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Contents

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., 67 Comp. Gen. 10 (1987). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

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

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

Table of Decision Numbers

Cite Decisions as 69 Comp. Gen.—

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

List of Claimants, etc.

Tables of Statutes, etc.

United States Statutes

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

United States Code

See also U.S. Statutes at Large

Published Decisions of the Comptrollers General

Decisions of the Court

January 1990

B-237122, January 4, 1990

Procurement

Bid Protests
■ Moot allegation
■■ GAO review

Procurement

Competitive Negotiation
■ Discussion
■■ Offers
■■■ Clarification
■■■■ Propriety

Protester has no basis to object to the agency decision to hold discussions and request best and final offers where firm is not low if discussions were not held, and discussions effectively provide a new opportunity for firm to compete for award.

Matter of: Servrite International, Ltd.

Servrite International, Ltd. protests the award of a contract to Contact International Corporation (CIC) under request for proposals (RFP) No F62562-89-R0130, issued by the Department of the Air Force for operating a dairy plant. Servrite initially argued that it was the low offeror under the evaluation scheme and that, in any event, CIC is nonresponsible and therefore ineligible for award.

We deny the protest.

Servrite and CIC submitted offers. The agency reports that Servrite was the apparent low offeror based on initial offers. The contracting officer, however, requested "clarifications" of both offers to permit proper price evaluation. Servrite subsequently submitted a revised offer which displaced it as the low firm. The contracting officer then requested and received from Servrite verification of its revised offer, following which the Air Force awarded the contract to CIC as the low offeror in accordance with the evaluation scheme which basically called for award to the low priced offeror.

After filing an initial report, the agency subsequently advised our Office that it believes the request for "clarifications" concerning price constituted discussions. In its view, it failed to formally open discussions or request best and final offers (BAFOs) although it accepted a revised offer from Servrite.

It reports that it has decided to open discussions with both offerors, request BAFOs and make a new award consistent with the RFP evaluation scheme. It thus views Servrite's protest as academic.

While not disputing the agency's position on the merits as to its status as second low offeror after it submitted its revised offer, Servrite objects to the Air Force's decision to hold discussions and request a BAFO. Servrite points out that prices have been exposed and alleges that the agency's proposed action creates an auction. Servrite asserts that award on initial, unrevised offers is the appropriate remedy here.

Discussions are communications between the government and an offeror that either involve information essential for determining the acceptability of a proposal or provide an opportunity for proposal revision. Clarifications, on the other hand, are inquiries for the purpose of eliminating minor uncertainties or irregularities in a firm's proposal and do not require discussions with other offerors in the competitive range. *See* Federal Acquisition Regulation § 15.601 (FAC 84-28). If discussions are held with one offeror, they must be held with all offerors in the competitive range. *See Greenleaf Distribution Services, Inc.*, B-221335, Apr. 30, 1986, 86-1 CPD ¶ 422.

If the Air Force is incorrect and its communication with Servrite constituted clarification, not discussions, then Servrite's offer as clarified was not low and award to CIC as the low priced firm on initial offers was proper. Alternatively, if the Air Force is correct and discussions were improperly held solely with Servrite, Servrite has no basis to complain to the Air Force since the agency could not award to Servrite on the basis of its revised offer without also providing CIC an opportunity to engage in discussions and revise its offer. Moreover, the Air Force's proposed remedy thus effectively provides Servrite a new opportunity to compete for the award.

We deny the protest.

B-237139, January 5, 1990

Procurement

Sealed Bidding

■ **All-or-none bids**

■ ■ **Responsiveness**

Low bid is properly determined to be responsive as an "all or none" bid where bidder provides one lump-sum price for work required rather than individual prices for six line items (base item plus five additives) in the solicitation's schedule.

Matter of: Jones Floor Covering, Inc.

Jones Floor Covering, Inc., protests the proposed award of a contract to Liberty Painting Company under invitation for bids (IFB) No. F04693-89-B-0019, issued by the Department of the Air Force for interior painting and carpeting of the

hallways of seven buildings at Los Angeles Air Force Base. The protester argues that Liberty's bid should have been rejected as nonresponsive because it submitted one lump-sum price in response to the IFB, which requested prices for six line items.

We deny the protest.

The IFB was issued on August 15, 1989, and 13 bids, including Liberty's low bid, were received by the September 14 bid opening. The agency states that due to a funding limitation, the IFB contained a bid schedule for a base item and five additive items. Line item one required a base price for work on two specific buildings, while the other five line items were called additives and sought prices for the five other buildings. The contracting officer states that breaking down the work required into different line items provided a means for making a partial award based on funds determined to be available at the time of the award. In addition, the IFB contained Standard Form (SF) 1442 (solicitation cover sheet) with a provision which stated that the "offeror agrees to perform the work required at the prices specified below in strict accordance with the terms of this solicitation," and which provided a space for bidders to write in their prices. Liberty did not complete the bid schedule containing the line items; rather, it merely indicated a dollar amount of $474,000 in the space provided in SF 1442.

Prior to bid opening, the agency announced and recorded that it had $613,863 available for this project for which it had estimated would require $700,932. Because of the price difference between Liberty's bid and the government estimate, the contracting officer requested Liberty to verify its bid. By facsimile dated September 18, Liberty verified its price and returned a completed bid schedule indicating prices for each line item. The agency determined that Liberty had submitted a responsive "all or none" bid. Jones filed its protest to our Office on September 27.

Jones argues that Liberty's failure to submit prices for each line item creates an ambiguity as to what it was actually bidding on. Therefore, it argues, Liberty is not unequivocally bound to perform each line item of the contract and is nonresponsive. The protester also contends that Liberty could assert a mistake and withdraw its bid if it chose to do so or could deliberately allocate its bid price as to make it unbalanced.

A bid is ambiguous in a legal sense only where, when taken as a whole, it is susceptible of two or more reasonable interpretations. *See Hirt Telecom Co.* B-222746, July 28, 1986, 86-2 CPD ¶ 121. Here, we find that the agency reasonably concluded that Liberty submitted an "all or none" bid, that is, it submitted a bid price for the work described in all line items. Although it did not provide prices for each line item, Liberty indicated its total price beneath the IFB provision which requested the bidder's price for the "work required." We disagree that the total price submitted for the "work required" is susceptible to more than one reasonable interpretation. The range of prices received and the government estimate clearly indicated that Liberty was not bidding solely on th

base item but instead offered much more.[1] In the absence of any indication in the bid, we do not think that it is reasonable to conclude, as the protester urges, that the "work required" could refer to only line item one, or some lesser combination of line items. There is simply nothing in the record to support the conclusion that Liberty intended to limit its bid for less than all the work. Rather the only reasonable interpretation, in our view, is that Liberty intended to bid on all of the work required. Thus, it submitted an "all or none" bid.

Jones also argues that Liberty's bid should have been rejected as nonresponsive because it cannot be evaluated in accordance with the evaluation scheme stated in the solicitation since it failed to provide prices for each item. Essentially, it objects to an "all or none" bid where prices were requested for various line items.

On a solicitation requesting a base bid and various additive items, as here, bids must be evaluated on the basis of the work actually awarded; any evaluation which incorporates more or less than the work that will be awarded fails to obtain for the government the benefits of full competition on the work to be performed. *Rocky Ridge Contractors, Inc.,* B-224862, Dec. 19, 1986, 86-2 CPD ¶ 691. Since sufficient funds were available to make the award on the base bid and all additive items in this case, Liberty's "all or none" bid could be accepted as responsive; its failure to timely break down its separate prices for the base bid and additives is a minor informality not requiring the rejection of its bid. Of course, Liberty's bid ran the risk of being rejected as nonresponsive, if the Air Force did not have sufficient funds for all items. *Id.*

Moreover, in *Rocky Ridge Contractors, Inc.,* B-224862, *supra,* and the other decisions cited in that case, we stated that the bidder's bid should not be rejected where it did not break down separate prices for various items even where the solicitation warned that failure to do so would result in the rejection of the bid. Here, where there was no such provision in the solicitation and where Liberty offered to perform the work required, which was the basis of the award, award to that firm was proper.

Accordingly, the protest is denied.

[1] For example, the government estimate for the base item was $194,949. Most firms bid less than the government estimate for the base item. As stated above, Liberty's total bid was $474,000.

B-237685, January 5, 1990

Procurement

Competitive Negotiation

■ **Offers**

■■ **Risks**

■■■ **Pricing**

Procurement

Specifications

■ **Minimum needs standards**

■■ **Risk allocation**

■■■ **Performance specifications**

Protest allegation that solicitation provision, which requires contractor to lodge its employees in a privately operated facility, places undue cost risk on offerors is denied where the solicitation provides that the contractor's costs of lodging will be reimbursed by the government and any other costs to the contractor are easily calculable.

Procurement

Competitive Negotiation

■ **Competitive advantage**

■■ **Non-prejudicial allegation**

Protest that operator of lodging facility has a competitive advantage is denied where protester does not show what advantage the operator is alleged to have or that the alleged advantage was caused by any unfair action by the government.

Matter of: Eagle Management, Inc.

Eagle Management, Inc., protests the terms of request for proposals (RFP) No. N68836-89-R-0275, issued by the Department of the Navy for mess attendant services at the Naval Station and Naval Air Station at Guantanamo Bay, Cuba. Eagle argues that the solicitation requirement that the contractor lodge its employees at a privately operated facility subjects offerors to undue costs and risk, and that the operator of the facility has a competitive advantage and should be excluded from the competition.

We deny the protest.

The RFP contemplates the award of a firm, fixed-priced contract for mess attendant services for a base year and two option years. Offerors were informed that the lowest priced, technically acceptable offer for all items would be selected for award. The RFP also informed offerors that the contractor's employees would be lodged at a floating facility, which is being operated for the Navy by Kellogg Plant Services, Inc. A copy of Kellogg's lease agreement with the Navy was provided with the RFP, and offerors were informed that the contractor would be required to enter into a lodging agreement with Kellogg, subject to the stated room rates and conditions.

Eagle principally objects to the requirement that the mess attendant contractor lodge its employees at this floating facility. Eagle, the incumbent contractor, states that under its current contract the Navy furnished rent-free housing in government barracks.[1] Eagle argues that it cannot estimate its lodging costs because the floating barge room rates are based upon occupancy and are subject to quarterly adjustment. Eagle contends that the costs of lodging will fluctuate over the term of the contract. In addition, Eagle objects to various requirements in the lodging agreement, for example, that the contractor provide a security deposit for each employee berthed at the facility and that the contractor indemnify Kellogg against claims arising out of the lodging agreement and obtain liability insurance. Eagle argues that these provisions put inordinate risk in cost of performance on the successful contractor.

Eagle's arguments are without merit. The RFP provides that the contractor will invoice the Navy on a monthly basis for costs of lodging at the facility. Thus, the solicitation contemplates that the contractor will receive this lodging rent-free, and the potential fluctuation of room rates will not entail any additional cost or risk to the contractor. Furthermore, the RFP sets out maximum room rates for each category of lodging and provides that offerors need only estimate the amount of staff required to be lodged to calculate their lodging costs. Accordingly, the possible fluctuation of room rates should pose no risk to Eagle.

Also, while offerors must bear the expense of obtaining liability insurance and the costs associated with "fronting" the room rent and deposits and invoicing the Navy, these requirements do not present any undue risk since Eagle should be able to reasonably project these costs based upon its estimated staffing needs. In any event, there is no requirement that a solicitation eliminate all performance uncertainties and risk; rather, offerors properly may be left to exercise some business judgment in projecting their costs and preparing their proposals. *See AAA Eng'g & Drafting, Inc.*, B-236034, Oct. 31, 1989, 89-2 CPD ¶ 404.

Eagle also argues that Kellogg should not be allowed to compete for award under the RFP. Eagle apparently believes that Kellogg would have a competitive advantage because Kellogg operates the lodging facility for the Navy. Eagle, however, has not shown what advantage Kellogg allegedly has, and we fail to see any advantage since the mess attendant contractor will be reimbursed for its lodging costs by the Navy. Furthermore, the Navy and Kellogg state that Kellogg, like any other contractor, would be required to enter into a lodging agreement at the facility, subject to the same room rates and conditions. In any event, since Eagle does not argue that Kellogg's alleged advantage has resulted from unfair action on the part of the government, there is no basis to require the Navy to exclude Kellogg from the competition. *See Advanced Sys. Technology, Inc.*, B-235327, Aug. 29, 1989, 89-2 CPD ¶ 184.

The protest is denied.

[1] Eagle, however, admits that the availability of the government furnished on-base housing has never been adequate to meet the housing requirements of the various base contractors and that these facilities were provided on an "as is" basis, requiring the contractor to bear the costs of minor repair and utilities.

B-236790, January 10, 1990

Procurement

Sealed Bidding
■ Unbalanced bids
■■ Materiality
■■■ Responsiveness

Low bid for operation and maintenance contract is materially unbalanced where price for initial 60-day mobilization period amounts to approximately 63 percent of overall price for the firm, 1-year performance period in the contract as awarded, and 22 percent of the potential 5-year contract period.

Matter of: Technology Applications, Inc.

Technology Applications, Inc. (TAI), protests the Department of the Navy's award of a contract to Person-System Integration, Limited (PSI), under invitation for bids (IFB) No. N61339-89-B-2005, step two of a two-step sealed bid acquisition for the operation and maintenance of F-14A aircraft training simulators. TAI asserts that the Navy should have rejected PSI's bid as materially unbalanced.[1]

We sustain the protest.

Under step one of the procurement, the Navy requested technical proposals for contractor operation and maintenance (COMS) of, and supply support for, F-14A training simulators at Naval Air Station Ocean, Virginia Beach, Virginia, and Naval Air Station Miramar, San Diego, California. The solicitation provided for a potential contract period of up to 5 years, including (1) a firm requirement for a 60-day mobilization period (during which the contractor was to acquire personnel, conduct training, inventory government-furnished property, observe the performance of the prior, transitioning contractor on a not-to-interfere basis, and perform other mobilization tasks so as to prepare to assume performance responsibility), (2) an initial option for operation and maintenance and supply support for 10 months, (3) three subsequent, separate option years, (4) an option for 10 months, and (5) a final option for a 60-day transition period.

The specifications generally required the contractor to maintain the training simulators in an operationally-ready state, with all essential subsystems fully functional and the simulators manned by a properly qualified operator, during scheduled training time. In addition, the specifications required the contractor, as part of the fixed-price supply support requirement, to assume responsibility for the timely procurement at contractor expense of those spare and repair parts costing $25,000 or less for any single item and other consumables necessary to accomplish trainer operation and maintenance and to maintain a prescribed stock inventory level.

[1] Two-step sealed bidding is a hybrid method of procurement that combines elements of sealed bidding and negotiations. Step one is similar to a negotiated procurement in that the agency requests technical proposals, without prices, and may conduct discussions. Step two consists of a price competition among those firms which submitted acceptable proposals under step one. *Simulaser Corp.*, B-233850, Mar. 3, 1989, 89-1 CPD ¶ 236.

Eight offerors submitted technical proposals in response to the step one request for technical proposals, and all offerors were invited to submit firm, fixed-price bids. The solicitation provided for evaluation based upon the prices for the firm requirement and all options, except that if there were insufficient funds available at the time of award to fund supply support, evaluation was to be based upon all options except supply support. The solicitation cautioned that the government might reject materially unbalanced bids, and defined an unbalanced offer as one based on prices that are significantly less than cost for some work and significantly overstated for other work. Six of the offerors subsequently submitted step two sealed bids, ranging in total from PSI's low bid of $5,451,968 to a high bid of $11,443,945.

After reviewing the bids, the contracting officer wrote to PSI to advise it of the possibility of an error in its bid. In requesting PSI to verify its bid, the contracting officer noted that the bid ($5,451,968) was significantly lower than the remaining bids (including TAI's second low bid of $6,532,339). PSI, however, responded by verifying its bid as correct.

