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Notice

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

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Preface

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

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

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

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

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

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

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

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B-232304, November 1, 1988

Procurement

Specifications
■ Minimum needs standards
■■ Competitive restrictions
■■■ Justification
■■■■ Sufficiency

Protest that a solicitation requirement for 100 percent in-process inspection testing of hammer heads exceeds the contracting agency's minimum needs is denied where the record shows that the testing requirement is necessary to minimize safety risks to hammer users.

Matter of: Barco Industries, Inc.

Barco Industries, Inc., protests the requirement for crack detection testing in solicitation No. FCEN-FW-A8116-S, issued by the General Services Administration (GSA) for hammers. Barco contends that the testing method exceeds GSA's minimum needs. We deny the protest.

The solicitation requires that all hammer heads be 100 percent in-process inspected after heat treating by either a wet magnetic particle inspection test or an ultrascopic detection test. The protester alleges that 100 percent in-process inspection testing is unnecessary for assurance of crack-free hammers because problems relating to cracked heads can be detected by sample techniques if the sampling is properly performed and consistently applied. The protester alleges that the testing is unreasonably burdensome because it will require hiring additional personnel who will have to be trained and certified to operate the inspection machinery.

GSA contends that the 100 percent in-process testing requirement is necessary for safety reasons because a crack in a hammer head can result in fragmentation of the head thereby creating a safety risk for the user. GSA cites reports from the Consumer Product Safety Commission (CPSC) establishing the occurrence of both fatalities and head and eye injuries due to the fracturing of hammer heads during use.

According to GSA, cracks in hammer heads occur during the forging or heat treating stages of the production process. GSA's engineering branch reviewed different methods of testing relating to crack detection and determined that 100 percent in-process magnetic particle testing or ultrascopic detection is the most effective method to detect defects in hammer heads. GSA further states that the

use of sample techniques when compared to other testing methods, contrary to the protester's assertion, is ineffective and subject to a significant margin of error because defects in hammer heads do not necessarily occur in a uniform manner within a particular lot. In addition, GSA states that major companies in the steel and railroad industries also require 100 percent in-process testing. Finally, with regard to the effect of the requirement on the field of competition, GSA states that it surveyed the market and identified five forged hammer head manufacturers that perform 100 percent in-process testing.

A contracting agency has the primary responsibility for determining its minimum needs and the best method of accommodating those needs. *PTI Services, Inc.,* B-225712, May 1, 1987, 87-1 CPD ¶ 459. When a protester challenges a solicitation requirement, the procuring agency must establish *prima facie* support for its contention that the requirement is essential to meet the agency's minimum needs. Once the agency demonstrates *prima facie* support, the burden is on the protester to show that the requirement is clearly unreasonable. *Marine Transport Lines, Inc.,* B-224480.5, July 27, 1987, 87-2 CPD ¶ 91.

Here, the record establishes that the requirement for 100 percent in-process testing relates to human safety. In this regard, as noted above, GSA provided evidence from the CPSC establishing that numerous injuries have occurred due to the fracturing of cracked hammer heads. The fact that the testing requirement may result in a higher contract price does not demonstrate that the requirement is unreasonable. On the contrary, where a solicitation requirement relates to human safety, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results, but the highest possible reliability and effectiveness. *See American Airlines Training Corp.,* B-217421, Sept. 30, 1985, 85-2 CPD ¶ 365. In addition, the record shows that private companies which are major manufacturers or consumers of steel have adopted 100 percent in-process testing, further supporting the reasonableness of the requirement. As a result, we find that GSA has established that the 100 percent in-process testing requirement is necessary to meet its needs. Other than reiterating its initial contention that sample testing is adequate, the protester has not responded to GSA's rationale for requiring 100 percent in-process testing. Accordingly we see no basis to object to the requirement. *PTI Services, Inc.,* B-225712, *supra.*

The protest is denied.

B-233164, November 1, 1988

Procurement

Bid Protests
■ Definition

Procurement

Bid Protests
■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Adverse agency actions

Letter to agency stating intent to protest rejection of proposal which does not state any basis for protest is not sufficient to constitute a protest to agency; in any event, agency-level protest must be filed within 10 working days of date protester knew the basis for its protest.

Matter of: Shankle's Engineering & Consulting

Shankle's Engineering & Consulting protests the Department of the Interior's decision to exclude its proposal from the competitive range under request for proposals No. 3424. Shankle's asserts that its proposal was "evaluated unfairly."

We dismiss the protest.

Shankle's states that it was informed, no later than September 7, 1988, that its proposal did not fall within the competitive range. Shankle's then requested a debriefing. According to the agency, the debriefing was conducted by telephone on September 20.[1] On September 19, Shankle's informed the contracting officer by telephone that it intended to protest the agency's determination to exclude it from the competitive range. On September 20, Interior conducted a detailed debriefing with Shankle's by telephone. Shankle's was advised specifically why its proposal was found outside the competitive range. The contracting officer received, on September 28, a written confirmation of Shankle's intent to protest dated September 20. On September 30, Interior dismissed Shankle's protest as untimely filed. Shankle's subsequently filed a protest with our Office on October 12, in which it claims it was "evaluated unfairly."

Initially, we note that Interior considered Shankle's letter of September 20 as a protest. However, the letter merely confirms Shankle's intent to protest which it orally communicated to Interior on September 19, and fails to state any basis of protest. On September 30, the agency dismissed this "protest" because it was untimely since it was filed on September 28, more than 10 working days after the protester knew its proposal was rejected. *See* 4 C.F.R. § 21.2(a)(2) (1988). While the letter was not timely filed, in our view, this letter was not sufficient to constitute a protest since it merely confirmed an intent to protest and did not specify any basis for protest. *See MedSource, Inc.*, B-225635, Jan. 27, 1987, 87-1 CPD ¶ 92. In any event, under our Bid Protest Regulations, a protest which was

[1] The agency has provided us a chronology of events and copies of correspondence and documents to support the chronology.

initially untimely filed with the contracting agency is untimely when subsequently filed with our Office. 4 C.F.R. § 21.2(a)(3) (1988); *Tioga Pipe Supply Company, Inc.*, B-230040, Feb. 24, 1988, 88-1 CPD ¶ 190.

Furthermore, if we consider Shankle's protest to our Office as the initial protest, it is untimely because it was filed on October 12, more than 10 working days after Shankle's learned of any possible basis of protest at the debriefing on September 20. Under our Bid Protest Regulations, a protest based on other than an apparent impropriety in the solicitation, to be deemed timely, must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. *See* 4 C.F.R. § 21.2(a)(2) (1988); *Eastman Kodak Co.*, B-228908, Sept. 24, 1987, 87-2 CPD ¶ 298.

The protest is dismissed.

B-226494, November 7, 1988

Civilian Personnel

Relocation
■ Household goods
■■ Shipment
■■■ Reimbursement
■■■■ Eligibility

Reimbursement may be allowed for the expenses of a household goods shipment initiated by the widow of the deceased employee pursuant to the authorized sale of their house at the old duty station in furtherance of an authorized transfer, notwithstanding that the employee died before the shipment was initiated.

Matter of: Garland F. Davis, Deceased—Reimbursement of Widow for Shipment of Household Goods After Death of Employee

The question presented here is whether payment may be allowed in the case of a transferred employee for expenses incurred in undertaking an authorized household goods shipment that was not initiated until after the employee's death.[1] In the circumstances, we conclude that payment may issue to his widow as reimbursement for the cost of the shipment.

Background

Mr. Garland F. Davis was transferred from the Veterans Administration (VA) Hospital in Marion, Illinois, to the VA Medical Center in Fayetteville, North Carolina, with a reporting date of July 22, 1986. At the time he and his wife resided in Marion. On June 27, 1986, the VA provided him with a written authorization to make the move from Illinois to North Carolina at government ex-

[1] The question was presented by Conrad R. Hoffman, Director, Office of Budget and Finance (Controller), Veterans Administration.

pense. This included authorization to ship up to 18,000 pounds of household goods using a Government Bill of Lading. When Mr. Davis reported for duty at the VA Medical Center in Fayetteville in July 1986, Mrs. Davis remained in Marion to sell their house which she did in early November 1986. Subsequently, Mr. Davis died in Fayetteville on November 13, 1986. Mrs. Davis completed the sale of the residence on December 15, 1986, and because of the death of Mr. Davis, she rented an apartment in Olivette, Missouri, instead of proceeding to Fayetteville. In connection with the sale of her house, Mrs. Davis arranged for the shipment of her household goods to her newly rented apartment in Olivette at a cost of $1,347.07, which she paid in full.

The concerned VA finance officer questions whether reimbursement for the shipment of household goods expenses may be allowed in these circumstances.

Analysis And Conclusion

There is no indication in the statute or regulations of any intent to deprive the survivors of a transferred employee of reimbursement for relocation expenses incurred after the employee's death where such expenses would have been reimbursable to the employee had he survived. In fact, both section 5724 and section 5724a of title 5, United States Code, provide for payment of various expenses of the "immediate family" of the employee who is transferred, thus recognizing that the government's obligation extends beyond the employee himself. *See Michael Longo,* 65 Comp. Gen. 237 (1986), wherein we held that although the household goods shipment was recalled because of the employee's death, this could not serve as a basis for disallowing reimbursement.

In the present case, the household goods shipment was undertaken pursuant to the sale of a residence at the old duty station by Mrs. Davis as the result of the VA's prior authorization of her husband's move from Illinois to North Carolina at government expense under the authority of 5 U.S.C. § 5724 (1982). Although no binding obligation had been entered into by the employee or his wife prior to the employee's death for the shipment of household goods, we do not find that this may serve as a basis for disallowing reimbursement of the expenses involved. Obviously the need of his wife to incur such expenses arose out of the transfer of Mr. Davis to Fayetteville and that need continued after he died. Since the purpose of the statute is to reimburse the expenses occasioned by the transfer of an employee, and since such expenses do not cease with his death, we do not regard the right to reimbursement for such expenses as ceasing with his death. *See* 24 Comp. Gen. 319 (1944).

Moreover, we do not regard it as material that the employee had not entered into a binding obligation or incurred the expense before his death. As long as the expenses arose in connection with the transfer and would have been reimbursable to the employee, they may be allowed to the same extent as allowable to the employee if he had survived. *Gerard Wijsmuller,* B-183389, Nov. 24, 1975.

The fact that the shipment was not to the new duty station is not significant. Reimbursement of transportation expenses to a place other than the new duty station is authorized by para. 2-8.2d of the Federal Travel Regulations, FPMR 101-7, September 1981, *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1986). However, reimbursement is limited to the constructive cost of shipping the goods to the new station. *William O. Simon, Jr.,* B-207263, Apr. 14, 1983.

Mrs. Davis also claims additional reimbursement because she brought her own boxes and did her own packing. Accordingly, she feels she is entitled to the full estimated cost of $1,973.88. However, there is no authority for an allowance for services voluntarily provided by an employee or member of his family even though the expense of such service would be reimbursable if provided by an authorized carrier. Although Mrs. Davis's efforts may have relieved the carrier of the need to pack certain of the household effects being transported and may have incidentally effected a savings to the government, it appears that Mrs. Davis voluntarily rendered those services without authority to obligate the government for whatever sums may be involved. *Alex Kale,* 55 Comp. Gen. 779 (1976).

Accordingly, we conclude that the household goods shipment expense of $1,347.07 incurred by Mrs. Davis is allowable in accordance with 5 U.S.C. § 5724 and the implementing regulations.

B-231149, November 7, 1988

Civilian Personnel

Travel

■ Permanent duty stations

■ ■ Actual subsistence expenses

■ ■ ■ Prohibition

An employee attending an advisory council meeting in the vicinity of her official duty station rented a hotel room rather than return to her residence, due to heavy snow and blizzard conditions, in order to ensure her presence at the meeting the next day. Her claim for lodging expenses must be denied since employees may not be reimbursed for per diem or subsistence at their headquarters regardless of unusual conditions.

Matter of: Nancy Blustein—Lodging Expenses at Headquarters

This is in response to a request from the Director, Division of Fiscal Services, Department of Health and Human Services for our decision concerning the entitlement of Ms. Nancy Blustein to reimbursement for the cost of lodging obtained in the vicinity of her official duty station. For the reasons stated below, Ms. Blustein is not entitled to reimbursement for that expense.

Background

On January 7 and 8, 1988, the National Council for Health Services Care Technology Assessment held a meeting of its National Advisory Council in a hotel in Washington, D.C. Ms. Blustein, the Executive Secretary of the Council, attended the meeting on January 7. Weather forecasts for the remainder of the day predicted a winter storm which would drop 6 to 12 inches of snow in downtown Washington, and it began to snow heavily around 5 p.m. In light of the blizzard situation that was developing, Ms. Blustein determined that it would be necessary for her to remain at the meeting site overnight in order to ensure her presence at the remainder of the meeting on January 8.

In fact, had Ms. Blustein not remained at the hotel that evening, it appears that weather conditions might have prevented her from traveling to the hotel from her residence in Rockville, Maryland. This is based on the fact that the federal government was closed on January 8 due to the traveling conditions.

The agency recommends payment of Ms. Blustein's claim for lodging expenses based upon the unusual circumstances of her case. The agency notes that the National Advisory Council, which is required by law to meet at least three times a year, entails the travel at government expense of non-federal members from various locations around the country. Further, attendance by the Director of the Office of Health Technology, the Executive Secretary (Ms. Blustein), or an appropriate designee is required in order for the Council to meet. The agency states that had Ms. Blustein not been present on January 8, the Council Chairman would have cancelled the remainder of the meeting without completing the Council's business, which would have required that the Council reconvene at a later time at greater expense to the government.

Opinion

It is a well-established rule that the government may not pay, in addition to an employee's regular compensation, per diem or subsistence expenses to civilian employees at the employee's official duty station, even though they may be working under unusual conditions. 42 Comp. Gen. 149 (1962). We have based this prohibition on paragraph 1-7.6a of the Federal Travel Regulations (FTR) (Supp. 1, Sept. 28, 1981), which has been revised and is now found at FTR, para. 1-7.4a (Supp. 20, May 30, 1986), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1987). It provides as follows:

> a. *No allowance at official station.* A per diem allowance shall not be allowed within the limits of the official station (see definition in 1-1.3c(1)) at, or within the vicinity of, the place of abode (home) from which the employee commutes daily to the official station except as provided in Part 1-14. Agencies may define a radius or commuting area that is broader than the limits of the official station within which per diem will not be allowed for travel within one calendar day.

Reimbursement of actual and necessary subsistence expenses follows the same rules as entitlement to per diem. *See* FTR, para. 1-8.1d (Supp. 20, May 30, 1986).

This prohibition is also based upon the provision found in 5 U.S.C. § 5536 (1982) that no employee of the government "unless specifically authorized by law," shall receive any pay or allowance in addition to that provided by statute. *See* B-202104, July 2, 1981.

Consistent with this general rule, we have disallowed claims for lodging expenses under circumstances similar to Ms. Blustein's. For example, in *Joslin McIntosh,* B-200779, Aug. 21, 1981, we denied the claim of an employee who, knowing that she was required to report to work the next day regardless of weather conditions, rented a hotel room rather than return in heavy snow and on icy roads to her residence 20 miles away. Similarly, in *Sandra Bradshaw,* B-226403, May 19, 1987, we denied the claim of an employee whose supervisor directed her to rent a room in the vicinity of her headquarters because she was needed the next day on a time critical project and a bad weather forecast threatened to worsen an already difficult transportation situation. *See also Philip Rabin,* 64 Comp. Gen. 70 (1984).

We have also denied claims for lodging expenses by employees who had duties to perform in connection with certain government-sponsored conferences. *Karen A. Killian,* B-223500, Mar. 16, 1987; *Richard Washington,* B-185885, Nov. 8, 1976.

We have created an exception to the general rule by authorizing government purchase of meals for employees at headquarters based upon findings that furnishing these meals was necessary in an extreme emergency involving danger to human life or destruction of federal property. *See* 53 Comp. Gen. 71 (1973); *Richard D. Rogge,* B-189003, July 5, 1977. Further, 5 U.S.C. § 5706a (Supp. IV 1986) provides authority for the payment of subsistence expenses at headquarters when the life of an employee who serves in a law enforcement, investigative, or similar position is threatened. *See also* FTR, Chapter 1, Part 14 (Supp. 20, May 30, 1986).

Ms. Blustein's case does not fall within either of the two exceptions mentioned above. As a result, we must deny her claim in accordance with the rule that an employee may not be reimbursed for per diem or subsistence at the official duty station regardless of unusual circumstances.

B-232175, November 7, 1988

Procurement

Competitive Negotiation

■ Offers

■■ Competitive ranges

■■■ Exclusion

■■■■ Administrative discretion

Absent a clear showing that an agency's evaluation was unreasonable, or inconsistent with the stated evaluation criteria, exclusion of protester's proposal from the competitive range is warranted

where agency evaluation finds the proposal unacceptable with major deficiencies that are considered to be the result of a poor and risky design and concludes that the proposal does not have a reasonable chance of being selected for award.

Procurement

Competitive Negotiation

■ Offers

■■ Risks

■■■ Evaluation

■■■■ Technical acceptability

The element of risk is clearly related to the evaluation of capability and approach, and it is permissible to evaluate risk in a technical evaluation of a proposal for a firm fixed-price contract.

Matter of: Kaiser Electronics

Kaiser Electronics (KE) protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. N62269-87-R-0210, issued by the Naval Air Development Center (NADC) for a firm-fixed-price contract for the design and development of an Integrated Night Vision System (INVS) to be used on tactical aircraft.[1] The protester questions the agency's technical evaluation of its proposal, and alleges that the reasons underlying its exclusion were not valid.

We deny the protest.

The RFP was issued on June 23, 1987, with a revised closing date of September 4, 1987. The RFP called for the delivery of 20 full-scale development units, with accompanying data, and included four options—a leader/follower program; limited production of 110 additional INVS units; and five more units as part of additional full-scale development. The INVS units were to be developed in accordance with the government specifications included within Section C of the RFP.

The RFP stated that the government would make a single award to the responsible offeror whose offer, conforming to the solicitation, was determined most advantageous to the government, price and other factors considered. According to the RFP, proposals were to be evaluated against three factors, listed in descending order of importance: technical approach, management approach, and logistics approach. Within the technical approach factor were four subfactors listed in descending order of importance: design approach, test and evaluation, pre-planned product improvement, and system effectiveness. The management approach factor had seven subfactors and the logistics approach factor had four subfactors, none of which are relevant to this protest. The RFP's emphasis under the design approach was placed on the extent to which the proposed INVS design meets the requirements of the RFP. The RFP further stated that evaluation of price proposals would be of secondary importance but that the

[1] The INVS is an image intensification device, mounted on a pilot's helmet, for use in fixed wing military airplanes as an aid to pilot vision during all phases of nighttime operation.

degree of its importance would increase with the degree of equality of the proposals.

Several proposals, including KE's, were received and evaluated. The technical scores ranged from a low of 8.7 to a high of 76.5 out of a possible 100 technical points. KE's proposal received an initial technical score of 36.2 and was included in the competitive range. Oral and written discussions were then conducted with all firms in the competitive range.[2] Proposals were then reevaluated and rescored by the technical evaluation committee. Although the technical score of KE's proposal increased to 48.3 out of the possible 100 points, the proposal was excluded from the competitive range at that time since it was determined technically unacceptable even after discussions.

KE's protest is essentially that the reasons the Navy presented for the technically poor rating of its proposal which led to its rejection were invalid. The protester contends that its proposal as amended is in total compliance with the requirements of the RFP and that the Navy evaluators misapplied and used unidentified evaluation criteria.

Initially, we note that a determination that an initial proposal is within the competitive range does not necessarily imply that the proposal would be technically acceptable for award, but merely denotes that the proposal has a real possibility of being made acceptable and that there is a reasonable chance it will be selected for award. *See* Federal Acquisition Regulation § 15.609(a) (FAC 84-16); *Space Communications Co.,* B-223326.2, B-223326.3, Oct. 2, 1986, 66 Comp. Gen. 2, 86-2 CPD ¶ 377. Further, the evaluation of proposals and determination of whether an offeror is in the competitive range are matters within the discretion of the contracting agency, since it is responsible for defining its needs and must bear the burden of any difficulties resulting from a defective evaluation. *The International Association of Fire Fighters,* B-224324, Jan. 16, 1987, 87-1 CPD ¶ 64. Consequently, we will not conduct a *de novo* technical review of the proposals; our review is limited to examining whether the evaluation was fair and reasonable and consistent with the RFP criteria. *Maxima Corp.,* B-220072, Dec. 24, 1985, 85-2 CPD ¶ 708. The fact that a protester may disagree with the agency's conclusion does not itself render the evaluation unreasonable. *See TIW Systems, Inc.,* B-222585.8, Feb. 10, 1987, 87-1 CPD ¶ 140. For the reasons stated below, we do not believe that the protester has shown that the agency's judgment as to the risks involved with the design approach proposed by KE, and which led to rejection of the proposal, was unreasonable or inconsistent with the evaluation criteria.

The Navy evaluators concluded that KE's optical design was extremely poor. Because of KE's inability to resolve certain major technical deficiencies, believed to be inherent in its design, KE was found to be unable to meet certain required specifications involving the following: (1) objective lens design; (2) relay

[2] It is unclear whether the agency made a formal competitive range determination based on its preliminary technical evaluation. However, the agency did decide to keep KE in the competition until discussions were conducted with the firm.

and display optics assembly design; (3) image intensifier assembly; (4) physical adjustments; (5) unaided eye field of vision; and (6) schedule. For our purposes here, we will only discuss the technical problems involving the resolution (objective lens design) and gain/throughput (image intensifier assembly), since the Navy states, and we agree, that failure to comply with the RFP requirements involving either would have been cause to find the KE offer technically unacceptable after discussions.

With respect to lens design resolution,[3] all parties agree that under the RFP, the minimum requisite resolution for an INVS unit with a 30 degree FOV is 1.0 cycle/milliradian (cy/mr), whereas an INVS unit with a 40 degree FOV need only have a resolution of .76 cy/mr. The KE design was evaluated by the Navy as offering a resolution of .80 cy/mr. The protester argues that its design offers a 40 degree FOV for which a resolution of .76 cy/mr or higher is acceptable. The Navy, however, contends that KE's design offers a 30 degree FOV, for which in accordance with the specifications a resolution of .80 is clearly unacceptable. Further, regardless of whether KE's design offers a 30 degree or 40 degree FOV, both parties agree that KE proposes to achieve the 40 degree FOV by canting [4] the monoculars. It is the Navy's position that canting is specifically prohibited by the RFP. The Navy also states that canting introduces an unacceptable technical risk to the design. The protester, on the other hand, argues that the specifications do not prohibit canting and that technical risk was not a stated evaluation factor.

We have no reason to disagree with the agency's interpretation of the requirement. Paragraph 3.2.2.1.6.2 of the RFP clearly requires under binocular alignment that "the intensified image presented to each eye shall be *coaxial* with each other." (Italic added.) By use of the term coaxial, the record shows that the agency intended the monoculars to be parallel, precluding canting (setting at an angle). The protester does not explain why the agency's interpretation is unreasonable. Moreover, KE was specifically advised in the February 11, 1988 discussions with the agency that canting the monoculars was a very poor design approach and presented unacceptable technical risks. Nevertheless, KE subsequently again insisted on its approach of "canting the optics inward," despite the Navy's advice that it presented unacceptable risks.

Although technical risk was not a stated evaluation factor, we believe that selection of a contractor which can best perform this contract involves a choice between design approach and the acceptance of a certain level of risk. While technical evaluations must be based on the stated evaluation criteria, the interpretation and application of such criteria often involve subjective judgments. Thus, we will not object to the use of evaluation factors not specifically stated in the RFP where it is reasonably related to the specified criteria and the correlation is sufficient to put offerors on notice of the additional criteria to be applied. *See Consolidated Group,* B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21 at 7, 8. We have condoned the evaluation of risk in a technical evaluation of a proposal for a

[3] Resolution (clarity) is a measurable characteristic of an optical system.
[4] To set at an angle.

firm fixed-price contract. *Litton Systems, Inc., Electron Tube Division,* 63 Comp. Gen. 585 (1984), 84-2 CPD ¶ 317. Since the element of risk is clearly related to the evaluation of design approach, we find nothing improper in the Navy's use of risk as an element of the evaluation. The protester simply has not shown that it could provide an acceptable system with its proposed approach without canting, despite having been afforded the opportunity to do so after discussions.

