United States General Accounting Office

GAO

Office of General Counsel

September 1989

Decisions of the Comptroller General of the United States

Volume 68

Pages 655–727

PCN 45300681100

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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September 1989

B-226956.3, September 1, 1989

Procurement

Bid Protests
■ **GAO procedures**
■ ■ **Preparation costs**

Procurement

Competitive Negotiation
■ **Offers**
■ ■ **Preparation costs**

Protester is not entitled to be reimbursed costs of preparing proposal and pursuing protest that were awarded by General Accounting Office (GAO) decision, which sustained the protest but did not recommend that the award be disturbed, where the protester subsequently sought to have award overturned in United States District Court and the court denied the protest.

Matter of: SWD Associates—Claim for Costs

SWD Associates claims the costs of preparing a proposal and filing and pursuing a protest, including attorneys fees, that it was awarded in our decision in *SWD Assocs.*, B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256. That decision sustained SWD's protest of an award to the Bankers Building by the General Services Administration (GSA) under solicitation for offers No. GS-05B-14403 for leased office space in Chicago, Illinois.

We deny the claim and modify our prior decision to eliminate our award of SWD's protest costs.

Bankers was selected for award as the lowest priced offeror. In our decision of September 16, 1987, we sustained SWD's protest because we found GSA conducted improper post-best and final offer (BAFO) discussions with Bankers to remove exceptions taken in Bankers's BAFO to solicitation requirements covering the minimum termination notice and the occupancy date. We found the award to Bankers without reopening discussions violated Federal Acquisition Regulation (FAR) § 15.611(c) (FAC 84-16) since SWD was not offered an opportunity to submit a new BAFO. Although we sustained SWD's protest, we did not recommend that the award be disturbed, inasmuch as we found the government had no right to termination within the initial 5-year phase of the lease. However, since we found GSA unreasonably excluded SWD from the procurement because of the improper post-BAFO discussions, we awarded SWD the costs of preparing its proposal and filing and pursuing its protest, including attorneys fees.

On October 5, 1987, SWD filed suit in the United States District Court for the District of Columbia to enjoin performance of Bankers's contract pending a resolicitation of BAFOs from Bankers and SWD. SWD asked the court to accept our determination that GSA's conduct of post-BAFO discussions with Bankers was improper, but to reject our recommendation that the award not be disturbed. SWD argued that, contrary to our decision, GSA did have the right to terminate the lease because GSA had illegally deleted the mandatory termination for convenience clause from the Bankers's contract.

In its answer filed in response to SWD's complaint, GSA argued to the court that the post-BAFO communications with Bankers did not constitute "discussions," but rather were "clarifications," not requiring another round of BAFOs, and that our decision was erroneous in this regard. GSA also argued that it had no termination right under the lease.

On March 31, 1988, the district court granted GSA's motion for summary judgment and dismissed SWD's complaint. *See SWD Assocs. Ltd. Partnership v. United States Gen. Serv. Admin.*, 34 Cont. Cas. Fed. (CCH) ¶ 75,468 (D.D.C. Mar. 31, 1988). In so doing, the court agreed with GSA that the post-BAFO communications with Bankers were not a clear violation of the procurement regulations and declined to follow our Office's decision on this matter. The court therefore also agreed with GSA and our Office regarding the inappropriateness of terminating Bankers's contract. SWD did not appeal the district court decision.

On November 10, 1988, SWD submitted an invoice to GSA in the amount of $82,127.10 representing its costs of proposal preparation on the solicitation and for filing and pursuing its protest, including attorneys fees. This invoice was based upon the award of such costs in our September 16, 1987, decision.

By letter dated January 12, 1989, GSA denied SWD's claim because SWD had filed suit subsequent to our decision awarding these costs and the district court decided that the post-BAFO communications, which were the underlying basis for our cost award, were not a clear violation of procurement regulations. GSA asserts that since our Bid Protest Regulations provide that we will dismiss any protest where the matter involved has been decided on the merits by a court of competent jurisdiction and since, by SWD's initiative, this matter was decided in GSA's favor by a court of competent jurisdiction, GSA is no longer required to pay SWD its costs.

SWD protests GSA's failure to pay the awarded protest costs to our Office. SWD argues that although the court did not provide the relief it requested, the court decision did not purport to overrule or modify our decision—specifically the award of protest costs. SWD argues that the court only found there was no "clear and prejudicial" violation of law in the award, which it states is a far more lenient standard of review than that employed by our Office when it determined that the Bankers's award "does not comply with statute or regulation," such that the award of protest costs was warranted. *See* 31 U.S.C. § 3554(c)(1). That is, SWD argues that the court did not find GSA's post-BAFO

communications complied with applicable regulations, and our decision on this point therefore remains binding on GSA with regard to protest costs.

We do not agree with SWD. Clearly there is an inconsistency between the conclusion reached in our prior decision and that reached by the court. The legal issue in both forums was the same: whether the agency's post-BAFO discussions with the awardee violated the procurement regulations. We concluded that prohibited discussions had occurred, while the court concluded there were only "trivial" clarifications. These different conclusions cannot logically be attributed to a difference in the standard of review applied by each of the forums. Although it is true that the court did not specifically comment on our award of costs to SWD, that award was based on our conclusion that a violation of the procurement regulations had occurred, a conclusion which the court rejected.

Under the circumstances, we agree with GSA that our award of costs should be modified. Since the court did not uphold SWD's protest, we find it inappropriate to award SWD protest costs.

SWD also argues that GSA's refusal to pay its protest costs constitutes an untimely request for reconsideration under our Bid Protest Regulations and thus should be rejected. We find no merit to this contention. Since it was SWD that elected the court action, GSA had no obligation to seek modification of our prior decision. Indeed, if GSA had made such a request, we would have dismissed the matter when SWD filed this action in the district court. 4 C.F.R. § 21.9(a), § 21.12(c); *Prince Georges Contractors, Inc.,* 64 Comp. Gen. 647 (1985), 85-2 CPD ¶ 11, *aff'd,* 64 Comp. Gen. 786 (1985), 85-2 CPD ¶ 195; *Superior Eng'r. and Elec. Co., Inc.—Recon.,* B-224023.2, Mar. 20, 1987, 87-1 CPD ¶ 318.

Finally, SWD notes that GSA did not raise the issue of SWD's entitlement to protest costs in the district court action. However, we will not decide whether GSA was required to counterclaim for the protest costs in the district court, since that court's rules are for it and not this Office to decide.

Accordingly, SWD's claim for protest costs is denied. Our prior decision is modified to withdraw our award of these costs.

B-230368, September 1, 1989

Civilian Personnel

Compensation

■ Retroactive compensation

■ ■ Compensatory time

■ ■ ■ Adverse personnel actions

■ ■ ■ ■ Retired personnel

Employee who was denied a promotion because of age discrimination is entitled to be credited with the amount of compensatory time earned by the incumbent of the position she was denied for all periods during which she would have been ready, willing, and able to perform the duties of the posi-

tion. Since the employee now is retired, she may receive overtime pay for these compensatory hours as part of her backpay award.

Matter of: Lillian B. Crosier—Backpay Award

An official of the Department of the Navy asks whether Ms. Lillian B. Crosier, who was denied a promotion because of age discrimination, may be credited with the hours of compensatory time earned by the incumbent in the position she was denied. Ms. Crosier may be credited with the total hours of compensatory time earned by the incumbent for the period in which she was ready, willing and able to perform the duties of the position. Since she retired without returning to duty, she may be paid for these hours at the rate for which she would have been paid overtime for the hours.

Background

Ms. Crosier, a civilian employee of the Department of the Navy, applied for a higher graded position, Budget Officer, grade GS-12, with the Navy. Following her nonselection she filed a complaint with the Navy alleging, among other things, that she was denied the position because of discrimination based upon her age. The Secretary of the Navy found that she had been discriminated against on the basis of age and was therefore entitled to a retroactive promotion with backpay. Since she had retired by the time of the decision, the Navy correctly awarded her backpay for all periods that she was ready, willing, and able to perform the duties of the Budget Officer, GS-12 position.

Ms. Crosier seeks to be credited with 151.7 hours of compensatory time as part of her relief. This is the amount of compensatory time earned by the incumbent in the Budget Officer position for the period for which Ms. Crosier is entitled to receive backpay. Since she is now retired, she asks to be paid for these hours as part of her backpay award.

Opinion

The basis of Ms. Crosier's action was the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1982). We have held that when an employee is successful in an age discrimination action, an appropriate remedy is a retroactive promotion and backpay consistent with the Back Pay Act, 5 U.S.C. § 5596 (1982). *See Francis J. Pinkney III,* B-213604, May 15, 1984. *See also Albert D. Parker,* 64 Comp. Gen. 349 (1987); 62 Comp. Gen. 239 (1982).

In computing Ms. Crosier's backpay, she is entitled to receive all pay and allowances she would have received had she initially been given the promotion. *See Harold Darefsky,* 66 Comp. Gen. 422 (1987). If she had returned to duty, then we would authorize adjustment of her leave accounts to reflect 151.7 hours of compensatory time for her use. *See generally Francis J. Pickney III,* B-213604, *supra.* Likewise, had the incumbent of the position Ms. Crosier sought been paid overtime, we would approve overtime pay as part of her backpay award. *See*

Ronald J. Ranier, et al., B-207997, Aug. 23, 1983. Here, however, while Ms. Crosier's leave account would reflect 151.7 hours of compensatory time as a result of the backpay correction, since she is now retired we must decide whether she can be paid for unused compensatory time.

Generally, an employee who retires without using compensatory time does not get paid for these hours but must forfeit them. *Henry J. Bender*, B-202026, Aug. 18, 1981. If, however, an employee did not use her compensatory time for reasons beyond her control, such as the exigencies of the service or the failure of the agency to approve her request for time off, then she may receive overtime pay for unused compensatory time. *See* 31 Comp. Gen. 245 (1952); *Charles E. Jarvi*, B-217937, Nov. 26, 1985.

In the present situation, we consider Ms. Crosier to be entitled to receive payment for the 151.7 hours of compensatory time at overtime compensation rates. Since she retired before the backpay award, she could never use the compensatory time that she would have accrued but for the discriminatory action. Therefore, she should be paid for the compensatory time which she did not use for reasons beyond her control. *See generally* 31 Comp. Gen. 245, *supra*, citing 26 Comp. Gen. 750 (1947).

Accordingly, Ms. Crosier's backpay award may include payment of 151.7 hours of compensatory time at the overtime rate applicable to these hours when they would have been accrued.

B-235409, September 1, 1989

Procurement

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

Protest is sustained where agency determined that urgency required that competition be limited to local gravel sources, and then failed to solicit offer from protester solely due to his non-local mailing address, even though agency was fully aware that protester owned local gravel pit.

Matter of: Charles Snyder

Charles Snyder protests the award of a contract to S & J Enterprises, under request for proposals (RFP) No. F65501-89-R-0030, issued by the Department of the Air Force for gravel aggregate to be used at King Salmon Air Force Station, Alaska. The requirement called for an indefinite quantity of gravel aggregate for the summer 1989 construction season (up to 25,000 cubic yards), plus 4 option years (up to 20,000 cubic yards for each year). Snyder argues that he was improperly excluded from the solicitation process and thereby precluded from submitting a proposal under the solicitation.

We sustain the protest.

The RFP in issue here represents the agency's second attempt to meet this gravel requirement. On February 1, 1989, the Air Force issued RFP No. F65501-89-R-0007 for this requirement, synopsized it in the *Commerce Business Daily* and sent the RFP to nine potential contractors, among them Snyder's Gravel Pit, Inc., owned by the protester. On February 23, Snyder and other interested firms attended a pre-proposal conference, but as of the closing date for receipt of proposals, March 6, only one proposal was received, the price of which was judged unreasonable. The contracting officer contacted several of the potential contractors who had not submitted proposals, including Snyder, and learned that the reason for their nonparticipation had been that their pits could not produce gravel as large as required by the RFP. The contracting officer then canceled the solicitation for lack of a reasonable price, initiated a review of the government's needs, and determined that a smaller size gravel would be acceptable.

At this juncture, however, the uncertainty of the gravel supply was threatening road repair and improvement projects considered essential to mission readiness. In this regard, since outdoor construction can only be performed at the base from May through September, any delay in a project can push the completion date too late into the fall, thus requiring that it be postponed until the next year. Hence, the need to establish a source was judged urgent and compelling and the Air Force executed a justification and approval for less than full and open competition to justify the use of oral negotiations with potential vendors in the immediate area only, pursuant to the authority of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). The contracting officer limited the firms solicited to the one which had responded to the previous solicitation, plus the three firms from the mailing list of the previous solicitation with mailing addresses in the King Salmon area. The protester was omitted from the mailing list because he had not submitted a proposal under the original solicitation, and his mailing address was Kenai, Alaska, several hundred miles from King Salmon.

The four firms on the mailing list were invited to a preproposal conference at the base on March 15 to discuss the requirement and so that negotiations could be initiated with interested parties. The requirement apparently was not otherwise advertised. Of the four, only Moorcroft Construction and the awardee, S & J, attended. During the course of discussions and on-site investigations, the government was informed that a local gravel pit was owned by Snyder and operated by Moorcroft. A written RFP was issued on March 21 and mailed to each of the four potential offerors. It provided that offers could be submitted orally or in writing by the closing date, March 27, and that oral negotiations would be conducted subsequently with all interested parties. A pre-negotiation briefing was held on March 29 and S & J was selected for award as the low responsive, responsible offeror, without further discussions. After denial of an agency-level protest, Snyder filed a protest with our Office. Performance of the contract has not been stayed due to an agency finding that the urgent and compelling status

of the requirement, because of the short construction period, precludes delays in performance. *See* 31 U.S.C. § 3553(d)(2) (Supp. IV 1986).

Snyder does not challenge the Air Force's finding that the requirement here was urgent, but claims simply that the urgency did not justify excluding him from the competition strictly on the basis of his mailing address being outside the King Salmon area, since (1) he was readily accessible by mail or by telephone; (2) he had demonstrated his interest in the procurement and his accessibility by his attendance at the February 23 pre-proposal conference under the previous solicitation; and (3) he did own a gravel pit local to the King Salmon area, as the Air Force was fully aware, and that he, not Moorcroft, operated that pit with personnel and equipment leased from Moorcroft.

The Air Force claims that its decision to solicit only the firm that had responded to the previous solicitation and those that appeared to be located in the immediate area was proper given the urgency of the requirement. The agency states it had a good faith belief that it was soliciting proposals from all possible sources and that, although it became aware that Snyder owned a local pit, the contracting officer believed Snyder's interests were being represented by another firm, Moorcroft, which currently was operating Snyder's pit. The Air Force has determined, however, that it would not be in the government's best interest to exercise the options under the circumstances; it has advised the contracting activity to recompete those requirements, affording Snyder an opportunity to submit an offer.

Generally, CICA requires contracting agencies to obtain full and open competition through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (Supp. IV 1986); *TeQcom, Inc.,* B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700. An agency may use other than competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency were not permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2) (Supp. IV 1986); *Data Based Decisions, Inc.,* B-232663, B-232663.2, Jan. 26, 1989, 89-1 CPD ¶ 87. When proceeding on the basis of such urgency, however, the agency still is required to request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e) (Supp. IV 1986); *Fairchild Weston Systems, Inc.,* B-225649, May 6, 1987, 87-1 CPD ¶ 479.

We find that the Air Force did not meet this standard here. Although we see nothing objectionable in the Air Force's decision to limit competition to local gravel suppliers based on the urgency caused by the short construction season, the limitation did not warrant excluding Snyder from the competition. The record clearly shows that the Air Force was fully aware, prior to receipt of proposals, that Snyder was a gravel supplier; that he was interested in competing if the size of the required gravel was reduced; and that he had a local gravel pit (which actually is adjacent to the awardee's gravel pit). In other words, Snyder not only fell within the class of firms the Air Force intended to solicit, but the Air Force was, or should have been, fully aware that this was the case.

The Air Force advances two principal reasons for excluding Snyder: (1) Snyder's mailing address was outside the base locale; and (2) the Air Force believed Snyder's interests were represented by Moorcroft. Both reasons are unpersuasive. First, since the agency's concern in imposing the limitation was apparently avoiding delays that might result from long-distance transportation of gravel, the address of the gravel pit itself, not the mailing address of the owner, was the proper consideration for purposes of deciding which firms to solicit; again, Snyder's gravel pit was in the local area. The Air Force also indicates it did not want to contract with an owner out of the local area, but it does not explain how doing so would cause delays in the procurement or otherwise negatively affect performance. In this regard, the record shows that Snyder was accessible by mail and telephone, often was present at the gravel pit, and had attended other meetings at the facility; it is not apparent to us why a more constant presence would be necessary for negotiations or contract performance.

Similarly, it is unclear to us why the Air Force believed Snyder's interests were being represented by Moorcroft. Snyder was included on the original mailing list and attended the pre-proposal conference, and the agency contacted Snyder after only a single proposal was received on the first solicitation to determine why Snyder had not submitted an offer. In its report on this matter, moreover, the Air Force indicates that it decided not to solicit Snyder, not because Snyder already was represented in the competition, but because of the local area restriction. Thus, notwithstanding that the government was advised by Moorcroft that it was operating Snyder's pit, these facts show that the Air Force either knew or should have known that Snyder and Moorcroft were unaffiliated beyond that contractual arrangement and that Snyder's pit was available for this procurement. In these circumstances, the agency's reliance on the advice of Moorcroft, a potential competitor of Snyder, was at its own risk, and does not justify the failure to solicit Snyder when the facts indicate that Snyder's pit was available and that Snyder was interested.

We conclude that the Air Force improperly failed to solicit Snyder, and sustain the protest on this basis. Because contract performance continued in the face of Snyder's protest due to urgent and compelling circumstances, it is not practicable to recommend that the Air Force resolicit the base requirement. We do recommend, however, as the Air Force proposes, that it not exercise the options under S & J's contract, and instead recompete for its needs beyond the base year. We also find the protester entitled to recover the costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988); *Data Based Decisions, Inc., supra.*

The protest is sustained.

B-235435, September 1, 1989

Procurement

Noncompetitive Negotiation

■ **Use**

■■ **Justification**

■■■ **Urgent needs**

Agency—a wholly-owned government corporation engaged in sales to other government agencies—properly limited competition for required raw materials to six of nine potential sources where agency properly conducted procurement under Federal Acquisition Regulation § 6.302 (unusual and compelling urgency provision) because (1) the raw material order had to be quickly placed to obtain both a source of supply able to meet production and delivery deadlines and a price low enough to avoid a loss on agency's contract with another government agency; (2) an incorrect telephone number on the agency's source list thwarted the agency's attempt to seek a quotation from the protester; and (3) there is no evidence of a deliberate attempt by the agency to exclude the protester from the competition.

Procurement

Noncompetitive Negotiation

■ **Use**

■■ **Justification**

■■■ **Urgent needs**

Agency—a wholly-owned government corporation funded by proceeds from sales to other government agencies—properly ordered its entire production-run requirement for raw material under a limited competition procurement where agency obtained competitive prices from six offerors, and immediate purchase of the entire requirement was necessary to secure source of supply and current prices, in order to ensure that agency would meet its delivery deadlines and avoid a loss on a contract to sell the resulting production to another agency.

Matter of: Tan-Tex Industries

Tan-Tex Industries protests the award of a contract to EnPro Corporation by Federal Prison Industries, Inc. (UNICOR), for raw material used in the fabrication of mailbags.[1] UNICOR conducted the procurement under the limited competition provision of Federal Acquisition Regulation (FAR) § 6.302 (unusual and compelling urgency) in order to secure quickly a source of supply at the current market price so that it could both meet the delivery dates and avoid a loss on a $6 million mailbag contract with the U.S. Postal Service. Tan-Tex contends that the agency improperly invoked FAR § 6.302, that Tan-Tex was improperly denied an opportunity to compete for the requirement, and that the agency should have ordered less than its entire raw material requirement under the circumstances of limited competition.

We deny the protest.

[1] Federal Prison Industries, Inc., is a wholly-owned government corporation operating under the tradename UNICOR. UNICOR's inmate laborers use the material (Codura nylon duck cloth) to make mailbags. Codura yarn is manufactured by E.I. Dupont; however, only a few mills (weavers) are able to weave the yarn into the cloth which must then be finished by "converters" such as Tan-Tex and EnPro. UNICOR purchases the material under contract from converters, and manufactures it into mailbags.

The Postal Service solicitation under which UNICOR was competing called for delivery of finished mailbags beginning in August 1989. UNICOR understood from conversations with the Postal Service and potential suppliers that it had to act quickly—placing an order before April 28, 1989, the anticipated award date for the Postal Service contract—to ensure availability of the raw material. UNICOR had learned that The Osterneck Company of North Carolina, in anticipation of the Postal Service award, had already reserved much of the limited loom time available at the few mills able to work the yarn. Moreover, UNICOR heard that the Postal Service was about to award another contract requiring the same raw material which would further increase the demand at the few mills able to supply the raw material. Believing that it would have to act before the Postal Service began awarding contracts in order to obtain (1) a source of supply able to meet production and delivery deadlines, and (2) a price low enough to avoid a loss on the contract, UNICOR prepared a statement of urgency and a justification for other than full and open competition which was approved on April 26.

UNICOR had previously solicited verbal price and delivery quotations for the raw material from a list of nine known suppliers in the course of pricing its bid for the Postal Service contract. On April 27, UNICOR again used the list to solicit limited competition. UNICOR telephoned the suppliers, telling those it reached that they had through the next day to submit offers. Six of the nine suppliers responded with prices. UNICOR did not reach the protester because, although the protester's name appeared on the list, its telephone number was incorrect. On April 28, UNICOR awarded a $2,821,340 contract to EnPro. In May, the U.S. Postal Service awarded two mailbag contracts, one to UNICOR, and one to Osterneck.