Meanwhile, TAI wrote to the contracting officer to complain that PSI had submitted an unbalanced bid by frontloading 22 percent ($1,210,365) of its overall bid for 5 years into the 60-day mobilization period. The contracting officer agreed that "PSI is obviously unbalanced mathematically," and observed that "PSI appears to be unbalanced due to the high price bid for mobilization." He determined, however, that it did not appear that PSI's bid was materially unbalanced, that is, that award to PSI would not result in the lowest cost to the government; in this regard, the contracting officer noted that PSI's bid becomes low in the first half of the third contract year and concluded that there was "no reason to believe" that the contract would not be in effect for at least 3 years. Consequently, the agency made award to PSI, exercising at the time of award the first, 10-month option for operation and maintenance and supply support. TAI thereupon filed this protest with our Office.

In response to TAI's protest, which reiterates the claim that PSI's bid was materially unbalanced and grossly frontloaded, PSI claims that the "bulk of PSI's supply/support bid accounts for advance purchase of replacement parts." According to PSI, it concluded that it would be necessary to invest in a significantly increased inventory of replacement parts "because substantially all such parts must be custom-made by the manufacturers of the simulator components, a process which requires weeks or months, and concomitant downtime for the affected simulator."

The Navy argues that the determinative consideration here is the contracting officer's expectation that award to PSI would result in the lowest ultimate cost to the government. In this regard, the agency notes that PSI's total price was $1,080,371 lower than TAI's second low bid, and emphasizes that it becomes low during the first half of the third contract year, and that there are "no foreseeable programmatic decisions which are expected to prevent the Navy from exercising all five options."

However, even if the Navy expects to exercise the options, there remains a concern as to whether the contract provides sufficient incentives to assure PSI's continued, satisfactory performance after its receipt of the initial, enhanced payments. In this regard, we consider it significant that the contracting officer, applying the applicable Department of Labor wage determinations, found that PSI's bid was substantially less than the amount required for payment of the minimum wages for the personnel proposed in its technical proposal; the agency subsequently estimated that PSI had underbid its direct labor cost by $2,174,150, not including profit or overhead on the additional wages.

Certainly, acceptance of PSI's grossly front-loaded bid provides a disincentive for the government to administer the contract in a manner consistent with its best interest if contingencies should arise after the enhanced payments have been made that would ordinarily require termination. *See F & E Erection Co.*, B-234927, June 19, 1989, 89-1 CPD ¶ 573. As the Navy points out, the government will not receive title to the spare parts—those not incorporated into the prescribed minimum stock inventory— the extensive advance purchase of which the government is financing. As a result, should the Navy terminate the contract after the mobilization period, or fail to exercise the option after the firm, initial contract year, the Navy will have expended an amount well in excess of the next low bid—$1,109,665 at the end of 60 days and $550,568 at the end of the first year—and of the actual value of the items or services to be provided.

While PSI explains that its bid for supply support during the 60-day mobilization period included the cost of extensive advance purchases of replacement parts, we do not believe that the costs of the advance purchase of a substantial portion of the replacement parts for the potential 5-year period of the contract are legitimate costs of mobilization. As a result of its bidding approach, PSI would receive approximately 63 percent of the overall contract price for the firm, 1-year performance period and 22 percent of the overall contract price for the potential 5-year contract period at the end of the 60-day mobilization period. As such, the price for the mobilization period is far in excess of the actual value of the services to be provided.

Nor does it appear that PSI's approach represented a reasonable approach to contract performance. As an initial matter, we note that the contracting officer questioned PSI's bid for mobilization, and the Navy has never argued that such substantial advance purchases of replacement parts were reasonable and necessary. Further, none of the other offerors adopted a similar approach to the procurement of replacement parts; PSI's bid ($1,114,775) for the supply support portion of mobilization was 1335 percent, or $1,037,095, more than the next low bid ($77,680) for this item. In particular, PSI does not explain why substantial advance purchases are necessary when the solicitation provides for the government to furnish the new contractor with the current inventory of replacement parts. Certainly, it does not appear reasonable to purchase replacement parts for option years that the government is not yet committed to exercising. This is especially true here, where the specifications stated that the agency planned to undertake extensive, future modifications of the simulators during the potential

contract period, which presumably would eliminate any need for many current parts.

In these circumstances, we conclude PSI's bid was materially unbalanced and thus should have been rejected. The protest is sustained.

We recommend that the contract with PSI be terminated for the convenience of the government and award made to the next low bidder, TAI, if otherwise appropriate. Further, we find TAI to be entitled to the cost of pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1989); *see Falcon Carriers, Inc.*, 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

B-236871, January 12, 1990

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Amendments
■■■ Propriety

Protest challenging agency's decision after receipt of initial proposals to issue amendment to request for proposals (RFP) increasing the number of items to be procured, instead of issuing separate solicitation for the additional number required, is denied since a significant change in the government's requirements is a proper basis for amending an RFP after receipt of proposals.

Matter of: Barrier Wear, Inc.

Barrier Wear, Inc., protests the Defense Personnel Support Center's (DPSC) decision to amend request for proposals (RFP) No. DLA100-89-R-0207 for extended cold weather parkas after the receipt of initial offers to increase the number of parkas to be procured. Barrier Wear contends that the agency's decision to amend the solicitation at that point to increase the quantity was unreasonable, and that the agency instead should have issued a separate solicitation to satisfy its additional requirements.

We deny the protest.

The solicitation involved the acquisition of extended cold weather parkas by DPSC on behalf of the Army. The RFP, as originally issued, requested offers on both a basic quantity of 44,040 and an option quantity of 44,040 parkas and advised that the price for the option quantity would be added to the price for the basic quantity in evaluating offers. Offerors were required to submit technical proposals, with award to be made to the offeror submitting the lowest priced technically acceptable proposal. The original RFP set April 26, 1989, as the closing date for receipt of offers.

The solicitation was subsequently amended several times, with the changes including deletion of the requirement for technical proposals and extension of the closing date to June 9. After offers had been received, but before an award had

been made, the contracting officer was informed that the Army had increased the number of parkas that it required by 48,948, from 44,040 to 92,988. As a consequence, DLA issued Amendment 0006 to the RFP, which increased both the basic and option quantities of parkas to 92,988, and replaced the delivery schedule with a new one with approximately the same monthly increments for a longer period of deliveries. The amendment, which was issued on August 15 and synopsized in the *Commerce Business Daily* on August 17, set September 8 as the closing date for receipt of proposals. On September 8, Barrier Wear filed its protest with our Office.

DLA amended the RFP after being advised by the Army that available funding had increased so as to permit acquiring an additional number of parkas which the Army required to meet its needs. Barrier Wear argues that DLA instead should have made award under the original RFP and issued a separate solicitation for the additional parkas. We see no basis on which to conclude that DLA was required to procure the needed parkas only in the manner the protester suggests. On the contrary, under Federal Acquisition Regulation § 15.606(a), a significant change in the government's requirements as to quantity is a proper basis for the issuance of an amendment after receipt of proposals. Accordingly, DLA properly amended the RFP to include the additional parkas required by the Army. *Magneco Inc.*, B-235338, Sept. 1, 1989, 89-2 CPD ¶ 207.

Barrier Wear argues that the agency's justification for amending the solicitation was merely a pretext fabricated by the agency so that it would not have to make an award to the protester. The protester contends that if, as the agency claims, the increased quantities are required to satisfy an outstanding Army requirement currently on back order and to sustain rates for high priority units already issued cold weather clothing, then the RFP should have been amended to require larger deliveries early in the contract's performance rather than extending the period for performance.

There simply is no support in the record for Barrier Wear's contention that the decision to amend the RFP to include the additional parkas was motivated by bad faith. With regard to Barrier Wear's argument concerning DLA's choice of delivery schedule, the fact that the agency extended the delivery schedule rather than increasing the size of the early increments bears only on when, not whether, the additional parkas were required. In fact, the agency's decision to extend the delivery period instead of increasing the size of each delivery suggests that it was attempting not to exclude small businesses, which might not have the production capacity to manufacture larger monthly increments, from the competition. In any event, once the Army's need for the additional parkas and the available funding were established, DLA properly amended the RFP to include the additional number.

The protest is denied.

B-236911, January 12, 1990

Procurement

Bid Protests

■ GAO procedures

■■ Interested parties

■■■ Direct interest standards

Protester is an interested party under Bid Protest Regulations to protest that agency improperly evaluated its proposal and that request for proposals (RFP) was improperly canceled on the basis that no acceptable proposals were received, even though the protester's proposal was among the lowest ranked and highest priced.

Procurement

Competitive Negotiation

■ Offers

■■ Evaluation

■■■ Personnel experience

Agency reasonably found protester's proposal was unacceptable because it failed to offer personnel with direct relevant experience as required by the RFP. The protester's assertion that the failure to have the specified experience is not deficient since the personnel it offered have broad experience in related fields and may utilize this experience for their assignments under the RFP is merely an attempt by protester to rewrite the solicitation and restate the agency's needs.

Procurement

Competitive Negotiation

■ Offers

■■ Evaluation

■■■ Personnel experience

Procurement

Competitive Negotiation

■ Offers

■■ Evaluation

■■■ Technical acceptability

Agency reasonably rejected the protester's proposal as technically unacceptable where the protester's proposed personnel did not meet the agency's specific education and experience requirements and the protester did not indicate that it could or would offer different personnel meeting these requirements.

Matter of: Sach Sinha & Associates, Inc.

Sach Sinha and Associates, Inc. (SSAI), protests the rejection of its proposal as technically unacceptable and the cancellation of request for proposals No. M67004-89-R-0105, a 100 percent small disadvantaged business set-aside, issued by the United States Marine Corps for support of the collective and joint training division of the Department of Defense Training and Performance Data Center, Orlando, Florida.

We deny the protest.

Section M-4(a) of the solicitation provided that the evaluation and award selection process would combine technical and price proposal ratings with technical factors being weighted 60 percent and price weighted 40 percent. Section M-4(b) set out the following technical factors in descending order of importance: (1) technical/management approach, 30 percent (2) personnel resources and manning, 15 percent (3) corporate experience/facilities, 15 percent. Under the personnel resources and manning factor, among other things, offerors were required to demonstrate that the training and experience of the proposed personnel were "directly relevant to the research." The solicitation listed 7 job categories, which were delineated as key personnel: (1) senior management analyst, (2) management analyst (NGB) (National Guard), (3) management analyst (USMC) (Marine Corps), (4) management analyst (Land), (5) management analyst (Air), (6) senior computer systems analyst, and (7) systems analyst.

The Marine Corps states that technical evaluations were performed on the eight proposals received, including SSAI's, but none of the proposals received a satisfactory rating for the personnel resources and manning factor since none proposed acceptable key personnel. Because all offerors failed this element of the technical evaluation, no further evaluation was undertaken and all offerors were notified that they were technically unacceptable. Inasmuch as no acceptable proposals were received, the offerors were also informed that the small disadvantaged business set-aside was being withdrawn and the requirement was being resolicited as a 100 percent small business set-aside. This decision was concurred with by the small and disadvantaged business utilization (SADBU) specialist.

SSAI contends that its proposed personnel have more than adequate backgrounds to perform their tasks, and that the rejection of SSAI's proposal for unacceptable key personnel was unreasonable. SSAI contends that the cancellation of the RFP is capricious and prejudicial to SSAI in that it makes it appear that small disadvantaged businesses are not capable of performing the contract.

The Marine Corps argues SSAI is not an interested party to protest because it lacks sufficient direct economic interest in the cancellation of the RFP. *See* 4 C.F.R. §§ 21.0(a) and 21.1(a) (1989). In this regard, the Marine Corps notes that SSAI submitted the second highest price and that several proposals were approximately half the price of SSAI's, including a proposal from a firm much more nearly acceptable than SSAI's. The Corps argues that given this relative rating SSAI would not be in line for award under this RFP, and thus it is not an interested party to protest alleged irregularities in the procurement.

We disagree. SSAI's protest not only concerns the withdrawal of the small disadvantaged set-aside, but also questions the Corps' evaluation of its proposal. Were SSAI to prevail in its protest and show that its proposal was improperly found to be technically unacceptable, we could recommend reinstatement of the small disadvantaged business set-aside and reevaluation of SSAI's and the other offerors' proposals. *See Transportation Research Corp.,* B-231914, Sept. 27, 1988,

88-2 CPD ¶ 290. In each of the cases cited by the agency to support its contention that SSAI is not an interested party, *e.g., State Technical Inst. at Memphis,* 67 Comp. Gen. 236 (1988), 88-1 CPD ¶ 135; *Training Eng'g Aviation Management Corp.,* B-235553, May 26, 1989, 89-1 CPD ¶ 516; *Computer Science Innovations Inc.,* B-231880, Sept. 27, 1988, 88-2 CPD ¶ 289; *Hydroscience, Inc.,* B-227989, B-227989.2, Nov. 23, 1987, 87-2 CPD ¶ 501, even if we were to have sustained the particular grounds of protest, it would have made no economic difference to the particular protester as there was another offeror higher in relative ranking that would have taken precedence over that protester. The situation here, however, is distinguishable since, if we sustain SSAI's protest and find that SSAI's proposal was unreasonably evaluated, SSAI would have another opportunity for award based on a reevaluation of its proposal.

The Corps states that SSAI was found unacceptable because of the 7 key personnel offered by SSAI, only 2 individuals even remotely met the requirements of the RFP. Moreover, the Corps contends that firm employment commitments, required by the RFP, were not submitted by SSAI for any of the key personnel.

Our review of allegedly improper technical evaluations is limited to a determination of whether the evaluation was fair and reasonable and consistent with the evaluation criteria. We will question the agency's determination of the technical merit of proposals only upon a clear showing of unreasonableness or abuse of discretion. *Jones & Co., Natural Resource Engineers,* B-228971, Dec. 4, 1987, 87-2 CPD ¶ 555. Such a showing is not made by the protester's mere disagreement with the evaluation or its good faith belief that its own proposal should have been considered acceptable. *See Sigma Sys., Inc.,* B-225373, Feb. 24, 1987, 87-1 CPD ¶ 205.

The RFP set out certain minimum qualifications for the 7 skilled experienced professional/technical personnel essential under the contract. For example, the qualification requirements for the management analyst (NGB) called for a "Bachelor's degree or higher in a business, engineering, or related science field." The RFP also called for

> broad knowledge combined with at least 5 years of directly relevant experience in training data as related to the U.S. Army including Army Reserve, and the National Guard. Detailed experience and knowledge in service training in the above service components as related to weapons training ranges, maneuver areas, and training facilities.

The resume of the individual SSAI offered for this position does not indicate any college degree, although one is required. Moreover, the individual's experience is in anti-submarine warfare and the individual's resume lists no Army, Army Reserve, or National Guard experience. Consequently, we agree with the Corps that the experience which this individual possesses had no documented relevance to the land actions of the Army, Army Reserve, and Army National Guard such that he could be reasonably found unsatisfactory.

The requirements in the solicitation for the management analyst (USMC) called for "broad knowledge combined with at least five years of directly relevant experience in training data as related to the U.S. Marine Corps, including the

U.S. Marine Corps Reserve." Once again the individual offered by SSAI for this position has no stated experience at all in the Marine Corps or the Marine Corps Reserve. We agree with the Corps that although this individual had extensive experience with the Navy, that experience does not meet the RFP's specific requirement for directly relevant experience related to the Marine Corps.

The position for management analyst (Air) required "broad knowledge and experience in training data, including resources and capabilities, as related to military service training in air warfare weapons training used by the various Service components." The resume of the individual SSAI offered for this position shows experience at Air Force test flight centers but shows no training-related military experience whatsoever, despite the clear requirement in the RFP for experience in military service training. Here again SSAI has offered an individual who may possess excellent qualifications but not in the area of expertise for which the Corps was looking.