The Navy also found that KE's image intensifier assembly did not meet the requirements of paragraph 3.2.2.4.4 for minimum photopic throughput [5] of the light from the image intensifier of 62 percent. According to the Navy's evaluation, KE's throughput was only 11 percent. KE does not contend that the Navy's evaluation with respect to throughput and gain is incorrect or that its design did in fact meet the stated values in the RFP. Instead, the record shows that KE apparently made a conscious decision to make certain tradeoffs when it chose to design for ultra-low system distortion and compatibility with corrective and protective eyewear using a configuration which it knew could not meet the 62 percent transmission. Once again, through discussions, the Navy informed KE that its approach was believed by the Navy to be of an "extremely high technical risk." However, KE never corrected this problem to the Navy's satisfaction.

According to the Navy, the KE proposal was vastly inferior technically (especially in design) to each of the other remaining offerors, and substantially higher in price than one of those offerors. Consequently, the Navy determined that KE did not have a reasonable chance for award and eliminated it from the competitive range.

Based on the record before us, we find that the evaluation of KE's proposal was reasonable. KE's proposal did not meet certain stated technical specifications in several respects and was considered to involve a high degree of risk. KE admits that it made certain technical tradeoffs with respect to meeting the specifications and merely disagrees with the agency's determination that its approach was technically inferior. Moreover, KE had the opportunity through discussions to improve or correct its proposal, but failed to do so.

KE also argues that the Navy failed to properly rank the evaluation criteria in the RFP and that it was misled by the RFP to improperly place more emphasis on developing an innovative approach than in meeting some of the stated RFP requirements. The Navy admits that there was an error in the ranking of evaluation "sub-subfactors" but believes that the protester was not prejudiced because even if the provisions were read as KE suggests, the firm's offer would remain technically unacceptable. The RFP listed in descending order of importance the three major technical evaluation factors and each major factor's subfactors. However, KE interpreted the RFP as also stating that the factors listed under each subfactor were also listed in descending order of importance. The

[5] The measure of the amount of visible light that is passed from the end of the image intensifier assembly that is visible to the eye.

RFP provided the following with respect to the evaluation of the subfactor, design approach:

M.3.1.1 *Design Approach*

The extent to which the proposed INVS design meets the requirements of the solicitation. This will include, but not be limited to, innovation, modularity, degree of and rationale for specification variances, Human Factors Engineering, demonstrated understanding of the tactical aircraft mission environment, demonstrated understanding of the system engineering requirements as well as system performance requirements, and demonstrated understanding of the scientific issues and engineering tradeoffs among critical design and integration parameters.

According to KE's interpretation, innovation is the most important factor under the subfactor, design approach. Consequently, KE argues that it concentrated its efforts in proposing an innovative design. However, even if the evaluation criteria are read as KE interprets then, the overriding factor under design approach would be the "extent to which the proposed INVS design meets the requirements" of the RFP, not innovation. Further, regardless of the "sub-subfactor" criteria under which KE's design approach was evaluated, KE's approach, as we have found, was reasonably viewed as being of extremely high technical risk, more costly, and inferior to the other proposals in the competitive range. While the RFP permitted an innovative design, the agency was not prohibited from evaluating the risks of the innovative design. We therefore find no merit to this protest ground.

Finally, KE contends that the Navy failed to advise KE that there was a risk of it being eliminated from the competition on technical grounds. We find this allegation also to be without merit. The agency report contains a record of oral and written discussions conducted with KE. All areas of deficiencies were discussed with KE, including the Navy's perceived technical risk involved in KE's design approach. KE was notified of the agency's concerns and was given the opportunity to amend its proposal. We do not think that any more was required. We further find no merit to KE's contention that it was prejudiced by the agency's delay in notifying the firm that its proposal had been rejected, since we have determined that the Navy had a reasonable basis for determining KE's proposal to be outside the competitive range.

The protest is denied.

B-231845, November 8, 1988

Procurement

Contract Management

■ Contracts

■■ Assignment

Although Anti-Assignment Act, 41 U.S.C. § 15 (1982), generally prohibits the assignment of government contracts, this statute is intended solely for the protection of the government and the government may recognize an assignment as the circumstances in a particular case may warrant notwithstanding the Act.

Procurement

Contract Management

■ **Contracts**

■■ **Assignment**

Contracting agency acted reasonably in approving assignment of a government contract where agency thereby assured continued performance of contract for urgently needed supplies under essentially the same material contract terms.

Procurement

Contract Management

■ **Contracts**

■■ **Assignment**

Assignment of a government contract is not inconsistent with the provisions of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a) (Supp. IV 1986), generally requiring agencies to obtain full and open competition in conducting procurements.

Matter of: American Shipbuilding Company

American Shipbuilding Company protests the Department of the Navy's decision to permit the assignment by Pennsylvania Shipbuilding Company (PSC) of its contract for construction of two T-AO 187-Class fleet oilers to Avondale Industries, Inc. American asserts that the assignment was contrary to the Anti-Assignment Act, 41 U.S.C. § 15 (1982), and that the Navy instead was required to recompete the requirement for the two ships. We deny the protest.

The Navy awarded a fixed-price incentive contract to PSC in 1985 for the construction of two T-AO fleet oilers, with options for two additional fleet oilers; the Navy subsequently exercised the options in February 1986 and February 1987. In late 1987, however, PSC informed the Navy that it was experiencing financial difficulty as a result of significant cost increases and that the amount of past due debts owed subcontractors was increasing. Concerned that PSC would be unable to continue operation and might file for protection under the bankruptcy statutes, the Navy suggested that the firm consider alternative solutions, including the possibility of transferring the contracts for the two option ships to another contractor. PSC then contacted known potential suppliers, including Avondale, which already was under contract to build seven fleet oilers, and American. These discussions resulted in a tentative agreement between PSC and Avondale to assign PSC's contract for the two option ships to Avondale.

The Navy participated in the final negotiations with the two shipyards to set the conditions under which it would acknowledge an assignment. As a result of these negotiations, by means of modifications of the agency's contracts with the shipyards, the contracts for the two option ships were assigned to Avondale for completion at a firm, fixed price under the delivery schedule in the PSC contract. PSC agreed to a firm, fixed price for completion of the remaining two ships under its original contract, and also agreed to replacement of a restrictive

default clause in its original contract with a standard default clause more favorable to the government. The total cost to the government for completion of the contract assigned to Avondale and the two ships retained by PSC will not exceed the government's expected total liability prior to the assignment.[1]

American first argues that the assignment was contrary to the provisions of the Anti-Assignment Act, which generally prohibits the transfer of government contracts. American acknowledges that the courts have previously held that the government, if it chooses to do so, may recognize an assignment outside of the specific provisions of the Act, *see, e.g., Tuftco Corp. v. United States,* 614 F.2d 740 (Ct. Cl. 1980); *American Financial Associates, Ltd. v. United States,* 5 Cl. Ct. 761 (1984), *aff'd,* 755 F.2d 912 (Fed. Cir. 1985), but asserts that these rulings are distinguishable from the facts here on the basis that they turned on government conduct that estopped the government from disavowing the assignment. Moreover, American asserts that the prior caselaw is inconsistent with, and has been superseded by, the provisions of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a) (Supp. IV 1986), which generally requires agencies to obtain full and open competition in conducting procurements. According to the protester, the assignment of the two oilers constituted an improper sole-source procurement not justified by any of the exceptions to the requirement for full and open competition.

We find that American has provided no support for its contention that waiver of the anti-assignment provisions of the Act is permitted only where the government is otherwise estopped from disavowing the assignment. On the contrary, as has been repeatedly recognized, the government may waive the statute and recognize an assignment as the circumstances in a particular case may warrant because the general prohibition on the transfer of government contracts is intended solely for the protection of the government. *See Tinker & Scott v. United States Fidelity & Guaranty Co.,* 169 F. 211 (C.C.D. Or. 1909); *Intercontinental Mfg. Co., Inc.,* ASBCA No. 18218, 74-1 BCA ¶ 10,470; *see also In-Vest Corp.,* GSBCA No. 6365, 83-1 BCA ¶ 16,502 (statute was enacted to prevent persons of influence from buying up claims against the United States and to avoid conflicting demands for payment and chances of multiple liability).

The Navy considered the transfer here an appropriate option under the circumstances because the oilers are urgently needed to replace ships approaching the end of their useful service life. The ships to be replaced are, on average, approximately 40 years old; they are more expensive to operate and maintain, and are less capable than the 187-Class oilers. The agency states that the time required for termination of PSC's contract, overcoming any delays caused by the consequent bankruptcy of PSC, preparing a solicitation package for the partially-constructed ships, conducting a competitive reprocurement, and securing completion by a new contractor (other than Avondale), would have delayed delivery of the oilers by at least 4 to 6 years. While the Navy has indicated that a

[1] In calculating the agency's total expected liability prior to the assignment, the Navy added to the contract ceiling price the anticipated sums above the ceiling to which the contractor will be entitled to under the escalation terms of the contract.

short delay in delivery would be acceptable, it maintains that a delay of this magnitude would have had an adverse effect on operational capabilities. In this regard, we note that American has not claimed that it can deliver the ships according to the delivery schedule in PSC's contract as agreed to by Avondale and at a price lower than or equal to Avondale's.[2]

Further, we do not agree with American that the agency was required to conduct a competitive procurement in order to obtain a completion of the contract work. CICA does not apply to a transfer of work from one contractor to another where, as here, the transfer is intended to assure continued performance of the contract under essentially the same material terms (same items, cost and delivery) upon which a competition had already been conducted. We find nothing unreasonable or in violation of statute in the agency's approach here.

American argues that the assignment involves the use of appropriated funds unavailable for this purpose. The protester cites prior decisions of our Office (*Tacoma Boatbuilding Co.*, 66 Comp. Gen. 625 (1987); 60 Comp. Gen. 591 (1981)), in which we stated that in reprocurements after the voluntary modification or termination for convenience of a contract, as distinguished from a termination for default, the appropriated funds obligated for the original contract are not available to fund a replacement contract if the period of availability for the appropriation had otherwise expired. It contends that under this rule, the appropriated funds originally obligated for the four oilers are no longer available and that the Navy instead should have relied on then current fiscal year 1988 appropriations. In addition, American points out that while the Navy has notified Congress of its intent to reprogram additional funds, that is, shift funds within a lump sum appropriation from other accounts for use in building the four oilers, Congress has not yet approved the proposed reprogramming.

The Navy, however, reports that the funds obligated for the 1985 award of two ships and the subsequent exercise in 1986 and 1987 of the options for two additional ships were fiscal year 1985, 1986 and 1987 "Shipbuilding and Conversion, Navy" appropriations with a 5-year period of availability.

With respect to the use of reprogrammed funds, we note that in the absence of specific statutory limitations, agencies are generally legally free to reprogram, even though to do so may be inconsistent with informal understandings with Congress or with budget estimates on which an appropriation was based. *See generally* B-215002, Aug. 3, 1987. We are aware of, and the protester has cited, no applicable statutory provision requiring advance congressional approval for reprogramming of the funds in question. Furthermore, although Department of Defense (DOD) instructions on reprogramming impose certain non-statutory restrictions on reprogramming, see DOD Directive 7250.5, Jan. 9, 1980 and DOD Instruction 7250.10, Jan. 10, 1980, such limitations are matters of internal executive policy and therefore do not provide our Office with a basis to object to an

[2] Moreover, we note that American has in fact contended in another protest filed with our Office (B-231923.2, concerning a subsequent procurement for additional oilers) that as a result of Avondale's prior experience in constructing 187-Class oilers, no other shipyard can offer a price as low as Avondale's.

expenditure. *LTV Aerospace Corp.*, 55 Comp. Gen. 307 (1975), 75-2 CPD ¶ 203; *see generally Interscience Systems, Inc.*, 60 Comp. Gen. 331 (1981), 81-1 CPD ¶ 222.

American also contends that in converting PSC's contract from a fixed-price incentive to a firm fixed price contract, the agency violated the provisions of 10 U.S.C. § 2405 (1982), which prohibits DOD from adjusting any price under a shipbuilding contract "for an amount set forth in a claim, request for equitable adjustment, or demand . . . arising out of events occurring more than 18 months before the submission of the claim, request, or demand." According to the protester, PSC's current financial difficulties (the impetus for the assignment) resulted in part from a renovation of its shipyard begun after PSC purchased the facilities in 1982.

PSC's assignment of the contract does not constitute a "claim, request or demand" as defined under the statute; the arrangement reached in no way appears to represent the settlement of an actual or potential claim by PSC. Furthermore, as indicated above, the total cost to the government for completion of the four ships will not exceed the government's expected total liability under the contract in effect prior to the assignment when sums to which the contractor would be entitled under the escalation provisions of the contract are taken into consideration.

The protest is denied.

B-231952, *et al.*, November 8, 1988

Procurement

Special Procurement Methods/Categories
■ Computer equipment/services
■■ Multiple/aggregate awards
■■■ Contract awards
■■■■ Propriety

An agency decision to procure photocopier machines and related services on a total package basis was legally unobjectionable where the agency reasonably believed that this method of contracting would: (1) increase competition for certain categories of copiers; (2) facilitate maintenance and servicing of machines; (3) reduce the user activity's costs (related to storage space, dealing with the contractor, and performance of routine functions); and (4) allow greater flexibility in redistributing copiers to meet changing user needs.

Procurement

Competitive Negotiation
■ Competitive advantage
■■ Non-prejudicial allegation

An agency is not required to cast its procurement in a manner that neutralizes the competitive advantages some firms may have over the protester by virtue of their own particular circumstances.

Matter of: Eastman Kodak Company

Eastman Kodak Company has filed eight protests under solicitations issued by the General Services Administration (GSA) for cost-per-copy services for various federal user activities pursuant to GSA's cost-per-copy program.[1] Under the contracts the contractor is to furnish copier machines and all necessary supplies except paper. The solicitations were for fixed-price, requirements contracts (the user activity will pay a fixed-price for each copy it makes) for up to a 3-year period (including the basic 1-year period and two 1-year option periods). Kodak contends that the RFPs were overly restrictive of competition, because they required offers for all of a user activity's copier needs and stated that a single award would be made under each solicitation for the entire requirement.

We deny the protests.

Each solicitation specified the number of copiers that the user activity anticipated needing over the entire contract term; the copiers were separated into either four or five categories—designated as "volume bands"—corresponding to expected monthly production. For example, RFP No. FCGE-A2-75455-N stated that the Navy would need 28 volume band I copiers (producing up to 5,000 copies per month), 8 volume band II copiers (producing 5,001-15,000 copies per month), 9 volume band III copiers (producing 15,001-30,000 copies per month), and 1 volume band IV copier (producing 30,001-50,000 copies per month). The RFPs also set out certain performance requirements that copiers had to meet to be acceptable within each volume band; for example, volume band I copiers had to be able to produce at least 12 copies per minute while volume band V copiers had to make at least 55 copies per minute.

Among other things, contractors must install copying machines, relocate machines if necessary, train agency "key" operators, and provide all consumable supplies (except paper). Contractors also are required to maintain the machines, to repair copiers within a 4-hour response time (2 hours for certain critical copiers), and to provide substitute units where repairs cannot be made within 24 hours.

Each solicitation stated that the government would award a single contract for all requirements and directed that, in order to be considered for award, a proposal must offer to provide and state a price for all volume bands. Kodak argues that this provision for a single award for all volume bands is overly restrictive of competition in contravention of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253a(a)(2)(B) (Supp. IV 1986), which requires that solicitations "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law."

[1] The request for proposals (RFP), the user agency, and the total number of copiers upon which offers were to be based were: (1) RFP No. FCGE-A4-75450-N, National Aeronautics and Space Administration, 131 copiers; (2) RFP No. FCGE-MV-75464-N, Navy (Charleston, South Carolina), 183 copiers; (3) RFP No. FCGE-A1-75453-N, GSA, 292 copiers; (4) RFP No. FCGE-JN1-75465-N, Navy (Hawaii), 145 copiers; (5) RFP No. FCGE-JN1-75466-N, Navy (Guam), 90 copiers; (6) RFP No. FCGE-A4-75461-N, Navy (New Jersey), 58 copiers; (7) RFP No. FCGE-A2-75454-N, Navy (Pensacola, Florida), 126 copiers; (8) RFP No. FCGE-A2-75455-N, Navy (Panama City, Florida), 46 copiers.

Kodak explains that it primarily offers larger machines appropriate for volume bands III, IV and V, but does not manufacture photocopy machines that produce copies at the slower rates allowed for volume bands I and II. Thus, Kodak contends that it and other firms that do not manufacture a number of different types of copiers designed to meet the various performance requirements of every volume band are effectively precluded from competing on an equal basis with firms that do supply many different copier models. The protester points out that, while it could arrange to supply smaller, slower, lower-volume machines in conformance with the requirements for volume bands I and II by subcontracting with a manufacturer of small copiers, it would be at a competitive disadvantage as it would have to pass the costs of subcontracting on to the government in its proposal. Kodak requests that our Office recommend that GSA terminate the contracts awarded under these solicitations and amend the RFPs to allow offers and awards to be made separately for each volume band contained in each RFP.

Under CICA, a contracting agency must specify its needs in a manner designed to achieve full and open competition, 41 U.S.C. § 253(a)(1)(A), and include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 41 U.S.C. § 253a(a)(2)(B). Thus, where, as here, the protester contends that acquiring certain services as part of a total package rather than breaking them out unduly restricts competition, we will object only where the agency's choice of a total package approach as necessary to meet its minimum needs lacks a reasonable basis. *See The Caption Center,* B-220659, Feb. 19, 1986, 86-1 CPD ¶ 174.

GSA reports that it had a number of reasons for using the total package approach in each of these procurements. In our view, the most significant considerations are as follows:

1. GSA believes that awarding one contract for all copiers at a user facility encourages competition because it eliminates the possibility that an offeror might receive an award for only a low number of machines. GSA also believes that awarding contracts on a band-by-band basis as the protester suggests might have the effect of reducing competition for many of the bands that require very low numbers of copiers. GSA contends that many potential offerors might decline to make offers on bands which contain as few as one copier because it would be very costly to maintain and service only one machine. In this regard, GSA points out that there are at least 11 major copier suppliers that are capable of supplying copiers meeting the performance requirements of all four or five volume bands.

2. GSA maintains that the total package approach greatly facilitates servicing of machines, because an offeror can dedicate one or more repair persons to the particular user's site if there are enough copiers to justify it. GSA believes that the total package approach increases the likelihood that the service response time requirements will be met, and thus reduces the amount of time that machines will be out of service; moreover, the use of a technician dedicated to a user's location should result in lower maintenance costs.

Kodak disputes GSA's contention regarding the benefits of a dedicated technician. Kodak maintains that it and other offerors will be able to meet the service response times even if they choose to use service personnel that are not at the using activity's location. Furthermore, the protester argues that if a service person who is dedicated to a particular site is used, service might be impeded when multiple service calls tax that particular technician's resources.

3. GSA believes that it will be able to reduce user activity costs significantly in several different ways by allowing only one contractor to be responsible for all of the user activity's copier needs. For example, GSA reports that the contractor is required to provide all consumable supplies (toners, developers, fuser oil, etc.) other than paper, and the using activity must provide adequate storage space to the contractor. Therefore, if awards were made on a band-by-band basis, as many as five storage areas would have to be offered and maintained. GSA charges that this additional storage space would result in duplication of costs to the government. Another example GSA offers is that having a single contractor provide the equipment will make it easier for government personnel to perform routine maintenance (such as clearing paper jams and adding toner) because it is likely, though not required under the contract, that only one manufacturer's equipment will be involved. Also, GSA believes it will be less costly to train government operators if, as is likely, only one type of copier is used throughout a using activity. Moreover, administrative time and effort will be saved by the user activity because contracting personnel will only have to deal with, make calls to, and meet with one contractor where problems arise, or whenever else necessary.

Kodak counters that a total package approach does not assure that all equipment supplied will be of the same brand. Moreover, the protester points out that even equipment from the same manufacturer may vary considerably from one volume band to the next, and, thus, there is no guarantee that it will be easier for government employees to perform routine functions where one contract is awarded.

4. Finally, GSA asserts that awarding only one contract for all copier services will allow the user activity greater flexibility to meet its changing copier needs over the potential 3-year period of the contract. GSA points out that an agency's needs may change over time or may have been incorrectly estimated initially. In such cases, where certain copiers are over/underutilized it is quite simple to redistribute existing machines among various volume bands if all volume bands are supplied by the same contractor rather than by several different contractors. Furthermore, GSA believes that contractors would be unlikely to report that a copier was over/underused, if it might result in a switch to a different machine from a volume band for which a competitor was the contractor.

Essentially, Kodak argues that the personnel of the user activity will have sufficient incentive to report overuse of a copier because such a machine will be subject to more downtime and will need more repairs. On the other hand, according to Kodak, underused copiers will give the government a bargain. In any event, Kodak states that the government retains the right to reassign machines

whether there are five contractors (in a band-by-band award situation) or only one contractor (as in the total package approach used by GSA in these procurements).

Analysis

Under CICA, 41 U.S.C. § 253(a)(1)(A), a contracting agency is required to specify its needs in a manner designed to achieve full and open competition. An agency's use of a total package approach is consistent with this statutory mandate where the agency reasonably shows that one, integrated contract is necessary to meet its needs. Here, while the protester disagrees with GSA's analysis and has refuted some of GSA's arguments, the protester has not shown that GSA's decision to use a total package approach was unreasonable. *See DePaul Hospital and The Catholic Health Association of the United States,* B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173.

We find persuasive GSA's argument that a single contractor approach will lead to better, quicker maintenance at reduced cost to the user activity. We recognize that repair times are set forth in the contract; nevertheless, we also recognize that, in reality, a contractor that is responsible for all of the user activity's copiers might have more incentive to respond quickly than a contractor that is responsible for only a small number of machines. In addition, we are persuaded that a total package contract will increase the likelihood that the contractor will provide one or more technicians who are dedicated to the site. We have previously held that the benefit of dealing with only one contractor that is accountable for all repairs/maintenance is a rational basis for using the total package approach. *See Southwestern Bell Telephone Co.,* B-231822, Sept. 29, 1988, 88-2 CPD ¶ 300. Moreover, we believe that GSA's argument concerning greater flexibility in redistributing machines provides yet another reasonable basis for procuring on a total package basis. *See The Caption Center,* B-220659, *supra.*

We also find that GSA's attempt to avoid duplication of administrative costs by reducing training costs and storage space and facilitating routine maintenance by government workers are all valid reasons for the single contractor approach used in these procurements. *Id.; Servicemaster All Cleaning Services, Inc.,* B-223355, Aug. 22, 1986, 86-2 CPD ¶ 216. In this connection, we note that the record contains a Navy report that supports GSA's view that considerable administrative time and expense can be saved by having to deal with only one contractor at a using activity.

Finally, while Kodak argues that it is prevented from competing because it offers only larger machines and is reluctant to enter into subcontracts to provide the smaller machines, GSA reasonably concluded that overall the total package approach may in fact enhance competition by attracting more offerors than individual awards on a band-by-band basis because of the greater number of copiers involved, and by preventing offerors from limiting their offers to the larger, more lucrative bands and not competing for the smaller, less profitable bands. In this regard, the record shows that, with the sole exception of the

Guam procurement, all procurements received at least three proposals, an indication that the single award requirement was not overly restrictive and that adequate competition was achieved. *See Jazco Corp.*, B-193993, June 12, 1979, 79-1 CPD ¶ 411 at 7.

The protester's argument that as a supplier of only highspeed, high-volume copiers, it cannot compete on an equal basis with firms that can supply machines for all volume bands, provides no basis to object to GSA's well-supported decision to use a single contractor at each user activity. An agency is not required to cast its procurements in a manner that neutralizes the competitive advantages some firms may have over others by virtue of their own particular circumstances. *Secure Engineering Services, Inc.*, B-202496, July 1, 1981, 81-2 CPD ¶ 2.