Tan-Tex first contends that UNICOR's use of other than full and open competition procedures was improper because the loom shortage on which the urgency was based did not exist.

Generally, procurements must be conducted using competitive procedures. *See* 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986). However, an agency may use other than competitive procedures where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency did not limit the number of sources from which bids or proposals are solicited. 41 U.S.C. § 253(c)(2); FAR § 6.302-2(a)(2). We will object to the agency's determination to limit competition based on unusual and compelling urgency only when the agency's decision lacks a reasonable basis. *Colbar, Inc.,* B-230754, June 13, 1988, 88-1 CPD ¶ 562. Here, we find that the record supports UNICOR's determination that an urgent situation existed which justified its decision to limit competition.

Tan-Tex argues that the agency determination is based on incorrect information. In support of its argument, TanTex has provided letters from three mills capable of producing the raw material. One mill claims that it had the capacity to produce the raw material at the time UNICOR was soliciting sources and that it continues to have the required capacity. The second mill states that it

has the capacity to weave the required yardage within normal textile leadtimes from receipt of an order. The third mill states that it had the capacity as of April 28, to produce the required yardage.

UNICOR reports that the three mills named by the protester were not on its source list and therefore were not contacted by UNICOR. UNICOR reports that it acted on the basis of the market information provided by its suppliers, and that its suppliers had advised UNICOR that only one mill had dedicated sufficient capacity to meet the requirement, that all other mills were operating on a "subject to prior sales" basis, and that quick action was required to secure both production commitments and price protection since the price of the yarn was increasing.

UNICOR is a wholly-owned government corporation which carries out its mission to employ inmate laborers in part by entering into contracts to manufacture items for sale to other government agencies. Its operations are sustained solely by the revenues produced by its operations. Consequently, both production commitments and price protection are important to the agency's continuing operation. In this case, UNICOR's ability to perform the $6 million Postal Service contract depended upon its promptly obtaining a source of supply at a price low enough to provide a return over cost. Since UNICOR operates in a commercial sphere, we think that it can reasonably apply a business perspective to its determination of whether a particular procurement presents an urgent and compelling situation. The need to quickly secure both a source for a raw material which may soon be subject to a demand in excess of supply, and a reasonable price in a rising market to meet commitments under a $6 million contract are, in our view, urgent and compelling considerations in this context. Accordingly, in our view, UNICOR properly used the limited competition exception of FAR § 6.302 under the circumstances of this procurement. *See Washington Printing Supplies Inc.,* 66 Comp. Gen. 647 (1987), 87-2 CPD ¶ 234.

Tan-Tex also argues that, to the extent an urgency existed, it was due to a lack of advance planning by UNICOR or the Postal Service. Under FAR § 6.301(c), the use of other than full and open competition may not be justified based on a lack of advance planning by the requiring activity. Tan-Tex argues that UNICOR should have planned for a potential loom shortage before it submitted an offer under the Postal Service solicitation, or attempted to negotiate a later delivery date for the mailbags with the Postal Service.

The record shows that UNICOR acted promptly to secure a source of supply once it became aware of the Postal Service procurement. Similarly, we fail to see how the requirement for advance planning required that UNICOR attempt to persuade the Postal Service to change the delivery schedule it had determined was necessary to meet its needs. Finally, to the extent Tan-Tex alleges that there was a lack of advance planning by the Postal Service, the Postal Service's actions clearly are not at issue in the protest and have no bearing on the propriety of UNICOR's actions with regard to advance planning. Accordingly, we see no basis to conclude that the urgency on which the limited competition was based was due to a lack of advance planning.

Tan-Tex also contends that it was improperly denied an opportunity to compete for the requirement because the agency failed to investigate why it was unable to reach Tan-Tex, a listed source of supply. We disagree. When using other than competitive procedures based on unusual and compelling urgency, the agency is required to request offers from as many potential sources as is practicable under the circumstances. 41 U.S.C. § 253(e); FAR § 6.302-2(c)(2). Here, UNICOR tried to contact Tan-Tex; however, an incorrect telephone number on the agency's source list thwarted the agency's attempt to seek a quotation from the protester. There is no evidence of a deliberate attempt by the agency to exclude the protester from the competition and none is alleged. Once UNICOR properly determined that competition would have to be limited, the contracting officer was vested with considerable discretion to determine the best method suited to satisfy its urgent needs. *See Engineering Research, Inc.,* B-180893, Sept. 12, 1974, 74-2 CPD ¶ 161. The record shows that on Friday, April 28, after receiving six bids and believing that an award had to be made that same day, the contracting officer determined that she had obtained as much competition as she could in the time she had and awarded the contract. Under the circumstances, we see no reason to question the contracting officer's decision to curtail solicitation after receiving six bids and proceed with award.

Finally, Tan-Tex contends that because the competition was limited UNICOR should have limited the amount purchased to a quantity sufficient to meet UNICOR's needs until UNICOR could conduct an open competition for the balance of the requirement. We disagree. The availability of the raw material was diminishing and not expected to increase, the market price was increasing and was not expected to drop, and there was no indication that the six firms solicited had not offered their best competitive prices. Under the circumstances, any delay in contracting for the required materials could only create a substantial risk that UNICOR would be unable to meet its commitments under the Postal Service contract either because sufficient material was not available or because the rising market made it impossible for UNICOR to perform without incurring a significant loss. Consequently, we find UNICOR's decision to award the entire requirement reasonable.

The protest is denied.

B-235474, September 6, 1989

Procurement

Sealed Bidding
■ Bid guarantees
■ ■ Sureties
■ ■ ■ Acceptability
■ ■ ■ ■ Information submission

Individual sureties on a bid bond were properly found unacceptable where, in their Affidavits of Individual Surety (standard form 28), they misstated and omitted essential information needed to

verify their net worths, thereby casting doubt on their integrity and ability to fulfill the surety obligation.

Matter of: Farinha Enterprises, Inc.

Farinha Enterprises, Inc. (FEI), protests its rejection as nonresponsible under invitation for bids (IFB) No. F04666-89-B0013, issued by the Department of the Air Force for repair and ventilation of the gym at Beale Air Force Base in California. The Air Force rejected FEI based on its determination that the two individual sureties on FEI's bid bond failed to submit sufficient evidence of ownership and value of the assets claimed in support of surety net worth, and that they thus were unacceptable.

We deny the protest.

The Air Force received eight bids by bid opening on March 24, 1989. The low bidder was found to have made a mistake in its bid and was later allowed to withdraw, thereby establishing FEI as the low bidder. The IFB required bidders to submit a bid bond or guaranty in the amount of 20 percent of the bid price; 20 percent of FEI's base bid amounted to $99,012. FEI submitted a bid bond naming two individual sureties and provided a completed Affidavit of Individual Surety, standard form (SF) 28, for each surety.

The SF 28 completed by the first surety indicated a net worth of $772,323, and listed as assets five parcels of real estate, four of them solely owned by him, a video store, cash, notes receivable, and equipment. The second surety indicated a net worth of $774,080, and listed as assets solely-owned real property, cash, and vehicles. Both sureties listed several other bonds on which they are sureties.

As part of its review of the SF 28s submitted with FEI's bid, the agency undertook a title search, which revealed that three of the deeds to real property that the first surety listed as solely-owned were either not recorded in his name or were held jointly by him and another party. In addition, the agency was unable to confirm ownership of certain real property allegedly owned by the second surety. As a result of these apparent misstatements, the contracting officer sent FEI a letter on March 31, requesting that FEI furnish by April 6 additional, specific documentation verifying the ownership and value of both sureties' assets.

FEI responded by providing some, but not all, of the requested information 1 day after the April 6 deadline, and the agency found that the documents furnished only confirmed its doubts as to the ownership and value of the assets claimed in the sureties' SF 28s. Since the contracting officer was unable to make an affirmative determination of responsibility, he rejected FEI's bid by letter dated April 18. On April 27, FEI filed an agencylevel protest challenging the rejection of its bid on the basis that its sureties' net worth exceeded the amount required; although FEI did not provide any new documentation with respect to the credibility or financial status of its sureties, it promised to subsequently submit additional evidence in support of its protest. When FEI failed to

do so by May 2, the contracting officer rejected the firm's bid and denied the protest. FEI thereupon filed this protest with our Office.

The acceptability of an individual surety is a matter of responsibility and may be established at any time prior to contract award. The contracting officer is vested with a wide degree of discretion and business judgment in making an acceptability determination, and this Office will defer to the contracting officer's decision unless the contracting officer lacked reasonable basis for the determination. *Carson & Smith Constr., Inc.*, B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560. We have recognized that because the purpose of the bonding requirement is to provide the government with a financial guarantee, information which calls into question the sureties' integrity and the credibility of their representations in connection with the procurement diminishes the likelihood that this guarantee will be enforceable, and may be considered by the agency in determining the sureties' acceptability. *Ware Window Co., et al.*, B-233367, B-233168, Feb. 6, 1989, 89-1 CPD ¶ 122.

Under this standard, we find the Air Force had a reasonable basis for rejecting both sureties based on the deficiencies and discrepancies in the information furnished concerning their net worths. As discussed above, contrary to their representations in the SF 28s, the sureties did not solely own certain real property, and when the contracting officer requested specific, additional documentation from the sureties to verify their ownership and the values of these and other listed assets, the sureties responded only selectively; the record still contains none of the requested information on certain of the sureties' properties, and no explanation as to why this information is missing or was inaccurate in the first place.

Further, the first surety furnished documentation showing that nearly all of the "notes receivable" listed in his SF 28 were in fact unsecured loans to a corporation that he solely owned, with no terms of repayment specified, and none of the information submitted verified the claimed value of his video store inventory. The second surety furnished a statement explaining that the cash assets he listed in his SF 28 as solely owned were actually in his name and the name of a person who was not a surety to this contract, and he failed to furnish references, as requested by the contracting officer, or other documentation to verify the amount of the claimed cash assets.

We think the agency reasonably determined that these substantial misstatements, omissions, and inconsistencies called into doubt the sureties' integrity and the credibility of their representations, thereby diminishing the likelihood that the sureties' financial guarantee would be enforceable. This determination provided a proper basis for rejecting the sureties. *See id.; Carson & Smith Constr., Inc.*, B-232537, *supra.*

FEI contends that, despite the informational problems concerning certain assets, its sureties possessed other unquestioned assets establishing adequate worth. It is our view, however, that once a surety's integrity reasonably has been called into question, then notwithstanding the alleged adequacy of any un-

misstated assets, the agency is justified in rejecting the sureties. Again, this reflects the nature of the surety obligation as a financial guarantee and the importance we think an agency is entitled to place on the accuracy, thoroughness, and verity of surety financial information. In any case, it is not clear that both sureties in fact possessed an adequate net worth. For example, the first surety did not submit proof that he was the sole title holder to four of the five pieces of real estate listed (and did not apportion the claimed equity among the five properties); could not satisfactorily document the claimed value of the video shop inventory; listed as notes receivable unsecured loans to his own corporation with no terms of repayment specified; and was already a surety for another $411,571 in bonds.[1]

The protest is denied.

B-233387, September 7, 1989

Civilian Personnel

Travel

■ Travel expenses

■■ Official business

■■■ Determination

■■■■ Burden of proof

A school principal employed by Department of Defense Dependents Schools, Germany Region, claims travel allowances for expenses he incurred incident to travel he performed when he received notice of the agency's proposal to remove him. The notice provided for his right to make an oral response pursuant to agency regulation. The employee's duty station was Erlangen, Germany, and the agency designated Wiesbaden, Germany, as the location for the oral presentation. The oral response, as part of the proposed adverse action process constitutes official business for which travel expenses are reimbursable.

Matter of: Gary C. Rhyne—Travel Expenses Incident to Removal Proceeding

This action is in response to a letter dated October 7, 1988, from Mr. Gary C. Rhyne, requesting reconsideration of our Claims Group's settlement Z-2865861, September 27, 1988. That settlement sustained the Department of Defense's action disallowing Mr. Rhyne's claim for travel expenses incurred on October 26, 1987, in connection with travel from Erlangen, Germany, to Wiesbaden, Germany, to make an oral response to a proposed notice of removal. The opportunity to make an oral response is provided for by agency regulation and the loca-

[1] FEI also argues that we should sustain its protest on the basis that the contracting officer improperly rejected FEI's bid as "nonresponsive" when the bid bond was proper on its face. However, while the financial acceptability of an individual surety is a matter of responsibility and not responsiveness, the contracting officer's use of the word "nonresponsive" rather than "nonresponsible" in rejecting FEI's bid is of no legal consequence. *See Aceves Constr. and Maintenance, Inc.*, B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7. It is plain from the record that the contracting officer in effect made a nonresponsibility determination when rejecting FEI's bid.

tion was designated by the agency. For the reasons which follow, Mr. Rhyne is entitled to travel expenses incident to this trip.

Background

The record shows that Mr. Rhyne was employed as principal of the Erlangen Elementary School by the Department of Defense Dependent Schools, Germany Region. On October 2, 1987, he was issued a Notice of Proposed Removal. The notice provided for the opportunity to respond to the proposed adverse action both orally and in writing, based upon section E.2.f. of DSG Regulation 5752.2, March 8, 1984, entitled "Department of Defense Dependents Schools, Germany Region, Adverse Actions."

The Dependents Schools designated Dr. Robert E. Lundgren, Deputy Director, DODDS - Germany Region, Wiesbaden, Germany, as the official to receive Mr. Rhyne's response to the proposed action. Apparently Mr. Rhyne chose to respond both in writing and orally. To make his oral response he traveled by private automobile on October 26, 1987, from Erlangen to Wiesbaden, and returned, at his personal expense, a distance each way he claims of about 200 miles. Upon return, Mr. Rhyne submitted a voucher for travel expense reimbursement which the agency has refused to pay.

The Director, Germany Region, Dependents Schools, reported to our Office that Mr. Rhyne was not directed to appear in Weisbaden, but only given the opportunity to do so, and that his travel was a voluntary election. He further states that the agency neither issued travel orders nor was the issuance of such orders authorized. The Director further notes that the claimant was a nonpreference eligible in the excepted service, and that his entitlement to make an oral reply was only as provided by agency regulations cited above.

The Director summarized his reasons for rejecting Mr. Rhyne's request for reimbursement for travel expenses as follows. Applicable regulations do not include a specific reference to payment of travel expenses for this purpose, but provide for the payment of travel expenses of "official travel" only, defined as only travel which is in connection with business of the government. The Director maintains that reimbursement is within the agency's discretion, based upon its consideration of the best interest of the employee and the government, and he emphasizes that Mr. Rhyne was not directed to appear before the deciding official, but only given the opportunity to do so.

Opinion

The provisions of law regarding the personnel system for teachers in the overseas schools are set forth at 20 U.S.C. §§ 901-907 (1982),[1] and include authority

[1] Defense Department Overseas Pay and Personnel Pratices Act, Public Law 86-91, July 17, 1959, 73 Stat. 213, as amended.

under 20 U.S.C. § 902 for the Secretary of Defense to issue implementing regulations.

The agency's administrative report on Mr. Rhyne's case indicates that Mr. Rhyne's entitlement to make an oral reply was only as provided by agency regulations which are equivalent to those in 5 C.F.R. Part 752, implementing 5 U.S.C. Chapter 75, concerning adverse actions. The agency specifically refers to 5 C.F.R. § 752.404(c) which requires, in cases of removal actions, that the agency grant the employee a reasonable amount of official time to respond and that it designate an official to hear the employee's oral response.[2] As is indicated previously, the agency states that neither its regulation granting the right to an oral response nor 5 C.F.R. § 752.404(c), after which its regulation is patterned, provide for payment of travel expenses for the employee to present the response. The agency does not consider such travel as being on official business for which travel allowances are payable.

In similar circumstances, however, we have long considered such travel as being official business and reimbursable as such. For example, on this basis we have allowed reimbursement of travel expenses incurred by employees incident to their agency's hearing of their legitimate grievances as authorized by Executive Order. 21 Comp. Gen. 382 (1941). Similarly, we held that where a statute conferred upon an employee a right to an oral hearing on his appeal concerning his efficiency rating, necessary travel required to attend such a hearing must be considered official business and the expenses so incurred are reimbursable to the extent authorized by travel regulations. 31 Comp. Gen. 346 (1952). *See also,* 33 Comp. Gen. 582 (1954); and *Lawrence D. Morderosian,* B-156482, June 14, 1977.

We recognize that in Mr. Rhyne's case his travel was performed to make an oral response to a proposed adverse action, and not to attend a formal administrative hearing as in the above-cited decisions. Nevertheless, we consider his travel to be official business because it was necessary for him to travel to effectuate his right to make an oral reply to the designated agency official at the critical time before a final decision to take action had been made. The location selected for the hearing was determined by, and in the complete control of, the agency. We believe it would be unreasonable to have the right to make an oral response made dependent on the economic capability of the employee to sponsor his own travel to a location chosen by the agency. Accordingly, Mr. Rhyne's travel was on official business and the necessary and allowable travel expenses he incurred are reimbursable.

Therefore, our Claims Group's disallowance of the claim is overruled and payment on Mr. Rhyne's travel voucher should be made in accordance with applicable travel regulations. The voucher and the request for official travel submitted to us are returned to the agency for action.

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[2] This provision in effect restates the requirements of 5 U.S.C. § 7513(b).

B-235424, September 7, 1989

Procurement

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

Solicitation which limits the award of contracts for a given group of courses to a single academic institution in the United States European Command is not legally objectionable where, after consideration of logistical, demographic and economic factors on a theater-wide basis, the procuring agency concludes that its solicitation is the most practicable and will most advantageously fulfill the needs of the military student population.

Matter of: Chicago City-Wide College

Chicago City-Wide College (CCC) protests the terms of request for proposals (RFP) No. DAJA37-88-R-0345, issued by the Department of the Army for the acquisition of postsecondary undergraduate education services in the United States European Command. CCC argues that the terms of the RFP violate § 1212(b) of the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, 99 Stat. 583, 726 (1985), codified at 10 U.S.C. § 113 note (Supp. IV 1986).

We deny the protest.

Background

In late 1985, Congress passed § 1212 of the Department of Defense Authorization Act, *supra,* concerning the competing of educational services for military personnel. Section 1212(b) provides that:

> No solicitation, contract, or agreement for the provision of off-duty postsecondary education services for members of the Armed Forces of the Department of Defense, or the dependents of such members or employees, other than those for services at the graduate or postgraduate level, may limit the offering of such services or any group, category, or level of courses to a single academic institution. However, nothing in this section shall prohibit such actions taken in accordance with regulations of the Secretary of Defense which are uniform for all armed services as may be necessary to avoid unnecessary duplication of offerings, consistent with the purpose of this provision of ensuring the availability of alternative offerors of such services to the maximum extent feasible.

After the statute's passage, the Department of the Air Force issued a solicitation, acting on behalf of itself and for the Army and Navy, for the procurement of off duty undergraduate educational services for the Pacific theater. That solicitation, which limited the award of each category of courses to a single educational institution, was the subject of an earlier protest to our Office. *Chicago City-Wide College,* B-228593, Feb. 29, 1988, 88-1 CPD ¶ 208 *aff'd* July 19, 1988, 88-2 CPD ¶ 64. In those decisions, we upheld the actions of the Air Force in limiting the number of educational institutions in each course category on the basis that the agency had reasonably concluded that "unnecessary duplication" within the meaning of the statute, would result if more than one educational

provider were permitted to offer courses in each category in the Pacific theater. In reaching that conclusion, we determined that certain "interim guidance" which had been issued by the Office of the Secretary of Defense (OSD) and applied to acquisitions by all branches of the service, properly implemented the statute and properly permitted consideration of various economic, demographic and logistical factors for purposes of making "unnecessary duplication" determinations. In essence, we found reasonable the Air Force's determination because the supply of educational services in the Pacific theater necessarily involved the servicing of many small, minimally equipped installations which were thousands of miles apart and because the Air Force stated that it needed to balance enrollments at large installations against small installations for purposes of economic viability. We also concluded that there was nothing legally objectionable in making an "unnecessary duplication" determination on a theater-wide basis.

Subsequent to the first protest, the OSD issued permanent guidance with regard to the making of "unnecessary duplication" determinations. *See Department of Defense Instruction* (DODI), No. 1322.19 (May 9, 1988), *codified at* 32 C.F.R. pt. 72 (1988). That DODI differs from the interim guidance in that it eliminates consideration of status of forces agreements in making "unnecessary duplication" determinations and allows the determination and finding (D&F) to be based upon satisfaction of any one of four enumerated criteria rather than all four criteria. The four criteria, one of which must be satisfied to limit the number of providers of postsecondary education services, are that the demographic distribution of the potential student population prevents the effective delivery of education services by multiple providers, adequate classroom and administrative space to meet education program needs is unavailable, educational staff need to manage education programs at the installation level is not available, and the theater commander cannot provide reasonable logistic support to multiple providers.

The European theater

Currently in the European theater, the three branches of the armed forces receive their educational services under separate contracts which were entered into prior to the passage of section 1212(b) *supra*. The majority of educational services in the European theater are procured by the Army and the Air Force, due primarily to the significantly larger number of installations which these two branches of the services maintain in Europe. Under the current contracts, the Air Force maintains a "single provider" system under which each course category is offered theater-wide by a single institution. This current arrangement involves services being rendered pursuant to four separate contracts which were awarded to four separate institutions. The Army currently maintains a "multiple provider" system called the Contracted Education Services Program (CESPRO). Under the Army scheme, educational providers compete at each "military community" for the exclusive right to offer a particular course

category. Currently the Army retains under contract some five educational institutions.[1]

The Current RFP

The solicitation which is the subject of the current protest is based upon a D&F issued by the cognizant authority on September 7, 1988.[2] That D&F provides authorization to limit the offering of any particular group of courses to a single academic institution, pursuant to DODI 1322.19, *supra*, to avoid duplication of services. It specifically finds that the demographic distribution of the student population in the theater precludes the effective delivery of services by more than one institution and necessitates the balancing of enrollments at large installations against small installations; that there is inadequate administrative office and classroom space to accommodate more than one provider per course category; that logistical support for contractors is only on an "as-available" basis and cannot reasonably be extended to multiple providers; and that there is insufficient Department of Defense educational staff to manage multiple providers.