Although SSAI asserts that the Corps' position on the foregoing personnel does not take into account the fact that very experienced personnel can apply their experience in one arena to another, the RFP imposed specific experience requirements that had to be met. For instance, for the management analyst (NGB) position, the RFP calls for "broad knowledge," but also clearly requires "at least five years of directly relevant experience . . . relating to the U.S. Army." In this connection, we have held that an agency may reasonably require a contractor to offer personnel with direct relevant experience to be considered acceptable. *SelectTech Servs. Corp.,* B-229851, Apr. 18, 1988, 88-1 CPD ¶ 375.

With regard to the senior computer systems analyst called for in the RFP, 5 years experience in "computer associated cartography, digital terrain models, spatial data sets, and image resources related to military uses of geographic information systems" was required. The Corps states that SSAI did not identify a resume to this labor category and the Corps only learned during the conference held on this protest which resume SSAI intended to offer for this position. The Corps submits, and nothing SSAI has presented would make us disagree, that a review of the resume SSAI states it offered for this position shows that the individual fails to exhibit experience in the above stated requirements.

Finally, with respect to the systems analyst position, SSAI contends that a resume submitted for the proposed labor category Database Development Manager/System Development was intended to identify the individual for this position. As the Corps points out, however, neither that nor any other resume indicated it was for the systems analyst position.

Based on our review of the record, we find the agency reasonably determined SSAI's proposed personnel were unacceptable overall.

SSAI argues that the Corps' decision to find SSAI technically unacceptable is improper since the Corps only evaluated the personnel resources and manning factor, which accounts for only 25 percent of the total technical evaluation points. However, the record shows that regardless of the designated weight of this factor, it was a minimum requirement of the Corps that the contractor

have personnel that met the specific education and experience requirements set forth in the RFP. As explained by the Corps, it was a cornerstone of this project that the contractor provide individuals already firmly grounded in the operations and training of the particular services and disciplines set forth in the RFP and that to allow a contractor to use personnel who are not subject matter experts would result in "an incredibly high" learning curve. Not only did SSAI's proposed personnel not come close to meeting the RFP requirement, but it does not claim that it could or would have offered different personnel that met these specific requirements; instead, it argues that the personnel it proposed could adequately perform the contract. Under the circumstances, the agency reasonably determined SSAI's proposal was unacceptable overall because of its unacceptable personnel, whether or not the rest of its technical proposal could have been considered acceptable. *See tg Bauer Assocs., Inc.*, B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549.

Since none of the eight proposals was found technically acceptable and since the SADBU specialist approval was obtained, we find nothing improper in the cancellation of the RFP and withdrawal of this requirement from the small disadvantaged business set-aside program. Federal Acquisition Regulation (FAR) § 19.506 (FAC 84-48); Department of Defense FAR Supplement § 219.506 (1988 ed.).

The protest is denied.

B-237009, January 12, 1990

Procurement

Competitive Negotiation
■ Contract awards
■■ Initial-offer awards
■■■ Propriety

Award to low acceptable offeror on basis of initial proposals was proper even though protester, after a pricing audit conducted by Defense Contract Audit Agency as part of the evaluation, offered to lower the price in its initial proposal below the price in awardee's initial proposal; procurement did not progress beyond the initial proposal stage so as to require request for best and final offers (BAFOs), there was no indication that the awardee would reduce its price in a BAFO, and the potential reduction in protester's price would not offset awardee's significant technical superiority.

Matter of: Data Management Services, Inc.

Data Management Services, Inc. (DMS), protests the rejection of its offer and the proposed award of a contract to SelectTech Services Corporation, the incumbent, on the basis of initial offers, under request for proposals (RFP) No. DAKF15-89-R-0024, issued by the Army for operation and maintenance of the Military Entrance Processing Command/Selective Service System Computer facility in Illinois.

We deny the protest.

The RFP contemplated the award of a firm, fixed-price services contract on the basis of the best overall proposal, with consideration given to the following evaluation factors listed in descending order of importance: technical, management, and price. The RFP further provided that the government might award a contract on the basis of initial offers received, without discussions.

Four firms submitted proposals. The Army reports that prior to the commencement of proposal evaluation and in anticipation of the possible need to enter into comprehensive negotiations, the contracting officer requested the Defense Contract Audit Agency (DCAA) to perform audits of three proposals, including those of SelectTech and DMS, and provide field pricing reports pursuant to Federal Acquisition Regulation (FAR) § 15.805-5(a)(2) (to allow a detailed analysis of the proposals for use in contract negotiations).[1] In the interim, the agency's evaluation panel performed in-depth evaluations of the technical and management proposals, which resulted in SelectTech's technical/management proposal being rated far superior to the other proposals: SelectTech received a total technical/management score of 886 (out of a possible 920 points), with an adjectival rating of outstanding, while DMS, the next highest rated offeror, received 548 total points, with an adjectival rating of fair. (The remaining offeror, Keydata Systems, Inc., received a total score of 518.4 points.)

At the completion of technical/management evaluations, the evaluators were provided with the price proposals. SelectTech's proposed price was $2,853,562, and DMS' was $2,860,670. (Keydata's price of $7,471,694 was viewed as excessively high and its proposal was not further considered.) The offered prices of SelectTech and DMS were determined competitive and comparable to historical prices and the government estimate. Based on the technical/management evaluations and the price analysis, the contracting officer determined that SelectTech's proposal was most advantageous to the government, offering the highest technical/management score and the lowest price. Consequently, the contracting officer determined to make award to SelectTech on the basis of initial proposals, without discussions.

DMS contends that award on the basis of initial proposals was precluded by FAR § 15.610, because discussions already had been initiated by the DCAA auditor; under the FAR, award based on initial proposals is permitted if the solicitation notified all offerors that award might be made without discussions and award is in fact made to the low cost offeror without any written or oral discussions with any offeror. FAR § 15.610(a)(3). DMS maintains that the auditor persuaded the firm that $66,460 of its estimated indirect costs of performance were mistakenly allocated to this contract, and that the auditor, apparently with the approval of the contracting officer, then requested and aided in the preparation of a revised price proposal reflecting an equivalent reduction in its price. DMS argues that the agency therefore no longer had the option of making award based on initial proposals, but instead should have solicited and evaluated best and final offers (BAFOs) from all offerors in the competitive range.

[1] Although it is not clear from the record, apparently the agency determined that the fourth proposal on its face was so technically unacceptable that a detailed evaluation was not necessary.

We do not agree that the procurement here proceeded beyond the initial proposal stage, and find nothing objectionable in the award based on initial proposals.

Based on the record, as discussed above, the DCAA audit, we think, clearly was intended only as a means of gathering information for use in the evaluation and possible future negotiations; it was not initiated for the purpose of entering into formal discussions with DMS. Indeed, as the proposals, including DMS', had not yet been evaluated under the evaluation scheme in the RFP (*i.e.*, under the technical, management, and price factors), there would have been no reason for the agency to request the audit for the purpose of correcting deficiencies in the proposal or to solicit proposal revisions. Rather, it appears that the DCAA audit was requested for the purpose of determining prices for use in arriving at a final technical/management/price evaluation; the agency clearly could conduct an audit to aid in the price evaluation without obligating itself to conduct discussions. *See generally Validity Corp.*, B-233832, Apr. 19, 1989, 89-1 CPD ¶ 389.

We conclude that the procurement never proceeded to the discussion stage, and that the agency therefore was not precluded from awarding to SelectTech based on its low, technically superior initial proposal. *See generally The Saxon Corp.*, B-232694.2 *et al.*, June 13, 1989, 89-1 CPD ¶ 553. The fact that DMS' price might have come down had revised offers been obtained does not change this result. Although the audit indicated DMS might have reduced its price in a BAFO, SelectTech's audit revealed no pricing discrepancies and there was no other indication that SelectTech could have been expected to lower its price to any significant degree. (Of course, considering that DMS' technical score was so far below SelectTech's and that technical/management were more important factors than price, even if in revised proposals DMS reduced its price while SelectTech did not, it is not likely that DMS would have been selected for award in light of SelectTech's technical superiority.)

The protest is denied.

B-231513, January 16, 1990

Appropriations/Financial Management

Judgment Payments

■ Permanent/indefinite appropriation

■■ Availability

A court order finding defendant agency guilty of discrimination and directing the specific administrative action of developing new, nondiscriminatory employment systems is not a money judgment for which 31 U.S.C. § 1304, the Judgment Fund, is available as a source of funding. The fees and expenses of an expert paid for by defendant agency to help develop the new systems were neither "costs" of the litigation nor part of the plaintiffs' attorney fees. Accordingly, the expert's fees and expenses are properly paid for out of agency appropriations, not the Judgment Fund.

Matter of: Drug Enforcement Agency—Source for Payment of Expert's Fee in *Segar v. Civiletti*

The question in this case is whether the cost of an expert hired in order to effectuate several court orders in a case arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, may be paid from 31 U.S.C. § 1304, the Judgment Fund.[1] The fees and expenses of the expert selected to help implement specific administrative actions that the court ordered defendants to perform do not constitute a money judgment for which the Judgment Fund is available. The expert's fees and expenses do not qualify as "costs" of the litigation nor as part of plaintiffs' attorney fees. Accordingly, they are properly payable from agency appropriations.

Background

The Drug Enforcement Agency (DEA) was found guilty of racial discrimination in a class action brought by DEA's black special agents in *Segar v. Civiletti,* 508 F. Supp. 690 (D.D.C. 1981). DEA was ordered to immediately commence validity studies to "implement effective, nondiscriminatory supervisory evaluation, discipline, and promotion systems" and the parties were ordered to suggest other remedial actions. To effectuate the court's order, the parties entered a Joint Stipulation, adopted as an order by the court on July 31, 1981, that established a working group, which included "an expert selected by plaintiffs" whose cost "shall be treated as a cost of this litigation."

As a result of the remedial actions suggested by the parties, the court ordered on February 17, 1982, among other items of relief, that defendants develop and implement new, nondiscriminatory employment systems for the DEA. The court also awarded costs, including reasonable attorney fees, to plaintiffs as prevailing parties. DEA appealed the 1981 liability finding and the 1982 remedial order However, to develop the new employment systems pending appeal, the parties entered a stipulation, adopted by the court as an order on April 28, 1983, which included plaintiffs' expert as a member of the working group during the first two stages of the project plan who would be paid $400 per day up to a maximum total of $12,000 (plus travel and per diem expenses). The stipulation and order also stated that DEA would reimburse plaintiffs on a current basis for these expenses but that the necessity for the expert's services was still contested and the costs were to be "treated as a cost of this litigation." A final footnote in the stipulation regarding the expert's costs stated:

> The sums referred to in this paragraph shall be paid from the fund created by 31 U.S.C. § 724(a) [since recodified as § 1304] pursuant to Comptroller General Decision B-191321.

The district court's order was affirmed in part and vacated and remanded in part. *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984). There was no reference in the decision to the expert or to the payment arrangements for his expenses

[1] This responds to a letter dated May 18, 1988, from the United States Attorney for the District of Columbia concerning *Segar v. Meese,* USDC, D.C. Civil Action No. 77-0081.

However, DEA's liability for discrimination was affirmed. Litigation was completed when the Supreme Court denied certiorari on May 20, 1985. 471 U.S. 1115 (1985). The remaining issues were resolved by a stipulation and order respecting outstanding claims, agreed to by the district court on February 17, 1987, which found that plaintiffs were prevailing parties and provided that the development of new employment systems would continue to completion in accord with the stipulation and order of April 28, 1983. The February 17, 1987, order did not finally resolve the amount to be paid for attorney fees and costs but stated that it was to remain in effect for 4 years. No subsequent orders have been issued by the court.[2]

Opinion

Specific Agency Action

The Judgment Fund is available to pay money judgments against the United States—not judgments directing a specific action, even if that specific action may be translated into a measurable cost. B-193323, Jan. 31, 1980. For example, if a judgment ordered reinstatement of a terminated federal employee—but did not specifically order backpay to the employee—any resulting payment to the employee because of the reinstatement would not be paid from the Judgment Fund but from agency appropriations. 58 Comp. Gen. 311 (1979). Also, a court-approved settlement in which a defendant agency agrees to hire an equal opportunity expert to review the agency's equal opportunity procedures and to make recommendations for their improvement is a specific action to be paid from agency appropriations rather than the Judgment Fund. *Securities and Exchange Commission,* B-234793.2, June 5, 1989.

We believe that the orders in 1981 and 1982 requiring DEA to develop and implement new, nondiscriminatory employment systems were orders that directed specific actions for which DEA's appropriations were available. The manner in which DEA stipulated with plaintiffs to implement the orders— reimbursing plaintiffs or directly paying for an expert selected by plaintiffs—is not determinative. The court orders were not money judgments payable out of the Judgment Fund. Nor do we find that the expert's expenses could qualify to be paid out of the Judgment Fund as litigation "costs" or as part of attorney fees.

Expert's Fee as Litigation "Cost"

The Judgment Fund is available to pay the "cost" of litigation awarded a prevailing plaintiff against the defendant government. 31 U.S.C. § 1304. Defendant DEA made clear in its stipulations implementing the district court orders that it opposed the selection by plaintiffs of an expert because the agency believed

[2] The expert has continued to work on the new nondiscriminatory employment systems under the same arrangement as he did on the first two phases of the project plan. Beginning in 1988, he has been paid directly by the government.

that it had not discriminated and did not need to change its existing employment systems. The DEA wanted to preserve the right to recover the expert's expenses if it prevailed on appeal. Hence, the parties stipulated that the expenses would "be treated as a cost of this litigation."

Subsequent to the stipulations in this case, however, the Supreme Court ruled that the expenses in excess of $30 a day of a non-court-appointed expert used as a witness could not be taxed as a "cost" of litigation. *Crawford Fitting Co. v. J. T. Gibbons, Inc.,* 482 U.S. 437 (1987). The court also ruled at pp. 441-442 that unless an item of litigation expense appears in 28 U.S.C. § 1920, it may not be taxed as a "cost" of litigation. The expert in this case does not appear to have been used as a witness. *See State of Ill. v. Sangemo Const. Co.,* 657 F.2d 855 (7th Cir. 1981). Therefore, since the expenses of the expert in this case, a non-witness expert, are not listed in section 1920, they may not be taxed as "costs." *Crawford, supra; Shipes v. Trinity Industries, Inc.,* 685 F. Supp. 612 (E.D. Tex. 1987).

Although the stipulation cited a decision of the Comptroller General, B-191321, published at 58 Comp. Gen. 115 (1978), as the authority for paying this non-witness expert out of the Judgment Fund, that decision had nothing to do with the payment of "costs" or experts from the Judgment Fund. It stated that a judgment which specifically designates the government's contribution to the Civil Service Retirement Fund incident to a backpay award to be paid from the Judgment Fund would be honored. That contribution, as designated, was just an additional part of a money judgment, which is routinely paid from the Fund. The decision provides no authority for transforming a non-witness expert's expenses into taxable "costs" contrary to law. Since the expert's expenses are not "costs," they may not be paid from the Judgment Fund on that basis. Also, the stipulation could not properly designate the Judgment Fund as the source of the government payment if the congressional appropriations scheme provides a different source of funds, either. *Cf. Eastern Transportation Co. v. United States,* 159 F.2d 349 (2d Cir. 1947).

Expert's Fee as Part of Attorney Fees

The expenses of the non-witness expert in this Title VII case are also not payable from the Judgment Fund under the theory that they are part of the award of attorney fees to the prevailing plaintiffs because they have not been shown to be part of the work product of plaintiffs' attorneys.