The protester also suggests that GSA has acted improperly in these procurements because GSA did not allow offerors to submit alternative proposals for individual awards for each volume band. Kodak argues that GSA should have evaluated multiple awards for individual volume bands against a single award for all volume bands to determine the method of contracting that would be most favorable to each user activity. We need not evaluate the merits of the protester's suggested procurement methodology. What is before us is not a question of what GSA could have done, but instead, whether the procurement method actually chosen by GSA was legally supportable. As we have found that GSA's decision to procure on a total package basis was reasonable, the procurement method was clearly legally unobjectionable. *See International Business Services, Inc.*, B-209279.2, Feb. 8, 1983, 83-1 CPD ¶ 142 at 5-6.

The protests are denied.

B-231978, November 8, 1988

Procurement

Competitive Negotiation

■ Discussion

■■ Adequacy

■■■ Criteria

Where procuring agency presented the protester with several specific questions concerning deficiencies in its proposal during discussions and later rejected the proposal because the protester did not adequately answer these questions in its best and final offer, procuring agency conducted meaningful discussions. Agency properly led the protester into the areas of its proposal needing amplification, and is not required to conduct all-encompassing negotiations or provide preferred approach.

Procurement

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

Procuring agency's decision to reject the protester's proposal as technically unacceptable was reasonable where the proposal did not meet several of the solicitation requirements. General Accounting Office will not substitute its evaluation of the proposal for the agency's, but rather will examine the agency's evaluation to ensure that it was reasonable and consistent with the evaluation criteria and procurement laws and regulations.

Procurement

Contractor Qualification
■ Competition rights
■■ Administrative agencies

The United States Department of Agriculture Graduate School may compete in competitive procurements because of its unique status as a nonappropriated fund instrumentality.

Matter of: Automation Management Consultants Incorporated

Automation Management Consultants Incorporated (AMCI) protests the award of a contract to the United States Department of Agriculture Graduate School (USDAGS), under request for proposals (RFP) No. RS-PER-88-364, issued by the Nuclear Regulatory Commission (NRC), for operation and maintenance of NRC's Information Technology Services Training Laboratory. AMCI contends that NRC did not conduct meaningful discussions, did not properly evaluate the merits of its proposal, and improperly awarded the contract to a federal agency at a substantially higher price than AMCI proposed.

We deny the protest.

NRC issued the RFP on February 22, 1988, to procure automated data processing training for its employees. The RFP specified evaluation factors and advised that award would be made to the responsible offeror whose technically acceptable proposal presented the most advantageous technical/cost relationship to the government. The RFP further advised that technical merit would be more significant than cost and reserved the right to accept other than the lowest offer.

On the March 30, 1988, closing date for the receipt of initial proposals, NRC received eight proposals. The contracting officer adopted the competitive range recommendation of the Source Selection Evaluation Panel (SEP), which evaluated proposals according to the RFP's evaluation criteria and determined that three proposals were technically unacceptable. The remaining five proposals, including AMCI's were included in the competitive range. While AMCI's proposal was determined unacceptable as submitted, it was considered susceptible of being made acceptable through discussions.

NRC notified each offeror of the results of the initial evaluation by letter dated May 13, 1988 and for three offerors in the competitive range, specific questions

concerning their technical proposals were included, establishing the basis for oral discussions. Discussions were held on May 19 and best and final offers (BAFO) were requested no later than May 26. All five offerors submitted BAFOs which were evaluated by the SEP on June 7. NRC conducted cost discussions with offerors on June 9 and requested a second round of BAFOs which were submitted on June 10. On June 13, the SEP recommended award to USDAGS as the only offeror determined to be technically acceptable. On June 17, NRC awarded the contract to USDAGS. NRC notified AMCI of the award and of the reasons why its proposal was not accepted by letter dated June 29.

AMCI contends that NRC did not conduct meaningful discussions because it failed to advise AMCI of the deficiencies which resulted in rejection of its proposal. We have held that the requirement for discussions with all responsible offerors whose proposals are in the competitive range includes advising offerors of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of revised proposals. Federal Acquisition Regulation § 15.610(c)(2) and (5) (FAC 84-16); *Furuno U.S.A., Inc.*, B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. However, we have rejected the notion that agencies are obligated to afford all-encompassing negotiations. All that is necessary is that agencies lead offerors into areas of their proposals needing amplification. *See Jonathan Corp.*, B-230971, Aug. 11, 1988, 88-2 CPD ¶ 133.

NRC rejected AMCI's proposal as technically unacceptable because AMCI did not adequately address the RFP requirements for IDMS/R and RAMIS II Reporter (type of software) experience. AMCI's initial proposal indicated the qualifications of its proposed instructors in IDMS/R software by the insertion of an "x" on a skills matrix beside the proposed instructor's name. However, the section in the proposal designated for discussing instructors' experience did not discuss any experience in the software. Moreover, experience with the RAMIS II Reporter system and in IBM OS/MVS mainframes, also requirement under the RFP, were not marked on the matrix. Further, AMCI's proposal did not address the RFP requirements for experience in publishing a newsletter, nor did it provide a detailed plan for course modifications and development, which were the other reasons that NRC eventually rejected the proposal as technically unacceptable.

With respect to these deficiencies in AMCI's initial proposal, the contracting officer May 13 letter to AMCI included the following questions/comments for discussion:

(1) Who will be teaching each of the courses listed in section B.1 of the RFP and what are their experience and qualifications for doing so;

(2) Please provide clarification regarding your qualifications for publishing a newsletter; and

(3) Please indicate who will do course development and modification.

Thus, while AMCI argues that NRC did not advise it of the deficiencies in its proposal, these questions apprised AMCI of those weaknesses in its proposal

which ultimately led to the rejection of its proposal. Therefore, we do not find that NRC failed to conduct meaningful discussions.

AMCI also argues that NRC did not properly evaluate the merits of its proposal in accordance with the RFP's listed evaluation criteria. AMCI states that it proposed four instructors that were qualified to teach IDMS/R and RAMIS, and that each of these instructors possessed more than adequate experience and qualifications to teach NRC's mainframe classes. Further, AMCI contends that its proposed project manager was capable of publishing a quarterly newsletter, as was evidenced by the sample newsletter articles which it provided in answer to NRC's questions. AMCI further contends that it provided more than adequate information and support concerning who would perform course revisions by proposing that individual instructors would be responsible for making minor modifications during their nonteaching hours.

In reviewing an agency's technical evaluation, we will not substitute our evaluation of the proposal for the agency's; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the evaluation criteria in the solicitation and the procurement laws and regulations. Moreover, the protester bears the burden of establishing that the evaluation was unreasonable, which is not met by merely disagreeing with the agency's judgment. *See McManus Security Systems,* B-231105, July 21, 1988, 67 Comp. Gen. 534, 88-2 CPD ¶ 68.

AMCI's BAFO essentially repeated the format of its initial proposal and failed to identify any relevant experience with IDMS/R, IBM OS/MVS mainframes and the RAMIS II Reporter. Since the RFP specifically called for technical experience in IDMS/R, IBM and compatible microcomputers, and IBM OS/MVS mainframes, AMCI was properly downgraded for this deficiency.

AMCI indicated in its BAFO that the proposed project manager had the relevant experience and training in publishing a newsletter and furnished a two page publication as a sample. However, the SEP determined that the project manager's experience was minimal and, more significantly, that because AMCI proposed that the project manager would spend only approximately 5 percent of her time on the newsletter, the bulk of the task would be performed by individuals that were not designated in the proposal as having publishing experience. Thus, NRC reasonably gave AMCI a slightly improved but still low score in this area. Regarding course revisions, NRC reports that the SEP determined that AMCI had failed to adequately address the question of who would do course modifications and revision because AMCI only replied that its individual instructors would do minor course revisions, when not engaged in teaching. NRC states that because AMCI failed to state which instructor would be teaching which course, there was no way for the evaluators to determine which instructor would revise which course, and whether that person was qualified to do so. Further, NRC contends that there is no reason to believe that an individual is fully qualified to prepare course revisions simply because the individual is teaching a course, and that a more senior person or specialist in the organization may be better qualified.

We do not find that NRC unreasonably evaluated AMCI's proposal. Although AMCI argues that its matrix identified the courses that each individual instructor was qualified to teach, and that it provided specific names and titles of hardware and software that each was experienced to teach, AMCI's proposal did not show that any of its proposed instructors were experienced in IDMS/R, IBM OS/MVS, and RAMIS II. In this connection, NRC reports that the degree of skill needed to master mainframe database management system software is appreciably greater than that needed to master off-the-shelf microcomputer programs, and therefore it did not regard AMCI's microcomputer experience as a satisfactory substitute.[1] AMCI has not established that NRC's evaluation of its proposal was unreasonable or improper, and we find that NRC properly rejected AMCI's proposal as technically unacceptable.

AMCI also argues that the award to USDAGS was improper because it is a federal agency, and that award was made at an excessive price, since AMCI's price was 34 percent lower. USDAGS is a nonappropriated fund instrumentality (NAFI), not a government agency. *See* 64 Comp. Gen. 610 (1984). NAFIs are generally recognized as being associated with and generally supervised by their respective government entities, here the Department of Agriculture. However, NAFIs operate without appropriated funds and are not paid by a government agency. USDAGS is not part of the Department of Agriculture, or any other federal agency, and it is funded through proceeds derived from its training courses and student tuition. Accordingly, we have concluded that obtaining services from USDAGS is tantamount to obtaining services from nongovernment commercial sources and, therefore, USDAGS may submit proposals under competitive procurements. *University Research Corp.*, B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636. Regarding USDAGS price relative to AMCI's price, since NRC properly concluded that AMCI's proposal was technically unacceptable, the fact that it was lower in cost is irrelevant. *HSQ Technology*, B-227935, Oct. 2, 1987, 87-2 CPD ¶ 329.

The protest is denied.

[1] AMCI also argues that IDMS/R was not listed as a teaching requirement or as a previously taught course contained in the RFP, and that of the 570 courses taught at the laboratory in the previous 4 years mainframes constituted only 2.3 percent. Thus, AMCI contends that NRC gave undue weight to the requirement for mainframe experience in the evaluation. We find no basis in the scoring to conclude that the SEP unreasonably evaluated this experience. Moreover, the RFP evaluation criteria specifically stated that this kind of experience would be evaluated. Therefore, to the extent that AMCI is challenging NRC's decision to evaluate mainframe experience, we find that the argument is untimely. *See* 4 C.F.R. § 21.2(a)(1) (1988).

B-232506, November 8, 1988

Procurement

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

Protest of solicitation's misdescription of surplus scrap metal is untimely where protester was aware that property was misdescribed and that agency would request waiver of liability for the misdescription prior to bid opening but did not file a protest with the agency until after bid opening.

Procurement

Sealed Bidding
■ Contract awards
■ ■ Propriety
■ ■ ■ Invitations for bids
■ ■ ■ ■ Defects

An agency may award misdescribed surplus property to the high bidder where the property is less valuable than what was advertised and the high bidder is willing to waive its rights under the solicitation's Guaranteed Description clause.

Matter of: Atlas Pacific Corporation

Atlas Pacific Corporation protests the award of a contract to Pacific Rim Aluminum, Ltd. under Sale No. 41-8439, conducted by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Region-Ogden, for kirksite scrap metal. Atlas argues that because the solicitation misdescribed the property as kirksite when it was actually 30 percent lead, DLA should have readvertised the sale, rather than awarding to the high bidder who executed a waiver acknowledging the misdescription.

We dismiss the protest.

The solicitation, issued on July 9, 1988, incorporated by reference the instructions, terms and conditions in the DLA "Sale by Reference" pamphlet dated January 1987. This pamphlet cautioned bidders to inspect the property prior to submitting a bid and stated that the property was offered "as is" and "where is" with no warranty as to quantity, quality, weight or description. It also contained a Guaranteed Description clause that provided, with certain limitations, that the property delivered would be as described in the solicitation and, if not, the purchaser would be entitled to a refund or downward adjustment in the price. The government also reserved the right to vary the weight of the property delivered by 25 percent.

Item 53 for which Pacific Rim's bid was accepted was listed in the solicitation as scrap kirksite, 600,000 pounds. Kirksite is a zinc alloy that contains about 97 to 98 percent zinc. After the solicitation was issued, DLA discovered that the property was approximately 30 percent lead by weight, rather than 100 percent kirksite, a more valuable metal than lead. DLA determined that rather than

withdraw the property from sale, it would require the successful bidder for the property to sign a waiver acknowledging the misdescription and waiving any claim against the government. Atlas inspected the property before bid opening and was informed of the misdescription and the waiver requirement. Pacific Rim did not inspect the property prior to bid opening and was not aware of the misdescription.

DLA received eight bids at the August 9 bid opening. Pacific Rim was the high bidder at $190,560. Atlas was the third high bidder at $176,394. Atlas' bid was accompanied by a letter stating that it was bidding on 70 percent kirksite and 30 percent lead, acknowledging that a waiver would be required, and emphasizing that its bid would be significantly higher if it were bidding on kirksite only.

On August 15, DLA informed Pacific Rim that it would only receive the award if the firm agreed to execute a waiver acknowledging the misdescription. Pacific Rim inspected the property on August 16 and advised DLA that it intended to sign the waiver. The following day, DLA discovered that the weight of the property was not 600,000 pounds as advertised, but 850,000 pounds. On August 31, DLA awarded a contract to Pacific Rim, with a waiver specifying that the firm understands that it may remove only 750,000 pounds of the kirksite (a 25 percent variation), and that the property contains 30 percent lead.

Atlas challenges the award to Pacific Rim, arguing that DLA is required to readvertise the sale because the property was misdescribed. Atlas' protest thus is based on an alleged impropriety apparent from the face of the solicitation—misdescription of the property—and was required to be filed before bid opening. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Since the protest was not filed until after award was made, it is untimely.

Atlas argues that it had no reason to challenge the misdescription before bid opening because it had been advised by the contracting officer during the site visit to bid on the actual property, and assumed all bidders would do the same. According to Atlas, only after bid opening did it have any reason to question whether all bidders had based their bids on the actual property. We find this argument unpersuasive. There was no reasonable basis for Atlas to assume that all bidders would bid based on the actual property. No amendment to the solicitation was issued correcting the misdescription or requiring site visits by the bidders to ascertain the actual composition of the property. In addition, to the extent that Atlas claims it relied on oral advice from the contracting officer to forgo filing a protest, such reliance was unreasonable. *See Westinghouse Electric Corp.*, B-224492, Aug. 9, 1986, 86-2 CPD ¶ 165.

In any event, Atlas' protest is without merit. As recognized since the decision in *MacDell Corp.*, B-156813, June 30, 1965, the standard Guaranteed Descriptions clause applicable to sales confers no rights on anyone except the bidder to whom award is made. In *MacDell*, we held that an agency could not properly refuse to award misdescribed surplus property to the high bidder where the property was less valuable than that which was advertised when the high bidder was willing to waive its rights under the Guaranteed Description clause,

just as a bidder in line for award may be permitted to offer terms more favorable to the government. *Id.*

Here, the property was advertised by DLA as kirksite, but actually contained 30 percent lead, a less valuable metal. Atlas argues that due to a rise in the price of zinc, the property increased in value between bid opening and award, making it actually more valuable, rather than less valuable, than when it was advertised, and the high bidder therefore was not entitled to award of the misdescribed property after executing the required waiver. DLA disagrees, arguing that, although the property was misdescribed, because of the 30 percent lead content it was actually less valuable, both at bid opening and the date of award, than that which was advertised. In our view, whether the market price for kirksite increased or decreased during the period between bid opening and award is irrelevant since bidders assume the risk of market fluctuations subsequent to bid opening. The relevant fact is that the property actually for sale was of lower value than the property as advertised at the time it was offered, and that the high bidder was willing to accept the property as is, releasing DLA from liability for the misdescription. Under these circumstances, the award to Pacific Rim was proper.

The protest is dismissed.

B-231885, November 10, 1988

Procurement

Socio-Economic Policies
■ Small businesses
■■ Contract award notification
■■■ Notification procedures
■■■■ Pre-award periods

Procurement

Socio-Economic Policies
■ Small businesses
■■ Contract awards
■■■ Size status
■■■■ Misrepresentation

Protest is sustained where, contrary to the Federal Acquisition Regulation (FAR), agency awarded a contract set aside for small business to a firm ultimately determined to be other than small without giving notice of the proposed award to other offerors for the purpose of size status protests or executing a written determination of urgency prior to award. Moreover, considering that the contract is for a 4-year period and the basis on which the awardee certified itself as a small business concern was found unpersuasive by the Small Business Administration, the continued performance of the contract would defeat a primary purpose of the Small Business Act.

Matter of: Maximus, Inc.

Maximus, Inc. protests the award of a contract to Meridian Corporation under request for proposals (RFP) No. 282-88-0014 issued by the Department of Health and Human Services (HHS) as a total small business set-aside to furnish services in support of the State Legalization Impact Assistance Grants (SLIAG) program. Maximus contends that the award to Meridian is improper because the firm is not a small business concern and HHS improperly failed to give preaward notification of the intended award to unsuccessful offerors, to the protester's prejudice.

We sustain the protest.

The solicitation requested proposals to provide support services under a cost-plus-fixed-fee contract for a period of 1 year plus 3 option years.[1] The RFP provided that the standard industrial classification (SIC) code for this procurement was 7374, Computer Processing and Data Preparation Services, with a small business size standard of $7.0 million in average annual receipts. Offerors were to submit separate technical and business (cost) proposals and were advised by the RFP that "paramount consideration shall be given to the evaluation of technical proposals rather than cost or price unless, as a result of technical evaluation, proposals are determined to be essentially equal, in which case cost or price shall then become the determining factor."

Eleven proposals were received, four of which were included in the competitive range. All four offerors had self-certified as small businesses. In making its competitive range recommendation, the evaluation committee numerically scored the 11 technical proposals received on the basis of a maximum possible score of 100 points. The offerors included in the competitive range received the following ratings in descending order of technical merit: 84.0 (Meridian), 78.0 (offeror 2), 74.0 (Maximus), 72.0 (offeror 4). With regard to cost, offeror 2 and offeror 4 proposed the highest and second highest costs, respectively, while Maximus was second lowest and Meridian proposed the lowest cost. Following discussions and receipt of best and final offers, the agency reevaluated those four offerors and selected Meridian as the firm submitting the proposal deemed most advantageous to the government on the basis that it rated the highest technically and offered the lowest estimated cost. Award was made on June 20, 1988 to that firm and Maximus was notified by letter dated June 28 and received by Maximus on July 5.

In the interim, on June 23, Maximus learned "unofficially" that HHS intended[2] to award the contract to Meridian and on that same day it submitted a protest challenging Meridian's small business size status to the contracting officer, who forwarded it to the Small Business Administration (SBA) by letter dated June 28. During the pendency of the size protest, Maximus received HHS'

[1] The contract as actually awarded, however, was for the entire 4-year term.

[2] Maximus was unaware at the time that award actually had been made 3 days earlier.

official notice of award to Meridian and immediately filed a bid protest with our Office on July 5, the date it received written notification of award.

On July 20, SBA's Philadelphia Regional Office issued a decision in which it found that under the circumstances, Maximus' size protest was timely filed with the contracting officer, and that "Meridian Corporation is not a small business concern for procurements having a size standard of $7.0 million, including this procurement." Meridian appealed that decision to SBA's Office of Hearings and Appeals, which upheld the prior finding that Meridian is not a small business. The SBA concluded that the fact that Meridian had not yet filed its latest federal income tax return did not excuse the firm from reporting its gross annual receipts for its most recent fiscal year, which had ended approximately 8 months before the firm certified itself as small.

Federal Acquisition Regulation (FAR) § 15.1001(b)(2) provides that in a small business set-aside:

> . . . upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror [to permit challenges, if warranted of] the small business size status of the apparently successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.

Small business size status protests may be filed by an offeror within 5 days of receipt from the contracting officer of this written notification of proposed award. *Id.;* 13 C.F.R. § 121.9 (1988). The FAR further provides that after receiving a timely size protest, the contracting officer must withhold award of the contract until the SBA has made a size determination or 10 business days have elapsed since SBA's receipt of the size protest, whichever occurs first. FAR § 19.302(h)(1).

Maximus argues that it was prejudiced by the contracting officer's failure to provide preaward notification of the intended awardee. Since its size protest was filed within 5 business days of when it did learn of the award and since the SBA's regional office's determination that Meridian is not a small business was made within 10 days of SBA's receipt of the size protest,[3] Maximus argues that its size protest was timely for purposes of this procurement and HHS should have terminated the contract. To remedy the contracting officer's failure to terminate the contract, the protester requests that we recommend that the contract be terminated for convenience of the government and award made to the next highly evaluated offeror, which Maximus believes is it.

HHS responds that since the award was made prior to a determination that Meridian was not small, the award is proper. The agency states that between June 15 through 17, the contracting officer was repeatedly reminded by the program office that there was an urgent need for the contract services and that any delay in awarding the contract would adversely impact the timely and effective implementation of the SLIAG program and could result in the loss of fiscal year

[3] We were informally advised by the SBA that it received the size protest from the contracting officer on July 6, 1988; thus, its decision of July 20 was issued 10 days after receipt of the size protest.

(FY) 1988 funds for the program. The contracting officer is therefore said to have made a "verbal determination" that urgent and compelling circumstances necessitated an immediate award to Meridian. The agency maintains that not only does the FAR permit a contracting officer to waive the preaward notice of the intended award where he determines that urgency necessitates award without delay, FAR § 15.1001(b)(2), but that the regulation does not require that the written determination of urgency precede the award; only that a written determination be made, at some point, that an urgency did in fact exist. HHS cites two previous decisions of this Office, *Superior Engineering and Electronics Co., Inc.*, B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698 and *Conversational Voice Technologies Corp.*, B-224255, Feb. 17, 1988, 87-1 CPD ¶ 169 to support its position.

In *Superior* we did not object to an urgent award made, notwithstanding a timely size protest, to a firm subsequently determined to be other than small. In that case, the preaward notice was given to the unsuccessful offeror after which the contracting officer made a written determination to proceed with the award nevertheless because of unusual and compelling urgency for the requirement. We held that if an agency awards a contract pursuant to a *bona fide* urgency determination, the notice requirements concerning size status are waived and any subsequent SBA determination that the awardee is other than small is prospective and termination of the contract is not required.

In *Conversational Voice* the contracting officer properly awarded a contract, without giving notice of the intended award, prior to the size protest based on an urgency determination. Notwithstanding the validity of the award, we stated that an agency should consider terminating such an award if, pursuant to a timely size protest, the contractor is found to be a large business. In that case, termination was not warranted because the agency could not have made award to the small business/protester because its prices were determined to be unreasonable.

We believe the circumstances here are readily distinguishable from the above two cases.

The record shows that as of June 3, the procurement had progressed to the point that the contract negotiator recommended award to Meridian as a responsible firm which had submitted the highest rated proposal with the lowest estimated cost, which was considered fair and reasonable. According to telephone memoranda in the file, on June 15 through 17 a series of three telephone calls was made from the agency's program office to the contract negotiator, the contracting officer, and to the Chief, General Acquisitions Branch, Public Health Service, in that order, in which the program office: (1) complained about the length of time being taken to process the award; (2) stressed the need to get the contractor "on-board immediately" in order for the agency to carry out its responsibilities under the SLIAG program; (3) pointed out that because the program was a temporary one, less than 10 federal employees had been assigned to it, so that the agency was dependent upon a large support service contract; and (4) indicated that there was a desire within the agency that the contract be awarded before the fourth quarter of the fiscal year because of budgetary con-

cerns and limitations. From the fact that the last conversation, which occurred at the highest of the administrative levels involved, concluded with an instruction to the program office subordinate to "follow up with [the contract negotiator to] get [a] firm award date," we conclude that a commitment of some sort was made to award the contract promptly and it was, in fact, awarded 3 days later.

In none of the accounts of these telephone conversations, however, does there appear any reference to the requirements of FAR § 15.1001(b). Indeed, even in the document which the agency now says memorializes the contracting officer's "verbal determination"—a memorandum to the file prepared weeks after Maximus' protest was filed with us—the contracting officer states that following the telephone conversations of June 15 through 17:

> . . . and subsequent conversations with the Contracting Officer; *it was determined* that immediate award of a contract was critical and of an urgent and compelling nature. *Notwithstanding* the requirements of [FAR §] 15.1001(b)(2), *an award was made* to that offeror who had provided the most technically acceptable proposal at the lowest cost . . . . (Italic added.)

