.

437

■ GAO procedures
■■ Interested parties

United States-Canada Free-Trade Agreement does not provide jurisdictional basis for the General Accounting Office (GAO) to consider protest by Canadian firm that is not an interested party under the Competition in Contracting Act of 1984 and GAO's Bid Protest Regulations.

438

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

Protest concerning rejection of quotation filed more than 10 working days after protester was orally advised that the product it proposed was unacceptable is untimely.

432

not require that a bid be submitted prior to the time called for in the solicitation but rather not later than the exact time set for opening bids.

440

■ Invitations for bids
■■ Terms
■■■ Liquidated damages
■■■■ Propriety

Agency's failure to adhere to executive branch guidance in formulating deduction provision does not render the provision improper; guidance was not binding and provision was unobjectionable because it did not establish impermissible penalty for defective performance.

435

Small Purchase Method
■ Quotations
■■ Modification
■■■ Acceptance time periods

Agency's request for clarification of a firm's quotation and acceptance of revised quotation is not legally objectionable under the informal procedures permitted for a small purchase. The language requesting quotations by a certain date cannot be construed as establishing a firm closing date for the receipt of quotations absent a late quotation provision expressly providing that quotations must be received by that date to be considered.

433

Socio-Economic Policies
■ Small business set-asides
■■ Use
■■■ Justification

Protest that contracting officials had agreed, as part of settlement of earlier protest, to conduct unrestricted procurement for support services contract and, therefore, agency's issuance of request for proposals as a set-aside for exclusive small business participation was improper is denied. Inherent in any settlement agreement was that (1) future procurement would be conducted in accord with Federal Acquisition Regulation (FAR) and therefore, (2) in accordance with the FAR, if sufficient number of small businesses showed interest in competing for the contract, the procurement would be set aside for exclusive small business participation.

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