If the expenses are not shown to contribute to the work product of the attorney they cannot be included in the fee award. *Missouri v. Jenkins by Agyei,* ——— U.S. ———, 109 S. Ct. 2463, 2470 (1989). *See also Denny v. Westfield State College,* 880 F.2d 1465, 1472 (1st Cir. 1989). In the present case the non-witness expert was hired after the trial that determined DEA's liability and apparently was not involved at all in the appeals process that confirmed DEA's liability. His function was to work along with DEA in developing a new employment system, which has not been shown to be a part of plaintiffs' attorney's work product.

Accordingly, since the expert's fees and expenses are the result of specific actions ordered by the court and not a money judgment, and since they cannot be taxed as "costs" or included as part of the award of attorney fees, they are payable out of DEA's appropriations and may not be paid from the Judgment Fund.

B-232354, January 16, 1990

Military Personnel

Relocation

■ **Relocation travel**

■■ **Reimbursement**

■■■ **Circuitous routes**

Notwithstanding orders directing a member to report to a specific port of embarkation incident to a transfer overseas, the member's entitlement to travel allowances is based on travel from the appropriate port of embarkation serving his temporary duty station when the orders do not direct travel to some other point.

Military Personnel

Travel

■ **Travel expenses**

■■ **Debt collection**

A member's claim for reimbursement of a collection made against him for the cost of traveling on a government aircraft pursuant to personal business is denied when the member alleges that he was eligible for space available travel but does not offer documentary evidence demonstrating that he would have been permitted to board the flight taken as a space available passenger.

Matter of: Major David K. Saffle, USMC—Circuitous Travel

Major David K. Saffle, United States Marine Corps, requests reconsideration of our Claims Group's denial of his claim for additional travel allowances for travel from Twentynine Palms, California to St. Louis International Airport, St. Louis, Missouri as directed in a modification to his travel orders dated May 6, 1986. The member also requests reimbursement of $100 charged for utilizing a Military Airlift Command (MAC) flight from St. Louis to Los Angeles, on the basis that he was eligible for space available travel at a reduced cost. We sustain the Claims Group's denial of the claim.

Background

By permanent change of station (PCS) orders dated February 13, 1986, as amended, Major Saffle was transferred from the Marine Corps Development and Education Command, Quantico, Virginia to the 1st Marine Aircraft Wing, Okinawa, Japan, with temporary duty in route at Twentynine Palms, commencing on June 11, 1986. He was authorized leave after completion of the tempo-

rary duty but before his required reporting for port call at St. Louis on July 15, 1986. The member arrived in Okinawa as directed on July 17, 1986.

The record indicates that the member did take leave in Columbus, Ohio prior to his arrival at St. Louis. The administrative report of the Marine Corps Finance Center also states that Los Angeles was the proper aerial port of embarkation to Japan for members traveling from Twentynine Palms. Neither the Marine Corps nor the member offers any explanation for a port call in St. Louis in lieu of Los Angeles, and the member bases his claim solely on the mandatory nature of his orders requiring him to report to St. Louis. Our Claims Group concluded that the St. Louis port call was arranged to accommodate the member who scheduled leave in Columbus prior to his departure for Japan.

Analysis and Conclusion

The travel of members of the uniformed services at government expense is governed by 37 U.S.C. § 404 which authorizes the payment of travel and transportation allowances to members while traveling away from their designated posts of duty under regulations prescribed by the Secretary concerned. Paragraph M 4159 of Volume 1, Joint Travel Regulations, in effect at the time, provides that allowances may be paid for the official distance between old permanent station and the appropriate aerial or water port of embarkation serving the old station.

When a member performs circuitous travel for reasons not involving official business, including travel to accommodate leave plans, reimbursement is ordinarily limited to the necessary costs of travel between his duty stations via the direct route. *Colonel John R. Dopler,* B-198341, Apr. 28, 1981; *Lieutenant Colonel Elbert W. Link, USA,* B-180936, Jan. 6, 1975; 47 Comp. Gen. 440, 443-444 (1968).

In this case Major Saffle was detached from his old station and ordered to perform temporary duty and then report to his new station without returning to the old station. The government's liability for his travel consisted of travel and transportation allowance from his old station, Quantico, to his temporary duty point at Twentynine Palms and to the point of embarkation serving Twentynine Palms, which was Los Angeles.

In our decision, *Matter of Lieutenant Colonel Bruce L. Harjung, USMC,* 62 Comp. Gen. 651, 652 (1983), a case involving alternate ports of debarkation, we said:

> We cannot agree with the view that the port of debarkation is not a travel entitlement issue but rather is a matter for determination by the service concerned. Paragraph M4159-1-3 of 1 JTR provides that allowances may be paid for the official distance between the appropriate aerial or water port of debarkation serving the new station and the new station in connection with permanent change-of-station travel from outside the United States to a new station in the United States. Clearly, this is a travel entitlement issue since it affects the travel costs to the government on permanent changes of station. To authorize alternate ports of debarkation which do not service the member's new station would be tantamount to authorizing circuitous travel to the member's new station at government expense, which was never intended.

While Major Saffle's travel involved a port of embarkation, the same principles apply. The only reason why St. Louis could be designated the port of embarkation would be to accommodate Major Saffle's leave arrangements in Columbus, Ohio.

Major Saffle suggests that the collection of $100 from him for the flight from St. Louis to Los Angeles is improper since he was eligible to travel on a space-available basis for $10. Although he may have been eligible to travel space available, we have no information concerning whether space was in fact available on that flight that he could have used since he was traveling under orders. In the absence of such information from official sources, we will not disturb the action taken by the Marine Corps.

Accordingly, Major Saffle's claim is denied and we sustain the action of our Claims Group.

B-235239.2, January 16, 1990

Procurement

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

Contracting agency's determination not to terminate contract award based solely on an FBI record of an interview with a former employee of the agency indicating that the awardee bribed the former employee to help it obtain the award will not be disturbed where (1) the awardee denies the alleged wrongdoing, leaving the charges disputed; (2) a criminal investigation of the alleged wrongdoing is ongoing; and (3) the agency states that if evidence of misconduct by the awardee to support terminating the contract is uncovered, corrective action will be taken at that time.

Matter of: Hazeltine Corporation

Hazeltine Corporation protests the award of a contract to NavCom Defense Electronics, Inc. (formerly Gould, Inc.), pursuant to request for proposals (RFP) No. N00019-87-R-0140, issued by the Naval Air Systems Command (NAVAIR) for production of test sets (designated as UPM-( ) by the Navy) for Identification Friend or Foe (IFF) units. Hazeltine charges that NavCom/Gould paid bribes to a NAVAIR employee to give the firm source selection-sensitive information in order to obtain a competitive advantage in the source selection process. Hazeltine also asserts that NavCom/Gould had an agreement to pay that same NAVAIR employee a large sum of money, contingent on NavCom/Gould being awarded the production contract, in return for his helping NavCom/Gould win the competition.

We deny the protest.

The procurement was conducted by the Navy to secure production quantities of IFF test sets for the Army, Air Force, and Navy. It was preceded by two re-

search and development contracts that were awarded to Hazeltine and NavCom/Gould in 1982. The firms successfully completed the research and development contracts and produced sample products. Accordingly, the competition for the production contract, which was initiated in December 1987, was limited to Hazeltine and NavCom/Gould as the only qualified offerors. Initial offers were submitted, negotiations conducted, and best and final offers (BAFOs) received by the Navy.

Prior to award, the Federal Bureau of Investigation (FBI) began an investigation (as part of Operation Ill Wind, a criminal investigation involving a number of Department of Defense procurements) to ascertain if Hazeltine had engaged in any criminal activities in pursuit of the IFF test sets production contract. On January 6, 1989, Hazeltine pleaded guilty to charges of conspiracy to defraud the government in connection with illegal payments it had made through consultants to a NAVAIR employee (a supervisory electronics engineer who was Branch Head of Ships Systems Engineering at NAVAIR and who was a member of the procurement review board for the IFF test sets production contract) to obtain evaluation-sensitive and other inside information in an attempt to win the IFF test sets production contract. As a result, Hazeltine was suspended from contracting with the government by the Navy from January 11 to April 11, 1989. Ultimately, a firm, fixed-price contract (contract No. N00019-88-C-0228) was awarded to NavCom/Gould on February 3, 1989.

Hazeltine filed its initial protest in our Office on April 18, 1989, alleging that NavCom/Gould had used bribery to obtain the production contract. In support of its protest, Hazeltine submitted an article from *The Washington Post,* dated April 5, 1989, concerning Operation Ill Wind. The article stated that the NAVAIR employee in question admitted, while testifying as a prosecution witness in the trial of three Teledyne Electronics executives, that he had received monthly payments for inside information on military contracts from a certain consultant. Hazeltine alleged that this same consultant represented NavCom/Gould in the present procurement, and Hazeltine charged that NavCom/Gould must have paid illegal bribes for source selection-sensitive information in the present procurement for IFF test sets. The article did not specifically indicate that illegal payments had been made on behalf of NavCom/Gould to the NAVAIR employee for inside information in connection with the IFF test set procurement.

Hazeltine also submitted portions of a transcript from the NAVAIR engineer's testimony in the trial. Among other things, the transcript revealed that the NAVAIR engineer, having already pleaded guilty to conspiracy to defraud the United States, testified that he had accepted bribes from the above-mentioned consultant for inside information in more than one defense procurement. The NAVAIR employee did not mention the IFF test sets procurement in the portion of the testimony provided by the protester.

We dismissed Hazeltine's initial protest because the Navy informed our Office that it would investigate the allegation that NavCom/Gould had obtained the UPM-( ) production contract by fraudulent means and that the Navy would take

corrective action (including terminating the contract for default or declaring the contract void, if appropriate) depending on the results of the investigation. We stated that Hazeltine could refile its protest if its allegation was substantiated by the Navy's investigation and Hazeltine was not satisfied that the Navy had taken appropriate corrective action. *Hazeltine Corp.*, B-235239, June 22, 1989, 89-1 CPD ¶ 592.

On September 7, 1989, Hazeltine asked that we reinstate its protest on the basis that documents released by the Navy concerning its investigation or otherwise uncovered by Hazeltine show that NavCom/Gould did, in fact, bribe the NAVAIR engineer to obtain inside information giving it an illegal competitive advantage in the procurement. More specifically, Hazeltine alleges that the NAVAIR employee provided NavCom/Gould with a document describing Hazeltine's design for its UPM-( ) test set. Hazeltine further asserts that NavCom/Gould received "quantity, budget and other bid information (including the initial and BAFO offering prices of Hazeltine) concerning the UPM procurement for a fee of $40,000—contingent upon NavCom/Gould's winning the contract." Hazeltine also alleges that the NAVAIR engineer told NavCom/Gould's consultant after BAFOs had been evaluated that NavCom/Gould had lost the competition because Hazeltine's BAFO was lower in price than NavCom/Gould's BAFO.

Hazeltine relies on information contained in various documents (including affidavits filed by the FBI in support of requests for search warrants and NavCom/Gould's own responses to the Navy's investigation) as support for its allegations. The most important document relied upon by Hazeltine is a record of interviews between the FBI and the NAVAIR engineer, indicating that the engineer stated that he accepted payments from NavCom/Gould in return for inside information on the IFF test set procurement.

The allegations made by Hazeltine are serious charges of criminal conduct by a government employee and NavCom/Gould's employees and consultant. Accordingly, we have examined the record compiled in this protest carefully in light of the grave nature of the matters raised by the protester. As discussed in detail below, the current record does not substantiate Hazeltine's allegations.

After the Navy obtained the FBI interview notes allegedly showing that the NAVAIR employee admitted accepting bribes from NavCom/Gould's consultant in return for inside information concerning the procurement, the Navy forwarded the interview notes to NavCom/Gould and asked that firm why its contract should not be declared void or terminated for the convenience of the government. In a series of letters, the Navy asked NavCom/Gould a host of questions concerning its conduct and the conduct of its consultant during the procurement. NavCom/Gould denies any wrongdoing by its employees and consultant in connection with the UPM-( ) test sets procurement. Moreover, NavCom/Gould states that, because of the Navy's inquiries, it conducted its own investigation. NavCom/Gould claims that it has no knowledge of any illegal actions by its employees or consultant nor those of its predecessor corporation and

that it found nothing in its records to support the NAVAIR engineer's claims of fraudulent activities.

NavCom/Gould admits that it or its predecessors have used the named consultant on various procurements over about a 20-year period. However, NavCom/Gould denies that it ever authorized that consultant to pay bribes to the NAVAIR engineer to gain a competitive advantage in this procurement. In this connection, NavCom/Gould has submitted an affidavit from the consultant wherein he swears:

> At no time [during or after he agreed to represent NavCom/Gould concerning the test set procurement] did . . . any officer, or employee of Gould discuss with or authorize me to make payments or promises of payment, or provide or promise to provide any other thing of value, to [the NAVAIR engineer] or to any other government official for any purpose including to influence the award. . . .

With regard to Hazeltine's first allegation that the NAVAIR engineer provided NavCom/Gould with a document describing Hazeltine's design for its UPM-( ) test set, NavCom/Gould denies that it paid for or received Hazeltine's design.

Concerning Hazeltine's allegation that NavCom/Gould received "quantity, budget and other bid information (including the initial and BAFO offering prices of Hazeltine) concerning the UPM procurement for a fee of $40,000--contingent upon NavCom/Gould's winning the contract," NavCom/Gould again denies paying for or receiving any such information from the NAVAIR employee. NavCom/Gould points out that the NAVAIR engineer allegedly said that the $40,000 bribe he was to receive was to be paid through the consultant whose monthly retainer would be raised to cover this amount; however, NavCom/Gould reports that the consultant's retainer was actually reduced during the UPM-( ) competition.

Finally, with regard to Hazeltine's allegation that the NAVAIR engineer told NavCom/Gould's attorney after BAFOs had been evaluated that NavCom/Gould had lost the competition because Hazeltine's BAFO was lower in price than NavCom/Gould's BAFO, NavCom/Gould denies that charge.

In sum, the record currently before us contains conflicting statements regarding the allegations raised by Hazeltine; the FBI interview notes indicate that the NAVAIR employee stated that he received payments from NavCom/Gould's consultant in return for inside information on the competition, a charge that NavCom/Gould denies.

We have contacted the Naval Investigative Service (NIS) and ascertained that both NIS and the FBI are presently conducting investigations into NAVAIR's and NavCom/Gould's conduct in this procurement to determine if there were any criminal activities leading to the award to NavCom/Gould. We also furnished NIS with copies of Hazeltine's April 18 and September 7 protest letters for use in that investigation. Thus, an investigation is still being conducted by the responsible federal agencies. At this point in the investigation the record before us does not establish that the procurement was tainted by fraud as Hazeltine alleges. Under these circumstances, we will not question the Navy's decision that the current record does not warrant termination of NavCom/Gould's

contract at this time. *Compare Litton Sys., Inc.,* 68 Comp. Gen. 422 (1989), 89-1 CPD ¶ 450, in which we sustained a protest and recommended that the Air Force terminate the awardee's contract for the convenience of the government, because of evidence that the awardee had improperly obtained (through a consultant) procurement-sensitive documents concerning the protester's proposal during the conduct of the procurement.

The protest is denied.

B-237249, January 16, 1990

Procurement

Socio-Economic Policies
■ Small business set-asides
■■ Contract awards
■■■ Price reasonableness

Award to large business which submitted low quote on small business-small purchase set-aside was improper, where the procuring agency did not specifically determine, or have any evidence to indicate, that the second low quote from a small business, which was only 6 percent higher than the price of the large business awardee, was unreasonable.

Matter of: Vitronics, Inc.

Vitronics, Inc., protests the issuance of a purchase order to Concurrent Computer Corporation, under request for quotations (RFQ) No. ICC-89-Q-0002 issued, as a small business set-aside under small purchase procedures, by the Interstate Commerce Commission (ICC) for the maintenance and repair of electronic equipment used by the ICC to prepare its payroll. Vitronics complains that the award was made to a large business.

We sustain the protest.