This somewhat vague and passive language does not support the conclusion that the contracting officer deliberately made the appropriate determination to waive the requirements of FAR § 15.1001(b)(2) and simply failed to reduce it to writing.

Moreover, we question whether an urgency determination would have been justified. The file shows that a matter of extreme concern to agency administrators was that the award of this contract not occur within the fourth quarter of the fiscal year because of budgetary constraints on the dollar volume of procurements which the agency could award in that quarter. We do not think that such budgetary considerations justify a waiver of the preaward notification prescribed by FAR § 15.1001(b)(2), based on "urgency of the requirement," simply so that award could be made in the third quarter of the fiscal year.

HHS also emphasizes that although it has many functions to perform under the SLIAG program, SLIAG is in the nature of a temporary reimbursement program of limited duration. For this reason, HHS explains, it assigned only a few federal employees to the program and was dependent on this support services contract for the performance of many tasks. In this connection, HHS reports that the states' applications for funding were due by July 15 and that the agency needed adequate lead time to bring a contractor up to speed to assist in the review of these applications. We think, however, that if HHS had acted promptly, it could have given the unsuccessful offerors the notification required by FAR § 15.1001(b)(2), allowed for the time provided by regulation for a size status protest, and still have made an award by early July, which would have been only 2 weeks after the actual date of award, June 20.

We are particularly concerned with this award to a large business under a small business set-aside since the contract is for a period of 4 years and the awardee's self-certification as a small business concern was made without regard to its most recent fiscal year's receipts. As the SBA's Office of Hearings

and Appeals observed, Meridian's reason for not considering its latest fiscal year's receipts in certifying its size status was unpersuasive and not supported by the size regulations. Under these circumstances, aside from our concern about the agency's reliance on urgency in this case, we think a long-term contract based on an erroneous self-certification would defeat a primary purpose of the Small Business Act. We therefore sustain the protest.

We are mindful of the contracting agency's position that to disrupt Meridian's contract would be seriously detrimental to this program and that some of the work that has been performed is not readily transferable to another contractor. We note, however, that some of the concerns expressed by the agency appear to have been obviated by the ending of the fiscal year. Had this procurement been awarded as a 1-year contract with options to extend for three additional 1-year periods, as the RFP provided, we could have given consideration to a recommendation that Meridian's contract be terminated at the end of the first year and that no options be exercised. Since the contract was awarded for a 4-year period, however, that alternative is not available. Not to terminate Meridian's contract, on the other hand, would harm the competitive procurement system in that for a 4-year period, a contract intended for small business concerns would be performed by a large business which certified itself as a small business without taking into account its latest applicable annual receipts.

After considering all these circumstances, we recommend that HHS promptly implement an orderly phase-out of all tasks being performed by Meridian to the extent that is possible consistent with the agency's meeting of its obligations under the SLIAG program, while it concurrently prepares a revised statement of work for those tasks which can be transferred to another contractor, and that it obtain revised proposals based on the revised statement of work from the three offerors who remained in the competitive range under this procurement. Upon selection of a new awardee, HHS should terminate Meridian's contract for convenience. Regardless of the outcome of that competition, Maximus is entitled to its cost of filing and pursuing its bid protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

B-232434, November 10, 1988

Procurement

Contractor Qualification

■ Responsibility criteria

■■ Performance capabilities

Definitive responsibility criterion requiring prior successful "reclassification" of a high concentration PCB transformer to non-PCB status for a minimum of 1 year without performing additional work can be met by submission of evidence of successful reclassification for a shorter time period after which the transformer was tested to determine residual PCB content. A test report, which established that the maximum PCB concentration level permitted could not have been exceeded for

a period substantially longer than 1 year, properly may be considered equivalent to the 1 year performance requirement since it establishes that the requirement would have been exceeded.

Procurement

Contractor Qualification

■ Responsibility/responsiveness distinctions

When a responsibility-type factor such as corporate experience is included as a technical evaluation criterion under a request for proposals, it does not constitute a definitive responsibility criterion.

Procurement

Competitive Negotiation

■ Offers

■■ Organizational experience

■■■ Evaluation

■■■■ Propriety

Where an offeror represents in its proposal that the resources of a parent company would be available to it during contract performance, the procuring agency properly may consider the experience of the parent company, as well as the subsidiary offeror's experience prior to acquisition, in evaluating the offeror's proposal.

Procurement

Competitive Negotiation

■ Contract awards

■■ Administrative discretion

■■■ Cost/technical tradeoffs

■■■■ Cost savings

Allegation that agency made improper price/technical tradeoff is denied where, contrary to protester's assumption that its proposal was higher technically rated than awardee's, award was made to lower priced offeror whose proposal received a higher technical score.

Matter of: Unison Transformer Services, Inc.

Unison Transformer Services, Inc., protests the award of a contract to Sun Environmental, Inc., for reclassification of certain PCB (polychlorinated biphenyls) electrical transformers [1] to non-PCB status, under request for proposals (RFP) No. 52SBNB8C5085, issued by the National Institute of Standards and Technology (NIST), Department of Commerce. Unison contends that Sun's proposal did not provide sufficient evidence that Sun satisfied certain definitive responsibility criteria contained in the RFP, and that Commerce made an improper price/technical tradeoff in determining to award the contract to Sun.

We deny the protest.

[1] Reclassification is the process by which PCBs are extracted from a transformer and replaced with non-PCB materials. The Environmental Protection Agency (EPA) has established guidelines for reclassification which provide that a transformer is successfully reclassified if for a 90-day period it has a level of less than 50 parts per million (ppm) of PCBs. 40 C.F.R. § 760.30(a)(2)(v) (1987).

The RFP called for the reclassification of and minor repairs to 86 transformers. Section M of the RFP included a requirement that:

> Prospective contractors will be determined to be nonresponsive due to responsibility and . . . not warrant further evaluation of their offer, if the offeror fails to provide evidence to document its successful reclassification of at least one high concentration PCB transformer to non-PCB status for a minimum of one year without "polishing." [2]

In addition, under the evaluation criterion for experience, which was the most important technical factor, the RFP called for a minimum of 2 years experience reclassifying high concentration PCB transformers to non-PCB status using an acceptable process.

Four proposals were received by the May 31, 1988, closing date, including Sun's and Unison's. The proposals were evaluated in accordance with the solicitation evaluation factors, which assigned 70 percent of the total score to "quality of service," which included technical factors (experience, safety record, and key personnel) and management, and 30 percent to cost. All four offerors were determined to be in the competitive range and were asked to submit best and final offers (BAFO). Both Sun's and Unison's BAFO prices were slightly under $2,000,000, but Sun's price was approximately 1 percent lower than Unison's. On August 8, Commerce awarded the contract to Sun on the basis that Sun offered a technically superior proposal which was lowest in price.

The gist of Unison's protest is that Sun did not and could not provide sufficient documentation to establish that it satisfied the definitive responsibility criterion of having successfully reclassified a high concentration PCB transformer to non-PCB status for a minimum of 1 year without polishing.

Definitive responsibility criteria are standards established by a contracting agency in a particular procurement to measure an offeror's ability to perform the contract. *Repco, Inc.*, B-225496.3, Sept. 18, 1987, 87-2 CPD ¶ 272. Such criteria in effect represent the agency's judgment that an offeror's ability to perform in accordance with the specifications for the procurement must be measured not only against the traditional and subjectively rated factors, such as adequate facilities and financial resources, but also against more specific requirements, compliance with which at least in part can be determined objectively. *W.H. Smith Hardware Co.*, B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110; Federal Acquisition Regulation § 9.104-2(a) (FAC 84-39). However, while definitive responsibility criteria establish a minimum standard which is a prerequisite to an affirmative determination of responsibility, we have recognized that there are situations where an offeror may not meet the specific letter of such criteria, but has clearly exhibited a level of achievement either equivalent to or in excess of the specified criteria, and thus properly may be considered to have satisfied the definitive responsibility criteria. *Haughton Elevator Division, Reliance Electric Co.*, 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294.

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[2] Polishing refers to additional work to the transformer after a transformer has been reclassified pursuant to EPA regulations.

Unison is correct that Sun did not meet the literal requirement of the definitive responsibility criterion for 1 year of successful performance. Sun submitted evidence of having performed a successful transformer reclassification under a Navy contract, and that the reclassified transformer remained in non-PCB status for 100 days without polishing. At that time, as indicated in Sun's proposal, the Navy requested that the transformer be drained of its fluid and shipped to a test laboratory for disassembly to determine the total PCB content in the transformer. This testing determined, by analysis of chemical samples, that the total quantity of PCB remaining in the transformer was an amount which, if it were dispersed in the transformer fluid, would add 8.7 ppm of PCB. The PCB level of the transformer fluid after reclassification and immediately before draining had been measured at 24 ppm. Accordingly, the test results established that the total amount of PCB content remaining in the transformer was sufficiently low that, irrespective of time, even if all of the PCB were to leach out simultaneously, the PCB concentration level could not exceed 33 ppm. This is below the acceptable 50 ppm level established by EPA as the upper limit for maintaining non-PCB status. Thus, the test showed that the reclassified transformer would remain below the required PCB concentration level for a period in excess of 1 year. We find that this satisfies the purpose of the definitive responsibility criterion by providing an acceptable equivalent. *See Haughton Elevator Division, Reliance Electric Co.,* 55 Comp. Gen. *supra.*

With respect to the adequacy of the documentation provided by Sun in its proposal, the scope of our review is limited to ascertaining whether sufficient evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive responsibility criterion had been met. The relative quality of the evidence is a matter for the judgment of the contracting officer. *Topley Realty Co., Inc.,* B-221459, Apr. 23, 1986, 65 Comp. Gen. 510, 86-1 CPD ¶ 398. Further, the extent to which an investigation may be required is a matter for the contracting officer to determine, not our Office. *BBC Brown Boveri, Inc.,* B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309.

As evidence of satisfying the criterion, Sun provided a description of the reclassification and a summary of the test described above. In this regard, while Unison contends that the transformer reclassified by Sun is smaller than those which are to be reclassified under the RFP, the definitive responsibility criterion has no size requirement, therefore, the size is not relevant. Sun's proposal included the test data which showed that the transformer would remain in a non-PCB status irrespective of time. Further, Sun provided the name and telephone number of the Navy contracting officer who supervised the contract under which the reclassification and laboratory analysis was performed, and this contracting officer verified Sun's information when contacted by Commerce. Accordingly, we find that Sun's proposal contained adequate documentation from which Commerce could reasonably conclude that Sun satisfied the definitive responsibility criterion. While Unison has alleged that there is other outside information available which may call into question the acceptability of the transformer reclassification which was described by Sun, our Office will not reevaluate the quality of the evidence submitted by Sun, or question the con-

tracting officer's judgment in this regard. *Allen-Sherman-Hoff Co.—Request for Reconsideration*, B-231552.2, Sept. 1, 1988, 88-2 CPD ¶ 202.

Unison has also protested that Sun did not satisfy the RFP requirement for 2 years of experience in reclassifying transformers which is contained in the technical evaluation criteria. As Commerce correctly argues, this experience requirement does not constitute a definitive responsibility criterion. Such a responsibility type criterion properly may be included in a negotiated procurement as a technical criterion, and here it was so included as an evaluation factor. *Consulting and Program Management*, B-225369, Feb. 27, 1987, 66 Comp. Gen. 289, 87-1 CPD ¶ 229.

Unison's argument in this regard is that Sun cannot have 2 years of corporate experience because it was not incorporated until November 1987. The record establishes that this allegation is factually incorrect. The Dun and Bradstreet report which Unison submitted in support of this proposition merely shows that Sun was acquired by ENSR Corporation in 1987. However, Sun was an operating entity in its own right prior to that date. Sun's proposal evidences that it was incorporated in 1976 and had several years of corporate experience in reclassifying transformers prior to its acquisition by ENSR. In addition, since the offer committed the resources of ENSR, Commerce was also entitled to consider ENSR's corporate experience in reclassifying transformers, which was also outlined in Sun's proposal, in evaluating Sun's experience in this regard. *See J.A. Jones Construction Co.*, B-227296, Sept. 1, 1987, 87-2 CPD ¶ 215. Accordingly, we find that Commerce had a reasonable basis to determine that Sun was highly qualified with respect to the experience requirement under the technical evaluation criteria, and this determination was not in violation of statute or regulation.

Finally, Unison asserts that the determination to award to Sun was not in accordance with the evaluation criteria which indicated that technical factors were more than twice as important as cost. In support of this argument, Sun points out that the price difference between the two proposals was minimal. However, while Sun is correct with respect to the price differential, the agency report shows that although the technical scores of the two offerors were very close, Sun received a slightly higher point score than Unison, and was considered technically superior.

Unison is basing its argument regarding its technical superiority on the premise that since Sun was incorporated in 1987 it must have received a low technical score for experience. However, as indicated above, this premise is incorrect, as is Unison's inference regarding the relative scores of the two offerors. Accordingly, there is no basis to question the price/technical tradeoff since award was, in fact, made to the lower priced, higher technically rated proposal.

The protest is denied.

Since we deny the protest, Unison's request for the costs of pursuing its protest, including attorneys' fees, and proposal preparation costs is denied. *Fairchild Weston Systems, Inc.*, B-229843.2, B-229843.3, June 3, 1988, 88-1 CPD ¶ 525.

B-232956, November 10, 1988

Procurement

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Signatures
■■■■ Omission

Bidder's failure to sign a telecopied bid modification may not be waived as a minor informality where the only evidence in the modification of the bidder's intent to be bound is the corporate letterhead and no other document signed by the bidder accompanied the modification.

Matter of: Jennings International Corp.

Jennings International Corp. protests the rejection of its telecopied bid modification and the award of a contract to any other bidder under invitation for bids (IFB) No. DACA65-88-B-0062 issued by the United States Army Corps of Engineers for the construction of water and sewer facilities and a warehouse at Fort A.P. Hill, Virginia.

We deny the protest.

The IFB, as amended, specified that bids were to be received by 11 a.m. on September 27, 1988. According to the IFB bids could be modified or withdrawn by telegraphic notice received by the time specified for receipt of bids.

Jennings sent its original bid on September 26 by Federal Express. The bid was received by the agency at 9:57 a.m. on September 27. That same day, Jennings telecopied a three page modification of its bid which was received by the agency at 9:47 a.m. At 10:25 a.m. the Corps received a telephone call from an unidentified representative of Jennings who sought and obtained confirmation of the agency's receipt of the original bid and the modification.

Bids were to be evaluated on the basis of the base bid prices and two work additives if they were within available funding. Since funds were not available for the additives at bid opening, only the base bids were evaluated. Jennings' initial base bid was $4,250,000 and its modified base bid was $7,880,000. Jennings' base bid, both as originally submitted and as modified, was low. After bid opening, the contracting officer determined that Jennings' modification could not be accepted because it was not signed. Jennings protested the rejection of its modification prior to award, nevertheless, the Corps determined pursuant to 31 U.S.C. § 3553(c)(2) (Supp. IV 1986) that urgent and compelling circumstances significantly affecting the interests of the United States did not permit waiting for our decision and awarded the contract to the second low bidder.

The protester argues that its failure to sign the modification should be waived as a minor informality. Jennings states and the agency does not dispute that Jennings clearly identified the telecopy as a bid modification and included the solicitation number, the address of the contracting agency, the bidder's letterhead, the name and address of the bidder, the time specified for receipt of bids

and the contract work description. Jennings contends that the manner of the bid modification and the fact that it confirmed receipt of the modification by the Corps prior to bid opening indicates its intent to be bound by the modified price and does not permit it to choose between the prices it submitted. Further, the protester points out that the IFB permitted the use of telegraphic bid modifications. The protester argues that since telegraphic bid modifications are not signed that its unsigned telecopied modification should be treated in the same manner. The protester does not argue that it should have received the award based on its initial base bid of $4,250,000.

As a general rule, an unsigned bid must be rejected as nonresponsive because without an appropriate signature, the bidder would not be bound should the government accept the bid. *Southeast Crane and Monorail Systems, Inc., et al.*, B-227080.2, B-227080.3, Oct. 26, 1987, 87-2 CPD ¶ 392. This requirement is necessary to prevent a bidder, after bid opening, from disavowing or attempting to disavow its bid to the detriment of the sealed bidding system. *Power Master Electric Co.*, B-223995, Nov. 26, 1986, 86-2 CPD ¶ 615. There is an exception to this general rule allowing for waiver of the failure to sign the bid as a minor informality when the bid is accompanied by other documentation signed by the bidder which clearly evidences the bidder's intent to be bound by the bid as submitted. Federal Acquisition Regulation (FAR) § 14.405(c)(1); *Wilton Corp.*, 64 Comp. Gen. 233 (1985), 85-1 CPD ¶ 128. We believe that these rules apply to bid modifications as well as bids, since the modification is, in essence, a new bid. *See Barnes Electric Co., Inc.*, B-228651, Oct. 2, 1987, 87-2 CPD ¶ 331.

It is clear, we think, from the modification itself that it was indeed transmitted by the bidder and that it was to pertain to the subject bid. It was not, however, accompanied by any other signed documents—the signed bid was sent separately by Federal Express—and therefore Jennings' failure to sign the modification may not be waived as a minor informality. Further, we must agree with the agency that the validity of the protester's bid, as modified, is questionable without any signature on the modification, even though its initial bid was signed and it telephoned to confirm receipt, because without a signature on the modification the contracting officer could not conclude with certainty whether that modification was submitted by someone authorized to do so. *See Canaveral Ship Repair, Inc.*, B-230630, May 20, 1988, 88-1 CPD ¶ 486.

We do not agree with the protester that the acceptance of telegraphic modifications, which do not include signatures, necessitates the acceptance of unsigned telecopied modifications. First, the acceptance of telegraphic modifications or withdrawals is an exception to the general rule which is specifically provided for by the regulations, FAR § 52.214-5(b), and announced in the solicitation. We are aware of no comparable provision regarding telecopied bid materials.[1] Most important, however, it is not possible to transmit a signature by telegram. We are not aware of any technical impediment to transmitting a bid modification with the signature of the bidder's authorized agent through the use of a "fax"

[1] A proposed amendment to the FAR currently under consideration provides for the facsimile transmission of bids and bid modifications, but signatures are required. 53 Fed. Reg. 30818, 30821-30822 (August 15, 1988).

or telecopy machine, and the protester does not contend that there is any. In fact, the protester offers no explanation at all as to why the modification was not signed. Consequently, unless we are to hold that a bid modification simply does not have to be signed by the bidder's authorized agent—which we are not prepared to do—we see no basis to excuse the lack of a signature here because of the existence of a single specified exception, for telegraphic modifications, based on technical necessity.

Regarding Jennings' contention that in a prior solicitation issued by the same contracting office it telecopied a similar modification which was found acceptable, improprieties in past procurements are not relevant to the acceptability of Jennings' modification in this case. *Barnes Electric Co., Inc.*, B-228651, *supra.*

We therefore conclude that the agency acted properly in rejecting Jennings' bid modification.

The protest is denied.

B-231968, November 14, 1988

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

In view of the protester's recognition as the incumbent that it was proposing a significant reduction in staffing (relative to historical levels), contracting agency reasonably communicated its concern with the proposed reduction and satisfied the requirement for meaningful discussions when it questioned whether the proposed approach was adequate to handle anticipated workload and offered the protester a reasonable opportunity to explain why its staffing was adequate and/or to revise its approach.

Procurement

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

Contracting agency acted reasonably in selecting for award of cost-reimbursement contract an offeror proposing a level of staffing that more closely conforms to actual historical manning levels rather than offeror proposing a significant reduction in staffing.

Matter of: Range Technical Services

Range Technical Services (RTS) protests the award of a contract to Computer Sciences Raytheon (CSR), under request for proposals (RFP) No. FO8606-88-R-0002, issued by the Department of the Air Force for technical and

support services for the Eastern Test Range and the Air Force's Eastern Space and Missile Center. RTS, a joint venture of General Electric Government Services and Pan American Services, Inc., challenges the Air Force's evaluation of its technical and cost proposals and contends that the agency failed to conduct meaningful discussions concerning perceived weaknesses in its proposed staffing. We deny the protest.

Background

Operation and maintenance (O&M) services for the Eastern Space and Missile Center, which includes Cape Canaveral Air Force Station in Florida and other facilities, have been provided by members of the RTS joint venture for approximately the past 35 years. The Air Force's acquisition strategy for the center contemplated enhancing competition by dividing the O&M requirement between two major contracts, including the protested procurement for engineering and technical services—"Center Technical Services"—and a second procurement for launch base support services. The agency recently awarded the launch base support contract to Pan American.

The solicitation for technical services contemplated award of a cost-plus-award-fee contract for a base period of 1 year and a possible 4 option years. The solicitation provided for proposals to be evaluated on the basis of management and technical approaches, factors of equal importance, and cost, a factor of less importance than the others.

Although the solicitation required offerors to propose a minimum of 620 man-years for long-range planning and the development of instrumentation and computer systems, approximately one-third of the required work, it imposed no overall level-of-effort requirement. Nevertheless, the solicitation statement of evaluation factors generally provided for an in-depth evaluation of the risks associated with an offeror's proposed approach and specifically provided for consideration of the quantity, quality and compensation of staffing with respect to both the technical and management areas. In this regard, the solicitation elsewhere required offerors to discuss their manning rationale and to provide detailed manning tables setting forth the number and types of staff assigned to each organizational unit, work location, and statement of work (SOW) requirement. In addition, the solicitation statement of evaluation factors provided for an assessment of an offeror's ability successfully to perform the RFP requirements for the proposed cost and for the calculation of the most probable cost of the offeror's approach; it cautioned that no advantage would accrue to an offeror proposing an unrealistically low cost.

Four proposals were received in response to the solicitation; all were included in the competitive range. After conducting written and oral discussions with offerors, the Air Force requested the submission of best and final offers (BAFOs). Based upon its evaluation of BAFOs, the agency found the proposal submitted by CSR to be most advantageous to the government. Although RTS had proposed the low cost ($342,691,284), 1.57 percent less than the cost proposed by

CSR ($348,174,294), the Air Force calculated the most probable cost of accepting either proposal to be approximately the same—that is, $410.9 million—and concluded that CSR's proposal offered significantly less risk to the government.

The Air Force's projection of substantially higher actual costs to the government than proposed by either offeror, and its perception of a disparity in risk associated with their respective approaches, primarily resulted from the agency's conclusions regarding the staffing necessary to perform the SOW. Under the predecessor contract, approximately 2,157 man-years of labor were used to satisfy the same requirements included under this solicitation, and the agency initially estimated prior to the receipt of proposals that 2,186 man-years would be necessary to continue to meet its requirements. None of the offerors, however, proposed comparable staffing; while CSR proposed 1,793 man-years, RTS proposed only 1,607 man-years. The agency estimated the staffing level likely to be necessary under each proposed approach for use in the technical evaluation and for calculating the most probable cost; these revised estimates contemplated a significant reduction in staffing from historical levels, but still exceeded the manning proposed by all offerors.

The agency found the staffing proposed by three of the offerors, including RTS and CSR, to represent weaknesses in their proposals. In particular, the agency determined that RTS had proposed 405 man-years less than was required to perform the SOW requirement for technical systems operations and maintenance, and that RTS' net, overall staffing level was 340 man-years below the agency estimate (1,947 man-years) for its proposed approach. CSR's proposed overall level was found to be 185 man-years below the agency estimate (1,978 man-years). Accordingly, although CSR's staffing was viewed as creating a moderate level of risk, RTS' staffing was found to create a high level of risk. The agency reports that since the evaluations of the two proposals were almost identical, the discriminating element proved to be the higher risk ascribed to RTS' approach because of its lower level of staffing. Upon learning of the ensuing June 23, 1988, award to CSR, RTS filed this protest with our Office.

Evaluation

RTS first alleges that the evaluation of proposed staffing, and the subsequent assessment of relative risk and cost realism, were based upon a superficial analysis that failed to take into account the significant, unique elements of each proposal and the important differences in the experience of the offerors. In this regard, we note that RTS' proposal set forth its rationale for proposing manning reductions, describing proposed consolidations, new management approaches and equipment upgrades that it believed would enhance productivity.[1]

[1] The Air Force questions the timeliness of RTS' protest of the cost evaluation on the ground that it is based on information in a June 24 newspaper article and was not filed until July 12, more than 10 working days later. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988). However, since it appears that RTS did not receive meaningful details concerning the evaluation of proposals until it was debriefed by the Air Force on July 1, we consider the protest to be timely.