The RFP provides for the award of one or more contracts on the basis of essentially nine contract line item numbers (CLINs). Each CLIN is comprised of a discrete group of courses, for example, lower level vocational technical training, lower level liberal arts, upper level liberal arts, etc. In addition, the RFP contemplates the award of one or more base year contracts and provides for the exercise of options for up to an additional 4 years.

In terms of performance requirements, the RFP requires contractors to offer "programs" at all Army, Navy and Air Force sites, communities and locations (numbering in excess of 600) but requires that actual instruction be given only at some 184 locations.

The protester argues that the Army's decision to preclude more than one institution from offering courses in a given course category and finding of "unnecessary duplication" in the European theater is violative of section 1212(b) *supra*, and is unsupportable in the European theater. Specifically, CCC argues that, as to the geographic area, the European theater is a small, densely organized field of operation. CCC notes by way of comparison that the Pacific theater, which was the area involved in the prior protest under section 1212(b), is a vastly larger area covering thousands of miles in which travel is difficult. In this regard, CCC points out that Japan alone is roughly the same size as the European theater in terms of distance. Also in this regard, CCC points out that, unlike the Pacific theater, the European theater is an area which is equipped with the

[1] The current educational provider systems in the European theater are discussed in a 1987 report of this Office, *DOD Voluntary Education; Determining and Meeting Postsecondary Education Needs in Europe*, GAO/HRD-88-12, December 1987.

[2] When issued, the D&F contemplated the provision of educational services for only the Army and the Air Force in a geographical area roughly comprised of continental Europe, Great Britain, and the Sinai. Subsequently, the RFP was amended to include services for the Navy and to include the countries of Iceland and Bahrain.

widest variety and greatest concentration of transportation resources including modern highways and roadways, railroads and metropolitan mass transit systems. Moreover, while CCC acknowledges the existence of a few remote locations within the European theater (*e.g.,* Iceland, the Sinai, Bahrain) it argues that these few remote locations cannot be used as a pretext upon which to base a determination to eliminate multiple providers in the European theater which is, in the main, compact.

As to the demographic distribution of the potential student population, CCC argues that, on the whole, potential students are located either at closely-clustered large installations or at satellite locations in close proximity to the larger installations. In support of this argument, CCC points out that well over half of all the military installations in the European theater are located in Germany alone and that similarly large "clusters" exist in England and other parts of Europe. In addition, CCC points out that the "satellite locations," which in many instances are no more than 5 miles distance from their larger supporting installations have mass transit systems and sophisticated road systems connecting them to larger bases, providing easy access for students commuting for purposes of receiving instruction. In this respect, CCC suggests that the Army's use of the over 500 remote locations in support of its D&F is misleading, since educational providers are required under the RFP to give instruction at only 184 locations, thereby necessitating some travel by at least a portion of the student body.

As to the unavailability of logistical support for contractors in the European theater, CCC argues that there exists no requirement that the agency provide unlimited logistical support such as administrative office space and military communications networks. In this regard, CCC points out that this is tacitly acknowledged in the RFP which states that the various logistical support requirements will only be provided to contractors on an "as available" basis. CCC also notes in this regard that it (and presumably other contractors now servicing the European theater) currently maintains at its own expense administrative office space and telecommunications facilities. CCC makes a similar argument with regard to the provision of classroom space.

Finally, as to the unavailability of Department of Defense (DOD) educational staff, CCC alleges that the agency has provided no support for its assertion that the DOD educational staff currently available will be less burdened by a "single provider" system than a "multiple provider" system.

In sum, CCC challenges the Army's determination that only a "single provider" system is practicable, arguing that the continued existence of a "multiple provider" system (*i.e.* CESPRO) along with the current presence of some nine educational providers in the theater suggests that the Army's D&F is based essentially upon administrative convenience. We are unpersuaded by these arguments.

As we noted in our previous decisions regarding section 1212(b), our Office's review of the agency's actions in limiting the award of course groups to a single

institution is limited to consideration of whether the agency's actions are reasonable and within the statute's requirements. In this regard, we emphasized as well that there was nothing legally objectionable in the procuring agency giving consideration to economic and logistical concerns in its decision making nor was there anything legally objectionable in an agency giving consideration to these factors on a theater-wide basis where it concludes that this is the most practicable method of assessing its needs. We reached these conclusions based upon our opinion that Congress, in passing the statute, intended to give the Secretary of Defense or his designee the responsibility to determine how to most advantageously meet the needs of the military student population based on the statutory language.

Here, we cannot conclude that the Army has acted unreasonably in limiting to a single provider any particular group of courses. As to the distribution of the potential student population, the record shows that, in fact, far less of the potential student population is stationed at large bases than CCC contends in support of its position. The Army states that, while there exist certain "clusters" in the European theater, there are also many remote sites which are a substantial distance apart. The Army points out, and the record shows, that two-thirds of the entire Army population in Europe are stationed at installations of 1,000 or less personnel and that there are some 200 remote Army installations with less than 500 service members. In this regard, the Army points out that many soldiers who are stationed at remote sub-locations are constrained by either the nature of the mission which they are conducting (*i.e.* cannot leave their duty stations) or simply the lack of transportation facilities which CCC alleges to exist. As to the Air Force presence in Europe, the record shows that 57 percent of the Air Force personnel are stationed at installations of 2,500 personnel or less and that there are some 140 remote sites with populations ranging from 10 to 1,050 service members.

The Army's D&F reveals that the Army intends to use the student populations at large installations to counterbalance uneconomic enrollment levels at smaller locations. We think this is consistent with the regulations which specifically permit the agency to consider in its determination the demographic distribution of the student population. *See* 32 C.F.R. § 72.4(b)(1) (1988). Specifically, the agency, taking into account economic considerations, determined that limiting the number of providers will enable offerors to provide services at small geographically remote installations as well as large bases. Such a determination necessarily involves the exercise of judgment and discretion. Based on this record, we cannot conclude that the Army's finding is unreasonable. As stated above, the regulations provide that the number of providers may be limited if any one of the enumerated criteria is satisfied. Since we have found that the agency reasonably determined that demographic considerations justified limiting the number of providers, we do not need to consider the other arguments advanced by the protester.

The protest is denied.

B-234060.2, September 12, 1989

Procurement

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

Procurement

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

Prior decision in which we sustained a protest and recommended termination of the contract is affirmed where the record showed that awardee improperly obtained source selection sensitive information concerning its competitor's product and where request for reconsideration does not establish any factual or legal errors in the prior decision.

Matter of: The Department of the Air Force—Request for Reconsideration

The Department of the Air Force requests reconsideration of our decision in *Litton Sys., Inc.*, 68 Comp. Gen. 422 (1989), 89-1 CPD ¶ 450. In that decision, we sustained Litton Systems, Inc.'s protest under request for proposals (RFP) No. F33657-88-R-0096, the production phase of a competition between Loral Systems Manufacturing Company and Litton for advanced radar warning receivers (ARWR) on the basis that Loral improperly obtained source selection sensitive information concerning Litton's system during a critical period in the ARWR competition.

We affirm our decision and recommendation.

The protest issue which we sustained—the improper disclosure of Litton source sensitive information—was based primarily on an affidavit unsealed in United States District Court that had been filed in support of requests for search warrants in connection with the Operation Ill Wind investigation, a criminal investigation of alleged improprieties concerning certain Department of Defense procurements.

The affidavit, prepared by a special agent of the Federal Bureau of Investigation (FBI) based on information obtained through wiretaps and other means, described improper conduct involving the ARWR competition which was limited to Litton and Loral. The affidavit stated that the Deputy Assistant Secretary of Acquisition for Tactical Systems provided sensitive procurement information to a private consultant who in turn passed the information to a senior vice-president of Loral in return for money. With respect to the ARWR competition, the affidavit stated that the consultant informed Loral of the results of the Air Force official's visit to Litton in October 1987 to evaluate Litton's ARWR development. The consultant gave Loral an opportunity to review and copy portions

of a "book" describing Litton's methodology which was prepared for a briefing Litton gave the Air Force concerning its ARWR progress. The affidavit also stated that in December 1987 the consultant obtained a paper relating to a classified briefing, which the Air Force official attended, that discussed Litton's dynamic electromagnetic environment simulator (DEES) testing of its ARWR. The affidavit further states that the consultant "has continued to provide . . . [Loral] with information about the competition that he obtains from . . . [the Air Force official]." These disclosures of information began 10 months before the production RFP was issued.

While not disputing the affidavit's contents, the Air Force argued that remedial action was not required because Litton had failed to establish that the information disclosed was proprietary, had been disclosed by an Air Force official, or had provided Loral with a competitive advantage.

We found that whether or not the information disclosed was proprietary, the record established that every page of the "book" was marked by Litton "F-16 RWR Competition Source Selection Sensitive" at the direction of the Air Force. We found that it was also clear that Loral was not entitled to access to the "book" which detailed and explained Litton's ARWR system. Further, we found that, although the affidavit did not state that the Air Force official gave the consultant the "book," given the close and continual relationship and joint actions between the consultant and the high ranking Air Force official as described in the affidavit, the clear implication in the affidavit was that the "book" was provided by the Air Force official.

We further noted that the affidavit indicated that the consultant received a paper prepared for a classified briefing on ARWR DEES testing which was limited to government officials, including the high-level Air Force official.

The affidavit also stated that the consultant knew of the briefing from the Air Force official and told Loral that he would obtain the papers concerning the testing from the government official. While the affidavit did not indicate whether Loral received a copy of the DEES testing paper, the affidavit stated that the consultant received a copy of this classified information and continued to provide Loral with information about the competition that he obtained from the Air Force official.

Based on the record, whether or not the Air Force official was involved in the actual release, we concluded that procurement sensitive documents in the Air Force's possession concerning Litton's product were obtained by Loral.

We then found that even if, as the Air Force argued, this information did not give Loral an advantage in the competition, in our view, the propriety of an award decision should not turn solely on whether or not the improperly obtained information ultimately proved to be of benefit to the wrongdoer. The propriety of the award must also be judged by whether the integrity of the competitive process is served by allowing the award to remain undisturbed, despite the awardee's misconduct. Judged by this standard, we concluded that the integrity of the system would be best served by a termination of the contract.

We recommended that the Air Force terminate Loral's contract, and then determine how it can best meet its needs for these systems in a manner which will ensure the integrity of the competitive process. We also awarded protest costs.

On reconsideration, the Air Force first argues that our decision departs from our Office's rule that where a protester's proprietary or procurement sensitive information has been leaked to a competitor, the protester must establish competitive prejudice. Second, the Air Force argues that our decision was based on wiretap evidence which may ultimately be suppressed in a criminal proceeding. The Air Force points out that the United States District Court enjoined the Air Force from using the wiretap information as a basis to suspend the high-level agency official named in the affidavit because the Air Force did not provide the official an opportunity to challenge the legality of the use of the wiretap evidence. Finally, the Air Force argues that our remedy of terminating the contract for the convenience of the government harms the government "operationally and financially" by increasing the procurement costs and further delaying the procurement for a needed military item.

As stated, the Air Force first contends that to sustain a protest in similar prior cases, we have required a finding of competitive prejudice where a competitor improperly obtained another competitor's source sensitive or proprietary information. *See, e.g. Management Servs., Inc.,* 55 Comp. Gen. 715 (1976), 76-1 CPD ¶ 74. The Air Force argues our decision in *Litton Sys., Inc.,* 68 Comp. Gen. 422, *supra,* is a departure from prior precedent. We disagree.

Where a protest decision has involved a protester's entitlement to the award, we have considered the prejudice to the protester resulting from the agency's improper action. *See Falcon Carriers, Inc.,* 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96. Here, we did not sustain Litton's protest because we found that Litton should have received the award, or even that Loral's proposal was incorrectly evaluated, as Litton alleged. Rather, we sustained the protest solely on the basis that Loral's improper conduct, by itself, without regard to its effect on the award selection, compromised the integrity of the competitive process. Our decision to sustain Litton's protest is consistent with prior precedent where the integrity of the competitive process was at issue. *See Informatics, Inc.,* 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53 and *Swedlow, Inc.,* 53 Comp. Gen. 139 (1973), *aff'd,* 53 Comp. Gen. 564 (1974), 74-1 CPD ¶ 55.

Next, the Air Force contends that our decision was improperly based on wiretap evidence which may ultimately be suppressed in a criminal proceeding. As indicated above, the Air Force points out that the United States District Court recently restrained it from suspending the high-level agency official named in the affidavit because the Air Force did not provide him an opportunity to challenge the underlying wiretap pursuant to Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et seq.* (1982).[1] It is the Air Force's position that our decision places it at odds with the district court ruling.

[1] The statute prohibits the use of wiretap information obtained in violation of law in any proceeding before any authority of the United States or a state or political subdivision. *See* 18 U.S.C. § 2515.

Initially, we note that neither the Air Force nor Loral questioned this Office's consideration of the evidence obtained from the wiretap in the original protest submissions. In fact, it was Loral who provided a copy of the redacted affidavit to our Office and to all interested parties. Neither Loral nor the Air Force presented any evidence to refute the contents of the affidavit. Indeed, Loral officials have publicly admitted that they did receive documents with respect to the ARWR procurement, though they insist the information did not change Loral's proposal. The affidavit in question has been used without objections in other bid protest proceedings of this Office. Furthermore, the Omnibus Crime Control Act, in pertinent part, permits only an aggrieved person in a civil or criminal proceeding to object to the use of wiretap evidence. 18 U.S.C. § 2518(10)(a). Here, the Air Force and Loral do not claim to be aggrieved persons as defined by the act which is limited to a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed. *See* 18 U.S.C. § 2510(11).

The FBI affidavit constituted probative evidence and was only one source of available evidence in the record that legitimately cast doubt on the integrity of the procurement process. We have previously relied on information from criminal investigations in determining the propriety of a procurement decision. *See, e.g., Ware Window Co.; Saleco-Ware Window Co.,* B-233367; B-233168, Feb. 6, 1989, 89-1 CPD ¶ 122; *Carson & Smith Constructors, Inc.,* B-232537, Dec. 5, 1988, 88-2 CPD ¶ 560.

Regarding our recommendation, the Air Force reports that it has a legitimate military need for this item and that termination of Loral's contract may unreasonably delay the program and substantially increase the costs of this procurement, since termination could result in resolicitation costs ranging from $60 to $300 million, exclusive of termination costs that might be payable to Loral.

As the Air Force knows, our recommendation was based on our conclusion that Loral's actions in this case seriously undermined the integrity of the competitive process. In view of our concern, we are unpersuaded by the Air Force's assertion of increased costs, which we find to be speculative, or its assertion of unreasonable delay, which the Air Force has not substantiated. Even if termination of the Loral contract may result in increased costs for this procurement, we nevertheless cannot ignore the serious harm to public confidence in the procurement system caused by the circumstances here. As for delay, in our prior decision we recommended that the Air Force terminate the tainted contract and take whatever actions it deems necessary to procure the requirement in a way that is consistent with preserving the integrity of the procurement process. We therefore see no need to modify our recommendation.

We also affirm the protester's claim for costs, including those incurred during this reconsideration. The protester should file its claim directly with the Air Force. If the parties are unable to agree on the amount within a reasonable time, this Office will determine the amount to be paid. 4 C.F.R. § 21.6(e) (1988).

Our prior decision and recommendation are affirmed.

B-216640.7, September 15, 1989

Civilian Personnel

Compensation
■ Overtime
■■ Claims
■■■ Statutes of limitation

Federal firefighters' request for additional retroactive FLSA compensation on the basis of a 1984 letter submitted to our Office is denied since the letter was not accompanied by a signed representation authorization or claim over the signature of the claimants so as to toll the 6-year Barring Act, 31 U.S.C. § 3702(b) (1982).

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Court decisions

Civilian Personnel

Leaves Of Absence
■ Overtime
■■ Eligibility

Our Office will follow the decision in *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987), which held that the leave with pay statutes prevent any reduction in firefighters' regular and customary pay, including overtime pay under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, when eligible employees are on authorized leave. Therefore, we will allow claims for overtime compensation for all periods of paid leave, subject to the 6-year limitation period in 31 U.S.C. § 3702(b). Our contrary decisions (60 Comp. Gen. 493 (1981), 55 Comp. Gen. 1035 (1976), B-216640, Mar. 13, 1985, B-216640, Sept. 18, 1985) are overruled.

Matter of: Federal Firefighters—Overtime Pay—Application of Barring Act—Authorized Leave

This decision is in response to a request from the Department of Justice. The issue presented by Justice is whether a 1984 letter submitted to our Office by a local union president on behalf of firefighters, who were members of the local at that time, constituted a filing of an administrative claim for purposes of tolling the Barring Act.[1] For the reasons that follow, we hold that it did not.

Background

The Justice Department is in the process of settling numerous claims for payment of backpay and interest under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1982). The plaintiffs are federal firefighters who initially filed suit in the Claims Court, in *Davila v. United States,* Claims Court No.

[1] September 29, 1984, letter from Frederick Evans, Jr., President of Local F-100, International Association of Firefighters (IAFF), to the General Accounting Office (received here October 1, 1984).

50-88C, for reimbursement of overtime for periods of paid leave. This suit is one of numerous similar suits that were brought and are part of a consolidated settlement as the result of a decision by the United States Court of Appeals, Federal Circuit, in *Lanehart v. Horner,* 818 F.2d 1574 (Fed. Cir. 1987). The *Lanehart* decision held that the leave with pay statutes prevent any reduction in regular overtime pay under the FLSA when eligible employees are on authorized leave under the provisions of 5 U.S.C. §§ 6303, 6307, 6322, or 6323.

The legal issues raised in *Lanehart* were previously considered by our Office. We concluded that federal firefighters could be allowed overtime compensation during periods of court and military leave under 5 U.S.C. §§ 6322 and 6323, but that this entitlement did not extend to periods of annual and sick leave under 5 U.S.C. §§ 6303 and 6307. *Overtime Compensation for Firefighters,* 62 Comp. Gen. 216 (1983); *David L. Gipson,* B-208831, April 15, 1983; *Frederick Evans, Jr.,* B-216640, Mar. 13, 1985, *affirmed on reconsideration,* B-216640, Sept. 18, 1985.

Counsel for the union in the present case maintains that the original 1984 letter requesting our decision in the *Evans* case, which involved an issue similar to the one in *Lanehart,* was sufficient notice of a claim so as to toll the 6-year statute of limitations as to those employees who were members of the union local at the time the letter was received in our Office. The request letter was received in our Office on October 1, 1984, and, if sufficient to toll the statute of limitations, would extend the overtime claims back to 1978 for purposes of the settlements now being effected by the Justice Department.[2]

Opinion

Barring Act

The 6-year Barring Act in 31 U.S.C. § 3702(b)(1) (1982) provides that a claim against the government presented under this section must contain the signature and address of the claimant or an authorized representative. Our regulations relating to this statutory provision are set out in title 4, Code of Federal Regulations. Thus, 4 C.F.R. § 31.2 (1988) provides that claims will be considered only when presented in writing over the signature and address of the claimant or over the signature of the claimant's authorized agent or attorney. Also, under 4 C.F.R. §§ 11.3 and 31.3 claims filed by an agent or attorney must be supported by a power of attorney or other appropriate documentary evidence of the agent's or attorney's authority to act for the claimant.

Based on these provisions, we held in a case involving application of a Court of Claims judgment and retroactive backpay under the FLSA that a simple written declaration signed by a claimant authorizing the agent to act for him and submitted to this Office with the filed claim was acceptable. *Civilian Aircraft*

[2] The settlement agreement states that an employee would be reimbursed for a 6-year period prior to commencement of an action in the District Court, Claims Court, or filing with the General Accounting Office, whichever occurs first.

Pilots, 66 Comp. Gen. 501 (1987). However, since we did not receive a signed representation authorization or claim over the signature of two of the individuals involved, we held that the Barring Act continued to run against them. *Id.* at 504.

In the present case, the President of Local F-100, IAFF submitted a request for a decision which, as previously stated, was received in this Office on October 1, 1984. Except for the signature of the president of the local, Frederick Evans, Jr., who is also a claimant, the submission was not accompanied by a signed authorization or claim over the signature of any of the members of the local at that time. Accordingly, the request letter did not toll the Barring Act for purposes of retroactive payment of FLSA claims, except as to Mr. Evans individually. However, we note that other members of the union local have subsequently filed claims with this Office, some as early as March 1985.

Lanehart Decision

While not raised by the Justice Department submission, we have reconsidered our prior decisions in view of the Court of Appeals decision in *Lanehart.* We believe that the *Lanehart* decision is a reasonable interpretation of the statutory language pertaining to firefighters' entitlement to overtime compensation for periods of annual and sick leave under the provisions of 5 U.S.C. §§ 6303, 6307.[3] *Cf. Turner Caldwell—Reconsideration in view of Wilson v. United States,* 61 Comp. Gen. 408 (1982). Therefore, we will follow the *Lanehart* decision and allow firefighters claims for overtime compensation during periods of annual and sick leave as well as periods of court and military leave. Accordingly, our decisions in *Frederick Evans, Jr.,* B-216640, *supra, Louis Pohopek,* 60 Comp. Gen. 493 (1981); and *R. Elizabeth Rew,* 55 Comp. Gen. 1035 (1976), are overruled in that regard.