The ICC received three quotations in response to the RFQ, which was issued pursuant to the small business-small purchase set-aside procedures of Federal Acquisition Regulation (FAR) § 13.105(d)(3) (FAC 84-28). Concurrent Computer, a large business, submitted the lowest quote of $19,384, while Vitronics, a small business, was second low at $20,604. The ICC made award to Concurrent Computer, as the low offeror,[1] pursuant to FAR § 13.105(d)(3), noting that the successful offeror had performed the work in prior years. FAR § 13.105(d)(3) provides that the contracting officer may cancel a small business-small purchase set-aside and complete the purchase on an unrestricted basis if a reasonable quotation from a responsible small business is not received. *See W.S. Spotswood & Sons, Inc.,* B-236713.2, Nov. 16, 1989, 89-2 CPD ¶ 469.

[1] While the protest was pending, the ICC determined that because of urgent and compelling circumstances significantly affecting the interests of the United States, it would not withhold award pending our decision. 31 U.S.C. § 3553(c) (Supp. IV 1986); 4 C.F.R. § 21.4(a) (1989).

Vitronics contends that its quote, which was only $1,220, or 6 percent, higher than the awardee's quote, was reasonable and that it is entitled to award as the low, responsible small business offeror.

A determination of price reasonableness for a small business set-aside is within the discretion of the procuring agency, and we will not disturb such a determination unless it is clearly unreasonable or there is a showing of fraud or bad faith on the part of contracting officials. *Flagg Integrated Sys. Technology*, B-214153, Aug. 24, 1984, 84-2 CPD ¶ 221. In making the determination, the contracting officer may consider such factors as the government estimate, the procurement history for the supplies or services in question, current market conditions, and the "courtesy bid" of an otherwise ineligible large business bidder. *Id.* Furthermore, in view of the congressional policy favoring small businesses, contracts may be awarded under small business set-aside procedures to small business firms at premium prices, so long as those prices are not unreasonable. *R.G. Dunn & Assocs., Inc.*, B-230831; B-230832, July 8, 1988, 88-2 CPD ¶ 28. In this regard, we have noted that a small business bidder's price is not unreasonable merely because it is greater than the price of an ineligible large bidder, since there is a range over and above the price submitted by the large business that may be considered reasonable in a set-aside situation. The determination of whether a particular small business price premium is unreasonable depends upon the circumstances of each case. *See Advanced Constr., Inc.*, B-218554, May 22, 1985, 85-1 CPD ¶ 587 (contracting officer in a set-aside procurement properly found reasonable a small business bid which was more than 11 percent higher than large business courtesy bid); *Browning-Ferris Indus.*, B-209234, Mar. 29, 1983, 83-1 CPD ¶ 323 (small business bid which was 36 percent higher than large business bid was found reasonable).

Here, the ICC has not stated that Vitronics's quote is unreasonable and has provided us with no explanation for its decision to make award to Concurrent Computer other than to cite FAR § 13.105(d)(3) and state that Vitronics's quote is higher than the awardee's quote. There is no indication in the record that the ICC, in making its determination, considered prior procurement history, current market conditions or a government estimate. Under the circumstances, we find that a 6 percent price differential is not so large as to make Vitronics's price *per se* unreasonable. Absent any explanation or determination by the ICC, we conclude that the contracting officer's determination to make award to the lower priced large business was unreasonable. *See W.S. Spotswood & Sons, Inc.*, B-236713.2, *supra.*

We sustain the protest and recommend that if the ICC finds Vitronics otherwise eligible for award, it should terminate Concurrent Computer's contract and make award to Vitronics.

Under the circumstances, the protester is entitled to the costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1). Vitronics should submit its claim for such costs directly to the ICC. 4 C.F.R. § 21.6(e).

The protest is sustained.

B-236932, January 19, 1990

Procurement

Bid Protests

■ Allegation

■■ Abandonment

Contention that agency should have held discussions with protester before requesting best and final offers so that protester could revise its proposal to correct any deficiencies is considered abandoned where agency reported that discussions were not necessary because protester's initial proposal was technically acceptable, and protester did not rebut or otherwise comment upon agency's assertion.

Procurement

Bid Protests

■ GAO procedures

■■ Protest timeliness

■■■ 10-day rule

■■■■ Effective dates

Protest is considered timely where it was filed in the General Accounting Office (GAO) within 10 working days after agency's initial adverse action on agency-level protest (issuance of amendment demonstrating that agency was not going to delete solicitation clause as requested by protester). Even though agency denied agency-level protest by letter more than 10 working days before protester filed protest with GAO, where protester denies receipt of agency's letter and record contains no evidence to show receipt by protester, we resolve doubt concerning timeliness in favor of protester.

Procurement

Bid Protests

■ GAO procedures

■■ Interested parties

■■■ Direct interest standards

Offeror whose direct economic interest would be affected by award of a contract under protested procurement is an interested party for purposes of protesting that preproduction evaluation clause deviates from Changes clause required by Federal Acquisition Regulation and should be deleted from solicitation.

Procurement

Competitive Negotiation

■ Offers

■■ Designs

■■■ Evaluation

■■■■ Technical acceptability

Preproduction evaluation clause requiring contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is to be read in conjunction with Changes clause which was incorporated into the solicitation as required by the Federal Acquisition Regulation (FAR), and therefore does not represent a deviation from the FAR Changes clause or a new procurement regulation requiring publication for public comment.

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

Use in production contract of preproduction evaluation (PPE) clause in order to shift burden to contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is proper where the contractor will be compensated for its PPE efforts as part of the overall contract price.

Matter of: Engineered Air Systems, Inc.

Engineered Air Systems, Inc. (EASI), protests award of any contract pursuant to request for proposals (RFP) No. DAAA09-89-R-0060, issued by the Department of the Army for 110 trailer-mounted weld shops and 9 weld machines (a component of the weld shops). EASI protests that the Army improperly requested best and final offers (BAFOs) without first conducting meaningful discussions, thereby depriving EASI of a fair opportunity to identify and correct deficiencies in its proposal. EASI also contends that the solicitation improperly incorporated a preproduction evaluation (PPE) clause that deviates from the Changes clause set forth in the Federal Acquisition Regulation (FAR) that was also incorporated into the RFP.

We deny the protest.

Issued by the United States Army Armament, Munitions and Chemical Command on May 30, 1989, the RFP contemplated award of a firm, fixed-priced contract. The closing date for receipt of initial proposals was August 18. The RFP was amended several times, but only amendments 0001, 0003, and 0004 are pertinent.

Amendment 0001 was issued on June 30; among other things, this amendment incorporated clause H-23, entitled "Basic Preproduction Evaluation Contract Clauses (PPE)," into the RFP. In its preamble, the clause stated:

Prospective offerors are cautioned that, although all of the engineering drawings included in the technical data have been prepared and checked in accordance with accepted engineering practices said technical data may require updating or correction for compatibility with the assembly and performance requirements of this contract. For instance, some items described by commercial or government part numbers may now be obsolete or otherwise unavailable, and government approval of contractor submitted ECP's [engineering change proposals] is required prior to use of substitute components or assemblies.

Consequently, the PPE clause required the contractor to perform a detailed evaluation of all technical data furnished under the contract in order to identify and propose correction of "any discrepancy, error, omission, or other problem which may preclude the attainment of required performance." The clause further directed that the preproduction evaluation and all problem documentation and related activities, including preparation and submission of ECPs, should no

be separately priced but should be included in the overall price quoted for the entire production contract. However, offerors were required to list for informational purposes the incremental price increase ascribed to the PPE clause requirements.

The PPE clause also listed the types of technical data changes the contractor would be required to make as part of the preproduction evaluation as those essential for:

1. attainment of functional or performance requirement of the end item specifications;

2. compatibility between quality assurance provisions and the physical or functional requirements of the specifications and drawings;

3. compatibility between engineering parts lists and other technical data;

4. correction of impossible or commercially impractical manufacturing requirements;

5. correction of impossible or commercially impractical assembly requirements;

6. procurement of physically and functionally suitable parts and materials; and

7. correction of mutually recognized errors in the end item specifications, where such correction will provide greater compatibility with the existing detail design.

The PPE clause stated that any other changes to the technical data would be processed in accordance with the Changes clause of the contract.

Amendment 0003 was issued on July 19. This amendment specifically asked offerors to present any technical data deficiencies that were not correctable under the PPE clause or any questions pertaining to the requirements of the clause. In response, by letter of July 28, EASI expressed several concerns it had regarding the PPE clause. Among other things, EASI expressed concern that the PPE clause would work to the competitive advantage of the incumbent contractor, because the incumbent is the only contractor that knows what the specific defects are in the technical data, while all other offerors would have to offer prices not knowing what defects, if any, they would have to correct at their own expense. EASI asked the Army to correct any known defects in the technical data and to delete the PPE clause from the solicitation. By letter of August 16, the procuring contracting officer declined to delete the PPE clause, explained that the Army was providing level three drawings so that the contractor could manufacture any parts that had previously been source-controlled, and explained that the Army was expecting the contractor to update the technical data package and incorporate changes that do not affect form, fit, or function as part of the preproduction evaluation effort.

After initial proposals were submitted, amendment 0004 was issued on September 7. This amendment provided that negotiations would close with receipt of BAFOs. The amendment also attempted to clarify the requirements of the PPE clause as follows:

PPE is required on sole source items to the extent that the information provided in the technical data package is verified. It is not intended that the design of the sole source part be evaluated.

On September 14, EASI filed its protest in our Office. Five offerors, including EASI, submitted BAFOs by the September 20 closing date.

We will not consider the protester's argument that the Army should have held discussions so that EASI could have identified any deficiencies and revised its proposal accordingly. The Army reported that EASI's initial proposal was considered technically acceptable and, therefore, there was no need to hold discussions with the firm. EASI filed comments on the Army's report, but did not rebut or otherwise comment upon the Army's assertion that discussions were not necessary. Consequently, we consider this issue to be abandoned. *See Rhine Air,* B-226907, July 29, 1987, 87-2 CPD ¶ 110.

With regard to EASI's challenge to the PPE clause, the Army first argues that EASI's protest is untimely. According to the Army, since the PPE clause was incorporated into the RFP by amendment 0001 (issued on June 30), EASI was required to protest before the August 18 closing date for receipt of initial proposals in accord with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). Since EASI did not file its protest in our Office until September 14, the Army requests that we dismiss the protest as untimely.

We find that EASI's protest is timely. As noted above, in response to amendment 0003, EASI complained about inclusion of the PPE clause to the contracting activity by letter of July 28 and specifically asked that the PPE clause be deleted. While EASI did not specifically state that it was protesting at that time, we construe EASI's letter as a protest because it clearly articulated EASI's concerns about the PPE clause and specifically suggested a remedy (*i.e.*, deletion of the clause) to the Army. Thus, EASI filed what we consider to be a timely protest with the contracting agency in accord with our regulations, 4 C.F.R. § 21.2(a)(1), (3).

While the Army responded to EASI's agency-level protest by letter of August 16, EASI claims that it had never received the Army's letter. It is our practice to resolve doubts about timeliness in favor of the protester. *See Fairfield Mach Co., Inc.,* B-228015, B-228015.2, Dec. 7, 1987, 87-2 CPD ¶ 562. As there is no evidence in the record to show that EASI actually received the Army's denial of its protest, we regard EASI's protest as timely filed, because it was filed within 10 working days after the Army's first adverse action on EASI's protest (*i.e.*, the September 7th issuance of amendment 0004 clarifying the PPE clause and demonstrating that the Army would not delete the clause as requested). *See* 4 C.F.R. § 21.2(a)(3).

The Army next argues that EASI is not an interested party to maintain the protest. The Army reports that EASI's evaluated price is the highest of the five offers submitted, several million dollars higher than the lowest priced offer. Moreover, the Army has provided for our *in camera* review an abstract of the BAFOs which shows that at least three of the other offerors took no exception to the RFP's requirements. Accordingly, the Army argues that, since the RF

indicated that the contract will be awarded on the basis of the lowest priced, technically acceptable offer, EASI does not have any prospect of winning this competition and, therefore is not an interested party. We disagree.

EASI is arguing that the RFP is defective, that the PPE clause should be deleted, and that the competition should be reopened on the basis of the amended requirement. If we were to sustain EASI's protest and recommend that the competition be reopened after the PPE clause were deleted, EASI would be able to compete on the basis of the relaxed requirements. Accordingly, EASI is an offeror whose direct economic interest would be affected by award of a contract under this procurement and, therefore, is an interested party for the purpose of protesting. *See* 4 C.F.R. § 21.0(a).

EASI protests that inclusion of the PPE clause is improper because it deviates from or modifies the Changes clause, FAR § 52.243-1, that is required to be included in all fixed-priced contracts in accord with FAR § 43.205(a)(1). EASI points out that, under the Changes clause as set forth in the FAR, a contractor is entitled to an equitable adjustment in the price or delivery schedule for changes to drawings, designs, or specifications, when such changes cause an increase or decrease to the cost of, or the time required for, performance of the work. EASI argues that the PPE clause modifies the Changes clause, because the PPE clause requires the contractor to suggest ECPs and accept the types of changes listed in the PPE clause without increase in the price or delay in delivery. EASI further contends that, because the PPE clause deviates from the Changes clause, the Army was required to, but did not, publish the deviation in the *Federal Register* for public comment as a new regulation.

We are not persuaded by the protester's arguments. The RFP specifically incorporates both the Changes clause (FAR § 52.243-1) and the Disputes clause (FAR § 52.233-1) as set out in the FAR. It is clear from reading the solicitation as a whole that the PPE clause is intended to be read in conjunction with the Changes clause, and that the contractor will be paid for any changes to specifications, designs, or drawings under either the PPE or the Changes clause. To the extent that the contractor does not agree with the contracting officer that a particular change is covered under the PPE clause, the contractor may make a claim for an equitable adjustment in price or other relief in accord with the procedure set out in the Disputes clause. Thus, we do not believe that the Army has modified the Changes clause by adding the PPE clause or that the PPE clause represents a deviation from the FAR-mandated clauses. *See Varo, Inc.*, B-193789, July 18, 1980, 80-2 CPD ¶ 44, where we rejected a protester's argument that a PPE clause constituted a change to the standard Changes clause.

With regard to the rationale for including the PPE clause in the RFP, the Army reports that the technical data package consists of approximately 1,500 drawings that are being used on 2 existing contracts for this item, and that neither contract has produced an end item as yet. Further, the Army states that it is not aware of any deficiencies in the technical data requiring correction in order to meet the assembly and performance requirements of the end item being procured. However, in recognition that the technical data may contain some errors,

the Army has attempted to obligate the contractor to correct any such errors and, in essence, to bear the risk that it will discover any such errors before production and will be able to produce the required end items.

We have examined and approved the use of similar clauses on several occasions in the past. In *AMF Inc. Elec. Prods. Group,* 54 Comp. Gen. 978 (1975), 75-1 CPD ¶ 318, we upheld the use of contract provisions that required the contractor to examine the technical data package and to find and correct all patent defects therein as part of the statement of work for a fixed-price contract. We held that it was reasonable for the agency to pay a contractor as part of the fixed-price bid for the contractor's best engineering efforts in reviewing the technical data package in an effort to assign the risk of defective specifications to the contractor rather than to the government and to avoid the prospect of extensive litigation that had resulted in the past because of defective specifications. *See also Varo, Inc.,* B-193789, *supra.* In *Electrospace Corp.,* 52 Comp. Gen. 219 (1972), we approved the use of a "Production Evaluation Concept" clause that was strikingly similar to the clause in the present RFP; in fact, the clause in *Electrospace Corp.* included the first six types of changes that are listed in the present PPE clause as changes for which the contractor would receive no additional compensation above the fixed price the contractor had bid.