The evaluation of proposals is primarily the responsibility of the contracting agency, since it is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Accordingly, our Office will not make an independent determination of the merits of technical proposals; rather, we examine the agency's evaluation to ensure that it is reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. The protester bears the burden of showing that the evaluation is unreasonable, and mere disagreement with the agency does not render the evaluation unreasonable. *Mark Dunning Industries, Inc.*, B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364.

Our review of the record confirms that the perceived weakness in RTS' staffing approach was the determinative factor in the source selection. RTS' proposal of significantly fewer man-years than considered necessary for its approach led the Air Force to view RTS' staffing plan as posing a high risk that RTS would be unable to perform the SOW requirements satisfactorily; correction of this weakness through the addition of more staff eliminated the purported cost advantage claimed by RTS. In view of the importance placed by the solicitation upon adequate staffing, the selection of CSR on the basis of its superior staffing was reasonable.

Notwithstanding RTS' speculation to the contrary, the initial staffing estimate was based upon a detailed analysis of the SOW requirements, taking into consideration the Air Force's extensive experience with the particular facilities and tasks encompassed within the contemplated contract and its expectations for future workload. The agency evaluation also took into consideration the specific measures proposed by RTS to enhance productivity; as it did for each offeror, the agency formulated a separate, final estimate of the staff required to perform the SOW under RTS' specific proposed approach. As a result of the differences between proposals, each of the final staffing estimates differed somewhat. The agency's willingness to consider the merits of new and different approaches was further evidenced by its determination that staffing below historical levels would be adequate. In other words, it does not appear from the record that the agency's analysis of staffing requirements was either superficial or made without reference to offerors' proposals.

Although the protester disputes the agency's conclusions as to the proper staffing level, we find nothing unreasonable in the Air Force relying on its estimates for the purpose of evaluating staffing; the Air Force's estimates more closely conform to the actual historical staffing level. We will not overturn an agency determination of its needs on the basis that the protester believes its own calculations are more correct. *Mark Dunning Industries, Inc.*, B-230058, *supra*.[2]

[2] This case is distinguishable from *Kinton, Inc.*, B-228260.2, Feb. 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112, on which RTS relies. In *Kinton*, unlike here, award was made on the basis of initial proposals without discussions and after the agency had conformed the proposals to an undisclosed staffing estimate without undertaking an independent analysis of each offeror's proposed approach.

Discussions

RTS maintains that the Air Force did not conduct adequate discussions because RTS was never advised that its proposed staffing was too low. Under the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4) (Supp. IV 1986), and Federal Acquisition Regulation (FAR) § 15.610(b), written or oral discussions must be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, that is, agencies must point out weaknesses, excesses or deficiencies in the offeror's proposal unless doing so would result in disclosure of one offeror's approach to another—technical transfusion—or would result in technical leveling through successive rounds of discussions, such as by pointing out inherent weaknesses resulting from the offeror's lack of diligence, competence or inventiveness. FAR § 15.610(d); *see B.K. Dynamics, Inc.*, B-228090, Nov. 2, 1987, 67 Comp. Gen. 45, 87-2 CPD ¶ 429; *Price Waterhouse*, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190. Agencies are not obligated to afford offerors all encompassing discussions, or to discuss every element of a technically acceptable competitive range proposal that has received less than the maximum possible score; rather, agencies generally must lead offerors into the areas of their proposal which require amplification. *See Avitech, Inc.*, B-223203.2, Mar. 27, 1987, 87-1 CPD ¶ 351.

The Air Force argues that it in fact fully discussed the perceived weakness in RTS' proposed staffing for technical systems operations and maintenance. In this regard, the Air Force cites a request for clarification in which the agency asked RTS to:

> provide an expansion of Form 3, Staffing by location . . . The Government intent is to have visibility of manpower levels, mix and identification of skills by SOW paragraph to the operating sites or work locations where work is performed. A description of qualifying criteria for each skill level is also required.

In addition to the clarification request cited by the Air Force, we have also examined the 31 additional clarification requests and 9 deficiency reports sent to RTS, and find these did adequately bring to RTS' attention the agency's concerns with RTS' staffing. For example, the agency requested RTS to provide additional information on how it intended to meet the solicitation requirements for operational analysis with the proposed manpower and to clarify why its proposal to allocate a substantial portion of the base maintenance staff to performing minor construction would not result in "devastating the routine and preventive maintenance work." Although the Air Force did not provide specific questions or comments with respect to all of the specific SOW requirements for which RTS had proposed insufficient staff, the agency did express more general concerns which encompassed RTS' overall approach to staffing these requirements. In this regard, the agency questioned whether RTS' assumption that it would not need to support 24-hour operations except where specifically required by the SOW provided the flexibility necessary to deal with the "dynamic scheduling and long duration test activities" which the agency anticipated. In addition, the Air Force asked RTS whether its proposed manning levels "reflect the total FY [fiscal year] manning for each SOW [paragraph], including the fluctu-

ating peak level workload requirements as satisfied [through RTS's workload surge response plan] . . . , or do you anticipate some SOW paragraphs will require additional manning levels?"

In view of RTS' recognition as the incumbent contractor that it was proposing a significant reduction in staffing from its prior contract, we conclude that the agency communicated the essence of its concerns and sufficient information to allow RTS to identify and address the primary weakness in its proposal. Since it does not appear from the record that RTS' proposal was technically unacceptable, that is, that the agency had finally determined that it was impossible to perform the SOW with the proposed overall level of effort, we do not believe that the agency was required to be more specific during discussions. In particular, the agency was required neither to label the staffing approach as a deficiency nor to recommend a specific staffing level. RTS was afforded a reasonable opportunity to explain why its proposed staffing was adequate to perform the SOW and/or to revise its staffing approach. The Air Force therefore satisfied the requirement to conduct meaningful discussions.

The protest is denied.

B-202983.2, November 16, 1988

Civilian Personnel

Compensation
■ Payroll deductions
■■ Taxes
■■■ Error detection
■■■■ Statutes of limitation

An agency erroneously deducted FICA taxes instead of Civil Service Retirement from an employee's salary. In the prior Comptroller General decision regarding this matter it was held that the erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. The agency never received the employee's letter authorizing the refund of the FICA amount from the Internal Revenue Service (IRS). Inasmuch as the IRS is bound by a 3-year statute of limitations when acting on claims submitted by federal agencies for refunds of erroneously paid FICA taxes, and more than 3 years have passed, the agency is now unable to recover the FICA taxes erroneously deducted from the employee's salary.

Civilian Personnel

Compensation
■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

In a prior decision we held that the erroneous overpayment representing the difference between FICA and Civil Service Retirement deductions from an employee's salary may be subject to waiver under 5 U.S.C. § 5584 (1982) and remanded the question to the agency for waiver determination on the merits. The agency took no action since it did not receive the employee's letter requesting

waiver. The prior decision in this case may be considered as initiating the waiver process, thus tolling the 3-year limitation period in 5 U.S.C. § 5584, and waiver consideration may proceed under 4 C.F.R. § 92.1 (1988).

Matter of: Sidelle Wertheimer—Erroneous FICA Deductions—Waiver—Statute of Limitations

This is in response to a request from the Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), for a decision concerning the agency's authority to take the corrective action we recommended in a prior decision. The decision concerned the erroneous withholding of Federal Insurance Contributions Act (FICA) deductions rather than Civil Service Retirement deductions from the salary of Ms. Sidelle Wertheimer, and the resulting overpayment of salary to her. Inasmuch as 6 years have passed since that decision was rendered and no action has been taken, the Director asks what action the agency now should take. For the reasons stated below, we conclude that the statute of limitations has expired for purposes of recovering the FICA contributions from the Internal Revenue Service, but HUD may still consider the amount of the erroneous overpayment of salary for waiver.

Background

Ms. Wertheimer was employed by HUD in January 1980 on a term appointment following her employment by another federal agency. However, since she was selected from a certificate of eligibles, she was processed as a new employee with FICA coverage. Based upon her prior employment, Ms. Wertheimer should have continued to be covered under Civil Service Retirement. The error was discovered in November 1980, and the agency requested our decision as to what corrective action should be taken.

In our decision B-202983, March 10, 1982, we held that the erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. We advised that the employee must agree in writing to permit the agency to obtain, to the extent possible, a refund of the FICA amount from the Internal Revenue Service (IRS). The employee must state that she has not claimed and will not claim a refund or credit of the amount of the erroneous FICA deduction, or if she has made a claim, she must identify and return to the agency any amounts refunded or credited or state that her claim has been rejected.

Further, we held that the difference between FICA and Civil Service Retirement deductions constitute an erroneous overpayment of pay to Ms. Wertheimer which may be subject to waiver under the provisions of 5 U.S.C. § 5584 (1982) and 4 C.F.R. Part 91 (1981). Since we did not have a full report as to the facts concerning the overpayment and the amount in question did not exceed $500, we remanded the question of waiver to the agency for its determination whether to grant waiver in this case.

In April 1982, the agency advised Ms. Wertheimer, in writing, of the decision. She was advised to: (1) request in writing that HUD obtain a refund of the erro-

neous FICA taxes from the IRS; and (2) either refund to HUD the amount of $139.81, which represented the difference between the FICA and Civil Service Retirement employee deductions, or request a waiver of the collection of the overpayment.

On April 20, 1988, Ms. Wertheimer wrote to HUD inquiring about this matter. She states that she applied for corrective action and a waiver when she received the agency's letter of April 30, 1982, and received no reply. However, the agency has no record of having received her request.

The agency now questions whether there is authority to make the corrective actions in this case, since the IRS is bound by a 3-year statute of limitations when acting on claims by federal agencies for refunds of erroneously paid social security taxes. Further, the agency notes that the waiver provision under 5 U.S.C. § 5584 requires that a request for waiver must be filed within 3 years from the date the error was discovered.

Opinion

Claims for refunds of erroneously paid FICA taxes are primarily matters for consideration by the IRS and not our Office. *See* 26 U.S.C. § 3102, 3111, 3112, 6301, 6302, 6401 and 6402, Internal Revenue Code of 1954, as amended; *Patricia J. Engevik,* B-202201, Dec. 23, 1981. We have previously recognized the general position taken by the IRS that it is bound by the 3-year statute of limitations prescribed by 26 U.S.C. § 6511 when acting on claims submitted by federal agencies for refunds of erroneously paid FICA taxes. *See Engevik, supra; John C. Edwards,* B-184003, July 13, 1976. Hence, since more than 3 years have passed, it appears that HUD would now be unable to recover the FICA taxes erroneously deducted from Ms. Wertheimer's salary.

Regarding the statute of limitations for the exercise of waiver authority, 5 U.S.C. § 5584(b) provides that the Comptroller General or the Secretary concerned may not exercise his authority under that section to waive any claim if application for waiver is received in his Office after the expiration of 3 years immediately following the date on which the erroneous payment of pay or allowances was discovered. Regulations implementing the statute contain similar language at 4 C.F.R. § 91.5 (1988).

Neither the law nor the implementing regulations require any specific form or language which would constitute an "application" for waiver. Since the law was intended to be beneficial to those requesting waiver, it should be liberally construed to carry out that intent, when possible.

Further, 4 C.F.R. § 92.1 provides that in the absence of an application for waiver, "either the Comptroller General of the United States, the Secretary concerned or the head of the agency which made the erroneous payment of pay or allowance may initiate the waiver procedures prescribed in these regulations." *See also Texas State Court Juror Fees,* B-219496, Jan. 22, 1986.

In this case, we initiated waiver action in the decision dated March 10, 1982, when we held that there was an erroneous payment made to Ms. Wertheimer and remanded the case to the agency for investigation and disposition. Since the action by this Office was within 3 years from the date of discovery of the error, the requirements of the statute of limitations for waiver authority have been met.[1] Accordingly, HUD should now continue the process by considering whether waiver of the erroneous overpayment should be granted on the merits.

B-232048, November 16, 1988

Procurement

Contractor Qualification
■ Responsibility
■■ Contracting officer findings
■■■ Negative determination
■■■■ Criteria

An agency is not required to conduct a preaward survey if the information on hand or readily available is sufficient to allow the contracting officer to make a determination of responsibility.

Procurement

Contractor Qualification
■ Responsibility
■■ Contracting officer findings
■■■ Negative determination
■■■■ Prior contract performance

Prior default determinations are proper matters for consideration in determining a contractor's responsibility despite pending appeals to a board of contract appeals.

Procurement

Contractor Qualification
■ Responsibility criteria
■■ Administrative discretion

Fact that no other agency has found protester nonresponsible is not evidence of bad faith on the part of the present agency as agencies may reach opposite results based on similar facts because responsibility determinations are inherently judgmental.

[1] *Cf.* 54 Comp. Gen. 644 (1975), holding that a prior denial of a timely filed waiver request may be reconsidered although the request for reconsideration was received after expiration of the 3-year period.

Contractor Qualification
■ Responsibility
■ ■ Contracting officer findings
■ ■ ■ Bad faith
■ ■ ■ ■ Allegation substantiation

To show bad faith, protester must submit virtually irrefutable proof that procurement officials had a specific and malicious intent to harm the protester.

Matter of: Automated Datatron Incorporated

Automated Datatron Incorporated (ADI) protests the rejection of its bid under invitation for bids (IFB) No. B551-S issued by the Government Printing Office (GPO) for microfiche.

The protest is denied.

ADI asserts that GPO's determination that ADI was nonresponsible because ADI had not shown satisfactory quality assurance capabilities for certain quality standards was inappropriate because the solicitation did not refer to those quality standards but only to lesser quality standards. ADI states that no preaward survey was conducted to assess ADI's responsibility and no objective criteria were used to measure ADI's capability. ADI contends that the nonresponsibility finding is in effect a *de facto* debarment of ADI.

GPO reports that this solicitation is a reprocurement necessitated by ADI's default on GPO's earlier microfiche contract, program B154-S. GPO states that ADI was defaulted under that program because of its inability to meet the contract quality standards and delivery schedules and its refusal to remanufacture approximately 1,800 defective print orders. GPO also refers to program B613-S in which ADI was again defaulted, even though it was favorably rated on a preaward survey, for poor contract performance. The contracting officer, noting these prior problems, found ADI nonresponsible on July 7, 1988, and on July 8, GPO's Contract Review Board concurred in this finding.

GPO states that ADI was orally informed of the nonresponsibility determination on two occasions by a contract specialist, but due to a clerical error ADI did not receive written notification of the determination. On July 18, ADI requested written confirmation of the nonresponsibility determination and the contract specialist then sent a letter incorrectly informing ADI that the determination was based on ADI's failure to meet Quality Level III standards. The contracting officer subsequently retracted this letter and informed ADI that it was found nonresponsible for failure to meet the schedule and quality requirements on past microfiche contracts.

ADI contends that GPO should not be allowed to raise a new basis for ADI's alleged nonresponsibility. ADI contends that certain GPO officials are motivated by bad faith and that it has never been found nonresponsible by any other government agency. ADI alleges that its problems with GPO began after it filed

a protest on another procurement. ADI states that it has appealed the termination for default under B154-S and this appeal is presently before GPO's Board of Contract Appeals. ADI contends that it is reasonable to conclude that its termination under B154-S was premature and taken in bad faith and the termination should not be used as evidence to justify GPO's present determination of nonresponsibility.

A contracting agency has broad discretion in making responsibility determinations, which is of necessity a matter of business judgment. *Costec Associates,* B-215827, Dec. 5, 1984, 84-2 CPD ¶ 626. Such judgments must, of course, be based on fact and reached in good faith; however, such decisions generally are within the discretion of the agency since the agency must bear the brunt of difficulties experienced in obtaining the required performance. *Urban Masonry Corp.,* B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. Therefore, we will not question a nonresponsibility determination unless the protester demonstrates bad faith by the agency or the lack of any reasonable basis for the determination. *Tek-Wave, Inc.,* B-228453.3, Apr. 26, 1988, 88-1 CPD ¶ 402. We do not think that ADI has made such a showing here as it appears from ADI's past contract performance that GPO had adequate justification for finding ADI nonresponsible.

With regard to ADI's contention that GPO should have conducted a preaward survey, we have held that an agency is not required to conduct a preaward survey if the information on hand or readily available is sufficient to allow the contracting officer to make a determination of responsibility. *Kirk Bros. Mechanical Contractors, Inc.,* B-228603, Nov. 12, 1987, 87-2 CPD ¶ 479. In this case, the contracting officer relied on the fact that ADI had been terminated for failing to perform essentially the same work under a prior contract and again recently had been terminated for poor quality work under another microfiche contract. We do not find such reliance unreasonable.

The fact that the GPO contracting specialist originally provided ADI with the wrong basis for which ADI was found nonresponsible was not prejudicial to ADI since the contracting officer had earlier made and documented his decision for valid reasons. In this connection, we have held that prior default terminations are proper matters for consideration in determining a contractor's responsibility despite pending appeals to a board of contract appeals. *SAFE Export Corp.,* B-209491, B-209492, Aug. 2, 1983, 83-2 CPD ¶ 153. Moreover, the fact that no other agency has found ADI nonresponsible does not evidence bad faith. See *Kirk Bros. Mechanical Contractors, Inc.,* B-228603, *supra,* in which we found that determinations of responsibility are inherently judgmental and, as such, contracting activities can reach opposite conclusions as to a firm's responsibility based on similar facts, neither having acted in bad faith. Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually irrefutable proof that they had a specific and malicious intent to harm the protester. *Ingram Barge Co.,* B-230672, June 28, 1988, 88-1 CPD ¶ 614. In view of the contracting officer's reasonable reliance on ADI's

recent poor performance on microfiche contracts, ADI has not shown that the agency acted in bad faith.

The protest is denied.

B-232025, November 17, 1988

Procurement

Contractor Qualification
■ Responsibility
■■ Corporate entities

Where step one technical proposal and step two bid are submitted by an entity that certifies itself as a corporation, are signed by the president of the corporation, indicate that corporation will be prime contractor, while two other corporations engaged in a joint venture will be subcontractors, and do not indicate that bidder is part of a joint venture, the General Accounting Office concludes, from the record as a whole, that bid was submitted by corporation and not by joint venture.

Procurement

Socio-Economic Policies
■ Labor standards
■■ Supply contracts
■■■ Manufacturers/dealers
■■■■ Determination

General Accounting Office does not consider whether a bidder qualifies as a manufacturer or regular dealer under the Walsh-Healey Act. By law, such matters are for determination by the contracting agency in the first instance, subject to review by the Secretary of Labor, if a large business is involved.

Matter of: Haz-Tad, Inc.; Hazeltine Corporation; Tadiran, Ltd.

Haz-Tad, Inc., Hazeltine Corporation and Tadiran, Ltd. protest the rejection of a bid submitted by "Haz-Tad, Inc." under invitation for bids (IFB) No. DAAB07-88-B-J101, issued by the U.S. Army Communications-Electronics Command as the second step of a two-step procurement.

The contracting officer initially considered Haz-Tad, Inc. as the bidding party. After bid opening, as a result of post-bid opening assertions by the protesters that the bid was in fact submitted by a joint venture comprised of all three protesting corporations, the contracting officer rejected the bid as nonresponsive. Specifically, the contracting officer determined that the identity of the legal entity submitting the bid was uncertain, rendering the bid ambiguous. We agree with the contracting officer's initial position that Haz-Tad, Inc. submitted the bid, and sustain the protest on this ground.

On July 1, 1987, the agency issued request for technical proposals (RFTP) No. DAAB07-87-R-J042 for production and delivery of digital group multiplexer (DGM) equipment.[1] The solicitation was issued as a two-step procurement in ac-

[1] Such equipment is used as an element of the Army's TRI-TAC tactical communications system; the DGM equipment links field units with larger shelter-mounted units to create a secure communication network.

cordance with Federal Acquisition Regulation (FAR) subpart 14.5 (FAC 84-12). In step one, offerors submitted technical proposals but did not submit prices or cost estimates; in step two, each firm that had submitted an acceptable technical proposal in step one was invited to submit a sealed bid for a contract.

Six offerors submitted step one proposals by October 16, 1987, the closing date for receipt of technical proposals. One of these technical proposals was submitted by "Haz-Tad, Inc." [2] and was signed by the president of that corporation. In a cover letter to its technical proposal dated October 15, 1987, Haz-Tad, Inc., by its president, stated as follows:

> The enclosed proposal, submitted by Haz-Tad, Inc., is fully compliant with the requirement of the U.S. Army CECOM Solicitation Number DAAB07-87-R-J042.
>
> Hazeltine and Tadiran have executed a preincorporation and shareholders agreement and have subsequently formed a corporation pursuant thereto called Haz-Tad, Inc. This corporation has been carefully structured to meet the security requirements necessary to maintain critical control of all classified information under the contract and to receive the necessary U.S. Government security clearances.
>
> * * * * *
>
> The Corporation will be the prime contractor and will award subcontracts to Hazeltine principally for system integration and Tadiran principally for modular assembly, capitalizing on the strengths of each party by having each perform those activities in which it has expertise.
>
> * * * * *
>
> Please note that because of their major roles Tadiran Electronic Industries, Inc. and Hazeltine Corporation, are signing this proposal in their individual capacities. These signatures in the individual capacities represent each company's guarantee running to Haz-Tad, Inc. and the United States Government to perform their portion of the effort to be subcontracted by the Corporation to them and a secondary guarantee by Hazeltine to the United States Government for Tadiran's performance of its subcontracted efforts.

Clause K.8 of the RFTP required a certification regarding the type of business organization submitting the offer. Haz-Tad, Inc. identified itself as a New York corporation and did not check the "joint venture" block. Further, in the text of its proposal, Haz-Tad, Inc. explained that Hazeltine Corporation and Tadiran, Ltd. "have formed" a joint venture for the purpose of manufacturing DGM equipment and that "the joint venture corporation will be the prime contractor and will award subcontracts to Hazeltine and Tadiran for the technical and manufacturing portions of the work." While the proposal did state that the "joint venture" would have a board of directors comprised of five individuals from Hazeltine and Tadiran, and referred to other cooperative and structural arrangements among the three firms, the proposal also specifically stated that "the name of the joint venture is 'Haz-Tad, Inc.,' " and that the "DGM contract award will be taken in the name of and on the basis of the joint venture."

On March 18, 1988, the agency asked five offerors, including Haz-Tad, Inc., all of whose proposals had been determined technically acceptable, to submit bids for a firm fixed-priced contract no later than April 18. Haz-Tad, Inc. submitted

[2] Haz-Tad, Inc. is a corporation formed and owned by Hazeltine Corporation and an Israeli corporation, Tadiran, Ltd. The nature of the relationship of these three firms to the solicitation is at issue here.

the low bid, $69,120,064, nearly half a million dollars less than the second low bid of $69,618,646 submitted by Honeywell, Inc. In its step two bid, Haz-Tad, Inc., at clause K.4, again certified itself as a New York corporation and not as a joint venture. The name of the bidder was again "Haz-Tad, Inc.," signed by its president, the same individual who had signed the step one proposal. Further, Hazeltine and Tadiran did not sign the step two bid as subcontractors.

On May 11, 1988, Honeywell alleged to the contracting officer that the low bidder, Haz-Tad, Inc. did not qualify as a regular dealer or manufacturer under the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35-45 (1982). Honeywell argued that the bid should be rejected as nonresponsive because the step one proposal allegedly demonstrated that Haz-Tad, Inc. was not a regular dealer or manufacturer but intended to subcontract all manufacturing to Hazeltine and Tadiran. In accordance with FAR, § 22.608-3 (FAC 84-7), the contracting officer notified Haz-Tad, Inc. of the protest and invited both Haz-Tad, Inc. and Honeywell to submit evidence concerning the matter. On June 3, the protesters responded to the agency's inquiries by arguing that the bid was submitted on behalf of a joint venture among Hazeltine, Tadiran, and Haz-Tad, Inc., and that with the resources of two major corporations behind it, the joint venture possessed sufficient manufacturing capability to qualify as a manufacturer under the Walsh-Healey Act.[3]

After reviewing various submissions and rebuttals among the firms, the contracting officer on July 6, 1988, rendered a decision rejecting the Haz-Tad, Inc. bid as nonresponsive because of his alleged inability to determine the identity of the real party in interest in Haz-Tad, Inc.'s bid. The contracting officer found it unclear whether the entity that submitted the bid was the corporation, Haz-Tad, Inc., or whether the corporation was submitting a bid as part of a joint venture which included Hazeltine and Tadiran. In the former case, the contracting officer also determined that Haz-Tad, Inc. could not qualify as a regular dealer or manufacturer under the Walsh-Healey Act; in the latter, he also determined that a joint venture involving a foreign corporation such as Tadiran would not meet the solicitation security requirements. This protest followed the rejection of Haz-Tad, Inc.'s bid as nonresponsive.