B-235487, B-235487.2, September 18, 1989

Procurement

Special Procurement Methods/Categories

■ Architect/engineering services

■ ■ Contractors

■ ■ ■ Evaluation

The Federal Acquisition Regulation does not require the presence of an architect on all architect-engineer boards. The regulation only requires that government members of the board collectively have experience in architecture, engineering, construction and acquisition matters.

[3] The *Lanehart* court agreed with our statutory interpretation of 5 U.S.C. §§ 6322 (court leave) and 6323 (military leave).

Procurement

Competitive Negotiation
■ Technical evaluation boards
■ ■ Bias allegation
■ ■ ■ Allegation substantiation

The General Accounting Office will not attribute bias in the evaluation of proposals on the basis of inference or supposition such as protester's questioning of the ethnic composition of evaluation officials.

Procurement

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

Protest against alleged apparent defects in evaluation criteria for architect-engineer selection is untimely where filed after the date specified for receipt of qualification statements from the competing firms.

Procurement

Bid Protests
■ Allegation substantiation
■ ■ Lacking
■ ■ ■ GAO review

Protest that selected firm is less qualified than protester is denied where record does not demonstrate that the agency's evaluation was unreasonable.

Procurement

Competitive Negotiation
■ Offers
■ ■ Evaluation errors
■ ■ ■ Non-prejudicial allegation

A showing of prejudice is an essential element of a viable protest. Where rescoring of proposals is undertaken because original evaluation used weights inconsistent with those in the solicitation, and rescoring using proper weighting shows that selected firm is still clearly the highest rated, protester is not prejudiced.

Matter of: IDG Architects

IDG Architects protests the selection by the National Aeronautics and Space Administration's (NASA) Ames Research Center of Bentley Engineers as the firm with which to negotiate an architect-engineer (A-E) contract for on-site engineering support service at Ames. IDG alleges that NASA's evaluation of its proposal and the selection process were unfair.

The protest is denied in part and dismissed in part.

Procurement of A-E services are conducted pursuant to the Brooks Act, 40 U.S.C. §§ 541-544 (1982), as amended by Pub. L. No. 100-656, § 742, 102 Stat. 3583 (1988), and Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988), and the implementing Federal Acquisition Regulation (FAR) subpart 36.6. Under these procedures, after publicly announcing a requirement, the contracting agency convenes an evaluation board that reviews performance data and statements of qualifications submitted in response to the announcement, as well as data already filed by firms that wish to be considered for A-E contracts. The board then holds discussions with no less than three of the firms; ranks them; and submits the firms' qualifications to a selection official, who determines the most highly qualified offeror. If the agency is not able to negotiate a satisfactory contract at a fair and reasonable price with the preferred offeror, the agency enters into negotiations with the next ranked firm, and so on. *Ward/Hall Assocs. A/A*, B-226714, June 17, 1987, 87-1 CPD ¶ 605.

IDG contends that since there were no architects on the evaluation panel, the evaluation was improperly biased toward the selection of an engineering firm. IDG contends that FAR § 36.602-2(a) requires that an architect be a member of the evaluation panel and that NASA violated this regulatory requirement. That FAR section reads as follows:

> When acquiring architect-engineer services, an agency shall provide for one or more permanent or ad hoc architect-engineer evaluation boards (which may include preselection boards when authorized by agency regulations) to be composed of members who, collectively, have experience in architecture, engineering, construction, and Government and related acquisition matters. Members shall be appointed from among highly qualified professional employees of the agency or other agencies, and if authorized by agency procedure, private practitioners of architecture, engineering or related professions. One Government member of each board shall be designated as the chairperson.

The regulation only requires that the members collectively have experience in architecture, engineering, construction and acquisition matters. There is no requirement that at least one member of the board must be a professional architect. The appointment of highly qualified professional employees of the government who have the requisite experience satisfies the regulatory requirement. Here, the evaluation committee was comprised of qualified and experienced engineers, technical and business personnel. Since this contract requires more engineering than architectural effort, NASA provided an appropriate mix of relevant disciplines on the evaluation board. *See FACE Assocs., Inc.*, 63 Comp. Gen. 86 (1983), 83-2 CPD ¶ 643.

IDG also questions the ethnic makeup and sensitivity of the persons involved in the selection process including the evaluation board. The composition of technical evaluation panels is within the discretion of the contracting agency and we will not review the qualifications of panel members absent a showing of possible fraud, bad faith, or conflict of interest. *Ward/Hall Assocs. A/A*, B-226714, *supra; Martin Marietta Data Sys., et al.*, B-216310 *et al.*, Aug 26, 1985, 85-2 CPD ¶ 228. To the extent that IDG alleges bad faith or bias on the part of the evaluation and selection officials, it has produced no evidence to support this contention. We will not attribute bias in the evaluation of proposals on the basis of

inference or supposition. *Art Servs. and Publications, Inc.,* B-206523, June 16, 1982, 82-1 CPD ¶ 595.

In reviewing a protest of an agency's selection of a contractor for A-E services, our function is not to reevaluate the offeror's capabilities or to make our own determination of the relative merits of competing firms. Rather, the procuring officials enjoy a reasonable degree of discretion in evaluating the submissions and we limit our review to determining whether the agency's selection was reasonable and in accordance with the published criteria. *Ward/Hall Assocs. A/A,* B-226714, *supra.* The protester bears the burden of proving that the agency's evaluation was unreasonable, and that burden is not met by the protester's mere disagreement with the agency's evaluation. *Id.*

The *Commerce Business Daily* (CBD) synopsis provided the following evaluation criteria: (1) professional qualifications necessary for satisfactory performance of required services; (2) specialized experience and technical competence in the type of work required; (3) capacity to accomplish the work in the required time; (4) past performance on contracts with government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules; (5) location in the general geographical area of the project and knowledge of the locality of the project, provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; and (6) the volume of work previously awarded to the firm with the object of effecting an equitable distribution of contracts. The relative order of importance of the criteria was stated to be criterion 2 most important, criteria 3 & 4 approximately equal, criteria 1, 5 and 6, approximately equal.

IDG challenges NASA's evaluation of the proposals on several bases. First, IDG states that NASA evaluated Bentley's entire existing staff, rather than just those employees who would relocate to the immediate area and directly perform this project. NASA did evaluate the offerors' management, their educational background, technical competence, specialized experience, capacity to accomplish the work, previous work experience, professional qualifications, type of engineering discipline, and their proposed personnel plan. This is consistent with the evaluation criteria which do not call for restricting the evaluation of an offeror exclusively to its proposed on-site personnel.

In this connection, IDG's contention that criterion 5, location of firm, should have been given a more important ranking because of the importance of having on-site professional staff is untimely because this alleged defect was apparent from the announced evaluation criteria, and IDG did not protest this matter prior to the date of receipt of qualification statements of the A-E firms. *Charles A. Martin & Assocs.—Reconsideration,* B-222804.2, May 15, 1986, 86-1 CPD ¶ 466. In any event, we note that both Bentley and IDG are located in the San Francisco Bay area, with Bentley being slightly closer to Ames than IDG.

IDG also asserts that it was improperly given a rating for specialized experience which was lower than Bentley's. IDG states that it is the incumbent at Ames and therefore has the exact specialized experience for the job which no other

firm has. With respect to American Society of Mechanical Engineers (ASME) piping systems experience in which NASA found IDG to be weaker, IDG states that as a prime contractor for the design of major multi-million dollar facilities it is responsible for major ASME piping projects. IDG states that its construction administration performance for NASA under its present contract has been excellent and its staff has written the Construction Management Manual now being used by NASA.

NASA points out that IDG's President told it during the preselection interview that IDG had no experience with ASME or American National Standards Institute (ANSI) code analysis. NASA also states that the construction manual written by IDG for NASA has required many revisions and work by NASA's staff and it is not yet being used. While NASA recognizes IDG's on-site experience, NASA found that IDG lacked the desired depth of in-house technical capacity and experience in mechanical, electrical and civil/structural engineering. IDG was also found to have minimal corporate experience in construction management/inspection and was lacking in pressure vessel certification experience. Finally, NASA noted numerous documented problems with IDG in construction management and noted IDG's lack of depth in engineering areas. Bentley, on the other hand, was found to be a well-managed, full-service engineering firm that met all of the specialized experience requirements. NASA found Bentley to have all required disciplines in-house with substantial depth in mechanical and electrical engineering.

We find NASA's evaluation to be reasonable. A high rating in specialized experience did not require actual work at Ames, but experience in the type of work to be required. Although incumbency can indeed provide specialized experience, in view of NASA's explanation and findings as stated above, we find that NASA had a reasonable basis for Bentley's higher rating in this area.

With regard to past performance, for which IDG was rated equal to Bentley, IDG asserts that the rating does not reflect the fact that NASA has first hand knowledge of IDG's performance but has no such first hand knowledge of Bentley's performance. The fact that NASA had experience with IDG does not establish that NASA was required to find IDG's past performance superior to Bentley's. NASA found that Bentley's experience was directly applicable to the type of work it would be required to perform at Ames. NASA reasonably determined that Bentley's performance on Navy contracts substantiated its capability to respond quickly and professionally to changing government needs.

IDG also complains that under the evaluation category "capacity to accomplish the work in the required time," Bentley was rated higher than IDG because Bentley has all disciplines in-house and has in-depth capability in each discipline except architecture. IDG states that it is unfair to evaluate IDG's lack of full in-house engineering strength at its home office because when IDG was being selected under the incumbent contract NASA informed IDG that a joint venture with a nationally recognized engineering firm was not required or desired. IDG also contends that it is unrealistic to evaluate in-house capability since it cannot be utilized within the NASA service support contract.

However, whatever IDG may have been told concerning the requirements of the past contract has no bearing on the requirements of this procurement. IDG was found to lack in-depth engineering capability and was rated less favorably than Bentley which had the requisite capacity. We find NASA's analysis on this point to be rationally based.

IDG also objects to criterion 6, the volume of NASA contracts already awarded, as adversely affecting IDG. This is untimely since the matter should have been protested prior to the date for the receipt of qualification statements of the A-E firms. *Charles A. Martin & Assocs.—Reconsideration*, B-222804.2, *supra*. Similarly, IDG's protest that the solicitation should have been set aside for minorities is also untimely, for the same reason.

Finally, after IDG received NASA's report on its initial protest, IDG protested NASA's failure to evaluate the proposals in accordance with the stated order of importance of the evaluation criteria. NASA reports that criterion 4, past performance, was incorrectly treated as being worth five points more than criterion 3, capacity to accomplish the work, when the two criteria were stated to be equal in importance. NASA performed a corrected evaluation, with criteria 3 and 4 treated equally. This correction resulted in only a minimal change in the total scores, with Bentley's score slightly increasing and IDG's slightly decreasing.

IDG contends that the original improper evaluation prejudices it because it was not evaluated consistent with the stated evaluation criteria. With respect to NASA's argument that its error had no effect on the final ranking of firms, IDG argues that it should have been allowed to structure its offer with the new evaluation scheme in mind and NASA cannot guess how offerors would have structured their proposals had they submitted offers different from the ones they did submit.

A showing of prejudice is an essential element of a viable protest. *120 Church Street Assocs.—Request for Reconsideration*, B-232139.2, Mar. 7, 1989, 89-1 CPD ¶ 245. We do not think that IDG was prejudiced by NASA's failure to use the solicitation's stated weights in its evaluation. As stated above, NASA rescored the proposals, assigning the weights in a manner which accurately reflected the solicitation's evaluation scheme. The result was that Bentley marginally increased its score and IDG's score was marginally decreased. Based on this recalculation, Bentley remained the highest-rated offeror by a slightly increased margin, and therefore the calculation error provides no basis for us to overturn NASA's selection. *Dynamic Sys., Inc.*, B-233282, Feb. 15, 1989, 89-1 CPD ¶ 161; *Arawak Consulting Corp.*, B-232090, Nov. 8, 1988, 88-2 CPD ¶ 457. We note that rescoring is an acceptable method of correcting a deficient evaluation based on incorrect weighting of evaluation criteria. *Id.*

The protest is denied in part and dismissed in part.

B-235659, September 18, 1989

Civilian Personnel

Travel
■ Temporary duty
■■ Travel expenses
■■■ Reimbursement
■■■■ Fees

An employee, who failed to negotiate a travel advance check prior to her departure on temporary duty, may not be reimbursed for the fee incurred when a relative sent funds via wire service.

Matter of: Robin L. Miller—Fee for Electronic Transfer of Funds

This responds to a request for an advance decision submitted by C. K. Hardy, Finance and Accounting Officer, United States Army White Sands Missile Range, New Mexico, concerning the claim of Ms. Robin L. Miller, an Army employee, for reimbursement of a $75 fee for electronic transfer of funds. The matter was forwarded to our Office by the Per Diem, Travel and Transportation Allowance Committee, PDTATAC Control No. 89-9. For the reasons stated below, we hold that the employee is not entitled to reimbursement of the fee as part of her expenses for temporary duty travel.

Background

Ms. Miller, an employee of the Department of the Army stationed in New Mexico, was issued a travel advance by United States Treasury check dated November 1, 1988, in the amount of $1,874. On November 13, 1988, she left her permanent duty station for a 6-day training course in New Jersey, without cashing the check. After attempting unsuccessfully to negotiate the check in New Jersey, Ms. Miller had her mother send her $1,874 through Western Union. Ms. Miller now requests reimbursement of the $75 fee charged for the wire service.

Opinion

The agency asks whether the wire service fee may be reimbursed as a check cashing fee similar to the one considered in *Wayne J. Henderson,* 61 Comp. Gen. 585 (1982), or whether reimbursement may be allowed as a cost of transporting personal funds necessary for normal expenses under para. C4709-1-13 of volume 2 of the Joint Travel Regulations.

In *Henderson, supra,* we held that although the Federal Travel Regulations specifically allow exchange fees for cashing government checks issued for expenses incurred for travel in foreign countries, no such allowance exists for check cashing costs incurred incident to travel within the United States. That decision would not apply to this case since Ms. Miller did not incur the claimed expense as a result of cashing a check in a foreign country.

The Joint Travel Regulations authorize the reimbursement of the "costs of traveler's checks, money orders, or certified checks purchased in connection with official travel inside or outside the continental United States for the safe transportation of personal funds necessary for normal expenses." 2 JTR para. C4709-1-13 (Change No. 251, Sept. 1, 1986).

Although this provision does not specifically exclude reimbursement for electronic transfer of funds, the facts in this case do not warrant an inference that Ms. Miller incurred the wire service fee in an effort to protect herself against the loss of her travel advance.

Finally, in *Tracy L. Huckaby,* B-225992, July 13, 1987, we allowed reimbursement of a wire service fee incurred in obtaining a passport required for overseas travel. In that case we held that reimbursement was authorized under the Federal Travel Regulations and agreed with the agency's determination that the employee's action was necessary to the transaction of official business.[1] *See also William T. Kemp,* B-223186, Feb. 27, 1987. In *Huckaby* we held it was appropriate for the employee to use a wire service to obtain the necessary documents in order to procure the passport in time to meet her travel requirements.

In the present case the agency determined that Ms. Miller had ample opportunity to negotiate the check at her permanent duty station prior to departing on temporary duty. We agree with that determination. Furthermore, the facts do not indicate that Ms. Miller incurred the wire fees while procuring urgently needed documents necessary to her transacting official business or to protect the funds against loss or theft while she was in transit. Accordingly, we deny the claim for reimbursement for the wire service fee.

B-235583, B-235584, September 19, 1989

Procurement

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

Protest that a contracting officer's determination of nonresponsibility based on unsatisfactory performance on current contracts was made fraudulently or in bad faith is denied where the protester does not challenge negative agency report concerning its performance which provides an independent basis to find the firm nonresponsible.

Matter of: Action Building Systems, Inc.

Action Building Systems, Inc., protests the rejection of its bids under invitation for bid (IFB) Nos. GS-09P-89-KSC0019 and GS-09P-89-KSC-0099, issued by the

[1] FTR, para. 1-9.1(c)(4) (Supp. 1, Sept. 28, 1981), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1988).

General Services Administration (GSA). The protester contends that the agency acted fraudulently or in bad faith in finding Action to be nonresponsible based on unsatisfactory performance under its current contracts.

We deny the protest.

On March 9, 1989, the protester submitted the lowest of three bids received under the first IFB, for providing janitorial and related services to include grounds maintenance at the U.S. Border Station in Calexico, California. On April 5, the protester submitted the lowest of five bids received under the second solicitation, for janitorial and related services at three locations in Tucson, Arizona.

After receiving reports from the contracting officer's representatives (CORs) at Calexico and at the agency's San Diego field office that the protester's performance was unsatisfactory on its current building maintenance contracts, the agency determined the protester to be nonresponsible. The contracting officer referred that determination to the Small Business Administration (SBA) for consideration under SBA's certificate of competency (COC) procedures. Based upon its internal operating procedures, which declare a firm ineligible for COC consideration where principals have been convicted of certain offenses, the SBA refused to consider the protester's application for a COC.[1] This protest followed.

The protester essentially argues that one individual, the COR at GSA's San Diego field office, who supplied information on Action's current performance, was involved in a deliberate and willful scheme to deny Action the award of the two contracts. Concerning its current building maintenance contracts, Action believes that considering the age of the buildings and the difficulty of the tasks involved, the deductions for inadequate performance on its contracts were not excessive; the protester states that on several occasions, the COR in San Diego stated that Action was doing a good job on its contracts. Action faults the agency for not considering its successful performance under other contracts and for relying solely upon the adverse information provided by the COR at the San Diego field office. The protester believes that this COR's statements and actions in administering the protester's contracts are inconsistent with the information that the COR provided to the contracting officer. Action considers this inconsistency, along with a statement by the COR that the protester would "never get this contract again," to be evidence of fraud or bad faith.

To make a "showing" of fraud or bad faith, we require the protester to present facts that reasonably indicate that the government actions complained of were improperly motivated. *See Vanguard Indus., Inc.,* B-233490.2, Dec. 21, 1988, 88-2 CPD ¶ 615. Here, regardless of the protester's allegations of bias against the one individual, the COR in San Diego, the record shows that the contracting officer,

[1] Specifically, these offenses include those listed in Federal Acquisition Regulation §§ 9.406-2(a) and 9.407-2(a) (FAC 84-43). The president of Action had received a sentence of 3 years probation for violating California water pollution statutes; after reviewing information regarding the charges, the SBA regional office determined that under its standard operating procedures, Action was ineligible for COC consideration. The protester admits that the SBA acted in good faith in finding the firm ineligible for a COC.

in making his determination of nonresponsibility, relied upon other sources as well. For example, Action does not challenge the negative recommendation of the COR at Calexico, which contained independent grounds for the contracting officer to find Action to be nonresponsible. Therefore, the protester has failed to present facts that reasonably indicate the contracting officer's determination was improper or unreasonable.

The protest is denied.

B-233936, September 21, 1989

Civilian Personnel

Relocation

■ Overseas personnel

■ ■ Home service transfer allowances

■ ■ ■ Eligibility

An employee was assigned to a United States-Saudi Arabian Commission under the Foreign Assistance Act and his travel was governed by the Foreign Service Travel Regulations. Upon his return to the United States, he is eligible for a home service transfer allowance even though he was not between assignments to posts in foreign areas. *See William J. Shampine,* 63 Comp. Gen. 195 (1983).

Matter of: Dennis H. Shimkoski—Claim for Home Service Transfer Allowance

This decision is in response to an appeal filed by Dennis H. Shimkoski from a determination reached by our Claims Group denying his claim for temporary quarters subsistence expenses and miscellaneous expenses.[1] We find that while Mr. Shimkoski is not eligible for reimbursement of temporary quarters subsistence expenses under 5 U.S.C. § 5724 (1982), he is eligible for a home service transfer allowance under 22 U.S.C. § 4081(14) (1982 & Supp. IV 1986).

Background

Mr. Shimkoski was employed by the Department of the Treasury from February 1983 to June 1987, and was assigned to the United States-Saudi Arabian Joint Commission on Economic Cooperation in Riyadh, Saudi Arabia. His assignment was made under the authority of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2385(d) (1982), which provides that employees so assigned are to receive allowances and benefits under the Foreign Service Act of 1980, 22 U.S.C. §§ 3901 *et seq.* (1982).

At the end of his assignment in Saudi Arabia, the Department of the Treasury issued Mr. Shimkoski travel orders under the authority of the Foreign Service Travel Regulations (FSTR, 6 F.A.M. § 134) authorizing "end of tour" travel, per

[1] Settlement Certificate Z-2865838, Nov. 15, 1988.

diem, and shipment of household goods for Mr. Shimkoski and his family from Riyadh, Saudi Arabia to San Francisco, California.

Upon his return to the United States, Mr. Shimkoski accepted a position with the Food Safety and Inspection Service, United States Department of Agriculture, in Alameda, California. He signed a 12-month service agreement, and he was authorized temporary quarters expenses by Agriculture for a period of 15 days. Mr. Shimkoski claimed $4,149.88 in temporary quarters and miscellaneous expenses, but Agriculture denied his claim. Agriculture contends that he was not entitled to reimbursement of relocation expenses under the Federal Travel Regulations incident to his return to the United States and that he was not entitled to payment of a home service transfer allowance. Our Claims Group upheld the agency's denial of Mr. Shimkoski's claim. We disagree with that determination and reverse our Claims Group.

Opinion

Since Mr. Shimkoski was appointed to his overseas position under the authority of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2385(d), with allowances and benefits authorized under the Foreign Service Act of 1980, 22 U.S.C. §§ 3901 *et seq.* (1982), he is not eligible for relocation expenses under 5 U.S.C. Chapter 57 for his return to the United States. Subsection 5724(g) of title 5, United States Code, specifically provides that the allowances authorized by section 5724 do not apply to an employee transferred under the Foreign Service Act of 1980. *See Charles R. Vincent,* B-194741, Feb. 19, 1981; *Albert N. Alexander,* B-188437, Sept. 15, 1977; *Department of Agriculture,* B-186548, Feb. 28, 1977.