We have also held that the fact that including this type of provision in an RFP can be construed as shifting to the contractor assumption of the risk of deficiencies in government specifications and drawings does not of itself render the solicitation provision invalid. *See International Telephone and Telegraph Corp. Electron Tube Div.,* B-169838, B-169839, July 28, 1970. Where, as in the present case, the agency reports that it is not aware of any specific defects in the technical data and drawings, but nonetheless acknowledges that the technical data package may contain defects, we think that use of the PPE clause is appropriate. Furthermore, we note that the Army has attempted in amendment 0004 to make it clear that the PPE clause will not obligate the contractor to evaluate the design of source-controlled parts. Thus, we conclude that the Army's use of the PPE clause is proper.

The protester argues that the Army's reliance on several of the above-cited cases is inapposite because those cases predated the implementation of the FAR. We do not agree. The above cases were, in fact, decided under the Armed Services Procurement Regulation, the precursor to the FAR. However, the legal principles upon which those protests were based have not changed. Therefore we believe the cases discussed above provide ample precedent supporting our finding that the Army's use of the PPE clause is proper.

Finally, after reviewing the abstract of offers *in camera,* we do not think that the protester has been competitively prejudiced in the present competition by inclusion of the PPE clause. While we are not at liberty to divulge the fixed prices contained in those offers, we note that EASI's offered price was significantly higher than the lowest offer. Moreover, EASI's offer stated that the amount it was charging for the PPE-related requirements was approximately one-fourth of the difference between EASI's total price and the lowest offeror's

total price. Thus, it appears that even if the RFP did not contain the PPE clause, EASI would not have lowered its price sufficiently to have displaced the lowest priced offer. *See KET, Inc.,* B-190983, Dec. 21, 1979, 79-2 CPD ¶ 429.

The protest is denied.

B-237172, January 19, 1990

Procurement

Sealed Bidding
■ Bids
■■ Error correction
■■■ Low bid displacement
■■■■ Propriety

Agency improperly permitted correction of bid containing discrepancy between arithmetic total of line item prices and grand total price indicated in bid where either price reasonably could have been intended, and only one of which was low. Agency may not rely upon bidder's worksheets to determine which price was intended since the request for correction is considered as resulting in displacing a lower bid.

Matter of: Virginia Beach Air Conditioning Corporation

Virginia Beach Air Conditioning Corporation (Virginia Air), protests the award of a contract to Mar Tech Mechanical, Ltd. t/a Gill Refrigeration & Air Conditioning (Gill), under invitation for bids (IFB) No. DTCG41-89-B-00008, issued by the United States Coast Guard Reserve Training Center, Yorktown, Virginia. The IFB was for the renovation and modification of the heating and air conditioning systems of a Coast Guard building at Yorktown. Virginia Air asserts that the Coast Guard improperly permitted Gill to correct an apparent mistake in its bid, thereby displacing Virginia Air as the low bidder. We sustain the protest.

The IFB, issued on July 5, 1989, called for bids on five line items (one base bid and four additive bids), in lump-sum subtotals, as well as a "grand total" for line items 1 through 5. The IFB stated that the low bidder would be the responsible bidder offering the low aggregate amount for line item 1 plus those additive line items providing the most features within the funds available.

Twelve bids were opened on September 6. Gill, the apparent low bidder, submitted the following bid:

Line Items	Amount
1	$488,0C
2	2,9C
3	32,3E
4	68,9C
5	370,3E
Grand Total:	$488,0C

Gill also inserted the figure of $488,000 in block 17 of Standard Form (SF) 144 (solicitation cover sheet) as its price for the "work required." (The correct arithmetical total of the line item prices listed in Gill's bid was $962,530). Virgin Air bid $571,886. Immediately after bids were opened and read, Gill requeste correction of its bid, stating that it had misinterpreted the instructions for cor pleting the bid schedule and that line items 1 and 5 were incorrect but that i grand total of $488,000 was its correct total bid.[1]

The contracting officer requested and received Gill's worksheets. Gill point out that its worksheets showed a total proposed price of $505,767 and al showed that this figure had been reduced to $488,200 shortly before bid openin Gill stated that line item 1 mistakenly included all items and that line item was also in error. The contracting officer admittedly could not determine fro the worksheets Gill's intended prices for line items 1 and 5 because Gill h estimated the job as a whole without breaking the figures into individual li items. The contracting officer did determine that the worksheets clearly show a maximum price of $517,815 for all the work, subsequently reduced, consiste with the grand total in Gill's bid of $488,000. Since the price of $488,000 w considered reasonable, and since this figure appeared several times in Gill's b the contracting officer permitted correction after a meeting with Gill represe atives in which they explained their allocation of costs to line items 1 and based on raw data in the worksheets.[2] The contracting officer accepted the planations and approved the following corrected bid:

Line Items	Amou
1	$218,
2	2,
3	32,
4	68,
5	164,
Grand Total:	$488,

[1] Gill allegedly entered the grand total in line item 1 because of a misinterpretation of IFB language. Specific SF 1442 described the total work to be performed as renovation and modification of the heating and air condi ing systems "in accordance with Sections A through J" of the IFB. Line item 1 had a similar description to form the work "in accordance with . . . Section J." This allegedly confused Gill. No other bidder was misled. submitted a bid bond total of $99,600 (20 percent of bid price) which was consistent with a bid of $488,000.

[2] As stated above, the worksheets themselves did not show any allocation of costs to specific line items in bid.

After permitting correction (approved by the head of the contracting activity), the agency awarded the contract to Gill for all line items since sufficient funds were available. After Virginia Air filed this protest with our Office within 10 calendar days of award, the agency permitted the performance of the contract to proceed based on a "best interest" determination.

The agency argues that Gill made a *bona fide* error in two line items which were both "obvious" mistakes and that therefore "[v]iewing [Gill's] worksheets . . . was correct and professional." The agency argues that the grand total of $488,000 was shown on the face of Gill's bid in no less than three places, and is "backed up" with a bid bond consistent with the figure. Therefore, the agency concludes that, read as a whole, the $488,000 figure was Gill's intended bid, as confirmed by its worksheets, and that therefore no displacement occurred in correcting the bid. We do not agree.

The Federal Acquisition Regulation (FAR) provides that apparent clerical mistakes may be corrected by the contracting officer before award, such as the obvious misplacement of a decimal point, obviously incorrectly stated discounts or obvious mistakes in the designation of a unit. FAR § 14.406-2 (FAC 84-12). Additionally, the FAR provides for correction of other mistakes disclosed before award; however, if correction would result in displacing one or more lower bids, such a determination may not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. FAR § 14.406-3 (FAC 84-12).

These regulations permit correction where a discrepancy admits to only one reasonable interpretation that is ascertainable from the face of the bid in light of the government estimate, the range of other bids, or the contracting officer's logic or experience. *See Hudgins Constr., Inc.*, B-213307, Nov. 15, 1983, 83-2 CPD ¶ 570. On the other hand, where a bid is reasonably susceptible of being interpreted as offering either one of two prices shown on its face, and only one of which is low, the bid must be rejected since the request for correction is considered as resulting in displacing a lower bid. *See Argee Corp.*, 67 Comp. Gen. 121 (1988), 88-1 CPD ¶ 482. In making such determinations, the agency may not rely upon the bidder's worksheets. *Russel Drilling Co.*, 64 Comp. Gen. 698 (1985), 85-2 CPD ¶ 87.

Here, in our view, there is no obvious or apparent explanation for the discrepancy on the face of Gill's bid between the stated grand total and the true mathematical total of the five line items in question. For example, Gill showed a bid of $488,000 for line item 1. Some of the other bidders offered $598,000, $514,225, and $479,000 for line item 1. Thus, in view of the range of prices received, Gill's bid for line item 1 was reasonably susceptible of being interpreted as its intended price for the line item from the face of its bid. Similarly, the true mathematical total of Gill's bid was $962,530. Some of the other bidders offered $976,000, $942,373, and $824,457 for the total work. Thus, Gill's bid could also be reason-

ably interpreted as offering the true mathematical total.[3] Thus, Gill's bid may reasonably be interpreted as intending either of two prices, and the bid actually intended cannot be determined without the benefit of advice from the bidder

The record also shows that the agency placed substantial reliance on Gill's worksheets to determine that its total intended price was in the range o $500,000.[4] As stated above, since the circumstances can be reasonably construed as involving the displacement of a lower bidder, the agency should not have permitted Gill to submit its worksheets. Accordingly, the protest is sustained.

We therefore are recommending to the Coast Guard that Gill's contract be terminated for the convenience of the government, and that award be made to Virginia Air, if otherwise appropriate.

We point out that our recommendation is made without regard to the extent o contract performance to date, since performance has proceeded despite the pro test filing. Where, as here, a federal agency receives, within 10 days of the dat of contract award, notice of protest filing under the statutory bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-355 (Supp. IV 1986), the agency must suspend performance of the contract until th protest is resolved. 31 U.S.C. § 3553(d)(1). The only exceptions are where th head of the responsible procuring activity makes a written finding that eithe contract performance is in the best interest of the United States, or there ar urgent and compelling circumstances significantly affecting the interests of th United States which do not permit waiting for a decision, and so notifies th Office. 31 U.S.C. § 3553(d)(2)(A), (B). Further, the statute requires that ou Office, in making a recommendation in connection with the resolution of a bi protest, disregard any cost or disruption from terminating, recompeting, c reawarding the contract if the head of the procuring agency determines to pr ceed with contract performance, as here, on the basis of the best interest of th United States. 31 U.S.C. § 3554(b)(2).

Accordingly, we make our recommendation irrespective of any factors oth than that contract award was improper. We also find the protester to be en tled to the costs of filing and pursuing its protest, including reasonable atto neys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1989). Virginia Air shou submit its claim directly to the agency.

[3] The fact that Gill entered the "grand total" figure in SF 1442 and obtained a bid bond consistent with t amount may be reasonably construed as a simple "carry-over" of an erroneous figure in the bid schedule.

[4] In fact, the agency immediately requested worksheets from Gill, and it is highly unlikely that the agency wc have permitted correction without the information gleaned from the worksheets.

B-236933, January 22, 1990

Procurement

Competitive Negotiation
■ Best/final offers
■■ Price adjustments
■■■ Misleading information
■■■■ Allegation substantiation

Protest that firm was misled by alleged agency oral advice is denied where even if protester's version of facts were true, the record contains no evidence that protester was placed at a competitive disadvantage by the alleged oral advice.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Downgrading
■■■■ Propriety

Downgrading of protester's proposal under one of 19 evaluation subcriteria during the best and final offer evaluation was not prejudicial to the protester because it did not materially affect source selection decision.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation

Protest that agency failed to properly follow the source selection plan (SSP) in evaluating offers is denied since SSPs are merely internal agency instructions which do not vest outside parties with rights, and agencies are only required to adhere to the evaluation scheme outlined in the solicitation.

Procurement

Bid Protests
■ GAO procedures
■■ Protest timeliness
■■■ Deadlines
■■■■ Constructive notification

Procurement

Competitive Negotiation
■ Contract awards
■■ Award procedures
■■■ Procedural defects

Protest that agency failed to timely notify protester of intent to award to another firm is denied where, even though agency erred in not providing timely notice, protester was not prejudiced.

Matter of: Antenna Products Corporation

Antenna Products Corporation protests the award of a contract to GKS, Inc. under request for proposals (RFP) No. DAAB07-89-R-C217, issued by Arm Communications Electronics Command for radio antenna kits for use by specia operations forces. Antenna Products principally argues that the Army misled i with erroneous oral advice, improperly evaluated its proposal, and failed t timely notify the firm of its intent to award to GKS.

We deny the protest.

The solicitation, a 100 percent small business set-aside, called for the submissio of firm, fixed-price offers for base and option quantities of the kits, as well as price for a spare parts package, first articles and related technical data pacl ages. In addition, the RFP provided that award would be made to the firm sul mitting the best overall proposal considering technical, cost and managemer factors, and provided that the technical factors were more important than co and management factors combined. Within the three broad criteria of technica cost and management, the RFP specified some 15 technical subfactors and fou management subfactors and further provided that firms were required t achieve a rating of no less than acceptable in each of the subfactors in order t be considered for award.

In response to the RFP, six firms submitted initial proposals and, after evalu tion, four of the six were determined to be in the competitive range. The agen then engaged in discussions with these four firms and subsequently requeste the submission of best and final offers (BAFOs). After the evaluation of BAFC the agency decided to award to GKS as the firm submitting the best overall pr posal; the contract was awarded to that firm on August 31, 1989. Thereafter, l letter dated August 31, postmarked September 6, and received by Anten Products on September 11, the Army informed Antenna Products of the awa to GKS. This protest followed.

Antenna Products first alleges that the Army misled it during its solicitation BAFOs. In this regard, Antenna Products alleges that the contract specialist, connection with the Army's solicitation of BAFOs, told the firm that pric were close, the competitive range was comprised only of technically qualified ferors and that all that was needed in connection with BAFOs was "for ever one to sharpen their pencils." Antenna Products alleges that, as a result these statements, it was incorrectly led to believe that all firms remaining the competitive range were technically equal and that cost had become t paramount consideration for award purposes. In support of its allegation, A tenna Products has provided affidavits executed by its contract negotiators testing to the fact that the Army's contract specialist made these statemen

The Army specifically denies that any statements to this effect were made its contracting personnel. The Army also has furnished affidavits executed the agency's contracting officer and contract specialist specifically denying t allegation.

In our opinion, we need not resolve this factual dispute between the parties in order to conclude that Antenna Products's allegation does not serve as a basis to sustain its protest. First, we do not think that Antenna Products's interpretation of these alleged statements was reasonable. We fail to see how being told to "sharpen [its] pencils" necessarily equates to all firms in the competitive range being technically equal or that cost had become the paramount factor for award purposes. Second, the record contains no evidence that the protester was placed at a competitive disadvantage by the alleged oral advice of the contract specialist, that is, that the protester would have submitted a different proposal had the firm not received such alleged oral advice.

Antenna Products next argues that the Army improperly evaluated its proposal by rescoring its BAFO in various areas which had not been the subject of discussions. In this respect, Antenna Products argues that the technical evaluation panel (TEP) significantly reworded the narrative portions of its report to the source selection authority for a number of the subfactors which were not the subject of discussions with the firm. In addition, Antenna Products points out that, for one of the technical subfactors, "understanding of the requirements," the TEP's actions resulted in the firm's being downgraded from an adjectival rating of "outstanding" for its initial proposal to "acceptable" for its BAFO.

We have examined the record in this case and conclude that there was nothing improper in the Army's evaluation of Antenna Products's BAFO. First, we point out that FAR § 15.611(d) (FAC 84-51) specifically requires the evaluation of BAFOs in addition to evaluation of initial proposals and does not limit the evaluation to the items that have been the subject of discussions. Second, we do not think that the Army's rescoring of Antenna Products's BAFO materially affected the source selection determination. In particular, we note that the firm's adjectival rating changed for only three of the evaluation subcriteria. For two of those subcriteria, "materials and facilities" and "maintenance," Antenna Products had received initial scores of only "susceptible," and those ratings were elevated to "acceptable" after the TEP examined the firm's answers to discussion questions relating specifically to those areas. For the remaining subcriterion, "understanding the requirements," Antenna Products's initial rating of "outstanding" was downgraded to "acceptable" after BAFOs were evaluated. Overall, therefore, Antenna Products's proposal was rated "acceptable" for each subcriterion. In contrast, GKS' proposal was rated "outstanding" in 12 out of the 19 subcriteria and received an aggregate rating of "outstanding." Thus, even if Antenna Products's adjectival rating for the "understanding the requirements" subcriterion had remained "outstanding," the record clearly shows that the source selection determination would have remained the same since it was firmly based on the significant technical superiority of the GKS proposal. We therefore see no basis to sustain Antenna Products's protest on this ground.