The test for responsiveness is whether a bid as submitted represents an unequivocal offer to provide the requested supplies or services at a firm-fixed price. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, the bid is responsive. *Coastal Industries, Inc.*, B-230226.2, June 7, 1988, 88-1 CPD ¶ 538. The determination as to whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. *See Hydro-Dredge Corp.*, B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Further, an award to an entity other than that named in the bid constitutes an improper substitution of bidders. *Griffin Construction Co.*, 55 Comp. Gen. 1254, 76-2 CPD ¶ 26. Additionally, in a two-step procurement, the

[3] Alternatively, the protesters now argue that the bid was submitted by Haz-Tad, Inc., the corporation and sole legal entity, and request that the contract be awarded on that basis.

purpose of step two is to solicit firm bids only from the specific firms which have submitted acceptable technical proposals during the first step. *G&C Enterprises, Inc.*, B-186748, Oct. 28, 1976, 76-2 CPD ¶ 367, *aff'd on reconsideration*, B-186748, Mar. 2, 1977, 77-1 CPD ¶ 155.

The agency generally concedes that on its face, the bid was submitted by Haz-Tad, Inc. and not by a joint venture. Indeed, Honeywell, the next in line for award, refers to the evidence as "overwhelming" that the bid was submitted only by Haz-Tad, Inc., the corporation. We agree.

The agency, in rejecting Haz-Tad, Inc.'s bid, apparently was persuaded by post-bid opening submissions by counsel for the protesters in which it was claimed that the bid was submitted by Hazeltine, Tadiran, and Haz-Tad, Inc. as a joint venture. Much of these submissions by the protesters to the contracting officer relied on evidence outside the bid: (1) that there was a manifestation of intent to form a joint venture in the preincorporation and shareholders agreements that formed Haz-Tad, Inc.; (2) that letters and correspondence between Hazeltine and Tadiran prior to bid opening show an intent to establish a joint venture; (3) that there was a memorandum to the agency's security branch management referring to a joint venture; and (4) that there is a structural pooling of resources among the firms. However, the record shows that there is no formal written joint venture agreement in existence and that the existence of such an agreement was alleged to have been based on oral understandings, written communications among the protesters, and by some references to "joint venture" in the step one proposal. We reject these arguments.

We think that the bid documents (step one and step two) establish the identity of the bidder as Haz-Tad, Inc., the corporation, which was formed as a result of a joint venture between Hazeltine and Tadiran for the purpose of bidding on this solicitation. We also think that the contracting officer should not have relied upon post-bid opening explanations to reject the bid as nonresponsive since the bidder's identity was clear on the face of the bid documents. Based on the record before us, Haz-Tad, Inc. appears to be a duly formed corporation, willing to perform in accordance with the terms of the solicitation.

As stated above, the technical proposal submitted on October 15 was submitted by Haz-Tad, Inc. and signed by its president. The cover letter to the technical proposal advised the agency that Hazeltine and Tadiran had executed a preincorporation and shareholders agreement and had formed a corporation called Haz-Tad, Inc. The letter specifically explained that the corporation was formed to avoid the problems of obtaining a secret facility clearance for Tadiran and advised that Haz-Tad, Inc. would be the prime contractor and would award subcontracts to Hazeltine for system integration and to Tadiran for modular assembly. Representatives of Hazeltine and Tadiran signed the proposal as a "guarantee running to Haz-Tad, Inc. and the United States Government to perform their portion of the effort."

The technical proposal contained a 12-page "Description of Joint Venture" which (1) stated that Hazeltine and Tadiran had agreed to form a joint venture,

(2) described the "joint venture corporation" as the prime contractor, with Hazeltine and Tadiran as subcontractors, (3) stated that "the name of the joint venture is Haz-Tad, Inc.," and that a contract would be taken in the name of and on the basis of the joint venture, and (4) proposed that the DGM contract be signed by authorized signatories of both companies, to signify their acknowledgment and acceptance of their responsibilities for the terms and conditions of the contract. The Haz-Tad, Inc. second step bid contained the same signature and certification as its technical proposal, with the additional identification of Hazeltine as the bidder's parent company and majority stockholder.

We therefore believe that the technical proposal described a joint venture between Hazeltine and Tadiran, with the corporation Haz-Tad, Inc. created as a vehicle to implement the agreement between the two corporations. Neither the step one proposal nor the step two bid contained evidence that the protester had entered into an agreement with Hazeltine and Tadiran to be part of a joint venture. We believe that based upon the bid as submitted, the identity of the bidder was established as Haz-Tad, Inc., a corporation owned and controlled by Hazeltine and Tadiran. We therefore sustain the protest on this ground.

Because he considered the bid to be ambiguous, the contracting officer did not address Honeywell's other contention. Honeywell argued that Haz-Tad, Inc.'s bid was nonresponsive because Haz-Tad, Inc.'s proposal to subcontract the work to Hazeltine and Tadiran precluded the firm from qualifying as a manufacturer or regular dealer under the Walsh-Healey Act.[4] Where, as here, a bidder properly certifies compliance with the Walsh-Healey Act, its bid is responsive in that respect. *Antenna Products Corp.*, B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297. Under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(9) (1988), our Office does not consider the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act; the responsibility for applying the "manufacturer or regular dealer" criteria of the Walsh-Healey Act to a large business bidder is vested in the contracting officer subject to final review by the Department of Labor and not GAO. *Products Engineering Corp.*, 55 Comp. Gen. 1204 (1976), 76-1 CPD ¶ 408. In this regard, the protesters state that they have reached agreement with the contracting officer that the Walsh-Healey eligibility question will be referred to the Department of Labor if we find, as we do, that Haz-Tad, Inc., the corporation, is the bidder. Thus, we think this entire matter, including Honeywell's assertions, should be so referred to the Department of Labor.

[4] Honeywell also asserts that Haz-Tad, Inc.'s bid is nonresponsive because it did not promise to obtain competition in subcontracting as allegedly required by FAR, § 52.244-5, incorporated by reference in the solicitation. This clause requires selection of subcontractors "on a competitive basis to the maximum practical extent consistent with the objective and requirements of the contract." However, this clause is applicable to negotiated procurements and only for other than firm fixed-priced contracts. *Id.* Consequently, it is apparent that this clause was inadvertently referenced in the solicitation and may be waived by the agency. Also, contrary to the further assertions of Honeywell, the solicitation only required the submission of a plan for subcontracting with small and disadvantaged bidders by the successful bidder if requested by the contracting officer; compliance with this requirement is clearly a matter of responsibility, not responsiveness. *Devcon Systems Corp.*, 59 Comp. Gen. 614, 80-2 CPD ¶ 46.

Accordingly, by separate letter of today, we are recommending to the Secretary of the Army that the contracting officer forward the determination and record to the Department of Labor for a determination of Haz-Tad, Inc.'s status as a regular dealer or manufacturer. If that determination is affirmative, and if otherwise appropriate, the contract should be awarded to Haz-Tad, Inc.

A protester may be awarded the reasonable costs of filing and pursuing its protest, including attorneys' fees, where our Office determines that a solicitation, proposed award, or award does not comply with a statute or regulation. 4 C.F.R. § 21.6(d)(1) (1988). For the reasons that follow, we do not think award of protest costs is appropriate here. As noted above, the contracting officer initially considered Haz-Tad, Inc. as the bidding party. Moreover, the bid documents (step one and step two) firmly established the identity of the bidder as Haz-Tad, Inc., the corporation. The ambiguity as to the identity of the bidding party first arose when the protesters, in post-bid opening submissions, maintained that the bid was submitted on behalf of a joint venture among Hazeltine, Tadiran, and Haz-Tad, Inc. As a result, the contracting officer concluded that the identity of the bidding entity was uncertain, and he then rejected the bid on that basis. Thus, the record shows that the protesters' actions contributed to (and even caused) the contracting officer's uncertainty concerning the identity of the bidding entity. We conclude that under these circumstances award of protest costs is not warranted.

The protest is sustained.

B-228998, November 21, 1988

Civilian Personnel

Compensation

■ Reduction-in-force

■■ Compensation retention

Agency abolished employee's position of Quality Assurance Specialist, GS-12, effective November 17, 1981, and offered employee a wage grade position in lieu of separation by reduction in force (RIF). Employee was erroneously notified that acceptance of Laborer position would include indefinite retention of GS-12 pay. Employee elected the lower grade position, rather than discontinued service retirement pursuant to RIF. In January 1984, employee was notified that GS-12 pay was not indefinite, but would be reduced retroactively to November 19, 1983. Employee is not entitled to pay of GS-12 position beyond statutory period of 2 years. Notice by agency official to contrary does not provide a basis to allow him additional compensation. Government cannot be bound beyond the actual authority conferred upon its agents by statute or regulations.

Civilian Personnel

Compensation

■ Reduction-in-force

■■ Procedural defects

Employee who accepted lower grade position after receiving a reduction-in-force (RIF) notice contends that the agency did not follow the proper procedures in conducting the RIF. This Office

cannot consider the employee's contention because challenges to agency RIF actions must either be processed through a negotiated grievance procedure, if applicable, or presented to the Merit Systems Protection Board.

Civilian Personnel

Compensation

■ Retirement compensation

■■ Separation dates

■■■ Retroactive adjustments

A retired civil service employee requests that his separation date be changed retroactively so that he may accept a discontinued service retirement pursuant to reduction-in-force notice. Employee alleges that his electing to forgo discontinued service retirement in November 1981 resulted from erroneous advice that saved pay would be indefinite. Agency may retroactively change employee's date of separation and submit request for retroactive discontinued service retirement to the Office of Personnel Management where agency incorrectly advised employee whose position was abolished that he would receive GS-12 pay indefinitely. The failure of agency to give employee correct information as to consequences of refusing separation and discontinued service retirement constituted administrative error which deprived him of right granted by statute and regulation to elect discontinued service retirement.

Matter of: Anthony M. Ragunas—Reduction in Force—Pay Retention—Discontinued Service Retirement

Mr. Anthony M. Ragunas, a retired employee of the Army Transportation Center, Fort Eustis, Virginia, appeals our Claims Group's denial of his claim for additional pay retention and compensation incident to his transfer to a lower graded position. His claim is founded on the basis of erroneous information he received from government personnel officials at the time of a reduction in force (RIF) which deprived him of certain options he had available to him such as a discontinued service retirement or a legal challenge to the RIF procedures. We affirm the action of our Claims Group,[1] but on the basis of administrative error we hold that the agency may retroactively change employee's separation date to the effective date of the RIF.

Background

On September 18, 1981, Mr. Ragunas, a Quality Assurance Specialist, GS-12, received notification that his position was to be abolished effective November 17, 1981, and that he was being offered the position of Laborer, WG-2 in lieu of separation by RIF. Subsequently, the Army upgraded its offer of continuing employment from Laborer, WG-2, to Insulator Helper, WG-5. The notification stated that acceptance of the position would include "a two-year period of grade retention followed by a period of indefinite pay retention." Mr. Ragunas reports that the period of "indefinite pay retention" was explained to him by officials of the Fort Eustis Civilian Personnel Office to mean that his pay would never be less than the pay at the GS-12, step 4, level that he was receiving at the time of

[1] Z-2816623, Aug. 17, 1987.

the RIF notification. The notification further informed Mr. Ragunas that if he declined the offer of the position, he would be separated by a RIF effective November 17, 1981, which would result in a discontinued service retirement, for which he was eligible for as a result of his years of service and age.

Mr. Ragunas accepted the upgraded offer on October 8, 1981, with an effective date of November 17, 1981, and thereby declined an immediate discontinued service retirement annuity. Mr. Ragunas emphasizes that although he was reluctant to go "from an office environment to a hard manual labor position at age 54, I accepted the job offer only with the firm understanding that I would retain my GS-12 rate of pay indefinitely."

On April 4, 1983, Mr. Ragunas received a further reduction in grade as a result of another RIF. He was placed in a Store Worker, WG-4, position. This action entitled Mr. Ragunas to a second two-year grade retention period ending April 3, 1985, based on the WG-5 position. On November 17, 1983, the Fort Eustis Civilian Personnel Division processed a personnel action terminating Mr. Ragunas' original period of grade retention. However, this personnel action failed to reduce Mr. Ragunas' salary from $34,269, GS-12, step 6, in accordance with 5 U.S.C. § 5363 (1982). Under section 5363 Mr. Ragunas was only entitled to basic pay at a rate equal to 150 percent of the maximum rate of basic pay payable for the grade of his new position. *See* generally 5 C.F.R. § 536.205 (1983). Because of this administrative error, Mr. Ragunas was overpaid for several months in the gross amount of $1,982.08. On February 2, 1984, Mr. Ragunas was notified of this overpayment, and the personnel action terminating his grade retention was corrected to reflect the correct salary.

In April 1983, Mr. Ragunas had started his new Store Worker, GS-4, position stocking canned goods at the Fort Eustis Commissary. In October 1983, Mr. Ragunas began experiencing back problems which resulted in light duty status in December 1983 and ultimately to an involuntary disability retirement which was approved in March 1984. Mr. Ragunas was relieved of his duties at the Commissary on March 9, 1984, and placed on terminal sick leave until his sick leave was exhausted on May 29, 1985, on which date Mr. Ragunas was officially retired.

Mr. Ragunas states that as a result of his being misled and misinformed concerning his pay retention rights he was deprived of his right to exercise his option in November 1981 to receive a discontinued service retirement. He stresses that his waiver of his right to a retirement annuity in 1981 was predicated on the misleading and erroneous advice he received from the Civilian Personnel Office. The Fort Eustis Personnel Office does not deny the characterization of its advice by Mr. Ragunas. The Personnel Office's subsequent failure in November 1983 to reduce Mr. Ragunas' salary supports the proposition that it did not understand the pay retention authority. Mr. Ragunas notes that his failure to have the opportunity to make an informed decision to accept the discontinued service retirement in November 1981, has been very costly to him financially in lost pay, sick leave, reduced life insurance, lowered annuity when retirement ultimately did take place, and in greatly impaired health.

Opinion

Pay Retention

Under section 5363(a)(1) and (b) an employee who ceases to be entitled to grade retention under 5 U.S.C. § 5362 by reason of the expiration of the 2-year period becomes entitled to a period of pay retention. This statute provides a specific formula for computing an employee's retained pay. Under section 5363(b) an employee is entitled to the lesser of (1) the rate of basic pay payable to the employee immediately before the reduction in pay (GS-12, step 6, in Mr. Ragunas' case), or (2) 150 percent of the maximum rate of basic pay payable for the grade (WG-5 for Mr. Ragunas) of the employee's position immediately after such reduction in pay. Since 150 percent of the WG-5 position was less than the rate of pay for a GS-12, step 6, the 150 percent of the WG-5 position was all that Mr. Ragunas was entitled to by statute in November 1983 after the expiration of his 2-year grade retention period under 5 U.S.C. § 5362 (1982).

While it is unfortunate that Mr. Ragunas was given incorrect information as to his entitlement to pay retention upon notification of proposed RIF action in September 1981, that error does not provide a basis to allow him any additional compensation not otherwise authorized by statute. It is well-settled that the government cannot be bound beyond the actual authority conferred upon its agents by statute or regulations, and this is so even though the agent may have been unaware of the limitations on his authority. *See M. Reza Fassihi,* 54 Comp. Gen. 747, 749 (1975), and court cases cited therein. The government is not estopped from repudiating advice given by one of its officials if that advice is erroneous. *See Joseph Pradarits,* 56 Comp. Gen. 131, 136 (1976).

RIF Procedures

Mr. Ragunas also contends that as a result of the erroneous information he was given that he forwent any opportunity to challenge the legality of the RIF procedures. This Office does not have jurisdiction to consider this contention. An employee claiming that an agency did not use proper RIF procedures must either pursue the matter through a negotiated grievance procedure, if available, or file an appeal with the Merit Systems Protection Board. *See* 5 C.F.R. § 351.901. *See also* FPM, ch. 351, S7 (Inst. 263, July 7, 1981). *Carmen G. Benabe and Howell E. Bell,* 66 Comp. Gen. 609.

Retroactive Discontinued Service Retirement On Increased Annuity

Mr. Ragunas has also requested that our Office consider granting him a retroactive discontinued service annuity or increasing the amount of his current annuity.

The Office of Personnel Management is by law vested with exclusive authority to adjudicate civil service annuity claims arising under 5 U.S.C. §§ 8331-8348, subject solely to administrative review by the Merit Systems Protection Board.

See 5 U.S.C. § 8347. Hence, we are without jurisdiction to review and render an authoritative decision on any claim Mr. Ragunas has asserted for a retroactive discontinued service retirement annuity or an increase in his disability retirement annuity.

Authorization Of Retroactive Separation Date

In cases where an employee claims entitlement to a retroactive separation, this Office has jurisdiction to rule on whether a retroactive separation date can be authorized. If our Office authorizes a retroactive separation date, Mr. Ragunas would be treated as having retired on November 17, 1981, and as having served as a reemployed annuitant thereafter, assuming that OPM otherwise agreed that he qualified for a discontinued service annuity under 5 U.S.C. § 8336(d) (1982).

Exceptions are made to the general rule against retroactive personnel actions ". . . where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation." *Douglas C. Butler,* 58 Comp. Gen. 51, 53 (1978). *See also* 55 Comp. Gen. 42 (1975); 54 Comp. Gen. 888 (1975).

This Office has previously permitted the retroactive changing of the separation date of an employee where the employee's separation did not conform to the intent of the parties. *Perry L. Peterson,* B-207676, Dec. 21, 1982; B-159889, Sept. 1, 1966. Additionally, we have permitted the retroactive changing of an employee's separation date where the agency committed an administrative error by granting the employee terminal leave and advising her that she would continue to earn annual leave during that period. B-167146, July 31, 1969. Finally, in a case that is closely analogous to Mr. Ragunas', we allowed a retroactive separation date where two employees had been deprived of their right to elect discontinued service retirements because of erroneous advice by the employing agency. *Dale Ziegler and Joseph Rebo,* B-199774, Nov. 12, 1980.

It is undisputed that the Army erroneously advised Mr. Ragunas that if he accepted continued employment in a Laborer position in November 1981, he would continue to receive his GS-12, step 4, salary indefinitely. The record is persuasive that if Mr. Ragunas had received legally correct advice on his future salary, he would not have declined a discontinued service annuity in November 1981. It is clear that Mr. Ragunas' decision to elect continued employment was predicated upon the erroneous advice he was officially given concerning his salary protection. The failure to advise Mr. Ragunas properly had the effect of depriving Mr. Ragunas of his right to elect a discontinued service retirement.

Accordingly, we hold that the Army may retroactively separate Mr. Ragunas as of November 17, 1981, in order to allow the Army to apply to the Office of Personnel Management for a ruling as to whether Mr. Ragunas would now qualify for a retroactive discontinued service retirement effective November 17, 1981.

See paragraph S11-3, subchapter S11 of Federal Personnel Manual Supplement 831-1.

B-231986, November 21, 1988

Procurement

Competitive Negotiation

■ Requests for proposals

■■ Amendments

■■■ Criteria

Information disseminated during the course of a procurement that is in writing, signed by the contracting officer, and sent to all offerors, meets all of the "essential elements" of a solicitation amendment and will therefore bind both the offerors and the agency.

Procurement

Specifications

■ Ambiguity allegation

■■ Specification interpretation

Offerors must be given sufficient detail in an RFP to allow them to compete intelligently on a relatively equal basis. Where the specifications are not free from ambiguity and do not describe the contracting agency's minimum needs accurately, the solicitation should be corrected and reissued.

Matter of: Automation Management Consultants Incorporated

Automation Management Consultants Incorporated (AMCI) protests the continuance of the procurement process under request for proposals (RFP) RFP-TC-88-002, issued by the United States International Trade Commission (ITC). The RFP is for a firm-fixed price task order contract for training ITC personnel in the use of personal computers and compatible software. AMCI contends that conflicting specifications resulted in an ambiguous solicitation such that AMCI could not adequately prepare a proposal.

We sustain the protest.

The RFP was issued on May 10, 1988, and was followed by the issuance of five amendments. The answers to questions submitted by prospective offerors were attached to three of the amendments. These questions and answers created inconsistencies with respect to the specifications.

The procuring agency states that these questions and answers were merely for clarification and were not intended to revise the RFP. However, we have held that information disseminated during the course of a procurement that is in writing, signed by the contracting officer, and sent to all offerors, meets all of the "essential elements" of a solicitation amendment and will therefore bind both the offerors and the agency. *See e.g., General Electric Canada, Inc.,* B-225996, May 5, 1987, 87-1 CPD ¶ 474. Because these questions and answers

meet this standard, we find they became a part of the RFP and offerors were entitled to rely on the information contained therein.

Section C.5(b) of the Statement of Work in the RFP, as originally issued, read as follows:

(b) With technology changing from day-to-day, requirements for additional software training are likely to occur. The Contractor must provide required additional training 30 workdays after the Government provides the proposed course outline.

The answer to question 18, attached to amendment 0001, regarding this section reads as follows:

Please note, Section C.5(b) has been revised to read: With technology changing from day-to-day, requirements for additional software training are likely to occur. The Contractor must provide required additional training within forty-five (45) workdays after the Government provides a proposed course outline.

In the same amendment, question 21 and the corresponding answer read as follows:

21. *Question*

Section C.5(b): "additional training" as required 30 days after proposed outline from Government.

Answer:

The contractor shall provide "additional training" 30 days after a task order has been issued by the Government outlining such changes.

In response to question 36, the agency stated: "In regard to the 30 work day development timeframe, this requirement is not negotiable."

The agency in its report on the protest, states that the answer to question 18 (45 days) was in error, and its requirement remains 30 days for course development.

While ITC may have known what it wanted, this was not conveyed to the offerors, especially in view of the statement in the answer to question 18 that this was a revision of section C.5(b). Moreover, while ITC states that any inconsistences did not impact on price, we find this clearly could have such an impact on an offeror's staffing, (*i.e.,* having to revise a course in 30 days vs. 45 days). This basis of protest is sustained.

Next, AMCI protests that the solicitation was unclear as to how much notice would be given the contractor by the government regarding the exercise of the option years. The RFP was for 1 year with 2 option years.

Section H.4 of the RFP stated that 60 days notice would be given by the government. Sections I.3 and M.3 of the solicitation stated 30 days notice would be given. ITC states this conflict was minor in nature and not corrected by amendment because it was overlooked, but it should not have impaired an offeror's ability to respond.

We do not find that the time frame within which the government may exercise an option and bind an offeror to another year's performance to be minor in nature, as such a provision could have an impact on pricing. Therefore, this in-

consistency should have been corrected. We also sustain the protest on this ground.[1]

Accordingly, we recommend that ITC reissue the solicitation, adequately specifying the contract requirements, to resolve any conflicts between the prior issued RFP, the amendments, and the written questions and answers. In addition, we find that AMCI is entitled to recover the costs of filing and pursuing the protest, since by successfully challenging the conflicting specifications, AMCI has helped enhance the competition under the RFP. *See Southern Technologies, Inc.*, 66 Comp. Gen. 208, 87-1 CPD ¶ 42. AMCI should submit its claim to ITC.

The protest is sustained.

B-229409, November 22, 1988

Civilian Personnel

Leaves Of Absence
■ Military leave
■■ Overpayments
■■■ Error detection
■■■■ Debt waiver

An employee who had accumulated 16 days of military leave was erroneously granted 28 days of military leave over a 2-month period. His indebtedness for use of 12 days of excess military leave is subject to waiver under 5 U.S.C. § 5584 (1982), but we conclude that waiver is not appropriate under the circumstances.