Similarly, there appears to be no authority to reimburse Mr. Shimkoski for relocation expenses under title 5, United States Code, after his return to the United States. Mr. Shimkoski was not transferred between duty stations upon his appointment with Agriculture since Treasury authorized his return travel to San Francisco, California, where Agriculture hired him. The report from Agriculture states that it authorized him temporary quarters expenses under the mistaken belief that his return travel from overseas was under title 5, United States Code, and the Federal Travel Regulations.[2]

The remaining question is whether Mr. Shimkoski is entitled to a home service transfer allowance as authorized under 5 U.S.C. § 5924(2)(B) or 22 U.S.C. § 4081(14) (1982 & Supp. IV 1986). The home service transfer allowance is granted to an employee for expenses incurred incident to establishing the employee at a post of assignment, and it includes a "miscellaneous transfer expense portion" which is similar to the miscellaneous expense allowance authorized under the Federal Travel Regulations and a "subsistence expense portion" which is comparable to the temporary quarters expense allowance authorized by the Federal Travel Regulations. *See William J. Shampine,* 63 Comp. Gen. 195 (1984).

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

Section 5924(2)(B) of title 5 limits payment of the home service transfer allowance at a post of assignment in the United States to instances where the employee is between assignments to posts in foreign areas. However, there is no similar limitation contained in 22 U.S.C. § 4081(14). Thus, in *Shampine, supra,* a case involving the return travel of an employee from the same United States-Saudi Arabian Joint Commission, we held that since the employee was authorized travel and relocation expenses under the Foreign Service Act, he was entitled to a home service transfer allowance under 22 U.S.C. § 4081(14) even though he was not between assignments in foreign areas. 63 Comp. Gen. at 199.

Following our decision in *Shampine,* the Standardized Regulations were amended in 1984 to distinguish between employees under 5 U.S.C. § 5924 and employees under the Foreign Service Act. The amended regulations confirm that employees are eligible for a home service transfer allowance in the United States under 5 U.S.C. § 5924 only if they are between foreign assignments. No such limitation is imposed upon employees under the Foreign Service Act of 1980. Instead, these employees need only agree to serve 12 months in the government.[3]

Since Mr. Shimkoski was transferred overseas under the authority of the Foreign Service Act of 1980 and since he agreed to remain in government service for 12 months upon his return to the United States, he is eligible for a home service transfer allowance under 22 U.S.C. § 4081(14). *Shampine, supra.* Accordingly, we conclude that Agriculture may allow Mr. Shimkoski a home service transfer allowance incident to his transfer from Saudi Arabia to the United States.

B-234849, September 21, 1989

Civilian Personnel

Leaves Of Absence
■ Leave transfer
■■ Leave substitution
■■■ Propriety
■■■■ Personnel death

Under the Temporary Leave Transfer Program for fiscal year 1988, the retroactive substitution of donated annual leave for leave without pay after the death of a leave recipient was improper. Any unused donated leave remaining to the credit of a leave recipient after his death should have been restored to the leave donors. In addition, the payment of compensation resulting from the retroactive substitution was erroneous but may be subject to waiver.

Matter of: Harold A. Gibson—Leave Transfer—Death of Leave Recipient

This is in response to a request from Ms. Jean W. Baines, Acting Assistant Director for Administration, Minerals Management Service (MMS), United States

[3] Standardized Regulations, section 251.1b, TL:SR 404, June 22, 1986.

Department of the Interior, for a decision concerning the propriety of retroactively substituting under the Temporary Leave Transfer Program for fiscal year 1988 donated annual leave for leave without pay after the death of a leave recipient. For the reasons discussed below, we find that the retroactive substitution of donated leave for leave without pay after the death of a leave recipient was improper. In addition, the payment of compensation resulting from the retroactive substitution was erroneous but is subject to waiver.

Background

On July 8, 1988, MMS approved the application of Mr. Harold A. Gibson, an employee in the Alaska office of the MMS, to become a leave recipient under the fiscal year 1988 Temporary Leave Transfer Program. At that time, Mr. Gibson was suffering from a severe illness and was undergoing extensive treatment. A few days later, on July 11, 1988, the Alaska office sent out a formal solicitation for donations of leave on behalf of Mr. Gibson, and 132 hours of annual leave were donated to Mr. Gibson by his fellow employees.

Unfortunately, on July 14, 1988, Mr. Gibson died due to complications of his illness. After being notified of Mr. Gibson's death, the Alaska office declined further offers of donations for Mr. Gibson. In addition, the Alaska office contacted the employees who donated leave to determine whether they wished to withdraw their donations. When the donors declined to withdraw their donations, the Alaska office took steps to have the 132 hours of donated leave retroactively substituted for 132 hours of leave without pay charged to Mr. Gibson earlier that year.

As a result of the retroactive substitution of donated leave, Mr. Gibson's beneficiary received $3,361.91 for these 132 hours as unpaid compensation due and payable to Mr. Gibson upon his death. The agency now questions the propriety of this retroactive substitution of donated leave for leave without pay and the resulting payment of compensation.

Opinion

The Temporary Leave Transfer Program for fiscal year 1988 was authorized as a 1-year experimental program under which the unused, accrued annual leave of officers or employees of the federal government could be transferred for use by other officers or employees who needed such leave because of a personal emergency. *See* Pub. L. No. 100-202, § 625, 101 Stat. 1329, 1329-430 (1987). Although the Temporary Program was authorized for only 1 year, a similar program has been established as a 5-year experiment under the Federal Employees Leave Sharing Act of 1988, Pub. L. No. 100-566, 102 Stat. 2834 (1988).

Under regulations issued by the Office of Personnel Management (OPM), annual leave donated under the Temporary Leave Transfer Program may be substituted retroactively for periods of leave without pay or used to liquidate an indebtedness for advanced annual or sick leave. 53 Fed. Reg. § 7327 (1988) (to be

codified at 5 C.F.R. § 630.906(d)). However, when the personal emergency affecting a leave recipient terminates, no further requests for transfer of annual leave to the leave recipient may be granted and any unused donated leave remaining to the credit of the leave recipient must be restored to the leave donors. 53 Fed. Reg. 7327 (1988) (to be codified at 5 C.F.R. § 630.909(c)).

The personal emergency affecting a leave recipient ends when the leave recipient's employment is terminated by the agency that approved the application. 53 Fed. Reg. 7327 (1988) (to be codified at 5 C.F.R. § 630.909(a)(1)). Thus, it appears, from the regulations cited above, that the purpose of the Temporary Leave Transfer Program was to provide income protection to a current employee during the period of personal emergency for which the application was approved. It further appears that the program was not intended to benefit an employee after the personal emergency ends or after the employee is separated from the federal service.

Mr. Gibson's employment terminated on July 14, 1988, the date of his death, and, based on the above-cited regulations, Mr. Gibson's personal emergency under the Temporary Leave Transfer Program also ended on July 14, 1988. At that point, according to the regulations, the agency should have restored the 132 hours of unused leave donated to Mr. Gibson before his death to the leave donors. The regulations do not provide for offering the leave donors an option whether to have their leave restored after the leave recipient's personal emergency has ended.

Therefore, we find that the retroactive substitution of donated leave for leave without pay after Mr. Gibson's death was improper. In addition, the payment of compensation in the amount of $3,361.91, resulting from the retroactive substitution, was erroneous. However, the erroneous payment of compensation may be subject to waiver under the provisions of 5 U.S.C. § 5584 (1982 & Supp. IV 1986) and 4 C.F.R. parts 91 and 92 (1988).

B-235522, September 21, 1989

Procurement

Special Procurement Methods/Categories

■ Architect/engineering services

■■ Federal procurement regulations/laws

■■■ Applicability

Contracting agency must solicit traditional surveying and mapping services by Brooks Act procedures instead of competitive proposals, since the services may be logically or justifiably performed by architectural engineering firm, whether or not related to architectural-engineering project.

Matter of: White Shield, Inc.

White Shield, Inc., protests the use of standard competitive procedures to secure cadastral mapping survey services at four sites in the Malheur National Forest

in Grant County, Oregon, under request for proposals (RFP) No. 4-89-34, issued by the Forest Service, Department of Agriculture. The protester contends that the required surveying and mapping work is architectural and engineering (A-E) in nature and as such it must be procured in accordance with the special procedures set forth in the Brooks Act for the federal government's procurement of A-E services. *See* 40 U.S.C. §§ 541-544 (1982) (*amended* 1988).

The protest is sustained.

White Shield alleges that the required surveying and mapping work involves the type of work included within the definition of professional architectural and engineering services. The Forest Service argues that the decision to use competitive rather than Brooks Act procedures is supported by decisions of this Office such as *Ninneman Eng'g—Reconsideration,* B-184770, Mar. 9, 1977, 77-1 CPD ¶ 171. In that decision we held that where a survey is independent of an A-E project, the survey may properly be procured under competitive statutes and regulations. The agency states that the surveying services are not being procured as part of any A-E project and no incidental A-E contract exists or is contemplated. On April 28, 1989, the contracting officer determined to proceed with this procurement, pending an advance decision, *infra,* which the Forest Service had requested from our Office on December 23, 1988.

White Shield contends that the definition of A-E services as stated in *Ninneman Eng'g—Reconsideration,* B-184770, *supra,* is no longer applicable. It argues that both the language and the legislative history of the Brooks Act, as amended in 1988, make clear that the definition of A-E services includes traditional surveying and mapping services, whether or not incidental to an A-E project, and the Forest Service is required therefore to use Brooks Act procedures for procuring these services. We agree.

Recently we issued a decision to clarify the requirement for utilizing Brooks Act procedures when procuring A-E services as a result of the 1988 amendment. *Forest Service, Dep't. of Agriculture—Request for Advance Decision,* B-233987, B-233987.2, 68 Comp. Gen. 555, July 14, 1989, 89-2 CPD ¶ 47. As noted in that decision, the 1988 amendment to the Brooks Act contains a new provision which defines the term "architectural and engineering services." Clause (C) of the amendment includes in the definition "other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including . . . surveying and mapping . . . services." 40 U.S.C. § 541 (1982); as amended by Pub. L. No. 100-656, § 742, 102 Stat. 3853; Pub. L. No. 100-679, § 8, 102 Stat. 4055 (1988). Further, the legislative history of the amendment supports the argument that agencies are required to use Brooks Act procedures for procuring traditional surveying and mapping services. 134 Cong. Rec. H10058 (daily ed. Oct. 12, 1988) (statement of Mr. Myers); *see also* H.R. Rep. No. 911, 100th Cong., 2d Sess. 24 (1988), and Federal Acquisition Regulation § 36.102 (FAC 84-45).

In this case, Brooks Act procedures were not applied on the basis that the services were not part of an A-E project and no incidental A-E contract exists or is contemplated, in reliance on *Ninneman Eng'g—Reconsideration,* B-184770, *supra.* However, as indicated above, the *Ninneman* test no longer applies. The test to be applied now is not whether the service is incidental to an A-E project; rather it is whether the service is of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions may logically or justifiably perform. In *Forest Service, Dep't. of Agriculture—Request for Advance Decision, supra,* we stated that the determination of Brooks Act applicability should be made initially on a case-by-case basis by the contracting officer since this initial decision is within the discretion of the contracting agency. However, the contracting agency's exercise of discretion must be consistent with the statutory and regulatory requirements. In this regard, the Brooks Act amendment specifically lists surveying and mapping as examples of services which members of the architectural and engineering professions may logically or justifiably perform. In our view, surveying and mapping services traditionally performed by members of the architectural and engineering professions (and individuals in their employ) are clearly subject to the Brooks Act procedures. Since there is no indication that the surveying and mapping services involved here are not traditional A-E services, Brooks Act procedures should have been applied. Therefore, the protest is sustained.

The normal recommendation that the procurement be resolicited in accordance with Brooks Act procedures is impractical in this case because the contract has already been fully performed. White Shield is entitled, however, to the reasonable costs of pursuing this protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988). White Shield's claim for such costs should be submitted directly to the Forest Service. 4 C.F.R. § 21.6(e).

B-235647, September 21, 1989

Procurement

Competitive Negotiation

■ Offers

■■ Evaluation errors

■■■ Allegation substantiation

Agency reasonably found an offeror did not demonstrate understanding of agency requirements in responding to sample tasks that could be ordered, as set forth in request for proposals, where the offeror was twice apprised of which task responses were unacceptable and the offeror's protest of the evaluation constitutes a mere disagreement with the agency evaluation.

Procurement

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

Disparities in evaluation ratings among technical evaluators do not establish an award decision was not rationally based in view of the potential for disparate subjective judgments of different evaluators on the relative strengths and weaknesses of technical proposals.

Procurement

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

Where a protester received an unacceptable rating on the most important evaluation criterion of four criteria listed in the request for proposals in relative order of importance, and acceptable ratings on the other three criteria, the overall unacceptable rating awarded the protester did not give inordinate weight to that most important criterion.

Procurement

Competitive Negotiation
■ Discussion
■ ■ Adequacy
■ ■ ■ Criteria

An agency satisfies requirement for meaningful discussions where it twice advises the protester of which responses to sample tasks, requested by request for proposals to evaluate the offerors' understanding of the government's requirements, were unacceptable and affords the protester the opportunity to revise its proposal. Since the offeror's understanding was being tested by its responses to the sample tasks, the agency need not specify all deficiencies in each sample task response because this may defeat the purpose of that evaluation criterion.

Matter of: Syscon Services, Inc.

Syscon Services, Inc., protests the award of a contract to Information Spectrum, Inc. (ISI), by the Naval Air Systems Command under request for proposals (RFP) No. N00019-88-R-0053 for integrated logistics support services.

We deny the protest.

The RFP solicited technical and cost proposals for an indefinite quantity, task order, fixed labor rate, time and materials contract for 1 year of support services with four evaluated option years. The RFP stated that technical and cost factors were of equal importance and listed the technical evaluation factors in descending order of importance as follows:

1. Technical Approach—Sample Tasks

2. Personnel

3. Management Plan/Manpower Utilization Matrix

4. Corporate Experience

The evaluation plan provided for and defined ratings of "outstanding," "better," "acceptable," "marginal," and "not acceptable" to be used in the evaluation.

The primary focus of this protest involves the first and most important evaluation criterion, under which offerors were requested to respond to 16 sample tasks, which were representative of the type of work that could be assigned under the contract. In this regard, the RFP instructed offerors:

> For each sample task, the offeror will provide: (1) a description of possible areas to be investigated in researching each task, (2) a detailed description of the technical approach and methodology which would be used in accomplishing each task, (3) identification of the additional information that would be required to perform each task, (4) a detailed work plan for implementation, (5) a product outline describing what would be the expected deliverable(s) or a result of this task, and (6) manhours by labor category but not cost. The offeror should not propose studies in response to the sample tasks but rather a detailed technical report addressing methodologies/recommendations that meet sample task requirements. . . .

This aspect of proposals was to be evaluated:

> to determine the extent of the offeror's understanding of the government's requirements. The special issues and problems associated with the performance of each sample task must be addressed clearly and completely in response to [the proposal instructions].

Three proposals, including those of Syscon and ISI, were submitted in response to the RFP and all were included in the competitive range. After one round of written discussions and revised proposals, a second round of written discussions was followed by a request for best and final offers (BAFOs) from the three offerors.

Syscon was rated "not acceptable" for the sample task criterion after the evaluation of its initial proposal, as well as its revised proposal/BAFO, because of numerous evaluated deficiencies in its sample task responses. In this regard, 14 of the 16 Syscon responses in the initial and revised proposals were found "not acceptable," and, in Syscon's BAFO, 12 of the 16 sample task responses were found "not acceptable." Although Syscon was rated "acceptable" for the other three technical criteria, its "not acceptable" rating on the most important criterion resulted in an overall technical rating of "not acceptable."

On the other hand, ISI was rated "better" overall after the initial, revised and BAFO evaluations. ISI was selected for award since it submitted the only technically acceptable proposal and because its evaluated price of $122,121,292 for 5 years was less than 1 percent higher than Syscon's lowest evaluated price of $121,114,620.

Syscon was provided an extensive debriefing, where most of its evaluated deficiencies were identified. In addition, pursuant to its request under section 21.3(c) and (d) of our Bid Protest Regulations, 4 C.F.R. §§ 21.3(c) and (d) (1989), Syscon was provided with all of the documentation relating to the evaluation of its proposal, except the worksheets of the individual evaluators.

Syscon protests that the evaluation of its task order responses was arbitrary and irrational. Syscon alleges its responses were unfairly penalized for failing to

consider items not required by the RFP and for not addressing matters that it in fact addressed. In support of its contentions, Syscon provided a detailed response to each of the sample task deficiencies identified by the Navy during the debriefing. Syscon also contends that the evaluators' ratings were not based on objective standards, as evidenced by the differing ratings the various evaluators gave the sample task responses on the initial evaluation. Indeed, Syscon points out that most of these evaluators rated many of Syscon's sample task responses "marginal" or better, rather than "not acceptable."

We will examine an evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. *VGS, Inc.*, B-233116, Jan. 25, 1989, 89-1 CPD ¶ 83; *Fairfield Mach. Co., Inc.*, B-228015, B-228015.2, Dec. 7, 1987, 87-2 CPD ¶ 562. However, the protester has the burden of affirmatively proving its case and mere disagreement with a technical evaluation does not satisfy this requirement. *Id.*

In this case, we find the protester's detailed critique of the numerous deficiencies found in the sample task response evaluation and defense of its proposal constitutes a mere disagreement with the technical evaluation and does not show the determination that Syscon's "not acceptable" rating for this criterion was unreasonable. Although the RFP makes apparent that the Navy's primary interest in obtaining the sample task responses was to determine to what extent the offerors understood the Navy's requirements, the record shows that Syscon's sample task responses did not indicate the requisite understanding, despite its being twice advised which of its sample task responses were not acceptable.

For example, on sample task No. 1, which, among other things, required the contractor to identify and describe the potential use of data bases and analytical tools available for identifying a particular problem involving a "weapons replaceable assembly" component of an avionics system, one of the deficiencies which the Navy found was that the excessive amount of time in Syscon's response to this task indicated that Syscon did not understand the time urgency of this task. Although Syscon claims the sample task did not state it was urgent, we again stress that the purpose of evaluating sample task responses was to ascertain offeror understanding of the Navy's requirements. Based on our review, Syscon's failure to recognize the time urgency of isolating this problem involving the readiness of an avionics system could reasonably be found by the Navy to evidence a failure to understand the Navy's requirements.

On sample task No. 2, which, among other things, required the contractor to perform a life cycle cost/readiness benefits analysis on a specified scenario, one identified deficiency, disputed by Syscon, was its alleged failure to identify certain relevant data bases. Syscon points out where in its proposal it mentioned these data bases. However, we find reasonable the Navy's response that Syscon did not discuss the utilization of these data bases in sufficient detail to demonstrate its understanding of how these data bases would be used.

The rest of the numerous evaluated deficiencies in the sample tasks are in a similar vein and have been disputed by Syscon. Although we will not discuss

each of these identified deficiencies, we cannot, based on our review, find unreasonable the Navy's determination that the vast majority of Syscon's sample task responses were unacceptable. In this regard, we note that Syscon was twice apprised during discussions of which sample task responses were not acceptable, yet it still failed to improve its proposal in any significant way.

Syscon has pointed out instances where some evaluators rated Syscon's responses to sample tasks as "acceptable" or "better" in the initial evaluation, but the consensus rating was found "not acceptable" on those tasks. Syscon claims this shows the evaluating must not have been based on objective criteria, and that Syscon's proposal was unreasonably evaluated.

The record indicates that the various evaluators independently evaluated each sample task response and the chairman of the evaluation committee for this aspect of the evaluation discussed the rationale with each evaluator for each rating to arrive at a consensus committee rating for each sample task response.

It is not unusual for individual evaluators to have disparate, subjective judgments on the relative strengths and weaknesses of a technical proposal. *Mounts Eng'g,* 65 Comp. Gen. 476 (1986), 86-1 CPD ¶ 358; *Monarch Enters., Inc.,* B-233303 *et al.,* Mar. 2, 1989, 89-1 CPD ¶ 222; *Unisys Corp.,* B-232634, Jan. 25, 1989, 89-1 CPD ¶ 75. Consequently, disparities in evaluator ratings, such as existed here, do not establish the award decision was not rationally based. *Id.* Moreover, there is nothing improper in the evaluators' discussion of proposals' relative strengths and weaknesses and their opinions of how the proposal should be rated to arrive at a consensus rating. In any case, the differences among the evaluators on the initial evaluation is not particularly pertinent in the present case, where Syscon was twice afforded, and took advantage of, the opportunity to revise its unacceptable sample task responses, and the evaluators, with general unanimity, found 12 of Syscon's 16 BAFO responses were unacceptable.

Syscon argues the sample task evaluation was given inordinate weight in the award selection; that its "not acceptable" rating for sample tasks should not have caused its technical proposal to be rated "not acceptable"; and that it should therefore have received the award as the low priced offeror. Syscon claims that merely listing this criterion as the most important of four technical criteria, listed in descending order of importance, would not indicate that a "not unacceptable" rating for this criterion would mandate an overall "not acceptable" technical rating, where, as here, the other factors are rated "acceptable."