Antenna Products also contends that the Army misapplied the source selection plan (SSP) in its evaluation of GKS. The protester argues that the SSP by its terms precluded the scoring of any proposal as "outstanding" and that the TEP erred in awarding GKS' proposal an adjectival rating of "outstanding" in any of

the enumerated evaluation criteria and subfactors. In support of this allegation, Antenna Products directs our attention to section 5 of the SSP which provides:

Rating procedure—A rating of Acceptable and Unacceptable will be used. Each evaluator will evaluate each offeror's proposal using the subfactors as the guideline. A narrative rating will be ascribed to each technical subfactor.

According to the protester, this language in the SSP precluded the assignment of any adjectival rating other than "acceptable and unacceptable."

There is no merit to this argument. The SSP was not a part of the RFP. As we have previously noted, SSPs are in the nature of internal agency guidance and as such do not give outside parties any rights. *Pan Am World Servs., Inc.*, B-235976, Sept. 28, 1989, 89-2 CPD ¶ 283. It is the evaluation scheme in the RFP, and not any internal documents an agency has, to which the agency is required to adhere. *Id.* Moreover, the record indicates that the agency's evaluation was consistent with the RFP.

Antenna Products next argues that the Army improperly made award to GKS in light of that firm's significantly higher proposed cost. In this regard, the protester alleges that the RFP called for award to the lowest priced technically acceptable offeror because it provides that firms must receive a rating of no less than "acceptable" in each evaluation area. According to the protester, this language, when read in conjunction with the provision of the SSP relating to the rating procedure quoted above and with the oral advice it received, required the Army to make award to the lowest priced technically acceptable offeror.[1]

In a negotiated procurement, the government is not required to make award to the firm offering the lowest cost unless the RFP specifies that cost will be the determinative factor. *Univ. of Dayton Research Inst.*, B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Here, as stated above, the RFP specifically contemplated a comparative technical evaluation of proposals with award to the "best overall proposal," with technical factors more important than cost and management factors combined. Further, we think that the Army made a reasonable cost-technical tradeoff in awarding to GKS, and was legally entitled to do so under the RFP's terms. In particular, we note that both the source selection determination as well as the TEP's final report indicate that, while the other three competitive range offerors submitted technically acceptable proposals, the proposal submitted by GKS offered a technically superior approach, and, although higher priced, represented a substantially lower risk of performance than those of the other firms. There is no evidence in the record to show otherwise.

The protester finally alleges that the Army failed to timely notify it of its intent to award to GKS in accordance with FAR § 15.1001(b)(2) (FAC 84-13), which requires agencies to provide unsuccessful offerors with notice of the agency

[1] Antenna Products also argues that the Army could not properly award to GKS because GKS allegedly failed provide option prices and a price for the optional spare parts, as required by the RFP. The protester bases allegation on the fact that the final award document does not show prices for these line items. We have reviewed both firms' proposals and point out that both GKS and the protester submitted identical pricing structures which included prices for the option quantities and optional spare parts packages.

intent to make an award prior to actually doing so in cases where the requirement has been set aside for small business.

The Army's failure in this respect is merely a harmless procedural error which does not affect its otherwise valid award. The purpose of the notice requirement is to provide unsuccessful offerors an opportunity to challenge the prospective awardee's size status for the procurement at hand. *See Fidelity Technologies Corp.*, 68 Comp. Gen. 499 (1989), 89-1 CPD ¶ 565.

Here, the Small Business Administration's Office of Hearings and Appeals is considering Antenna Products's size appeal against GKS, and the ruling will be applicable to the instant procurement. Consequently, we cannot conclude that Antenna Products was materially prejudiced by the Army's failure to provide it with timely notice of its intent to award to GKS.[2] Since we will only sustain a protest on this basis where a firm is prejudiced by the agency's failure to provide the required notice, *FKW Inc. Sys.; ColeJon Mechanical Corp.*, B-235989; B-235989.2, Oct. 23, 1989, 89-2 CPD ¶ 370, we have no basis to sustain the protest here.

The protest is denied.

B-237291, January 22, 1990

Procurement

Contractor Qualification
■ Responsibility
■ ■ Contracting officer findings
■ ■ ■ Affirmative determination
■ ■ ■ ■ GAO review

Affirmative responsibility determination is not subject to objection where, although awardee had experienced financial difficulties, contracting officer considered the company's financial situation and found in light of the fact that the company has become part of another corporation reportedly in a strong financial position, and has submitted satisfactory bank references, that company had the financial resources to perform the contract.

[2] We also note that the agency suspended performance of GKS' contract pending resolution of this protest.

Procurement

Contractor Qualification
■ Responsibility/responsiveness distinctions
■■ Sureties
■■■ Financial capacity

Procurement

Sealed Bidding
■ Bid guarantees
■■ Sureties
■■■ Acceptability

Protest against agency's acceptance of awardee's four individual sureties is denied where agency investigated the sureties and found that at least two of them were acceptable.

Matter of: Farnsworth Construction Company

Farnsworth Construction Company protests the award of a contract to Score Construction, Inc., under invitation for bids (IFB) No. F29650-89-B1005, issued by the Air Force for improvement of military family housing units at Kirtland Air Force Base. Farnsworth contends that Score is not a responsible contractor because of its financial situation and that the Air Force could not properly have found Score to be responsible. Farnsworth also challenges the acceptability of Score's individual sureties.

We deny the protest.

Bids on the project were opened September 11, 1989, with Score submitting the low bid. Recognizing that Score had financial difficulties, the contracting officer investigated the matter and found that Score had two satisfactory bank references, and had become part of another corporation which reportedly is in strong financial position. Additionally, the contracting officer found that Score had performed in a satisfactory manner on at least four recent contracts, three of which were with the Air Force. The agency also conducted an investigation into the individual sureties used by Score on its bid guarantee. While the investigation revealed a number of questions regarding Score's sureties, at least two of the four sureties listed were found to have sufficient assets. Finally, the contracting officer received a preaward survey report from the Defense Contract Administration Services Management Area, Phoenix, which recommended award to Score. Based on this Score was found to be responsible, and was awarded a contract on September 25.

Whether a prospective contractor has adequate financial resources to perform contract is a question of responsibility, Federal Acquisition Regulation § 9.104-1(a), as is the financial acceptability of a bidder's individual sureties *C.E. Wylie Constr. Co.*, B-234225, B-234227, May 5, 1989, 89-1 CPD ¶ 427. The contracting officer is vested with a wide degree of discretion and business judgment in considering responsibility matters, and we will not object to the contracting officer's affirmative responsibility determination in this type of ca

unless the protester shows that the procuring officials acted in bad faith. *C.E. Wylie Constr. Co.*, B-234225, B-234227, *supra*.

Farnsworth argues that the contracting officer could not have legitimately found Score to be responsible in light of the company's "extremely low price and . . . apparent financial difficulties." In this regard, Farnsworth points to a Dun & Bradstreet report it obtained on Score, which indicates that Score has a negative net worth.

We do not find any evidence of bad faith here. The fact that a contractor has a negative net worth does not require a finding of nonresponsibility. *See Hugo's Cleaning Serv., Inc.*, B-228396.4, July 27, 1988, 88-2 CPD ¶ 89 (bankruptcy filings do not require finding of nonresponsibility). Moreover, while we agree that Score has experienced financial problems, the contracting officer considered these problems and determined that they were sufficiently offset by Score's becoming part of another corporation which reportedly is in a strong financial position, and by the satisfactory bank references. Score's satisfactory performance on the four recent contracts was also considered. Thus, the record indicates that the contracting officer took Score's financial situation into account, evaluated the overall situation, and in the exercise of his broad discretion determined that Score was sufficiently sound financially to be found responsible. There is nothing in the record showing a lack of good faith on the part of the contracting officer in this respect.

Farnsworth's challenge to Score's individual sureties is based on a report from a surety bond service that alleges that three of Score's four individual sureties do not have sufficient net worth and that one of the sureties did not authorize his use as a surety on Score's bid bond. The documentation submitted by Farnsworth to substantiate its allegation that Score's individual sureties do not have sufficient net worth consists of computer sheets denoting generally the contractor and agency for which a construction project is being performed. The name of the individual sureties to which these computer sheets allegedly apply only appears handwritten across the top of each sheet. Further, Farnsworth has not supplied any documentation to substantiate its allegation that one of Score's individual sureties did not authorize his use on Score's bid bond.

The agency reports that it conducted an extensive investigation of the individual sureties used by Score, including obtaining financial statements prepared by a certified public accountant on all four sureties, and found that at least two of the four sureties were acceptable. In view of the fact that the contracting officer is vested with a wide range of discretion and business judgment in determining the acceptability of individual sureties, *C.E. Wylie Constr. Co.*, B-234225, B-234227, *supra*, the questionable veracity of the documentation submitted by Farnsworth to substantiate its allegations, and the apparent extensive investigation of the sureties conducted by the agency, we have no basis to object to the sureties.

The protest is denied.

B-237321, January 22, 1990

Procurement

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

Procurement

Socio-Economic Policies
■ Small business 8(a) subcontracting
■■ Contract awards
■■■ Delays
■■■■ Pending protests

In light of agency's broad discretion to decide to contract or not contract through the section 8(a) program, there is no legal basis to object to agency's suspension of negotiations with an 8(a) firm pending resolution of protest by another 8(a) firm involving allegations of conflict of interest on the part of the agency's technical project officer in selecting the 8(a) firm for negotiations or to the issuance of a task order for these services within the scope of an existing contract with a third 8(a) contractor.

Matter of: COMSIS Corporation

COMSIS Corporation protests the Department of Interior, Office of Surface Mining's (OSM) suspension of negotiations for an automatic data processing support services requirement offered to the Small Business Administration (SBA) for award to COMSIS under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988). Section 8(a) authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. COMSIS also protests the issuance of a task order by OSM under its existing 8(a) contract with Data Computer Corporation of America (DCCA) to cover these services.

We deny the protest.

By letter dated August 17, 1989, OSM offered certain automatic data processing support services at OSM's offices in Pittsburgh, Pennsylvania and Lexington Kentucky to the SBA for award through the SBA's section 8(a) program. OSM nominated COMSIS for award. By letter dated September 15, 1989, SBA notified OSM that the requirement had been accepted for the 8(a) program on behalf of COMSIS and authorized OSM to conduct negotiations directly with COMSIS. During these negotiations, on September 11, OSM received a letter from an other 8(a) concern, Computer Friend, Inc. (CFI), protesting the proposed award to COMSIS, alleging a conflict of interest and collusion involving the OSM technical project officer in selecting COMSIS as the 8(a) firm with which to conduct negotiations. OSM initiated an investigation of these charges and suspended negotiations with COMSIS. Because OSM determined some vehicle was necessary to provide continued ADP support services pending completing an investigatio

of the charges in CFI's protest, given that the incumbent contractor had issued termination notices to its employees and closed out its leases for space and equipment, OSM issued a task order effective October 1 against 8(a) contract No. HQ51-CT89-32008 with DCCA for temporary support services. On October 6, COMSIS protested to our Office.

COMSIS contends that OSM suspended negotiations with it to avoid an appearance of a conflict of interest, which COMSIS contends is an invalid basis to suspend negotiations. According to COMSIS, since negotiations were improperly cut off, OSM improperly issued a task order to DCCA. COMSIS argues that the task order is an improper change to that contract since it is for services in a geographic area not covered by that contract.

Under section 8(a) of the Small Business Act, a government contracting officer is authorized "in his discretion" to let the contract to SBA upon terms and conditions to which the agency and SBA agree. 15 U.S.C. § 637(a)(1). Therefore, no firm has a right to have the government satisfy a specific procurement need through the 8(a) program or award a contract to that firm. *Lee Assocs.*, B-232411, Dec. 22, 1988, 88-2 CPD ¶ 618. Consequently, we will object to an agency's actions under the section 8(a) program only where it is shown that agency officials engaged in bad faith or fraud or violated regulations. *Kinross Mfg. Corp.*, B-234465, June 15, 1989, 89-1 CPD ¶ 564.

COMSIS has not alleged any fraud or bad faith on the part of agency officials. Given the contracting officer's broad discretion in determining whether to award a section 8(a) contract, it clearly is legally unobjectionable for OSM to suspend negotiations with COMSIS while investigating Computer Friend's allegations of conflict of interest in the award of OSM's requirement.[1]

As for COMSIS's objection to the issuance of the task order to DCCA under its 8(a) contract with the SBA and OSM, the record shows that, contrary to COMSIS's allegation, the contract provides for nationwide ADP support services. Under the circumstances, there is no basis to object to the issuance of the task order under another 8(a) contract, since it is unquestioned that the agency had a continuing need for contractor support and, as indicated above, it had broad discretion as to how it could satisfy its requirements under the 8(a) program, absent fraud or bad faith.[2]

The protest is denied.

[1] The record indicates that Interior and the SBA have not resolved the question whether there was a conflict of interest situation that should preclude COMSIS from receiving an 8(a) award.

[2] The protester has challenged Interior's decision to continue performance of the task order during the pendency of this protest. Since the agency has informed us of its written determination to go forward with performance, it has complied with its statutory obligation. *Systems & Processes Eng'g Corp.*, B-234142, May 10, 1989, 89-1 CPD ¶ 441.

B-236927, January 23, 1990

Procurement

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

Agency reasonably found individual surety on bid bond unacceptable, and thus properly rejected bidder as nonresponsible, where, in response to agency request for supporting information showing ownership and value of assets claimed, the surety submitted escrow agreement as a pledge of assets, but the agreement was made subject to Louisiana, rather than federal law; agency was not required to compromise the financial guarantee represented by the bid bond by making government subject, in case of default, to laws under which its rights may be less than under federal law, which otherwise applies to federal contracts.

Matter of: Pete Vicari General Contractor, Inc.

Pete Vicari General Contractor, Inc., protests the rejection of its low bid under invitation for bids (IFB) No. GS-07P-89-HUC-0660, issued by the General Services Administration (GSA) for fire safety improvements, at the United States Custom House, New Orleans, Louisiana. The contracting officer rejected the protester's bid because the information provided by the individual sureties concerning their assets was insufficient to prove their acceptability.

We deny the protest.

The IFB required each bidder to provide a bid guarantee in an amount equal to 20 percent of its bid price. The IFB also contained General Services Acquisition Regulation (GSAR) § 552.228-74, "Pledges of Assets," which required bidders submitting guarantees supported by individual sureties to obtain pledges of assets from those individuals in the form of either (1) evidence of an escrow account containing commercial and/or government securities, or (2) a recorded covenant not to convey or encumber real estate.

Vicari, the apparent low bidder, submitted as its guarantee a bid bond naming two individual sureties. Following bid opening, the agency, in reviewing the affidavits of individual surety (Standard Form (SF) 28) included with Vicari's bond determined that ownership and value of the sureties' stated assets were not clearly established. By letter dated July 21, 1989, the agency informed Vicari that reliable and verifiable supporting documentation had to be submitted within 10 days, and that the escrow account specified in the GSA regulation incorporated in the IFB would be one acceptable type of documentation. Thereafter, by letters and telephone conversations, the agency advised Vicari of deficiencies in the information furnished, and Vicari attempted to correct the deficiencies.

One of the areas the agency deemed deficient concerned evidence of an escrow account for one of the sureties. On August 10, the protester delivered an escrow agreement to the contracting officer and, although the parties disagree on cer

tain specifics, the record shows that at least as of August 31, the agency had advised Vicari that the escrow agreement as submitted was insufficient because it provided in paragraph 27 that "this Escrow Agreement shall be governed by the laws of Louisiana in all respects, including matters of construction, validity and performance." The Hibernia Bank, the escrow agent, refused GSA's request that this provision be deleted, agreeing only to modify the clause to affect only potential disputes to which the bank was a party. GSA considered this modification inadequate and thus determined that the surety had not sufficiently shown that it had assets that would be available in the event of default, and rejected Vicari as nonresponsible.