Matter of: James J. Serpente—Waiver of Military Leave Erroneously Granted

The issue presented is whether an employee who was granted excess military leave may have the resulting overpayment waived under 5 U.S.C. § 5584 (1982) when, at the time the leave was used, the employee had annual leave available for usage. We conclude that an overpayment resulting from excess military leave usage may be considered for waiver, but that waiver is not appropriate in this case.

Background

This decision is in response to an appeal by Mr. James J. Serpente, an employee of the Norfolk Naval Shipyard (Shipyard), Portsmouth, Virginia, Department of the Navy. He appeals the settlement action by our Claims Group, Z-2879559,

[1] AMCI also initially protested a number of other alleged solicitation ambiguities which the agency specifically addressed in its report. Since AMCI did not respond to or refute the agency's arguments in its comments on the agency report, we consider these issues to have been abandoned. *See Front Desk Enterprises, Inc.*, B-230732, June 23, 1988, 88-1 CPD ¶ 603.

dated August 12, 1987, which held that annual leave or leave without pay (LWOP) should be charged for the use of excess military leave and that waiver was not appropriate.

The statutory authority for the granting of military leave is contained in 5 U.S.C. § 6323(a) (1982). As amended in 1980, that statute provides federal employees who are members of Reserve components of the armed forces with military leave at the rate of 15 days per fiscal year with a carryover of up to 15 days of unused military leave into a succeeding fiscal year. Mr. Serpente used 28 days of military leave during the 1982 fiscal year when, in fact, he was entitled to use only 16 days of military leave (1 day carryover from fiscal year 1981 and 15 days for fiscal year 1982) during the year. Accordingly, there was no statutory authority for granting him the 12 additional days of military leave.

The agency later determined that Mr. Serpente should have been charged LWOP for 12 days and that he was therefore overpaid salary in the amount of $1,695.36. Mr. Serpente requested waiver of the overpayment of pay under the provisions of 5 U.S.C. § 5584 (1982).[1]

Mr. Serpente states that his records substantiate that he is often called to perform active military duty and that as a result of frequent military recalls, his military leave record eventually developed errors. Mr. Serpente states that during 1982 when he used the military leave in question, he was informed by the payroll office that he had an adequate amount of military leave to cover his periods of active duty. Mr. Serpente also states that he was first notified of his negative military leave balance in June 1986, and he contends that, had he been made aware of the 12-day overpayment in a timely manner, he would have used annual leave or LWOP during his military training.

The Navy Accounting and Finance Center questions whether an overpayment of pay due to excessive use of military leave is subject to waiver when the employee had annual leave available at the time of usage.

Opinion

Under the provisions of 5 U.S.C. § 5584 (1982) and 4 C.F.R. parts 91-93 (1988), a claim of the United States against an employee arising out of an erroneous payment of pay or allowances may be waived, in whole or in part, by the Comptroller General of the United States or the head of the agency concerned.

With regard to waiver of erroneous amounts of annual leave, we have held that waiver of excess annual leave is appropriate when, as a result of a later adjustment to an employee's leave account, it is shown that the employee has taken leave in excess of that to which he was entitled, thereby creating a negative balance in his annual leave account. Otherwise, there is no overpayment which may be considered for waiver under the waiver statute since the error is susceptible to correction through reduction of the employee's positive leave balance.

[1] We note that he subsequently substituted annual leave for the 12 days of excess military leave.

Franklin C. Appleby, B-183804, Nov. 14, 1975; B-176020, Aug. 4, 1972; B-166848, June 3, 1969.

However, in a decision involving indebtedness for home leave, we held that waiver would be available for use of excess or erroneously granted home leave. *Lamoyne J. DeLille,* 56 Comp. Gen. 824 (1977). We noted that home leave and annual leave are authorized under separate statutes; they have different requirements for accrual and accumulation; the purposes for granting each form of leave are different; and there is no authority to allow lump-sum payment for home leave. *DeLille, supra.* Each of those distinctions apply equally to military leave. Thus, we conclude that excess or erroneously granted military leave may be subject to waiver under 5 U.S.C. § 5584 (1982).

In determining whether waiver should be granted in this case, we point out that pay or allowances arising out of administrative errors may be waived by the Comptroller General if collection "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a). However, such authority may not be exercised if there is an indication of fraud, misrepresentation, lack of good faith, or fault on the part of the employee. There is no evidence of fraud, misrepresentation, or lack of good faith by Mr. Serpente; however, it appears that he is not without fault in the creation of the overpayment.

In determining whether the actions by an employee are reasonable under the circumstances, we take into consideration such matters as the employee's position, knowledge, experience, and length of service. *See Carolyne Wertz,* B-217816, Aug. 23, 1985; *John R. Hanson,* B-189935, Nov. 16, 1978. We note that Mr. Serpente was a supervisor in the Industrial Relations Office, Personnel Operations Division at the Shipyard, a grade GS-12 level employee with approximately 18 years of federal service. We believe that in view of his frequent usage of military leave while on active duty for training as a Commander in the Naval Reserve, he should have been familiar with the limitations on military leave. Therefore, we conclude that Mr. Serpente was at least partially at fault in not being aware that he had only 16 days of military leave for usage during the period in fiscal year 1982 when he used 28 days of military leave. Accordingly, waiver of the overpayment of pay is denied.

B-231712, November 22, 1988

Military Personnel

Relocation

■ Variable housing allowances

■ ■ Eligibility

■ ■ ■ Amount determination

Service member who paid cash for his home may not prorate the purchase amount monthly in order to include it in his "monthly housing cost" for purposes of obtaining a full Variable Housing Allowance (VHA). The purpose of a VHA is to defray housing costs in those parts of the United States

where housing costs are especially high, and since the allowance is intended to be attuned to members' actual housing costs, a member who has no actual out-of-pocket housing expense does not qualify for the full allowance.

Matter of: Lt. Colonel Carey L. Freeman—Variable Housing Allowance—Allowable Expenses for Offset

We are asked whether a service member who paid cash for his house may prorate the amount he paid on a monthly basis in order to receive a full Variable Housing Allowance (VHA).[1] We conclude that such proration is not permissible.

A VHA, authorized by 37 U.S.C. § 403a (Supp. IV 1986), is paid to a service member who is entitled to a basic allowance for quarters (BAQ) if he or she is assigned to duty in a high cost housing area of the United States. Until the section was amended in 1985 by Public Law 99-145, § 602(c)(2), 99 Stat. 637, a member's actual housing costs were not directly relevant in determining the amount of VHA he or she received. Presently, however, the law requires that a member's monthly VHA be reduced by one-half of the amount by which his total VHA and BAQ exceed his "monthly housing costs." 37 U.S.C. § 403a(c)(6)(A).

In this case, Lt. Colonel Carey L. Freeman purchased a home in Poquoson, Virginia, with cash he received as part of an inheritance. Because Colonel Freeman was able to pay cash for the property, he did not receive a mortgage loan and, thus, has no monthly mortgage payment. Colonel Freeman's monthly housing cost thus consists only of hazard liability insurance, real estate taxes, etc., so that he does not qualify for VHA. In order to qualify for the full VHA to which he otherwise would be entitled, Colonel Freeman requests that the amount he paid in cash for the property be prorated, monthly, over the period of time he would have taken to purchase the home with mortgage financing, and that the prorated amount be included in his monthly housing costs for VHA purposes.

In our recent decision, *Variable Housing Allowance,* B-228860, B-229281, Aug. 19, 1988, 67 Comp. Gen. 578, we decided essentially the same issue. In that case, a member who paid cash for his home requested that he be permitted to include as a monthly housing cost his "opportunity cost"—the interest or return on investment he calculated he lost each month on the money he paid for his house rather than take out a mortgage and invest that money. We did not allow that "cost" because whether the member in fact incurs such a "cost" depends on the yet to be determined investment performance of his home versus another investment, and including opportunity costs would present a serious administrative problem in view of the many financial alternatives available to home buyers. We also noted that the services had some administrative latitude in implementing the VHA statute, and they explicitly had chosen not to include such costs in the definition of "monthly housing costs."

[1] The request for decision was submitted by the Chief Accounting and Finance Branch, Headquarters 1st Tactical Fighter Wing (TAC), Langley Air Force Base and assigned PDTATAC Control No. 88-8 by the Per Diem, Travel and Transportation Allowance Committee.

Moreover, the purpose of a VHA is to defray housing costs in those parts of the United States where housing costs are especially high. The 1985 amendments to the program were enacted due to congressional concerns about the cost of the program and to more closely attune the allowance to members' actual housing costs. *Variable Housing Allowance,* B-224133, Dec. 22, 1987, 67 Comp. Gen. 145. As stated above, Colonel Freeman's actual monthly housing costs are limited to items like insurance and taxes.

In view of our recent decision and the intent of the 1985 amendments to the VHA program to tie the payment of VHA to actual monthly housing costs, the monthly proration of a cash purchase of a house is not permissible in calculating the "monthly housing cost" of a service member.

B-230730, November 23, 1988

Civilian Personnel

Travel

■ Travel expenses

■■ Documentation procedures

■■■ Burden of proof

Civilian Personnel

Travel

■ Travel expenses

■■ Vouchers

■■■ Fraud

Employee's claim for reimbursement for lodging expenses is denied where the agency has met its burden of proof that claims for subsistence expenses were tainted by fraud. The agency investigation clearly revealed fraudulent statements on a travel voucher, and the failure to prosecute criminally for fraud does not preclude administrative action on a voucher where fraudulent action is strongly indicated.

Matter of: Department of the Navy—Fraudulent Travel Voucher

An employee of the Department of the Navy has appealed our Claims Group's settlement which denied his claim for reimbursement of lodging expenses for a period of temporary duty.[1] For the reasons that follow, we affirm our Claims Group's determination.

Background

The employee worked at the Puget Sound Naval Shipyard, Bremerton, Washington, when he was sent on temporary duty to the Portsmouth Naval Shipyard, New Hampshire, from April 17 to June 15, 1978. He submitted a travel

[1] Z-2862799, February 16, 1988.

voucher for the period and claimed lodging expenses of $1,376.89 as part of his expenses for temporary duty. His total claim was in excess of $2,000.

The Naval Investigative Service (NIS) investigated this employee and several other employees who also performed temporary duty at Portsmouth. The NIS determined that the employees had shared rooms at the Anchorage Motor Inn and had submitted inflated lodging receipts for reimbursement. In 1981, the Navy found as a result of the NIS investigation that this employee was indebted to the United States for $2,064.25, since a fraudulent claim for lodging taints the entire claim for per diem on days for which fraudulent information is submitted. 59 Comp. Gen. 99 (1979). Our Claims Group concurred in the Navy's determination and denied the employee's claim.

The employee says that he signed a travel reimbursement voucher which had not been filled out and that the voucher indicated that he stayed at the Meadowbrook Motor Inn during the entire period. The employee states further that the only receipts presented were for the Meadowbrook Motor Inn. Therefore, since there is no reference to the Anchorage Motor Inn or accompanying receipts, he alleges that there is no evidence that he submitted a fraudulent travel voucher. The employee also states that the United States Attorney's dismissal of the charges against him discredits the NIS investigation.

Opinion

We agree with the employee that the travel reimbursement voucher which he signed does not indicate that he stayed at the Anchorage Motor Inn. However, the amount shown as the actual cost of lodging on the voucher was $1,376.89. The employee indicated in a sworn statement before an NIS investigator 18 months later that this amount was inflated by $635.57 and that he knew at the time he submitted his travel voucher that the lodging receipts were not correct. This statement was corroborated by the employee who shared a room with the employee at the Anchorage Motor Inn.

Where an agency investigation clearly reveals that an employee included fraudulent statements in a travel voucher in order to obtain funds from the government, the agency has met its burden of proving that claims for subsistence expenses for those days are tainted by fraud. *Mark J. Worst,* B-223026, Nov. 3, 1987. It is clear from the investigative report submitted by NIS, which we have reviewed, that the employee purposely submitted a false statement to the agency concerning his lodging arrangements in Portsmouth. We have also consistently stated the view that the failure to prosecute criminally for fraud does not preclude administrative action on a voucher where fraudulent action is strongly indicated. 60 Comp. Gen. 357 (1981); B-219887, Jan. 21, 1986.

Accordingly, our Claims Group's settlement is sustained.

B-232419, November 23, 1988

Procurement

Sealed Bidding
■ Bids
■■ Judgmental errors
■■■ Error correction
■■■■ Propriety

Procuring agency properly denied protester's request to increase the price of its low bid because of alleged mistake of failing to apply a state use tax where the protester intentionally did not include the tax in computing its bid.

Matter of: Oregon Electric Construction, Inc.

Oregon Electric Construction, Inc. (OEC), protests the denial of its request to correct a mistake in its bid under invitation for bids (IFB) No. DACW57-87-B-0052, issued by the Portland District of the Corps of Engineers. OEC failed to apply a Washington state use tax in computing its bid price and requests that it be permitted to upwardly adjust its price to reflect the tax.

We deny the protest.

The IFB was issued on June 19, 1987, for the installation of government and contractor furnished equipment to operate the specialized control systems at the Dalles-John Day projects which are located on the Columbia River in the states of Washington and Oregon. The IFB advised that bidders would be held responsible for all state, federal, and local taxes and that the contract price should include these taxes. State, federal, and local taxes were defined as all taxes and duties, in effect on the contract date, that the taxing authority is imposing on the transactions or property covered by the contract. The state of Washington imposes a 7 percent use tax on all property, including government furnished property, installed in facilities in Washington.

At bid opening on April 7, OEC submitted the low bid of $537,709, and the next low bid was $641,500.

The government estimate for the work was $1,037,128. Since OEC's bid price was 51.8 percent of the government estimate and 16.2 percent lower than the next low bid, the Corps requested that OEC verify its bid. On April 15, OEC notified the Corps of a mistake in bid.

OEC advised that in computing its bid it mistakenly failed to include the 7 percent Washington state use tax which it had learned after bid opening would be levied against government furnished property. Therefore, OEC requested the Corps to upwardly adjust its bid by $36,673, derived by applying the 7 percent factor to the government furnished property listed in the IFB to be installed on the Washington side of the project. Included with this request was an affidavit from the OEC employee who prepared its bid, which indicated that the tax was not included in the bid because there was no reason to believe that the Washington use tax applied to government furnished property.

The Corps denied OEC's request to correct its bid. Federal Acquisition Regulation (FAR) § 14.406-3(a) (FAC 84-32) provides that a bidder may be permitted to correct a bid only if clear and convincing evidence establishes both the existence of the mistake and the bid actually intended. The Corps relied on our decisions holding that correction does not extend to situations where the bidder discovers the omission of a factor after bids are opened which was based on a particular judgment that later proved to be unwise or incorrect. *See Central Builders, Inc.*, B-229744, Feb. 25, 1988, 88-1 CPD ¶ 195. The Corps advised OEC that it could either withdraw its bid or accept award at the original bid price.

On July 19, 1988, OEC filed a complaint in the United States District Court for the District of Oregon seeking declaratory and injunctive relief. OEC and the Corps subsequently entered into a settlement agreement whereby the Corps permitted OEC to accept award of the contract while reserving the right to have the matter considered by our Office within 10 days of the contract award. The contract was awarded to OEC on August 17.

Whether there is clear and convincing evidence of a mistake and of the intended bid, as required under FAR § 14.406-3(a), in order to permit correction, is a question of fact, and we will not question an agency's decision based on this evidence unless it lacks a reasonable basis. *Northwest Builders*, B-228555, Feb. 26, 1988, 67 Comp. Gen. 278, 88-1 CPD ¶ 200. Correction of a mistake in bid is not permitted where the alleged mistake is based on an incorrect premise which a bidder discovers after the opening of bids. *Central Builders, Inc.*, B-229744, *supra*. To allow such a "correction" would impermissibly permit a bidder to recalculate its bid to arrive at a bid never intended before bid opening. *American Dredging Co., Inc.*, B-229991.2, Sept. 15, 1988, 88-2 CPD ¶ 248. While the amount of the tax can be determined by resort to the government furnished property listed in the IFB, there is no evidence that OEC intended to include the use tax in computing its original bid price. On the contrary, the OEC employee who prepared the bid admits that he did not intend to include the tax. Therefore, the Corps properly did not permit OEC to correct its bid.

OEC also suggests that the IFB may have been misleading concerning the requirement to apply the use tax to government furnished property because other government solicitations have included a special clause telling bidders how to apply the Washington use tax to government furnished property. However, the IFB specifically advised that bidders would be responsible for all taxes, and the Corps reports that none of the other bidders made a mistake in this regard, and further that it has never included such a clause in its solicitations. Accordingly, we find that the Corps did not mislead OEC with respect to the bidders tax obligations under the IFB.

The protest is denied.

B-232610, November 23, 1988

Procurement

Competitive Negotiation
■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Agency decision to eliminate protester from competitive range was reasonable even though it resulted in a competitive range of one. The totality of the major and minor deficiencies found by the evaluators in the protester's proposal provide adequate support for the decision.

Procurement

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

Protest alleging apparent defects in a request for proposals is untimely where it was not filed prior to the closing date for receipt of initial proposals.

Matter of: Rice Services, Ltd.

Rice Services, Ltd., protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. DTCG39-88-R-00628, issued by the Coast Guard for full food services at the Coast Guard Academy in New London, Connecticut. Rice argues that the deficiencies the agency identified in its proposal were either minor or incorrect and therefore did not constitute valid grounds for elimination of the proposal from the competitive range. The protester also argues that the RFP's staffing-level requirements were vague.

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

The RFP, which contemplated the award of a firm, fixed-price contract, was issued on June 29, 1988. Technical considerations were to be given more weight than price. The RFP listed seven technical factors, each of which was accorded equal weight; food, personnel, quality control program, sanitation, housekeeping plan, inventory control and business management/corporate experience.

On the August 3 closing date the agency received three proposals. The agency eliminated one of the proposals immediately because it failed to address significant portions of the RFP. After evaluating the initial proposals of the remaining two offerors the Coast Guard informed Rice by letter dated August 30 that its proposal was excluded from the competitive range. The letter listed at least one deficiency under the factors of food, personnel, sanitation and business management/corporate experience.

The protester argues that the agency's decision to exclude it from the competitive range is generally incorrect and specifically disputes three of the listed deficiencies. The areas disputed are the proposed staffing levels under the person-

nel factor, and Rice's experience and its strike contingency plan under the business management/corporate experience factor.

In reviewing protests concerning the evaluation of proposals and the resulting determination of whether a proposal is in the competitive range, our Office's function is not to reevaluate the merits of proposals and make our own determinations. Proposal evaluation is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. *Tiernay Turbines Inc.*, B-226185, June 2, 1987, 87-1 CPD ¶ 563. We will not disturb an agency's decision as to who is to be included within the competitive range absent a clear showing that it was unreasonable. *BASIX Control Systems, Corp.*, B-212668, July 2, 1984, 84-2 CPD ¶ 2. We will, however, scrutinize more closely any determination as this one that results in only one offeror being included in the competitive range. *Aydin Corp.*, B-224354, Sept. 8, 1986, 86-2 CPD ¶ 274.

Here, the evaluators identified several major deficiencies in Rice's proposal in four of the seven areas. The evaluators found that Rice's proposal could not be made technically acceptable without major revisions. While we agree with the protester that some of the deficiencies noted seem to be relatively minor, we also find that several of the deficiencies were substantial, and that in totality, the deficiencies identified by the agency adequately justify the determination to eliminate Rice from the competitive range. *See Aydin Corp.*, B-224354, *supra.*

The record indicates that the evaluators were particularly concerned about the staffing levels Rice proposed. Specifically the evaluators noted that Rice proposed 30.36 hourly employees to staff the cadet dining facility which allowed Rice 5.33 minutes per meal to prepare, cook, serve and clean after each meal. The evaluators believed this to be inadequate in view of the government estimate of 55 full time equivalents (FTE) [1] needed for the cadet facility. This would allow 9.77 minutes per meal. Additionally, the evaluators asked Rice to clarify [2] the overall personnel staffing levels it submitted in its initial proposal and to explain how it arrived at the hours and levels indicated. The record shows that in several employee position categories the number of employees Rice specified did not correlate with the total FTE hours per week it specified. For instance, Rice listed 19 full-time Cook II employees and 18 part-time; based on 40 hours per week, this equals 760 hours for full-time Cook II employees alone, however, Rice listed only 487 hours per week total. Rice argues that it proposed enough employees to meet the total RFP requirement of 74.5 FTE for both the cadet and the enlisted dining facilities. It explains the lower staffing figures by stating that since the RFP also provided that staffing levels could be proportionately reduced during off-peak periods such as when cadets are on vacation, it reduced its staffing to an average figure. The Coast Guard responds,

[1] The solicitation calculated the number of employees on the basis of full-time employee equivalents. For example, two part-time employees both working 20 hours per week or one full-time employee working 40 hours a week both equate to one FTE.

[2] While not denominated discussions, the agency did contact Rice after the submission of its proposal in order to "clarify" its proposed level of effort.

and we agree, that Rice still, however, did not explain as requested by the agency, how it arrived at the reduced hours proposed, in other words, what formula it used to produce the proposed level of effort. The evaluators determined that Rice's failure to clarify this after it was asked to do so left the proposal seriously flawed since the agency was unable to evaluate this portion of Rice's proposal. It also resulted in a conclusion on their part that Rice did not adequately understand the scope of the effort required to perform the services. We cannot conclude from the record that the agency acted unreasonably in determining that Rice's failure to account for the method of reduction was a serious deficiency.

The next area of disagreement is corporate experience. Here, the evaluators concluded that Rice did not have the minimum RFP requirement of 5 years experience in managing food service programs of comparable size and scope to that solicited. Rice maintains that since it has been in business for over 25 years and is currently successfully performing three of the largest food services operations in the Army that this alleged deficiency must be erroneous. The Coast Guard responds that through telephone contact it determined that Rice's experience did not include family style dining or the type of special events and functions that are a part of the Coast Guard Academy requirement. Additionally, the agency determined that of the numerous contracts Rice listed in its proposal to evidence its experience, all but one were contracts where the food and supplies were furnished by the government whereas this contract will require that these items be furnished by the contractor. The one exception noted was not, according to the agency, comparable in scope and complexity to this requirement. Other than to insist that it can easily accommodate these differences, the protester does not refute the agency's position. Consequently, we have no basis upon which to disagree with the agency's judgment in this regard.

The final deficiency which the protester specifically disputes concerns Rice's strike contingency plan. While this does not appear to be a particularly significant deficiency, the protester has chosen to dispute it. The evaluators concluded that six of the seven steps in the protester's plan could not be implemented within 1 day as Rice proposed. The protester argues that it could easily adjust the plan during discussions and argues that in any event it has a union agreement that prohibits strikes and the government is protected by a performance bond.

According to the agency, the requirement for the strike contingency plan was in part to enable the agency to determine whether the offeror has the expertise to minimize disruption of the food service in an emergency situation. In the evaluators' view, Rice's plan which must be completely implemented in the day before the work stoppage, was impractical and did not demonstrate that Rice had the requisite expertise in this area. This conclusion is not refuted by the protester's insistence that in its view such a plan will not be needed. Its proposal did not explain that the plan offered was based on the premise that it would not have to be implemented. Consequently, the protester has not shown that the agency evaluators' view in this regard was unreasonable.

The protester does not specifically respond to the remaining deficiencies listed in the agency's August 30 letter other than to generally argue that they are minor and easily correctable. In this regard, the record shows that the evaluators found Rice's menus to be repetitious, not in conformance in many instances to the RFP portion size and preparation specifications and comprised of generally inexpensive and/or canned and frozen items when fresh food was readily available. Additionally, the record shows that the evaluators considered Rice's proposal deficient because it did not submit 6 weeks of breakfast menus for the enlisted dining facility as required by the RFP. This made the evaluation of their nutritional content impossible.

The evaluators also listed as deficiencies the failure of Rice's dietitian to meet the RFP's 3-year experience requirement, and the designation of the lead cook as supervisor of sanitation staff in the absence of managers. We do not agree that by their nature these problems are necessarily minor and easily correctable.