Syscon's argument that the sample task evaluation was given inordinate weight has no merit. We have consistently recognized that listing technical factors in descending order of importance is sufficient to apprise offerors of their relative importance, which is all that is required. *Technical Servs. Corp.,* 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152; *TextronDiehl Track Co.,* B-230608; B-230609, July 6, 1988, 88-2 CPD ¶ 12. It is clear that under this RFP an overwhelming "not acceptable" rating in the primary technical evaluation area, supported by the fact that 12 of the 16 sample task responses were found "not acceptable," is suffi-

cient to support an overall "not acceptable" technical rating. *See Raytheon Support Servs. Co.,* B-219389.2, Oct. 31, 1985, 85-2 CPD ¶ 495.

Syscon claims that the discussions were not meaningful, primarily because the Navy did not specify why its task order responses were not acceptable, even though this was the primary basis its proposal was rated "not acceptable."

In the present case, the record shows that 14 of Syscon's initial sample task responses were either marginal or not acceptable. In the first round of discussions, the Navy advised Syscon in writing of which of these responses were not acceptable or marginal, and advised Syscon to "please submit a detailed analysis of these tasks to clearly and completely demonstrate your depth of knowledge and understanding of the government's requirements."

Upon evaluation of the revised proposals, the responses to these 14 sample tasks were still found to be marginal or not acceptable. In the request for BAFOs, the Navy advised Syscon of this determination and that resubmittal of these sample tasks was required. The Navy further advised:

> Sample task responses should be specific. Identify in your response why, how, where, etc. . . . . Your resubmission must provide a detailed analysis of these tasks to clearly and completely demonstrate your depth of knowledge and understanding of the government's requirements.

Additionally, the Navy provided Syscon with an example of deficiencies on one of the deficient sample task responses. The Navy did not otherwise during discussions provide Syscon with the specific sample tasks deficiencies.

As indicated above, notwithstanding the foregoing discussions, Syscon's BAFO responses on the 12 of the sample tasks were found unacceptable. Syscon complains that the discussions on the sample tasks were not meaningful because "all" deficiencies in the individual sample task responses were not identified.

We have consistently stated that in order for discussions on a negotiated procurement to be meaningful, contracting agencies must furnish information to all offerors in the competitive range as to the areas in their proposals which are believed to be deficient so that offerors may have an opportunity to revise their proposals to fully satisfy the government's requirements. *Pan Am World Servs., Inc. et al.,* B-231840 *et al.,* Nov. 7, 1988, 88-2 CPD ¶ 446. However, the content and extent of discussions is a matter of the contracting officer's judgment based on the particular facts of the procurement. *Huff & Huff Serv. Corp.,* B-235419, July 17, 1989, 89-2 CPD ¶ 55. In evaluating whether there has been sufficient disclosure of deficiencies, the focus is not on whether the agency describes deficiencies in such detail that there could be no doubt as to their identity and nature, but whether the agency imparted sufficient information to the offeror to afford it a fair and reasonable opportunity in the context of the procurement to identify and correct deficiencies in its proposal. *Id.; Eagan, McAllister Assocs., Inc.,* B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405. There is not, as is suggested by Syscon, a requirement that agencies conduct all-encompassing discussions; rather, agencies are only required to reasonably lead offerors into those areas of their proposals needing amplification, given the context of the procurement. *Eagan, McAllister Assocs., Inc.,* B-231983, *supra,* at 5.

Here, the sole purpose of evaluating offerors' responses to the sample tasks was not to assess the sufficiency of the offerors' technical approach *per se*, but, as expressly stated in the RFP and repeatedly emphasized during discussions, to evaluate the offerors' understanding of the government's requirements. As indicated above, the RFP made clear what information was to be submitted to test the offerors' understanding. If the Navy had simply spoon fed Syscon each of the noted deficiencies for every sample task, it may have led Syscon to simply repeat back the Navy's concerns point by point, which would defeat the primary purpose of the sample task scenario—to test the offerors' demonstrated understanding of the technical requirements of the contemplated contract. *Eagan, McAllister Assocs., Inc.*, B-231983, *supra.* That is, if such extensive discussions were conducted, the agency would be provided with no assurance that the offeror independently appreciated the problems identified by the agency. *Fairchild-Weston Sys., Inc.*, B-229568.2, Apr. 22, 1988, 88-1 CPD ¶ 394. Consequently, we find that where an offeror's understanding is being tested, as opposed to evaluating the adequacy of its technical approach to the contract work, the agency need not specify during discussions all identified deficiencies. *Eagan, McAllister Assocs., Inc.*, B-231983, *supra; see also Hill's Capitol Sec., Inc.*, B-233411, Mar. 15, 1989, 89-1 CPD ¶ 274 at 6; *Fairchild-Weston Sys., Inc.*, B-229568.2, *supra.*

Based on the foregoing, we find the Navy satisfied its duty to conduct meaningful discussions by identifying Syscon's unacceptable sample task responses, with an example of the type of deficiencies that existed in the responses, and by providing Syscon with adequate time and opportunity to correct these responses.

In a similar vein, Syscon claims that the Navy did not satisfy its obligation to conduct meaningful discussions for the personnel evaluation area. However, the record shows that in each round of discussions, the Navy advised Syscon and all other offerors of all unacceptable and marginal resumes. Given the RFP's detailed listing of job descriptions, education and work experience, this was sufficient to lead Syscon into areas of its personnel proposal needing change or amplification. *tg Bauer Assocs., Inc.*, B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549. Moreover, Syscon was not prejudiced even assuming the Navy discussions in this area were somehow deficient, since Syscon's personnel proposal was ultimately found acceptable and since Syscon's proposal was unacceptable overall because of its sample task responses. *Id.*

Syscon speculates that improper price discussions may have been held with ISI, but not the other offerors, because ISI significantly lowered its proposed price in its BAFO. However, not only does ISI deny any such communication was made, but the record contains no indication that ISI was in any way advised of the relative prices of the offerors or urged to lower its price. Indeed, the only discussions with the offerors was in writing. Moreover, ISI's BAFO documents the reasons for lowering its prices.

Finally, Syscon claims that ISI has an unfair competitive advantage, since one of its subcontractors participated in developing a revised version of the Life Cycle Logistic Process Specifications (LCLPS), which was the subject matter of

Sample Task No. 8 of the RFP. Under that sample task, the contractor was to provide a management plan on how to implement the revised LCLPS. Syscon was downgraded for its response to this task by failing to address standardization, warranties, and acquisition streamlining procedures. Syscon claims that these deficiencies resulted from its failure to have access to the revised LCLPS that was being developed by ISI's subcontractor and that ISI thus had an unfair competitive advantage.

The Navy and ISI claim the LCLPS is readily available and that Syscon does not claim it attempted to obtain a revised LCLPS. The Navy also notes that standardization, warranties and acquisition streamlining have been widely available Department of Defense-wide initiatives for many years. Moreover, sample task No. 8 stressed that standardization was a primary goal in updating the LCLPS. Consequently, we find Syscon's failure to give adequate emphasis to this matter in its sample task response could be found to evidence a lack of understanding of the Navy's requirements and that it therefore was not competitively prejudiced by ISI's subcontractor's access to the revised LCLPS. In this regard, the Air Force states that the subcontractor did not write, but only assembled, the revised LCLPS. Moreover, even assuming ISI had some competitive advantage by virtue of its subcontractor's work on the LCLPS, Syscon was also not prejudiced since its proposal would still be considered not acceptable, even assuming this sample task response was not considered, because it still would be not acceptable for 11 of the 16 sample task responses.

The protest is denied.

B-235664, September 21, 1989

Procurement

Sealed Bidding
■ Invitations for bids
■ ■ Cancellation
■ ■ ■ Justification
■ ■ ■ ■ Competition enhancement

Where only one responsive bid was received, contracting officer's desire to obtain enhanced competition by relaxing delivery schedule and geographic restriction constitutes a compelling reason to cancel the invitation and resolicit.

Matter of: McDermott Shipyards

McDermott Shipyards protests the cancellation of invitation for bids (IFB) No. DACW61-89-B-0041, issued by the U.S. Army Corps of Engineers, for modification of floating drydock No. 5801. The agency determined that the only acceptable bid it received, McDermott's, was unreasonably high, and that cancellation therefore was appropriate. McDermott challenges the determination of price reasonableness.

We deny the protest.

The solicitation requested bids from shipyards along the Gulf Intercoastal Waterway, or the Mississippi, Ohio or Missouri River systems, to add 120 feet in length and 20 feet in width to the floating drydock. The Army received bids from two offerors: Gulf Coast Fabrication, Inc., submitted the apparent low bid of $2,929,646, while McDermott bid $4,532,400. Gulf Coast, however, failed to submit a bid bond executed by a surety, as required by the solicitation; accordingly, its bid was rejected as nonresponsive.

Based on a comparison with the independent government estimate, the Army determined that the remaining bid, McDermott's, was unreasonable. The agency initially estimated the contract cost of completing the required work at $1,335,767; subsequently, prior to bid opening, this was revised upward to $1,414,467, to account for certain work not considered when calculating the initial estimate. After bid opening, the government estimate was again revised upward, to $2,540,493, to account for omitted work, an inadequate labor and other rates, and an increase in the installed cost of steel. Since McDermott's bid of $4,532,400 remained 78 percent higher than this revised government estimate, the contracting officer determined that it was unreasonable and, accordingly, canceled the solicitation. Contracting officials proposed instead to resolicit under relaxed specifications, revising the solicitation by (1) extending the period for constructing and delivering the new hull section from 180 days to 270 days, (2) making the existing drydock available during any of several "windows of availability," and (3) extending the period for integrating the new hull section into the existing drydock and modifying the existing drydock from 120 days to 180 days.

Upon learning of the cancellation, McDermott filed this protest with our Office, contending that the revised government estimate was defective, and that the cancellation therefore was improper, because the estimate failed to make any provision for the cost of certain required work and seriously underestimated the cost of other required work. After further review, the Army ultimately concluded that, as alleged, its revised estimate failed to allow for the costs of several of the required operating systems and for the costs of joining the new construction to the existing drydock. Although the agency, as a result, now accepts an upward revision of the estimate to $3,540,493 it continues to dispute McDermott's contentions with respect to other aspects of the estimate, and still maintains that the cancellation was proper.

Although a contracting agency has broad discretion to cancel an invitation, there must be a compelling reason to do so after bid opening because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed. *Tapex American Corp.*, B-224206, Jan. 16, 1987, 87-1 CPD ¶ 63; *see* Federal Acquisition Regulation (FAR) § 14.404-1(a)(1). The FAR authorizes cancellation where "all otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price," FAR § 14.404-1(c)(6); our Office will question an agency's determination of price reasonableness only

where shown to be unreasonable or where there is a showing of bad faith or fraud on the part of contracting officials. *See generally Nootka Envtl. Sys., Inc.*, B-229837, Apr. 25, 1988, 88-1 CPD ¶ 396.

Based on our review of the record, we find that the revised government estimate, upon which the determination was based, is of questionable reliability. In this regard, the Army now accepts as accurate an estimated contract cost 150 percent higher than the pre-bid opening estimate and 39 percent higher than the government estimate upon which the determination of price reasonableness was made; it admits to overlooking such seemingly basic cost factors as the cost of joining the new construction to the existing drydock. In addition, we find reason to question the credibility of the estimate even as revised. In particular, the specification required that the new work be blasted, that all remaining areas be "sandswept" clean, and that the entire vessel be coated with a prequalified coating system manufactured by the Devoe Marine Coatings Company. McDermott costed this work at $813,945 based on a quote from Devoe, while the Army included only $48,968 for this work in the estimate. As we find the specification clear and find no evidence that McDermott misinterpreted the scope of the required work, as the Army suggests, the accuracy of the estimate for purposes of rejecting McDermott's bid as unreasonably high is in doubt.

However, we find that the cancellation was justified on the basis of the agency's plan to increase competition by relaxing the specifications, that is, by removing the geographic restriction, extending the delivery periods, and allowing more flexibility with respect to the availability of the existing drydock.

We have previously recognized that a contracting officer's desire to obtain enhanced competition by relaxing a material specification constitutes a compelling reason to cancel an IFB after opening. *Agro Constr. and Supply Co., Inc.*, 65 Comp. Gen. 470 (1986), 86-1 CPD ¶ 352; *Grumman Corp.*, B-225621.2, B-225621.3, May 20, 1987, 87-1 CPD ¶ 528. The Army has determined that material portions of the specifications overstate its minimum needs and, given that only one responsive bid was received, we do not think it was unreasonable to conclude that the specifications substantially restricted competition. Further, whether or not McDermott's bid in fact was unreasonable in price, there is no indication that the bid was so low that the agency could not reasonably anticipate cost savings from enhanced competition due to significantly relaxed specifications. Under these circumstances, we find no basis for objecting to the contracting officer's business judgment that there is a reasonable possibility that more than one responsive bid will be received in response to a resolicitation based on relaxed specifications. We conclude that the cancellation is unobjectionable.

The protest is denied.

B-235665, September 21, 1989

Procurement

Competitive Negotiation
■ Best/final offers
■ ■ Technical acceptability
■ ■ ■ Negative determination
■ ■ ■ ■ Propriety

Protester's proposal was properly rejected as technically unacceptable where protester's best and final offer did not comply with material, mandatory requirements under the request for proposals. An offeror should not expect to be granted an additional opportunity to clarify or revise its proposal after submission of best and final offers.

Procurement

Competitive Negotiation
■ Discussion
■ ■ Adequacy
■ ■ ■ Criteria

Agency conducted meaningful discussions where it directed protester to areas in which its proposal was deficient or noncompliant with mandatory solicitation requirements. Procuring agency is not required to provide an offeror with exact proposal language which will establish compliance.

Procurement

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

Procurement

Competitive Negotiation
■ Requests for proposals
■ ■ Terms
■ ■ ■ Compliance

Protester's status as large corporation which has the capability to satisfy mandatory solicitation requirements does not establish that it will satisfy those requirements where its proposal indicates otherwise. Compliance with solicitation specifications must be determined on the basis of an offeror's proposal, not on the basis of the offeror's alleged intentions, corporate capability, or reputation.

Matter of: Digital Equipment Corporation

Digital Equipment Corporation (Digital) protests the award of a contract for a central scientific timesharing system to Convex Computer Corp., under request for proposals (RFP) No. 263-88-P(89)-0025, issued by the National Institutes of Health (NIH). Digital asserts that it submitted a lower priced proposal which was improperly rejected as technically noncompliant by NIH.

We deny the protest.

The RFP was issued on March 19, 1988, and NIH received six initial proposals by the June 27 closing date. The RFP provided that in order to be acceptable and eligible for evaluation, a proposal must meet all of the mandatory requirements set forth under section C of the RFP. Award was to be made to the offeror whose proposal offered the greatest value to the government, with technical quality stated to be more important than price. Offerors were required to execute a capacity benchmark test, with results to be submitted with their proposal, and offerors included in the competitive range were also required to perform a live test demonstration. In addition to the mandatory requirements, section C of the RFP also listed a number of optional features which offerors could include and which would be evaluated, if included, but which offers did not have to provide in order to satisfy the RFP requirements.

Based on its evaluation of initial technical proposals, the Technical Evaluation Committee (TEC) determined that all six offerors failed to meet one or more mandatory RFP requirement, and all offerors were given until August 15 to correct these deficiencies. On August 19 the TEC performed a technical evaluation of the proposals, taking into consideration the offerors' proposed corrections, and determined that only the proposals submitted by Convex and Digital should be included in the competitive range. The other four proposals were eliminated either because of failure to comply with the mandatory requirements, or because of other major technical deficiencies. Live test demonstrations were performed by Digital and Convex, and NIH personnel examined both offerors' cost proposals for the purpose of conducting a cost analysis. Based on this analysis of Digital's cost proposal, NIH determined that there were numerous discrepancies between Digital's technical proposal and its cost proposal, which raised questions as to what equipment, supplies and services Digital was offering to provide. Discussions were held with both offerors in the competitive range. Discussions with Digital occurred on November 28, at which time NIH provided Digital with a list of 34 deficiencies, to which Digital responded in writing on November 30 with responses which indicated that Digital would comply with the mandatory requirements in its best and final offer (BAFO).

BAFOs were received on December 21. In evaluating Digital's BAFO, the TEC determined that Digital had satisfactorily resolved 27 of the 34 deficiencies which had been raised during discussions, but that the remaining 7 were either unresolved, or Digital's resolutions had resulted in further deficiencies. The TEC also determined that 12 additional deficiencies were raised by new material in Digital's BAFO. Convex's BAFO was fully compliant with the RFP requirements. The NIH project director determined that, in order to enhance competition, he would request a second round of BAFOs to give Digital an additional opportunity to rectify its proposal deficiencies. On February 28, 1989, Digital was notified by letter of the deficiencies in its BAFO and was requested to submit a second BAFO by March 7. Digital was advised in this letter that its BAFO "did not meet certain mandatory requirements," and that "this shall be the only opportunity given to meet the requirements of the solicitation." This letter identified 14 areas in which Digital's BAFO failed to comply with mandatory RFP requirements. In addition, it referenced certain other technical and

cost areas which required clarification. NIH addressed the following deficiencies, among others, in which it indicated that Digital's BAFO was noncompliant:

7. Resolve the apparent conflict between the technical proposal and the cost proposal regarding the duration of the principal period of maintenance for the VAX 8810 main system during year one of the contract's life (Sections C.2.10.1 and C.8.4).

9. Verify that Software Support Services (QT-OJQAA-L9) proposed for the VAX 88x0 provides the right to use the MDDS (QT-OJQAA-EM) in years two through five of the contract's life (Sections C.2.3.2 and C.11).

10. Explain which proposed products provide software support on the VAX 6210 test system throughout the life of the contract (Sections C.2.3.2 and C.2.10.2).

13. Provide the unit and total price for the annual updates and replacements of documentation throughout the life of the contract (Sections C.2.11 and C.10.2.).

The TEC evaluated Digital's second BAFO and determined that Digital's proposal remained noncompliant with respect to four mandatory requirements under the RFP. The TEC concluded that Digital's proposal failed to comply with the requirement at section C.8.4 to provide a 16-hour per day principal period of maintenance (PPM) for on-call service, with a 2 hour response time, for the 8810 main system during the first year of the contract. Digital's second BAFO had clearly specified a 9-hour per day PPM in both the cost and technical sections. A 9 hour PPM had been referenced in the RFP as an on-site service option, but was not indicated as an acceptable PPM for the mandatory on-call service. Digital's BAFO also failed to provide certain software support required for the VAX 6210 X-Window system. In addition, Digital's BAFO failed to provide support for its f77 fortran compiler and failed to provide for certain required replacement and update documentation.

The contracting officer determined that Digital's proposal was still noncompliant and Digital was eliminated from the competition as technically unacceptable. Digital was notified of this determination on May 15, 1989, and on the same date award was made to Convex. Thereupon, after NIH provided Digital with a debriefing, Digital filed this protest with our Office on May 25. Contract performance was initially suspended, however, NIH subsequently made a determination under Federal Acquisition Regulation § 33.104(c)(2)(i) (FAC 84-9), that continued performance was in the best interest of the government.

The underlying rationale behind Digital's protest is that Digital should not have been eliminated for failure to comply with the mandatory requirements because Digital is an established corporate entity which is known to have the technical capability to fulfill the RFP requirements. Digital contends that notwithstanding any discrepancies in its BAFO, it clearly intended to satisfy the mandatory requirements. Digital also argues that NIH failed to engage in meaningful discussions because NIH should either have provided Digital with more specific questions or directions, or afforded it an additional opportunity to clarify its proposal. Thus, while Digital concedes that there were certain technical problems in its BAFO, it characterizes these problems as either the result of "miscommunication between Digital and NIH," or as clerical errors.

More specifically, with respect to Digital's failure to offer the required 16 hour PPM service, Digital argues that it is technically capable of providing this service and always intended to do so, and Digital questions how its proposal could have gone from being initially technically acceptable to technically unacceptable if NIH had conducted meaningful discussions. In particular, Digital contends that NIH's questions in this respect should have been more specific. Digital also contends that it should have been given an additional opportunity to clarify and comply after the second round of BAFOs.

Digital agrees that the RFP contains a mandatory requirement for 16 hour on-call PPM service and that its second BAFO only provides for a 9 hour on-call PPM. In its initial technical proposal, Digital had indicated that it would comply with the 16 hour requirement. It was on the basis of this indication in the technical narrative that NIH determined that Digital's proposal was technically compliant. However, in its BAFO, Digital made substantial changes in its hardware maintenance charges under its cost proposal, replacing many such charges with first-year warranty coverage. This warranty coverage indicated that during the first year, the PPM for the 8810 system was only 9 hours per day. When NIH evaluated Digital's cost proposal, the TEC became aware that Digital's cost proposal provided for a 9 hour PPM and became concerned that Digital did not intend to provide the required 16 hour PPM. As a result, NIH asked Digital to resolve the discrepancy between its technical and cost proposal in this regard in question 7 quoted above. When Digital clearly stated in its second BAFO that it was providing a 9 hour PPM during the first-year warranty period, NIH concluded that Digital's proposal was technically noncompliant.

We note that an agency properly may reject as technically unacceptable a proposal which it initially finds technically acceptable if, as here, the BAFO is noncompliant with a material term or condition of the RFP. *See Montgomery Furniture Co.,* B-229678, Mar. 1, 1988, 88-1 CPD ¶ 212. Thus, the fact that Digital's initial proposal was considered compliant does not establish that its BAFO was technically acceptable. While NIH could have asked Digital specifically whether it intended to supply the required 16 hour PPM, an agency is only required to lead an offeror into areas of its proposal which require correction. *Hill's Capitol Sec., Inc.,* B-233411, Mar. 15, 1989, 89-1 CPD ¶ 274. Agencies are not required to afford offerors all-encompassing discussions, and the actual content and extent of discussions are matters of judgment primarily for determination by the agency involved. *Addsco Indus., Inc.,* B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317. An agency is only required to express its concerns in a manner which reasonably communicates the nature and gravity of these concerns. *Mark Dunning Indus., Inc.,* B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364. In our view, NIH's reference in item 7, which specifically pointed out that there was a conflict in Digital's proposal with respect to the duration of PPM service, was sufficient to put Digital on notice that its proposal was noncompliant with the mandatory RFP requirement for a 16 hour PPM for on-call service.