It is an offeror's obligation to submit an adequately written initial proposal in order to establish that what it proposes will meet the government's needs. *Educational Computer Corp.*, B-227285.3, Sept. 18, 1987, 87-2 CPD ¶ 274. We find that the Coast Guard reasonably determined that substantial significant information was either omitted or not clearly set forth in Rice's proposal and that its proposal consequently was deficient in several areas. Rice disagrees with the agency's conclusion that the revisions required to make its initial proposal acceptable are of such magnitude as to be tantamount to the submission of a new proposal but offers no evidence other than its mere disagreement with the judgment of the contracting officials which is not sufficient to show the agency acted unreasonably. *The Camarillo Group Ltd.*, B-227926, Sept. 14, 1987, 87-2 CPD ¶ 246.

Rice also alleges that the RFP's staffing-level requirements were vague. It believes the RFP did not clearly explain how the FTE requirements were to be met and states that the agency failed to adequately clarify the requirements despite Rice's requests concerning this subject. The record shows that the agency and the protester had extensive discussions concerning these matters prior to the final closing date for receipt of proposals. If the protester was not satisfied with the solicitation as amended, it was incumbent upon it to either protest to the agency or our Office prior to the solicitation's closing date. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Its current protest of these matters was not filed with our Office until well after that time and it is untimely and will not be considered. *IMR Services Corp.*, B-230586, June 9, 1988, 88-1 CPD ¶ 548.

The protest is denied in part and dismissed in part.

B-229440, November 25, 1988

Military Personnel

Pay

■ Retirement pay

■■ Property distribution

■■■ Former spouses

Notwithstanding a 1986 modification to a divorce decree giving her a direct interest in her former husband's retired pay, the former spouse of a retired U.S. Army member is not entitled to receive direct payments from the retired pay of the service member since the original divorce decree issued in 1977 awarded the retired pay solely to the member. According to the Uniformed Services Former Spouses' Protection Act and implementing regulations, a subsequent amendment of a court order issued on or after June 26, 1981, to provide for a division of retired pay as property is unenforceable.

Matter of: Phyllis M. Tharp—Direct Payment of Former Spouse's Military Retired Pay

This decision concerns whether the U.S. Army properly denied Mrs. Phyllis M. Tharp's application for direct payments from the retired pay of First Sergeant Ernest N. Tharp as called for by a 1986 modified divorce decree issued by a Washington court. After reviewing the information before us, we hold that the U.S. Army acted correctly since it has no authority to make direct payments to Sergeant Tharp's former spouse from his retired pay in the circumstances of this case.

Background

The Tharps were married on January 21, 1946, and divorced in the state of Washington on November 17, 1977. In its decree of divorce the court stated: "The plaintiff [Sergeant Tharp] should be awarded as his sole and separate property, free and clear of any and all claims of the defendant . . . all retirement benefits and other pension rights the plaintiff has accumulated incident to his employment." In turn, Mrs. Tharp was awarded "in lieu of an interest in the retirement benefits accrued for the benefit of the plaintiff incident to his employment during the marriage of the parties a judgment in the sum of $44,877.72. . . ." Sergeant Tharp was to make monthly payments of $358.38 until this judgment was paid.

Mrs. Tharp later brought an action in the court which had granted the divorce and this court entered an Order Vacating Decree which modified the original order so as to give Mrs. Tharp an interest in Sergeant Tharp's retired pay. This order was issued on October 13, 1986. Sergeant Tharp appealed this new order and the court of appeals for the state of Washington affirmed the trial court.

The Army refused to honor the 1986 court order and make direct payments to Mrs. Tharp on the basis that for purposes of making direct payments to Mrs. Tharp the court order was unenforceable.

Discussion

With the passage of the Uniformed Services Former Spouses' Protection Act,[1] which added section 1408(d) to title 10 of the United States Code, former spouses of retired service members became eligible to receive direct payments of a portion of their former spouse's military retired pay to satisfy a court-ordered division of property. However, section 1006(b) of the Act, 10 U.S.C. § 1408 note, provides that in the case of a court order that became final before June 26, 1981, payments under section 1408(d) "may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications." *See also* 32 C.F.R. § 63.6(c)(7) (1986), which states in pertinent part that:

A modification on or after June 26, 1981, of a court order that originally awarded a division of retired pay as property before June 26, 1981, may be honored for subsequent court-ordered changes made for clarification, such as the interpretation of a computation formula in the original court order. For court orders issued before June 26, 1981, subsequent amendments after that date to provide for a division of retired pay as property are unenforceable under this part.

Conclusion

We agree with the Army's conclusion that the 1986 order is an unenforceable amendment to the 1977 divorce decree. The 1986 order does not clarify the 1977 decree, but modifies and alters the original award to Mrs. Tharp by giving her an interest in Sergeant Tharp's retired pay contrary to the language of the court's 1977 order. The plain language of the statute and its implementing regulations specifically render this type of modification unenforceable.

Accordingly, we hold that the U.S. Army properly has denied Mrs. Tharp's application for direct payments from her former husband's retired pay.

B-232017, November 25, 1988

Procurement

Competitive Negotiation
■ Requests for proposals
■ ■ Cancellation
■ ■ ■ Resolicitation
■ ■ ■ ■ Information disclosure

Recompetition of procurement is not required despite evidence that agency official, following evaluation of initial proposals, may have disclosed confidential source selection information to one firm participating in procurement, where there is no evidence of misconduct affecting the evaluation, and record indicates that competitive range determination and other source selection decisions were based entirely on appropriate considerations.

[1] Public Law 97-252, title X, § 102(a), Sept. 8, 1982, 96 Stat. 730. For a discussion of the purpose of this Act, *see* 63 Comp. Gen. 322 (1984).

Procurement

Competitive Negotiation
■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Exclusion from competitive range of technically unacceptable proposal not susceptible to being made acceptable without complete revision, and which thus has no reasonable chance of being selected for award, is proper.

Matter of: Comptek Research, Inc.

Comptek Research, Inc., protests the impending award of a contract to either one of two firms remaining in the competition, namely LTV Aerospace and Defense Company or Grumman Data Systems Corporation, under request for proposals (RFP) No. N0039-87-R-0275(Q), issued by the Space and Naval Warfare Systems Command (SPAWAR), Department of the Navy. Comptek, which was excluded from the competitive range, contends that the existence of improprieties and illegal activities on the part of an agency official in the conduct of this procurement should render invalid any contract awarded under the subject solicitation. Comptek asks that the requirement be recompeted and that it be reimbursed its proposal preparation and protest costs.

We deny the protest and the claim for costs.

Background

The solicitation requested offers for the prototype development and production of the Advanced Tactical Air Command Central (ATACC), and provided that the source selection decision would be made based on four major evaluation areas, listed in descending order of importance: cost, technical, integrated logistics support (ILS), and management/experience. The solicitation further specified that cost was the most important criterion, that both cost and technical were significantly more important than ILS, and that ILS was significantly more important than management. Although not disclosed in the solicitation, the evaluation factor weights assigned to the criteria were: cost/42, technical/40, ILS/15, and management/3.

In accordance with a source selection plan adopted for this procurement, a technical evaluation board was convened to evaluate the merits of the offerors' technical, ILS and management proposals. The board's findings, together with a summary report prepared by the board's chairman, were to be submitted to a Contract Award Review Panel (CARP), also formed pursuant to the source selection plan, which was responsible for reviewing and evaluating the proposals (with the technical assistance of the board), presenting a recommendation to the source selection authority concerning the offerors to be included in the competi-

tive range, and developing an award recommendation to the source selection authority.

Ten firms responded to the RFP. The board, in its report issued to the CARP, noted that all of the proposals had technical deficiencies, but that those submitted by LTV and Grumman nevertheless convincingly demonstrated their potential capabilities to deliver a prototype and production model. The board thus recommended that these two firms be included in the competitive range. The remainder of the firms, including Comptek, were found to have technical deficiencies so significant that their inclusion in the competitive range could not be recommended.

The board chairman, in his summary technical report, concurred with the board's competitive range recommendation with respect to all of the offerors except for United Technologies Norden Systems; he found that Norden also had demonstrated a technically acceptable and sound approach of low to moderate risk to the government and should be included in the range. The chairman emphasized the consensus of the board with respect to each offeror's prototype technical approach, *i.e.,* the software approaches proposed to meet the specified ATACC functions; LTV, Grumman and Norden were found to have demonstrated an understanding of the critical software requirements of ATACC. Two other firms were rated poor for this element, and the remaining firms including Comptek were found unacceptable.

The CARP reviewed and accepted the board's findings and used them to derive weighted evaluated scores for each proposal. (The board had rated the proposals by awarding raw points for each specified evaluation criterion; the precise numerical weights accorded to each was not disclosed to the board.) In addition, the CARP point-scored the offerors' cost proposals for the purpose of calculating total weighted scores for each offeror. These scores ranged from the two highest of 64.20 and 62.41, to a low of 30.44. Comptek's score of 36.07 was the sixth highest, while Norden's score of 34.90 was seventh. On the basis of these scores, the CARP recommended to the source selection official that both LTV and Grumman be included in the competitive range (along with another offeror that rated fifth overall but whose technical approach was considered superior to the third and fourth rated offerors).

The source selection official accepted the CARP's recommendation, but also decided to include Norden in the competitive range for the same reasons cited by the board chairman. The source selection official found these four offerors, which received the four highest technical scores, to be the only offerors having a reasonable chance of being selected for award.

Discussions were held with each of the four offerors and each was requested to respond to numerous written questions and to solve a sample software problem. Based on their responses, the source selection official, as advised by both the board and the CARP, revised the competitive range to include only LTV, Grumman and Norden. These three remaining competitors were then asked to submit best and final offers (BAFOs). LTV and Grumman timely complied with this re-

quest. Norden, however, declined and instead formally withdrew from the competition, citing an ongoing procurement fraud investigation being conducted by several government agencies of alleged fraudulent conduct on the part of current and former employees of the Department of Defense (DOD), consultants and defense contractors in the ATACC as well as other procurements.

Following Norden's withdrawal from the competition, two affidavits prepared in furtherance of this ongoing investigation by Federal Bureau of Investigation (FBI) special agents were unsealed by the United States District Court for the Northern District of Texas. These affidavits revealed that both the FBI and the Naval Investigative Service indeed were conducting an investigation of fraud in the procurement and the award of contracts by DOD. Specifically, and of particular importance to this procurement, one affidavit chronicled a series of meetings and telephone conversations between a SPAWAR employee and two consultants, which suggested that Norden was the recipient of confidential information on the ATACC procurement, including the board's evaluation of initial proposals and pricing data. Information contained in these affidavits, including references to alleged misconduct in the ATACC procurement, was subsequently reported in the July 1, 1988 edition of The Washington Post; Comptek's protest to our Office was filed shortly after the appearance of newspaper accounts of the investigation.

Allegation

In view of the information contained in the unsealed affidavits, Comptek contends that all decisions made with respect to the ATACC procurement by SPAWAR cannot be considered fair and objective. Specifically, Comptek maintains that the alleged ground for exclusion of Comptek's offer from the competitive range (technical insufficiency) cannot be viewed as legitimate since the entire deliberative process was tainted by the named official's alleged illegal conduct. While acknowledging it lacks specific evidence that the SPAWAR official's conduct competitively prejudiced Comptek, the protester points to the official's supervisory authority over the board chairman and the source selection official, and his access to and knowledge of source selection information, as a sufficient basis for assuming such prejudice under the circumstances here. Accordingly, Comptek requests that we direct SPAWAR to recompete the ATACC procurement and that it be allowed to recover its proposal preparation costs and the costs of filing and pursuing this protest.

Discussion

While the record here indeed contains evidence of the possible disclosure of source selection information by a SPAWAR official, we do not consider this alleged illegal activity [1] alone, which the record indicates benefited only Norden,

[1] It is important to note that the government official who is cited in the unsealed affidavits has not been found guilty so far of any of the alleged illegal actions.

as casting doubt on the propriety of the rejection of Comptek's proposal. There is no evidence suggesting that the official who allegedly disclosed the information either influenced or otherwise exercised control over this aspect of the source selection process. While this official had supervisory authority over the source selection official, the record demonstrates that the source selection official exercised his own independent judgment in making his competitive range determinations based primarily on the board's evaluation of proposals. Moreover, there is no evidence that any board members had any contact with, or were influenced by the official allegedly engaged in the misconduct; indeed, the board was responsible for Norden's low rating and actually recommended against including Norden in the competitive range.

Not only is there no evidence of misconduct affecting Comptek's evaluation, but our review indicates that the board's evaluation was based on a careful review of the proposal consistent with the RFP's evaluation scheme.

The board rated Comptek's proposal poor or unacceptable for each of the three evaluation criteria (technical, ILS and management). As stated in the board chairman's summary report, Comptek's proposed non-development software and its software for this procurement were found not to meet the system requirements for ATACC. For example, the board found that contrary to the specific requirements set forth in the RFP, Comptek's proposal transferred the major program risks to the government by virtue of its proposed use of government furnished computers and software. Further, it found that the non-development software items proposed were obsolete and not compatible with each other and the computer architecture proposed was inadequate and would not meet the specified 50 percent reserve capacity requirement. Additionally, the board, as stated in the chairman's report, found numerous other deficiencies in Comptek's proposal such as inadequate documentation for its proposed software as well as for its integrated software engineering plan, and also an unacceptable hardware approach. These conclusions were accepted by the CARP and eventually adopted by the source selection official.

Comptek, other than briefly questioning the solicitation's requirements regarding the use of government-furnished property (the RFP expressly provided that except for several enumerated items no other property would be furnished), has not challenged the reasonableness of any of these findings (even after discussions of each deficiency with the board chairman at the bid protest conference held in this matter); the possibility, as Comptek argues, that Norden was improperly included in the competitive range based on improper action by an agency official, provides no basis by itself to question the reasonableness of the decision to exclude Comptek from the competition. Thus, given the magnitude of the defects found in Comptek's proposal, which placed Comptek's evaluation score significantly below other offerors' scores, the source selection official had sufficient justification to exclude Comptek from the competitive range. *See DDD Co.,* B-228850, Nov. 23, 1987, 87-2 CPD ¶ 508; *Emprise Corp.—Request for Reconsideration,* B-225385.2, July 23, 1987, 87-2 CPD ¶ 75.

The seriousness of the alleged impropriety here cannot be overstated; fraudulent conduct on the part of government officials undermines public confidence in the integrity of the procurement system. As discussed above, however, there simply is no evidence that this alleged misconduct affected the evaluation of Comptek's proposal; in fact, the only evidence in the record indicates that Comptek's proposal was properly evaluated and that its exclusion from the competitive range was justified. We therefore find no basis for sustaining Comptek's protest. The further question of whether it is sound for the Navy to proceed with this procurement prior to the completion of the ongoing investigations is for the Navy to decide. In any event, our decision is not intended to preclude Comptek or any other offeror from seeking appropriate corrective action in the event that the ongoing investigations uncover additional evidence that improprieties on the part of government officials prevented fair consideration of their proposals.

Comptek argues that, notwithstanding a finding by our Office that its proposal was properly excluded from the competitive range, it nevertheless should be awarded protest and bid preparation costs in view of the illicit activities which allegedly occurred in the conduct of this procurement. In view of our finding that Comptek's proposal was properly excluded from the competitive range, and that the alleged improper agency action does not warrant corrective action, we find that Comptek is not entitled to recover its costs. *See Loral TerraCom—Request for Costs,* B-224908.6, Sept. 15, 1987, 87-2 CPD ¶ 250 (request for costs denied where, although there were other improprieties in the evaluation, protester was reasonably excluded from the competitive range).

The protest and the claim are denied.

B-232748, November 29, 1988

Procurement

Bid Protests

■ GAO procedures

■■ Interested parties

Protester that refuses to extend its offer acceptance period is not an interested party to protest award to another offeror by drawing of lots among equal low offerors.

Matter of: SuPressor, Inc.

SuPressor, Inc., protests the determination of the U.S. Army Missile Command (MICOM) to award a contract to Newport Scientific, Inc., under request for proposals (RFP) No. DAAH01-88-R-A615, for compressor assemblies for the Stinger Missile System.

The solicitation provided for award to be made to the responsible offeror submitting the low, technically acceptable proposal. SuPressor challenges MICOM's

selection of an awardee through the drawing of lots to break a tie between the equal low offers submitted by SuPressor and Newport.

We decline to address the merits of this dispute. We have been advised by MICOM that SuPressor's offer expired on November 13. The protester declined in writing the agency's request to extend its offer acceptance period, stating that it now prefers resolicitation to award under the current RFP. Our jurisdiction to consider bid protests, however, is limited to those filed by interested parties, which are defined as actual or prospective bidders or offerors whose direct economic interests would be affected by the award of, or failure to award, a contract. 4 C.F.R. § 21.0(b) (1988). In refusing to extend its offer acceptance period, SuPressor precluded any possibility that it could be awarded this contract even if we were to conclude that its challenge to selection by lot has merit; SuPressor thus is not an interested party eligible to continue with its protest. *See Lionhart Group, Ltd.—Request for Reconsideration,* B-232731.2, Nov. 4, 1988, 88-2 CPD ¶ 445; *S.J. Groves & Sons Co.,* B-207172, Nov. 9, 1982, 82-2 CPD ¶ 23; *Don Greene Contractor, Inc.,* B-198612, July 28, 1980, 80-2 CPD ¶ 74.

The protest is dismissed.

Civilian Personnel

Compensation
■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

In a prior decision we held that the erroneous overpayment representing the difference between FICA and Civil Service Retirement deductions from an employee's salary may be subject to waiver under 5 U.S.C. § 5584 (1982) and remanded the question to the agency for waiver determination on the merits. The agency took no action since it did not receive the employee's letter requesting waiver. The prior decision in this case may be considered as initiating the waiver process, thus tolling the 3-year limitation period in 5 U.S.C. § 5584, and waiver consideration may proceed under 4 C.F.R. § 92.1 (1988).

86

■ Payroll deductions
■■ Taxes
■■■ Error detection
■■■■ Statutes of limitation

An agency erroneously deducted FICA taxes instead of Civil Service Retirement from an employee's salary. In the prior Comptroller General decision regarding this matter it was held that the erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. The agency never received the employee's letter authorizing the refund of the FICA amount from the Internal Revenue Service (IRS). Inasmuch as the IRS is bound by a 3-year statute of limitations when acting on claims submitted by federal agencies for refunds of erroneously paid FICA taxes, and more than 3 years have passed, the agency is now unable to recover the FICA taxes erroneously deducted from the employee's salary.

86

■ Reduction-in-force
■■ Compensation retention

Agency abolished employee's position of Quality Assurance Specialist, GS-12, effective November 17, 1981, and offered employee a wage grade position in lieu of separation by reduction in force (RIF). Employee was erroneously notified that acceptance of Laborer position would include indefinite retention of GS-12 pay. Employee elected the lower grade position, rather than discontinued service retirement pursuant to RIF. In January 1984, employee was notified that GS-12 pay was not indefinite, but would be reduced retroactively to November 19, 1983. Employee is not entitled to pay of GS-12 position beyond statutory period of 2 years. Notice by agency official to contrary does not provide a basis to allow him additional compensation. Government cannot be bound beyond the actual authority conferred upon its agents by statute or regulations.

97

tion in furtherance of an authorized transfer, notwithstanding that the employee died before the shipment was initiated.

44

Travel
■ Permanent duty stations
■■ Actual subsistence expenses
■■■ Prohibition

An employee attending an advisory council meeting in the vicinity of her official duty station rented a hotel room rather than return to her residence, due to heavy snow and blizzard conditions, in order to ensure her presence at the meeting the next day. Her claim for lodging expenses must be denied since employees may not be reimbursed for per diem or subsistence at their headquarters regardless of unusual conditions.

46

■ Travel expenses
■■ Documentation procedures
■■■ Burden of proof

■ Travel expenses
■■ Vouchers
■■■ Fraud

Employee's claim for reimbursement for lodging expenses is denied where the agency has met its burden of proof that claims for subsistence expenses were tainted by fraud. The agency investigation clearly revealed fraudulent statements on a travel voucher, and the failure to prosecute criminally for fraud does not preclude administrative action on a voucher where fraudulent action is strongly indicated.

108

Military Personnel

Pay

■ Retirement pay

■ ■ Property distribution

■ ■ ■ Former spouses

Notwithstanding a 1986 modification to a divorce decree giving her a direct interest in her former husband's retired pay, the former spouse of a retired U.S. Army member is not entitled to receive direct payments from the retired pay of the service member since the original divorce decree issued in 1977 awarded the retired pay solely to the member. According to the Uniformed Services Former Spouses' Protection Act and implementing regulations, a subsequent amendment of a court order issued on or after June 26, 1981, to provide for a division of retired pay as property is unenforceable.

116

■ Variable housing allowances

■ ■ Eligibility

■ ■ ■ Amount determination

Service member who paid cash for his home may not prorate the purchase amount monthly in order to include it in his "monthly housing cost" for purposes of obtaining a full Variable Housing Allowance (VHA). The purpose of a VHA is to defray housing costs in those parts of the United States where housing costs are especially high, and since the allowance is intended to be attuned to members' actual housing costs, a member who has no actual out-of-pocket housing expense does not qualify for the full allowance.

106

Procurement

■ Offers
■■ Organizational experience
■■■ Evaluation
■■■■ Propriety

Where an offeror represents in its proposal that the resources of a parent company would be available to it during contract performance, the procuring agency properly may consider the experience of the parent company, as well as the subsidiary offeror's experience prior to acquisition, in evaluating the offeror's proposal.

75

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

Contracting agency acted reasonably in selecting for award of cost-reimbursement contract an offeror proposing a level of staffing that more closely conforms to actual historical manning levels rather than offeror proposing a significant reduction in staffing.

81

■ Requests for proposals
■■ Amendments
■■■ Criteria

Information disseminated during the course of a procurement that is in writing, signed by the contracting officer, and sent to all offerors, meets all of the "essential elements" of a solicitation amendment and will therefore bind both the offerors and the agency.

102

■ Requests for proposals
■■ Cancellation
■■■ Resolicitation
■■■■ Information disclosure

Recompetition of procurement is not required despite evidence that agency official, following evaluation of initial proposals, may have disclosed confidential source selection information to one firm participating in procurement, where there is no evidence of misconduct affecting the evaluation, and record indicates that competitive range determination and other source selection decisions were based entirely on appropriate considerations.

117

Socio-Economic Policies
■ Labor standards
■■ Supply contracts
■■■ Manufacturers/dealers
■■■■ Determination

General Accounting Office does not consider whether a bidder qualifies as a manufacturer or regular dealer under the Walsh-Healey Act. By law, such matters are for determination by the contracting agency in the first instance, subject to review by the Secretary of Labor, if a large business is involved.

92

■ Small businesses
■■ Contract award notification
■■■ Notification procedures
■■■■ Pre-award periods

■ Small businesses
■■ Contract awards
■■■ Size status
■■■■ Misrepresentation

Protest is sustained where, contrary to the Federal Acquisition Regulation (FAR), agency awarded a contract set aside for small business to a firm ultimately determined to be other than small without giving notice of the proposed award to other offerors for the purpose of size status protests or executing a written determination of urgency prior to award. Moreover, considering that the contract is for a 4-year period and the basis on which the awardee certified itself as a small business concern was found unpersuasive by the Small Business Administration, the continued performance of the contract would defeat a primary purpose of the Small Business Act.

69

Special Procurement Methods/Categories
■ Computer equipment/services
■■ Multiple/aggregate awards
■■■ Contract awards
■■■■ Propriety

An agency decision to procure photocopier machines and related services on a total package basis was legally unobjectionable where the agency reasonably believed that this method of contracting would: (1) increase competition for certain categories of copiers; (2) facilitate maintenance and servicing of machines; (3) reduce the user activity's costs (related to storage space, dealing with the contractor, and performance of routine functions); and (4) allow greater flexibility in redistributing copiers to meet changing user needs.

57

Specifications

■ Ambiguity allegation

■■ Specification interpretation

Offerors must be given sufficient detail in an RFP to allow them to compete intelligently on a relatively equal basis. Where the specifications are not free from ambiguity and do not describe the contracting agency's minimum needs accurately, the solicitation should be corrected and reissued.

102

■ Minimum needs standards

■■ Competitive restrictions

■■■ Justification

■■■■ Sufficiency

Protest that a solicitation requirement for 100 percent in-process inspection testing of hammer heads exceeds the contracting agency's minimum needs is denied where the record shows that the testing requirement is necessary to minimize safety risks to hammer users.

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*U.S. G.P.O. 1989-242-878:00002

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