Digital characterizes item 7 as merely providing it with a 50 percent chance to answer correctly, and characterizes its answer indicating that it intended to

provide a 9 hour PPM as a clerical error. Digital reasons that in response it simply mistakenly changed its BAFO to reflect a 9 hour PPM which was included in the RFP in a different section relating to optional on-site service. In our view, this argument ignores the content of the RFP, which clearly contains a mandatory requirement for a 16 hour PPM for oncall service. In the face of item 7, which raised an issue concerning Digital's compliance with a mandatory RFP requirement, Digital was not free to merely guess at which of two different PPM time periods it actually intended to propose. Nor does such an incorrect guess constitute a clerical error. Rather, it was incumbent on Digital to rectify its noncompliance with a mandatory requirement which was clear under the RFP, and to change its offer to indicate compliance with the 16 hour PPM, if that was, in fact, Digital's intention. *See Eagan, McAllister Assocs., Inc.*, B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405.

Digital also argues that even if NIH concluded that Digital's BAFO deliberately offered a 9 hour PPM, NIH could have established the cost of a 16 hour PPM from table B-6 which was included in Digital's proposal to provide additional costs for various extended optional PPMs. However, that table relates only to optional later-year service coverage and provides no information with respect to PPM service during the first year of warranty maintenance, which is the period for which Digital's proposed PPM service was found noncompliant.

Having provided an ambiguous PPM in its initial BAFO, and having provided a clearly noncompliant PPM in its second BAFO, Digital was not entitled to another opportunity to clarify its proposal through additional discussions and another round of BAFOs. As a general matter, an offeror may not contemplate a further opportunity to revise its proposal after submission of a BAFO. *Violet Dock Port, Inc.*, B-231857.2, Mar. 22, 1989, 89-1 CPD ¶ 292. Moreover, agencies are not required to notify offerors of deficiencies remaining in their proposals, or first appearing in their BAFOs, or to conduct successive rounds of discussions until such deficiencies are corrected. *Id.; Mark Dunning Indus., Inc.*, B-230058, *supra*. Accordingly, we find NIH's conduct of discussions both sufficient and reasonable.

Digital's entire argument is founded on the false premise that a firm is entitled to credit for its corporate stature, in lieu of having to satisfy RFP requirements in its proposal. On the contrary, neither Digital's corporate capability and stature, nor its current claim that it always intended to comply with the RFP requirements may serve to establish compliance. An offeror is not entitled to a favorable presumption in this regard because of its reputation, prior performance, or presumed intention; rather, compliance must be based on what the offeror actually submitted in its proposal. *Laser Power Technologies, Inc.*, B-233369, Mar. 13, 1989, 89-1 CPD ¶ 267; *Ingersoll-Rand Co., Trilectron Indus., Inc.*, B-232739 *et al.*, Feb. 7, 1989, 89-1 CPD ¶ 124; *Electronet Information Sys., Inc.*, B-233102, Jan. 24, 1989, 89-1 CPD ¶ 68. Since NIH properly concluded that Digital's BAFO failed to comply with the 16 hour PPM service requirement, a material term of the RFP, this constituted a sufficient basis to reject Digital's proposal as unacceptable. In negotiated procurements, a proposal that fails to

conform to a material term or condition of an RFP is unacceptable and may not properly form the basis for an award. *Essex Electro Engineers, Inc.*, B-229491, Feb. 29, 1988, 88-1 CPD ¶ 215.

Since Digital's noncompliance with the 16 hour PPM service requirement provided a valid basis for rejecting Digital's proposal, the question of whether NIH properly determined that Digital's BAFO was noncompliant in the other three areas is academic. However, we note that two of the areas (failure to provide required f77 fortran compiler support and failure to supply required X-Window system software support) essentially involve Digital's disagreement with NIH's technical assessment of the manner in which Digital proposed to fulfill the RFP's requirements. As a general matter, the determination of the relative merits of a proposal and whether material provided by an offeror establishes the technical acceptability of its offer is primarily the responsibility of the procuring agency, which must bear the burden of any difficulties resulting from a defective evaluation. *Pitney-Bowes,* 68 Comp. Gen. 249 (1989), 89-1 CPD ¶ 157; *Everpure, Inc.*, B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235. Accordingly, in reviewing complaints about the evaluation of a technical proposal and the resulting determination of whether the proposal is technically acceptable, our Office will not reevaluate the proposal and independently determine its merits; we will only determine whether the agency evaluation had a reasonable basis. *Stat-a-Matrix, Inc., et al.*, B-234141 *et al.*, May 17, 1989, 89-1 CPD ¶ 472; *Vikonics, Inc.*, B-234365, May 11, 1989, 89-1 CPD ¶ 443. In this regard, the protester's mere disagreement with the agency's judgment does not establish that it is unreasonable. *Systems & Processes Eng'g Corp.*, B-234142, May 10, 1989, 89-1 CPD ¶ 441. We have reviewed the record and, notwithstanding Digital's disagreement, we find that NIH had a reasonable basis to conclude that Digital's proposal failed to satisfy NIH's technical requirements in these areas.

With respect to Digital's failure to provide in its BAFO for required replacement manuals, Digital argues that its BAFO implies that these manuals would be provided without charge. However, while Digital indicates in its BAFO that it will provide updates at no cost, the BAFO does not state that Digital will provide required replacement manuals at no cost as well. The RFP specifies updates and replacements separately, as NIH also did during discussions, and Digital has not provided any convincing basis to establish that its offer to provide updates at no charge also encompasses replacements, as Digital argues it intended to mean. Digital also raises the same arguments with respect to this issue that were addressed above concerning Digital's corporate capacity and its intended compliance, and we reject these arguments for the same reasons.

Finally, Digital contends that NIH's determination to permit Convex to perform during the pendency of the protest was procedurally defective and therefore violated the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (Supp. IV 1986). We need not address this argument in view of our conclusion that Digital's proposal was properly rejected, since Convex's performance could not have prejudiced Digital. *See Crux Computer Corp.*, B-234143, May 3, 1989, 89-1 CPD ¶ 422; *VGS, Inc.*, B-233116, Jan. 25, 1989, 89-1 CPD ¶ 83.

The protest is denied.

B-235646, B-235646.2, September 22, 1989

Procurement

Competitive Negotiation
■ Offers
■■ Cost realism
■■■ GAO review

Contracting agency's cost realism analysis involves the exercise of informed judgment, and the General Accounting Office will not question such an analysis unless it clearly lacks a reasonable basis. Reasonable basis is provided by determination that awardee's technical approach is feasible, by Defense Contract Audit Administration analysis of awardee's rates, and by reconciliation of awardee's estimated costs with the independent government cost estimate.

Procurement

Competitive Negotiation
■ Contract awards
■■ Administrative discretion
■■■ Cost/technical tradeoffs
■■■■ Cost savings

Contracting agency may accept a technically lower rated proposal to take advantage of its lower costs, even though cost is the least important evaluation criterion, so long as agency reasonably decides that the cost premium involved in an award to a higher-rated, higher-cost offeror is not warranted in light of the acceptable level of technical competence available at the lower cost.

Matter of: OptiMetrics, Inc.; NU-TEK Precision Optical Corporation

OptiMetrics, Inc. (OMI), the incumbent contractor, and NU-TEK Precision Optical Corporation protest the award of a cost-plus-fixed-fee contract to Science and Technology Corporation (STC), under request for proposals (RFP) No. DAAD07-87-R-0140, issued by the United States Army White Sands Missile Range. OMI and NU-TEK principally contend that the Army did not properly evaluate the cost realism of STC's cost proposal, and otherwise misevaluated proposals. We deny the protests.[1]

The RFP, issued as a 100 percent small business setaside, sought proposals for directed energy and electrooptical atmospheric research support services at the United States Army Atmospheric Sciences Laboratory (ASL), which is dedicated to researching atmospheric effects on Army weapon systems and operations. The RFP required the successful contractor to provide scientific, engineering, and technical support for specific tasks relating to the directed energy and electro-optical areas of ASL's mission. While the RFP contained a general scope of

[1] NU-TEK also protests that the evaluation of OMI's proposal was improper because OMI proposed an extended workweek. However, since we find that award to STC was proper and in accordance with the evaluation criteria, we will not address this issue.

work, the specific tasks were to be implemented by work assignment orders which are to be defined as particular efforts and problems develop. The proposed contract was for a 1-year base period with four 1-year options.

The RFP provided that award would be made to the offeror whose technical proposal rating and evaluated cost were determined to represent the "best buy" to the government. The RFP contained two principal evaluation criteria, technical and management, with technical being three times as important as management.

Concerning cost, the RFP stated it was the least important factor, but cautioned offerors that as technical merit tends to equalize among offerors, cost would become a more significant factor in the selection process. The cost evaluation was to include an analysis of all proposed costs by comparison with the government cost estimate and by appropriate consideration of information from the Defense Contract Audit Agency (DCAA), government technical personnel, and other sources. The RFP included precise minimum qualifications and maximum level-of-effort estimates for several labor categories—such as Principal Investigator, Senior Scientist, and Junior Scientist. The RFP estimated the number of hours required and provided the anticipated labor skill mix, with offerors basically proposing labor rates, indirect expenses, and fees. The RFP also contained normalized estimates to be used by all offerors for travel requirements and for purchases of supplies, material, equipment and services.

Four timely proposals were received in response to the RFP. One of the proposals was determined to be technically unacceptable and excluded from the competitive range. The Proposal Evaluation Board (PEB) found the remaining three proposals acceptable and as meeting the requirements of the RFP. Written and oral discussions were conducted with these offerors, and best and final offers (BAFOs) requested. OMI's, NU-TEK's, and STC's revised proposals were evaluated as follows:

Contractor	Score	BAFO
Government Estimate	100	41,500,000
OMI	94.1	36,992,204
NU-TEK	82.9	37,663,034
STC	85.7	30,550,860

The contracting officer found that, except for cost, the proposal scoring was close and that most substantive technical differences between OMI and STC were in the scoring factors, "technical understanding" and "personnel availability." These scoring differences were not considered significant and were attributable to the normal experience advantage enjoyed by an incumbent contractor. The contracting officer determined that the higher technical and management competence of the OMI proposal as compared with the STC proposal was not sufficient to justify the additional expense. Award was therefore made to STC on the basis of its lower cost.

OMI and NU-TEK protest that the Army failed to conduct a proper cost realism analysis of STC's unrealistically low cost proposal.[2] The protesters' cost realism allegation is based primarily on the fact that STC's cost proposal for the basic requirement was more than 25 percent less than the government estimate. OMI argues that the RFP stated that reasonableness and realism of an offeror's costs would be judged by comparing those costs to the government estimate and that, contrary to the RFP, the Army disregarded the government estimate.

Initially, we note that the evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency involved. This is so because the agency is in the best position to assess "realism" of cost and technical approaches and must bear the difficulties or additional expenses resulting from a defective cost analysis. Since the cost realism analysis involves the exercise of judgment by the contracting agency, our review is limited to a determination of whether an agency's cost evaluation was reasonably based. *Quadrex HPS, Inc.*, B-223943, Nov. 10, 1986, 86-2 CPD ¶ 545.

We have reviewed the Army's cost realism evaluation here in light of OMI's and NU-TEK's allegations and find that the results reached were reasonable. The Army's evaluation consisted of a quantitative and qualitative review performed by the PEB and audit reports furnished by DCAA for STC and its proposed subcontractor. The Army in its cost analysis verified all direct labor costs including proposed escalation and indirect charges, off-site overhead, general and administrative expense, and subcontract/material handling. The Army also evaluated other direct charges, such as the normalized travel cost, the cost of money, proposed fee, tax burden, and phase-in costs.

STC's direct labor rates were higher than those of the other offerors for professional labor categories. STC's other labor rates were slightly lower than OMI's but were determined by the Army to be representative of the labor rates paid for similarly skilled labor on other contracts and consistent with minimum rates prescribed by Department of Labor Area Wage Determinations. Additionally, DCAA performed a complete audit of STC's pricing proposal, and no exception was taken to STC's proposed indirect expense rates. The cost realism evaluation resulted in a modest increase in STC's proposed cost. Moreover, as a result of the cost evaluation, the Army considered the labor force proposed by STC to be an innovative approach to satisfying the government's requirements that would result in a considerable savings to the government without sacrificing performance.

OMI, however, takes exception to the Army's cost evaluation on the basis that the solicitation specifically stated that proposed costs would be compared to the independent government estimate and that since STC's costs were substantially below the estimate it should have been rejected. We disagree. As previously

[2] In addition, OMI in its initial protest raised several other issues, including that the Army engaged in technical leveling and that STC may have submitted an untimely proposal. The Army in its report responded in detail to these allegations, and OMI in its comments did not rebut the Army's response. We consider the other issues to have been abandoned by the protester and will not consider them. *See TM Systems, Inc.*, B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

stated, with respect to the evaluation of cost, the solicitation specifically provided that "[t]he offeror's proposed costs will be evaluated by comparison with the government cost estimate and by appropriate consideration of information from the Defense Contract Audit Agency, Government Technical Personnel, and other sources." The solicitation clearly did not limit the cost evaluation to merely a comparison between proposed costs and the government estimate.

Moreover, we have recognized that where, as here, the government estimate is not revealed to offerors and proposals substantially deviate from that estimate, the contracting agency should consider the possibility that the proposals may nevertheless be advantageous to the government and conduct discussions with the offerors concerning the discrepancy. *See Teledyne Lewisburg; Oklahoma Aerotronics, Inc.*, B-183704, Oct. 10, 1975, 75-2 CPD ¶ 228. Here, the record indicates that the Army performed a complete analysis of the difference between STC's proposed cost and the government estimate. The government estimate was based primarily on historical expenditures which naturally related to OMI's technical approach as the incumbent. There was essentially no significant difference between STC's direct labor costs and the government estimate. In fact, STC's proposed labor costs were even higher than OMI's. The vast majority, approximately 80 percent, of the difference in STC's cost relate to indirect expenses which were verified by DCAA. Additionally, STC proposed a fee that was several percentage points below the government estimate. Under these circumstances, we conclude that the Army's cost realism determination was reasonable.

Next, the protesters argue that the Army failed to consider STC's mandatory extended workweek for professional employees in evaluating STC's technical proposal and that the extended workweek strategy has a significant impact on price. In this respect, the protesters contend that STC's professional employees are required to work a 44-to 48-hour week in order to receive full base pay.

We have no basis to disagree with the Army's evaluation here. The protesters essentially argue that STC's alleged extended workweek afforded STC an advantage in pricing its proposal because it allowed STC to give the impression that it offered a lower per hour labor rate when in fact the total labor cost is the same. Given the fact that STC's proposed total labor costs are greater than those of the protesters and, in fact, since STC's average labor rate per hour was greater than OMI's, we cannot say that STC's alleged extended workweek strategy gave it any significant competitive advantage. Moreover, the record shows that the Army thoroughly evaluated the labor rates proposed by STC and determined that they were realistic for STC to hire and maintain an acceptable workforce.

Additionally, OMI contends that the Army failed to eliminate a material competitive advantage accruing to STC, in that, contrary to the solicitation, STC proposed virtually all of its staff of approximately 65 persons to work on the government's site. Specifically, OMI argues that the RFP provision which stated that "[i]t is anticipated that offices for up to forty (40) people will be required," implied that the Army resources that would be made available to the successful offeror in the initial stages of the contract were limited to a maximum of 40

persons at the government's site. OMI states that it relied on the 40-person on-site limit in preparing its proposal which played a significant factor in OMI's selection of its final proposed mix of off-site, on-site, and subcontractor labor, thus affecting its price. OMI argues that the Army had a responsibility to assure a level playing field by adjusting the offers for the value of the extra government resources being required by STC. It is OMI's position that had this been done, the competitive advantage that accrued to STC would have been eliminated, and the price difference between the two proposals would have effectively disappeared.

We disagree that the solicitation limited the number of on-site personnel offerors could propose. At most, the solicitation indicated that the government anticipated only to have to provide for up to 40 on-site persons. The record indicates that STC proposed accommodations (in the form of portable trailers) for its proposed on-site employees, at no cost to the government. The solicitation did not limit the number of on-site personnel but merely indicated that the government only would provide resources for a limited number of persons. STC in its technical approach offered to provide additional resources for its on-site personnel, and OMI could have elected to do the same. (OMI in its approach made extensive use of off-site personnel.) The burden is on the offeror to submit a proposal that is both technically acceptable and cost effective, and the agency, in our view, has no duty to adjust a totally acceptable approach by one offeror because its competitor proposed a better and more cost effective approach.[3]

Here, the RFP stated that award would be made to that offeror whose proposal is determined to represent the "best buy" to the government. The RFP further stated that "as technical merit tends to equalize among offerors, cost will become a more significant factor in the selection process." In a negotiated procurement, even if cost is the least important evaluation criterion, an agency properly may award to a lower-priced, lower-scored offeror if it determines that the cost premium involved in awarding to a higher-rated, higher-priced offeror is not justified given the acceptable level of technical competence available at the lower cost. *AMG Assocs., Inc.*, B-220565, Dec. 16, 1985, 85-2 CPD ¶ 673. The Army considered all offerors to have submitted technically acceptable proposals and determined that award to STC, the low offeror, represented the "best buy" to the government. In our opinion, the Army's decision to award to STC, as the low technically acceptable offeror, was reasonable and consistent with the RFP's evaluation scheme, given the savings to the government of more than $6 million during the life of the contract.

The protests are denied.

[3] OMI also contends that STC submitted a generic phase-in plan that did not comply with the material requirements of the RFP. Our review of the record, however, reveals that STC submitted a detailed and fully acceptable phase-in plan with an estimated cost breakdown at no cost to the government.

B-235635, September 26, 1989

Procurement

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

Bidder's failure to acknowledge an amendment which increased by $650 the estimated cost of performance rendered the bid nonresponsive because the cost impact amounted to more than two times the difference between the low bid and the second low bid and more than 30 percent of the difference between the low bid and the protester's responsive bid. Such an amendment had a material impact on cost, and therefore the agency erred in allowing the apparent low bidder to acknowledge the amendment after bid opening.

Matter of: Gulf Electric Construction Co., Inc.

Gulf Electric Construction Co., Inc., protests the award of a contract to Atlantic Electric Co., Inc. under invitation for bids (IFB) No. F09650-89-B-0005, issued by the Department of the Air Force for the repair and upgrading of lighting fixtures in a building at Robins Air Force Base, Georgia. Gulf argues that the agency should have rejected Atlantic's bid as nonresponsive because Atlantic failed to acknowledge a material amendment to the IFB prior to bid opening.

We sustain the protest.

The IFB was issued on February 14, 1989, with bid opening scheduled for March 16. Amendment No. 0001, issued March 14, extended the bid opening date indefinitely. Amendment No. 0002, issued March 24, rescheduled bid opening for April 3 and incorporated addendum No. 0001 to the IFB which made six changes to the specifications. The addendum changed the material required for construction of the electrical raceways from "rigid steel conduit" to "EMT conduit," resulting in a $2,640 decrease in the government's estimated cost of performance,[1] and it required a chase to be added from a panel to the second floor, resulting in a $650 increase in the estimated cost of performance.[2] The other four changes to the specifications had no effect on the estimated cost of performance, or on the quantity, quality, or delivery of the items to be provided, and the protester does not argue otherwise.

Eleven bids were received by April 3. With respect to this protest, the following bids are relevant:

Atlantic Electric Co., Inc.	**$87,987**
Barnes Electric Co., Inc.	$88,295
Gulf Electric Construction Co., Inc.	$90,076

[1] The agency has advised that rigid steel conduit, a thicker, more expensive metal, is generally used in hazardous locations to protect the wires from physical damage. Here, the agency relaxed the requirement and requested the use of a thinner, less expensive metal because the wires would not be in close proximity to hazardous locations.
[2] The agency has advised that a chase, or opening, was needed through the ceiling in this area.

Atlantic, the apparent low bidder, had not, however, acknowledged amendment No. 0002 to the IFB prior to bid opening.[3] The contracting officer determined that because the net effect of the specification changes in the second amendment was to decrease the cost of performance by $1,990, Atlantic's failure to acknowledge this amendment was a minor informality, having a negligible effect on the price of the items to be provided. By letter dated April 26, Atlantic confirmed that its bid was correct and acknowledged receipt of the amendment. On May 11, after determining Atlantic to be the low, responsive and responsible bidder, the agency awarded the contract to Atlantic. This protest followed.

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected because absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment and its bid is thus nonresponsive. *O'Brien's Fire Protection Co., Inc.,* B-233248, Nov. 3, 1988, 88-2 CPD ¶ 437; *Loren Preheim,* B-220569, Jan. 13, 1986, 86-1 CPD ¶ 29. However, the failure of a bidder to acknowledge receipt of an amendment may be waived or allowed to be cured by the bidder where the amendment has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon. Federal Acquisition Regulation (FAR) § 14.405(d)(2) (FAC 84-12); *Gentex Corp.,* B-216724, Feb. 25, 1985, 85-1 CPD ¶ 231.

In this case, the two primary changes to the specifications in amendment No. 0002 caused a concurrent increase and decrease in the estimated cost of performance. In cases involving an amendment which both increases and decreases the contract requirements, we determine the materiality of the amendment by considering the increasing portion of the amendment separately. *See G.C. Smith Construction Co.,* B-213525, July 24, 1984, 84-2 CPD ¶ 100; *Northwestern Construction, Inc.,* B-186191, Nov. 23, 1976, 76-2 CPD ¶ 442. Further, whether the value of an unacknowledged amendment is trivial or negligible depends on the amendment's estimated impact on bid price *and* the relationship of that impact to the difference between the two low bids. Both parts of this test must be satisfied in order to permit waiver or correction of the failure to acknowledge the amendment. *See Marino Construction Co.,* 61 Comp. Gen. 269 (1982), 82-1 CPD ¶ 167.

Here, the cost impact of the increasing portion of the amendment is $650, more than two times the difference between Atlantic's bid and the second low bid, and it is more than 30 percent of the difference between Atlantic's bid and Gulf's responsive bid.[4] Such an impact clearly makes the amendment a material one. *See Marino Construction Co.,* 61 Comp. Gen. 269, *supra; Power Systems Diesel, Inc.,* B-224635, Nov. 24, 1986, 86-2 CPD ¶ 604. Therefore, the agency erred in allowing Atlantic to acknowledge this amendment subsequent to bid opening.

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[3] Barnes, the apparent second low bidder, also failed to acknowledge amendment No. 0002 prior to bid opening. Hence, our analysis of Atlantic's failure to acknowledge this amendment prior to bid opening equally applies to Barnes.

[4] The difference between Atlantic's low bid and the second low bid is only $308; the difference between the second low bid and Gulf's bid is $1,781.

Accordingly, we recommend that the Air Force terminate the contract awarded to Atlantic and award the contract to Gulf, if otherwise appropriate. Further, we find that Gulf is entitled to its protest costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1989).

The protest is sustained.

B-235684, September 27, 1989

Civilian Personnel

Leaves Of Absence
■ Annual leave
■■ Charging

Civilian Personnel

Travel
■ Travel expenses
■■ Official business
■■■ Determination
■■■■ Burden of proof

Firearms Instructor may not be reimbursed for costs of trying out for Olympic Shooting Team, since the tryouts did not constitute a training program or meeting for which reimbursements are allowed, nor did it constitute official business. The period of absence while at tryouts must be charged against annual leave.

Matter of: Charles H. Byrd II—Travel and Leave for Tryouts for the United States Olympic Team

Background

Mr. Ronald V. Cooper, Authorized Certifying Officer, Federal Bureau of Investigation (FBI), has referred the claim of Mr. Charles H. Byrd II to our Office for a decision. Mr. Byrd, a firearms instructor at the FBI Academy, qualified for the United States Shooting Team tryouts held in California in August 1988, and he requested and received approval for instructor development (training) funds to cover his travel and lodging expenses while at the tryouts. Mr. Byrd and his supervisors stated that his exposure to the expertise of other shooters, coaches, and gunsmiths as well as to recent developments in weapons technology and training techniques would be related to his official duties as a firearms instructor and would improve his ability to perform those duties.

Mr. Byrd participated in the tryouts and incurred expenses totalling $1,646.84. He also used 9 official workdays for which he was paid and was not charged against accrued annual or sick leave. After the tryouts, the certifying officer denied reimbursement of Mr. Byrd's expense voucher and recommended that Mr. Byrd's paid absence for 9 days be converted to annual leave. The certifying

officer argued that Mr. Byrd's participation in Olympic tryouts was beyond his official duties and that the FBI could not officially sponsor someone in tryouts against other amateur athletes.

Opinion

Chapter 41 of title 5, United States Code (1982), and 5 C.F.R. § 410 (1988) provide the authority for training federal employees in governmental or non-governmental facilities. Subsection 4101(4) defines training as "a program, course, or routine of instruction or education in fields:

> . . . which are or will be directly related to the performance by the employee of official duties for the Government, in order to increase the knowledge, proficiency, ability, skill, and qualifications of the employee in the performance of official duties. . . .

Both the Federal Personnel Manual (FPM) and our decisions have interpreted this statute to be "sufficiently broad and flexible to enable an agency to provide whatever training is necessary to develop the skills, knowledge, and abilities that will best qualify employees for the performance of official duties." FPM, Book 410, Subch. 1-3(2), Inst. 271 (1981); B-182398, Oct. 24, 1979. However, we have interpreted 5 U.S.C. § 4101 to minimally require that a program "be broadly designed to increase the knowledge and proficiency of the persons attending them" to constitute a training program. B-182398, *supra.* On the record before us, we conclude that the Olympic Shooting Team tryouts were designed to select persons to compete for the United States in the Olympic Games, not to develop skills, knowledge and abilities of the competitors through a planned, prepared and coordinated routine of instruction. Therefore, 5 U.S.C. §§ 4101-4118 provides no authority for Mr. Byrd to remain on on-duty status or be reimbursed for his cost while attending tryouts.

Similarly, we conclude that a gathering of firearms experts only for the purpose of competition in tryouts for the Olympic Games cannot be understood to constitute a meeting under 5 U.S.C. § 4110 (1982) for which Mr. Byrd could be reimbursed expenses. *See Dr. M.E. Kaye,* B-210522, Dec. 15, 1983.

Section 5702 of title 5, United States Code, provides that an agency may reimburse an employee for actual and necessary costs for travel while on official business. The Federal Travel Regulations (FTR) allow for reimbursement only for employee travel expenses "essential to the transacting of official business."[1] Mr. Byrd's travel to compete in Olympic tryouts cannot be characterized as travel for the purpose of transacting or performing official business within the meaning of the FTR. Mr. Byrd qualified for the tryouts and subsequently requested that the FBI approve funds to cover his travel and lodging costs. As such, his travel was primarily his personal choice and for his personal benefit, despite the value which the FBI might gain from his participation in the tryouts. *See Harold A. Knapp,* B-226863, Jan. 26, 1989.

[1] FTR, para. 1-1.3b (Supp. 1, Sept. 28, 1981), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1988).

Since Mr. Byrd's travel does not qualify as training, attendance at a meeting, or official business, the last question is whether his absence may be charged to administrative leave. Administrative leave excuses federal employees without loss of pay or charge to annual or sick leave accounts during periods in which they perform no official duties. *Satwant Singh Bajwa,* B-185128, Dec. 3, 1975. However, our decisions have limited the use of administrative leave to situations involving brief absences, and we have specifically denied such use to an employee who participated in the Pan American Games. *Bajwa, supra.* Therefore, the period of Mr. Byrd's absence, 9 workdays, may not be charged to administrative leave and should instead be charged to annual leave.

Accordingly, we find no authority to allow the excused leave or reimbursement of expenses that Mr. Byrd seeks. With regard to the travel expenses, we note that the FBI provided the airline ticket ($422) and a travel advance ($968), and Mr. Byrd seeks reimbursement for $1,228.48 in travel expenses. Collection of the erroneous payments from Mr. Byrd, however, is subject to waiver consideration under 5 U.S.C. § 5584, as amended (1982 & Supp. IV 1986). *See Rajinder N. Khanna,* 67 Comp. Gen. 493 (1988); *Major Kenneth M. Dieter,* 67 Comp. Gen. 496 (1988).

B-229329.2, September 29, 1989

Procurement

Payment/Discharge
■ Shipment
■■ Carrier liability
■■■ Burden of proof

An affidavit by the shipper's employee, who has personal knowledge of the facts, stating that a missing carton was loaded on the carrier's vehicle, establishes receipt by the carrier. Since the carrier offers no other explanation for the loss of the carton, a *prima facie* case of carrier liability for loss is established.

Procurement

Payment/Discharge
■ Shipment
■■ Losses
■■■ Common carriers
■■■■ Notification

A notice of loss called a discrepancy report, sent by the Department of the Air Force to the carrier 10 weeks after receipt of a carton by the carrier, identifying the lost property, its value, and stating the intention to hold the carrier liable, substantially complies with normal claims-filing requirements. Other circumstances indicating the carrier's awareness of the loss demonstrate that the carrier was not prejudiced by a 2-year delay in filing a formal claim.

Procurement

Payment/Discharge

■ **Shipment**

■■ **Tenders**

■■■ **Terms**

■■■■ **Interpretation**

A carrier's tender offered to transport Freight All Kinds, except articles of "unusual value." This exception is limited to items of intrinsic value, such as precious metals; it does not cover items such as scientific equipment which are expensive but lack intrinsic value. Therefore, an atomic clock valued at over $600 per pound cannot be viewed as an article of "unusual value" within the meaning of the tender exception since it possesses no intrinsic value.

Procurement

Payment/Discharge

■ **Shipment**

■■ **Carrier liability**

■■■ **Amount determination**

In the absence of a written agreement reducing the carrier's liability, it was indebted for a high-value clock's full actual loss. Even though the clock has no market value, that loss is measured by its cost, the practicability and expense of replacing it, and other factors that affect its value to the owner. Since the Air Force's determination of full actual loss was based on these elements, it was not excessive.

Matter of: PIE Nationwide, Inc.—Damages for Loss of an Atomic Clock

PIE Nationwide, Inc., appeals our Claims Group's determination, Z-2861141, March 12, 1987, that the carrier was indebted to the United States in the amount of $63,749.83 for the loss of an atomic clock. The Department of the Air Force recovered that amount by setoff. We sustain these administrative actions.

Background

On August 25, 1983, Ryder/PIE Nationwide, Inc. (PIE), received a shipment at Dover Air Force Base, Delaware, destined to Newark Air Force Station, Ohio. PIE's driver signed the Government Bill of Lading (GBL), No. T-0194785, and added "SLC-SW," indicating the commercial term, "shipper's load and count." The GBL described the shipment as one carton of Freight All Kinds (FAK), weighing 94 pounds; it also referred to PIE's rate tender "RYPI 78" (Tender 78). Air Force records show that the carton contained an atomic cession, master regulating clock used as a time-keeping source for a survival, low-frequency communications system that was en route from Europe for repairs when it was reported missing.

On November 4, 1983, Newark Air Force Station issued a discrepancy report (Standard Form 361). A copy of the report was sent to PIE indicating that the loss was discovered on September 16, 1983, when a routine records check

showed that the expected shipment had not yet arrived. The report also indicated that PIE was first notified of the loss on September 21, 1983, and that the clock's value was $93,774. The carton was never found, and on August 5, 1985, the Air Force presented a formal claim to PIE, which was reduced in amount to $63,749.83, by amended claim, on October 3, 1986. PIE appeals our Claims Group's determination, which resulted in the Air Force's collection of its claim, on five grounds.

Discussion

First, PIE contends that the Air Force has failed to satisfy its burden of proving that PIE actually received the carton. We disagree. The Air Force furnished a sworn statement by the warehouse foreman at Dover Air Force Base, where the GBL was issued, indicating that the carton was actually loaded on the carrier's equipment. An affidavit furnished by the shipper's employee having personal knowledge of the facts fulfills the shipper's burden of proving receipt by the carrier for our Office's claims purposes. *Consolidated Freightways,* B-185132, Dec. 22, 1976. Although PIE disputes receipt of the carton, we have accepted the statements of government agents on similar disputed factual questions in the absence of compelling contrary evidence. *Pacific Intermountain Express,* B-190147, May 31, 1978. PIE has presented no such evidence. Thus, the Air Force has satisfied its burden of showing that the carton was received by PIE.

Second, PIE contends that it was prejudiced in its effort to verify the loading of the carton, trace its whereabouts, and calculate its value by the Air Force's delay of nearly 2 years in presenting a claim. We conclude that the copy of the discrepancy report that the Air Force sent to the carrier on November 4, 1983, or about 10 weeks after the date of shipment, substantially complied with the normal claim-filing requirements. *See Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus,* 762 F.2d 1364, 1368 (9th Cir. 1985). Further, based on PIE's own tracing action in October 1983 and other efforts by the Air Force after discovery of the loss to address PIE's concerns, we see no prejudice to the carrier by the Air Force's procedures.

Third, PIE contends that because it did not agree to transport the clock under Tender 78, it should be relieved of liability. Tender 78 offered transportation of FAK, but it specifically excepted from the definition of FAK articles of "unusual value." PIE believes that the clock here, which was valued at over $678 per pound (based on the Air Force's amended claim), was such an article of "unusual value."

The Interstate Commerce Commission held in *Garrett Freightlines, Inc.—Modification,* 106 M.C.C. 390 (1968), that the term "unusual value," for the purpose of determining what articles a carrier can transport, contemplates an intrinsic value, as manifested in gold, platinum, and silver bullion. It distinguished these articles from those having a high value per pound but no intrinsic value, such as scientific equipment and electronic components. The clock shipped here, although of high value per pound, was not of "unusual value" since the clock did

not have intrinsic value. Therefore, applying this concept of "unusual value," which was also approved in *National Bus Traffic Assn., Inc. v. I.C.C.*, 613 F.2d 881, 886 (D.C. Cir. 1979), the clock was not excepted from Tender 78's coverage as FAK.

Fourth, PIE contends that the Air Force should have provided a detailed description of the clock, including its value, on the GBL rather than simply describing it as one carton of FAK. According to PIE, it is not liable because this was a misdescription of the clock.

The purpose of the FAK description is to eliminate the need to clarify or describe items. *See Public Utilities Commission of California v. United States*, 355 U.S. 534, 544 (1958). We find no support for PIE's contention that the Air Force had a duty to provide any description of the clock other than FAK. PIE cites *Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978), which held that a shipper who intentionally fails to disclose a shipment's high value to get a lower freight rate or misdescribes the shipment is barred from recovering for the shipment's loss. However, this case is inapposite here since PIE concedes that no fraud was involved in describing the carton containing the clock as FAK. Thus, in the absence of any proven shipper misconduct, the government is not barred from recovering the clock's full actual value.

Fifth, PIE contends that even if it is responsible for loss of the clock, the Air Force's claim is excessive and should be limited to the amount normally attributable to an item of non-extraordinary value—about $50 per pound. Under the Carmack Amendment of 1906 to the Interstate Commerce Act, 49 U.S.C. § 11707 (1982), carriers are liable for the full actual loss caused to property they transport. *Continental Van Lines, Inc.*, B-216757, Aug. 14, 1985. A carrier may not limit its liability for loss or damage in the absence of a written declaration on the bill of lading, as required by law. *Gordon H. Mooney, Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619 (2nd Cir.), *cert. denied*, 449 U.S. 875 (1980). Since there was no written agreement here on the GBL reducing PIE's liability, and since PIE did not limit its liability by filing released value rates in Tender 78 as it could have done, it is responsible for the clock's full value.

We have consistently held that the method of arriving at a lost article's full value where the property has no market value is to consider its cost, the practicability and expense of replacing it, and such other conditions as affect its value to the owner. B-190665, Feb. 17, 1978. Since the Air Force considered these elements based on statements made by government officials who claimed to have knowledge of the facts, and since PIE provided no contradictory evidence, we cannot conclude that the amount of $63,749.83 is excessive. *Compare Chandler Trailer Convoy, Inc.*, B-211194, Apr. 15, 1986.

Conclusion

A *prima facie* case of carrier liability for loss is established by showing: (1) property was received by the carrier; (2) the property was not delivered; and (3) the

property's valuation. We conclude that the Air Force has established a *prima facie* case of PIE's liability for the lost clock. While the matter is not free from doubt, on balance we are unable to say PIE has established a legally sufficient basis to overcome the Air Force's *prima facie* case. *See* 57 Comp. Gen. 170 (1977).

Accordingly, our Claims Group's determination of carrier indebtedness and the Air Force's deduction for the full actual loss are sustained.

Civilian Personnel

decisions (60 Comp. Gen. 493 (1981), 55 Comp. Gen. 1035 (1976), B-216640, Mar. 13, 1985, B-216640, Sept. 18, 1985) are overruled.

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Relocation
■ Overseas personnel
■■ Home service transfer allowances
■■■ Eligibility

An employee was assigned to a United States-Saudi Arabian Commission under the Foreign Assistance Act and his travel was governed by the Foreign Service Travel Regulations. Upon his return to the United States, he is eligible for a home service transfer allowance even though he was not between assignments to posts in foreign areas. *See William J. Shampine,* 63 Comp. Gen. 195 (1983).

692

Travel
■ Temporary duty
■■ Travel expenses
■■■ Reimbursement
■■■■ Fees

An employee, who failed to negotiate a travel advance check prior to her departure on temporary duty, may not be reimbursed for the fee incurred when a relative sent funds via wire service.

689

■ Travel expenses
■■ Official business
■■■ Determination
■■■■ Burden of proof

A school principal employed by Department of Defense Dependents Schools, Germany Region, claims travel allowances for expenses he incurred incident to travel he performed when he received notice of the agency's proposal to remove him. The notice provided for his right to make an oral response pursuant to agency regulation. The employee's duty station was Erlangen, Germany, and the agency designated Wiesbaden, Germany, as the location for the oral presentation. The oral response, as part of the proposed adverse action process constitutes official business for which travel expenses are reimbursable.

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■ Travel expenses
■■ Official business
■■■ Determination
■■■■ Burden of proof

Firearms Instructor may not be reimbursed for costs of trying out for Olympic Shooting Team, since the tryouts did not constitute a training program or meeting for which reimbursements are allowed, nor did it constitute official business. The period of absence while at tryouts must be charged against annual leave.

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Procurement

■ Discussion
■■ Adequacy
■■■ Criteria

Agency conducted meaningful discussions where it directed protester to areas in which its proposal was deficient or noncompliant with mandatory solicitation requirements. Procuring agency is not required to provide an offeror with exact proposal language which will establish compliance.

708

■ Discussion
■■ Adequacy
■■■ Criteria

An agency satisfies requirement for meaningful discussions where it twice advises the protester of which responses to sample tasks, requested by request for proposals to evaluate the offerors' understanding of the government's requirements, were unacceptable and affords the protester the opportunity to revise its proposal. Since the offeror's understanding was being tested by its responses to the sample tasks, the agency need not specify all deficiencies in each sample task response because this may defeat the purpose of that evaluation criterion.

699

■ Offers
■■ Cost realism
■■■ GAO review

Contracting agency's cost realism analysis involves the exercise of informed judgment, and the General Accounting Office will not question such an analysis unless it clearly lacks a reasonable basis. Reasonable basis is provided by determination that awardee's technical approach is feasible, by Defense Contract Audit Administration analysis of awardee's rates, and by reconciliation of awardee's estimated costs with the independent government cost estimate.

714

■ Offers
■■ Evaluation
■■■ Technical acceptability

Where a protester received an unacceptable rating on the most important evaluation criterion of four criteria listed in the request for proposals in relative order of importance, and acceptable ratings on the other three criteria, the overall unacceptable rating awarded the protester did not give inordinate weight to that most important criterion.

699

■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Agency reasonably found an offeror did not demonstrate understanding of agency requirements in responding to sample tasks that could be ordered, as set forth in request for proposals, where the

tester; and (3) there is no evidence of a deliberate attempt by the agency to exclude the protester from the competition.

663

■ Use
■■ Justification
■■■ Urgent needs

Agency—a wholly-owned government corporation funded by proceeds from sales to other government agencies—properly ordered its entire production-run requirement for raw material under a limited competition procurement where agency obtained competitive prices from six offerors, and immediate purchase of the entire requirement was necessary to secure source of supply and current prices, in order to ensure that agency would meet its delivery deadlines and avoid a loss on a contract to sell the resulting production to another agency.

663

Payment/Discharge
■ Shipment
■■ Carrier liability
■■■ Amount determination

In the absence of a written agreement reducing the carrier's liability, it was indebted for a high-value clock's full actual loss. Even though the clock has no market value, that loss is measured by its cost, the practicability and expense of replacing it, and other factors that affect its value to the owner. Since the Air Force's determination of full actual loss was based on these elements, it was not excessive.

724

■ Shipment
■■ Carrier liability
■■■ Burden of proof

An affidavit by the shipper's employee, who has personal knowledge of the facts, stating that a missing carton was loaded on the carrier's vehicle, establishes receipt by the carrier. Since the carrier offers no other explanation for the loss of the carton, a *prima facie* case of carrier liability for loss is established.

723

■ Shipment
■■ Losses
■■■ Common carriers
■■■■ Notification

A notice of loss called a discrepancy report, sent by the Department of the Air Force to the carrier 10 weeks after receipt of a carton by the carrier, identifying the lost property, its value, and stating the intention to hold the carrier liable, substantially complies with normal claims-filing require-

ments. Other circumstances indicating the carrier's awareness of the loss demonstrate that the carrier was not prejudiced by a 2-year delay in filing a formal claim.

723

■ **Shipment**
■■ **Tenders**
■■■ **Terms**
■■■■ **Interpretation**

A carrier's tender offered to transport Freight All Kinds, except articles of "unusual value." This exception is limited to items of intrinsic value, such as precious metals; it does not cover items such as scientific equipment which are expensive but lack intrinsic value. Therefore, an atomic clock valued at over $600 per pound cannot be viewed as an article of "unusual value" within the meaning of the tender exception since it possesses no intrinsic value.

724

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

Individual sureties on a bid bond were properly found unacceptable where, in their Affidavits of Individual Surety (standard form 28), they misstated and omitted essential information needed to verify their net worths, thereby casting doubt on their integrity and ability to fulfill the surety obligation.

666

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

Bidder's failure to acknowledge an amendment which increased by $650 the estimated cost of performance rendered the bid nonresponsive because the cost impact amounted to more than two times the difference between the low bid and the second low bid and more than 30 percent of the difference between the low bid and the protester's responsive bid. Such an amendment had a material impact on cost, and therefore the agency erred in allowing the apparent low bidder to acknowledge the amendment after bid opening.

719

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

Solicitation which limits the award of contracts for a given group of courses to a single academic institution in the United States European Command is not legally objectionable where, after consideration of logistical, demographic and economic factors on a theater-wide basis, the procuring agency concludes that its solicitation is the most practicable and will most advantageously fulfill the needs of the military student population.

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Compiled in the Office of the General Counsel
Legal Publications and Writing Resources Section