Federal Acquisition Regulation (FAR) § 28.202-2(a) requires the contracting officer to determine the acceptability of individuals proposed as sureties, and states that the information provided in the SF 28 is helpful in determining the net worth of a proposed individual surety. The contracting officer is not limited to consideration of the information in the SF 28, however, and may go beyond it where necessary in making his decision. *Transcontinental Enters., Inc.,* 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. One way the agency may go beyond the SF 28 is to require pledges of assets from individual sureties, as authorized by GSAR § 528.202-71; this step assures that surety assets shown on the SF 28 will be available to reimburse the government's costs in the event of a default. Ultimately, the determination of an offeror's responsibility as it is affected by the financial capabilities of offered individual sureties involves the exercise of subjective business judgment, and we will not disturb such a determination unless it is shown to be unreasonable. *Eastern Maintenance Servs., Inc.,* B-220395, Feb. 3, 1986, 86-1 CPD ¶ 117.

Applying the above standard, we find that GSA's actions here were reasonable. Specifically, it was proper for GSA to request supporting information establishing the ownership and value of the sureties' claimed assets, and it was proper for the agency to reject the escrow agreement Vicari furnished to satisfy this requirement based on the qualifying language in paragraph 27.

In this regard, paragraph 27, even as modified, made the contract subject to the laws of Louisiana rather than federal law, which governs contracts entered into by the government. *See Nationwide Roofing and Sheet Metal, Inc.,* 64 Comp. Gen. 474 (1985), 85-1 CPD ¶ 454. Application of state law gives rise to the possibility that the government's rights in case of default would be less than under federal law. We have held that a bid guarantee containing similar qualifying language as to applicable law that renders the government's rights uncertain warrants rejecting a bid as nonresponsive. *See generally Carolina Security Patrol, Inc.,* B-236276, Oct. 5, 1989, 89-2 CPD ¶ 320.

Although here the issue is one of responsibility, the agency's concerns with the qualifying language are just as valid. GSA is unfamiliar with the intricacies of Louisiana law and was concerned with the possibility that its rights in a dispute with the bank could be adjudicated differently than would be the case under federal law; if GSA accepted the escrow agreement as an adequate pledge of assets, it would be agreeing to subject the government's rights concerning the

escrow assets to this uncertainty. GSA was not required to do so and thereby possibly compromise the financial guarantee in support of which the pledge of assets was requested in the first place.

Vicari argues that GSA afforded it an insufficient opportunity to come up with an escrow agreement. We disagree. While, as indicated above, the parties dispute the point at which GSA first advised Vicari that it wanted paragraph 27 deleted, GSA in mid-August furnished Vicari with a sample acceptable escrow agreement, and on August 31 participated in a telephone conference with the protester and the Hibernia Bank. During this conference, GSA clearly stated that paragraph 27, even as modified, would likely be considered to render the escrow unacceptable. We conclude that GSA gave Vicari ample opportunity to develop an acceptable escrow agreement.

Accordingly, we find that the agency reasonably viewed one of Vicari's individual sureties as unacceptable, and thus properly rejected Vicari as nonresponsible.

The protest is denied.

B-237325, January 24, 1990

Procurement

Competitive Negotiation
■ Best/final offers
■■ Rejection
■■■ Propriety

Where protester is given notice of agency's interpretation of government requirement during discussions, agency properly rejected protester's offer as unacceptable for failing to meet requirement in its best and final offer.

Procurement

Socio-Economic Policies
■ Small businesses
■■ Competency certification
■■■ Eligibility
■■■■ Criteria

Where agency properly found a small business concern's offer to be technically unacceptable, without questioning the offeror's ability to perform or any other traditional element of responsibility, agency is not required to refer its determination to exclude the concern's proposal to the Small Business Administration under certificate of competency procedures.

Matter of: Environmental Technologies Group, Inc.

Environmental Technologies Group, Inc. (ETG), protests the award of a contract to Nuclear Research Corporation (NRC) under request for proposals (RFP) No DAAB07-89-R-P013, issued by the Department of the Army. The protester

argues that its proposal was improperly determined unacceptable. The protester also contends that the agency should not have rejected its proposal without referring the matter to the Small Business Administration (SBA) under certificate of competency (COC) procedures.

We deny the protest.

The agency issued the solicitation on April 11, 1989, as a 100 percent small business set-aside for a 3-year, firm, fixed-priced contract for radiac sets, which allow troops to detect and measure radiation from nuclear fall-out, including installation kits, spare parts and supporting data.[1] The solicitation provided for award to the responsible offeror submitting the lowest priced technically acceptable proposal. Production capability including manpower and quality assurance were subfactors under the technical evaluation criteria.

The agency received six proposals on June 12 and found five of them to be susceptible of being made acceptable and therefore in the competitive range. During written and oral discussions, the agency became concerned over the protester's plans to subcontract for 10 of 11 required circuit card assemblies. The agency advised the protester that it was concerned about the quality implications of the protester's subcontracting plans, particularly as to how the protester would insure that the subcontractor established the controls on work processes required by the quality standard, MIL-Q-9858A, as required by the RFP. During discussions, the agency noted that the protester would only be doing final assembly, inspection and packaging and requested the protester to "identify vendors, qualifications, ESD, parts control, configuration control and quality program (flow down adherence to MIL-Q-9858A)." This question was submitted in writing to the protester as a discussion question.

On September 6, the agency provided the offerors with a final list of discussion items and requested them to submit best and final offers (BAFOs) no later than September 13. At that time, the contracting officer again asked the protester to "[p]rovide a concise explanation of how the identified companies were verified to be in conformance with MIL-Q standards. Explain how ETG will monitor schedule and MIL-Q conformance and enforce ETG & MIL standards at each identified subcontractor."

The protester submitted a timely BAFO, in which it explained that Southwold, Inc. in Taipei, Taiwan, would provide the 10 subcontracted circuit card assemblies; the protester declined to require its subcontractor to establish its own procedures equivalent to the requirements of MIL-Q-9858A but explained that Southwold's quality assurance procedures did meet the less stringent requirements of MIL-I-45208A.[2] The agency found that the protester's response prom-

[1] The radiac set may be used in a nuclear battlefield environment to establish safe operational limits, or to monitor radiation where accidents involving nuclear materials have occurred. It is installed on combat vehicles.

[2] MIL-I-45208A provides for an end product inspection quality system where defective parts are sorted from the satisfactory parts. MIL-Q-9858A envisions a preventative quality system in which the manufacturing operations are controlled to prevent the production of defective parts. Paragraph 1.5 of MIL-Q-9858A states that the system's requirements exceed those of MIL-I-45208A in that "total conformance to contract requirements is obtained best by controlling work operations, manufacturing processes as well as inspections and tests."

ised nothing more than an end product inspection and provided no explanation of how the protester planned to impose process controls and insure testing at the vendor and subvendor level. The agency therefore rejected the protester's proposal as technically unacceptable and made award to NRC, which had submitted the lowest technically acceptable offer on September 25. This protest followed.

The protester argues that in finding ETG's best and final offer unacceptable because of its failure to impose MIL-Q-9858A on its subcontractors, the agency applied unannounced evaluation criteria. The protester believes that the solicitation was at best ambiguous in informing offerors of the requirement that MIL-Q-9858A flow down to subcontractors and that application of the MIL-Q-9858A to subcontractors is not only contrary to historical practice by defense agencies but also exceeds the agency's actual needs. The protester argues that while MIL-I-45208 is not as rigorous as MIL-Q-9858A, it is rigorous enough to meet those needs; furthermore, the protester has required its vendors in many instances to meet requirements more stringent than MIL-Q-9858A imposes. The protester asserts that if its subcontractors are forced to follow MIL-Q-9858A practices, they will be unable to offer items to the protester at reasonable prices.

The RFP required MIL-Q-9858A be followed by the actual manufacturer of the item. Thus, we think the agency reasonably interpreted the requirement as being applicable to a subcontractor if that is who will manufacture the radiac sets to be furnished under the contract. Moreover, the record shows that during oral and written discussions, the protester was advised of the agency's view that this quality assurance standard was to "flow down" to subcontractors used by the offeror. This communication itself was sufficient to place the protester on notice of the requirement. *See Federal Electric International, Inc.,* B-232295.2, Dec. 21, 1988, 88-2 CPD ¶ 610. Therefore, even if there was a reasonable question as to what the Army required of subcontractors prior to discussions, there should have been none thereafter. Accordingly, we find that the agency could properly evaluate subcontractor compliance with the required quality assurance standard.

The protester also objects to the agency's finding its proposal technically unacceptable because it proposed insufficient manhours. Since the protester's failure to commit itself to meeting the agency's quality requirements provided a valid basis for rejecting its proposal, we need not address the question of whether the Army properly found the protester's proposal unacceptable in other areas. *See Digital Equipment Corp.,* 68 Comp. Gen. 708 (1989), 89-2 CPD ¶ 260.

Finally the protester argues that before rejecting its proposal, the agency must refer the matter of its quality assurance procedures to the SBA. The protester notes that the evaluation factors that formed a basis for its rejection were not used to compare proposals, but as "go-no go" criteria; this, the protester argues, makes them a matter of responsibility. The protester furthermore notes that under Federal Acquisition Regulation § 9.104-1(e) (FAC 84-18), quality assurance measures are traditionally a matter of responsibility; an agency may not

find a small business nonresponsible for award without referring the matter to SBA under COC procedures.

We disagree that the agency's basis of rejection required referral to the SBA. The record before us contains no evidence that the agency doubted the protester's responsibility, that is, its general ability to meet quality control standards. Rather, the record reflects the agency's concern that the protester had refused to commit itself to meet quality assurance requirements which were a material part of the solicitation. The record therefore clearly supports the agency's position that the proposal's technical acceptability, not the firm's responsibility, was at issue in the rejection of the protester's offer. In such circumstances, referral to SBA is not required. *TM Systems, Inc.,* B-236708, Dec. 21, 1989, 89-2 CPD ¶ 577.

The protest is denied.

B-236265.2, January 25, 1990

Procurement

Competitive Negotiation

■ **Discussion reopening**

■■ **Propriety**

Where awardee waits until after award to advise the government that certain of its proposed line items do not meet the technical specifications required by the solicitation, if agency reopens discussions to permit offeror to modify its proposal, it must conduct discussions with all offerors in the competitive range.

Matter of: Federal Data Corporation

Federal Data Corporation protests award of an indefinite quantity/indefinite delivery contract to General Dynamics Corporation under request for proposals (RFP) No. F19630-89-R-0001 issued by the Air Force Computer Acquisition Center for computer hardware, software, maintenance, training, and data to support the Strategic Air Command's Strategic War Planning Systems. Federal Data contends that General Dynamics's contract should be terminated and that negotiations should be reopened because General Dynamics failed to reveal, prior to award, that it knew its proposal included noncompliant hardware and because the Air Force is currently evaluating General Dynamics's proposed substitute hardware.

We sustain the protest.

The RFP required fixed prices for more than 260 contract line items plus monthly maintenance prices for existing equipment. Proposals were evaluated, in descending order of importance, in technical, management, and cost areas. Award was to be made, based upon an integrated assessment of proposals, to the offeror whose proposal was most advantageous to the government.

Three offerors, including Federal Data and General Dynamics, submitted proposals and, after initial technical evaluations, discussions were conducted with all offerors. Once all matters raised in discussions were addressed by the offerors, the Air Force requested the offerors to "acknowledge that all negotiation issues are closed," and that they were in agreement with their respective draft model contract and the government's cost reconciliation. After General Dynamics and the other offerors so acknowledged, best and final offers (BAFOs) were requested. This request advised each offeror that if its BAFO contained inadequately explained changes from its original proposal, such changes might affect the adequacy of the proposal and could render it unacceptable. It further advised that any technical revisions would not be subject to further discussions.

While conducting a "cost refinement" of its proposal in anticipation of submitting its BAFO, General Dynamics discovered that it had made an error in its technical proposal with regard to certain line items comprising a mass storage subsystem. As originally proposed by General Dynamics, its subsystem would meet the specifications, including a requirement for 100 gigabytes (Gbytes) of automatically accessible storage, through use of 2 optical jukeboxes, 4 optical disk drives, 40 optical disks, each with a capacity of 2.56 Gbytes, and a controller.[1] However, General Dynamics misinterpreted the manufacturer's technical literature regarding the capacity of the optical disks which General Dynamics had proposed. The literature in question indicated each "drive" had a 2.56 Gbytes capacity, which General Dynamics engineers interpreted to mean a 2.56 Gbyte disk media capacity. In actuality, each disk's capacity is only 1.28 Gbytes. This misinterpretation resulted in a proposal which offered only half the equipment necessary to meet those specifications. Apparently because of the ambiguity of the technical literature submitted with General Dynamics's proposal, the Air Force evaluators did not notice this error.

General Dynamics did not notify the Air Force of its error or revise its proposal to correct the error because it believed from its acknowledgment of the draft contract and the closure of discussions, as well as from the BAFO request letter, that the Air Force had instituted a technical and communication "freeze" preventing further revisions.

After evaluating the BAFOs, the Air Force awarded the contract to General Dynamics at a current dollar value of $165,553,887. Federal Data was the second low offeror at $574,201,366 in current dollar value. Federal Data then filed a protest with our Office alleging among other things that General Dynamics was nonresponsible and was attempting to "buy in" with a below cost offer.

During the development of that protest, General Dynamics notified the Air Force that it was unable to furnish the three storage subsystem line items contained on a delivery order issued with the contract award, because of its error regarding capacity. In a series of letters and meetings, General Dynamics ex-

[1] Optical jukeboxes are so named because they resemble in function a phonograph record player jukebox. Optical disks are used for storage of information and information is retrieved by an automatic process which locates the proper disk, mounts it on a disk drive (if not already mounted), reads the information sought, and transfers it elsewhere in the system.

plained its error and sought to substitute a different subsystem than that originally proposed, for the approximately 15 line items affected. The substitute solution was necessary, according to General Dynamics, because merely doubling the capacity of the original equipment would exceed the maximum size specifications set forth in the RFP.[2] The Air Force has not yet completed its evaluation of the substitute subsystem in part because the optical disk drives are produced by the Toshiba Corporation and, under applicable law and regulations, Toshiba products may only be used in limited circumstances. *See* Section 2443, Multilateral Export Control Enhancement Amendments Act, Pub. L. 100-418, 50 U.S.C. App. § 2410a note, 50 U.S.C.A. App. § 2410a (West Supp. 1989); Federal Acquisition Regulation § 52.225-12 and § 52.225-13 (FAC 84-46).

Upon learning of General Dynamics's proposed substitution and of the Air Force's ongoing evaluation, Federal Data withdrew its original protest and filed the instant protest. Federal Data now contends that negotiations should be reopened due to General Dynamics's misrepresentation in failing to disclose its error prior to submitting its BAFO, and due to the Air Force's post-award discussions with, and waiver of the delivery schedule for, General Dynamics. In particular, Federal Data argues that it was prejudiced, since in a subsequent round of discussions, it would have lowered its price and General Dynamics likely would have raised its price.

It is plain that General Dynamics submitted a proposal that failed to meet mandatory specifications of the RFP, that acceptance of such a proposal is improper, and that the protracted discussions currently being conducted with General Dynamics are for the purpose of giving General Dynamics the opportunity to make its proposal acceptable. The conduct of discussions with one offeror requires that discussions be conducted with all offerors within the competitive range, including an opportunity to submit revised offers. 10 U.S.C. § 2305(b)(4) (1988); *Motorola, Inc.*, 66 Comp. Gen. 519 (1987), 87-1 CPD ¶ 604. This rule applies even where discussions are reopened after an initial selection is made, including where the post-selection negotiations do not directly affect the offerors' relative standing, because all offerors are entitled to equal treatment and an opportunity to revise their proposals. *PRC Information Sciences Co.*, 56 Comp. Gen. 768, 77-2 CPD ¶ 11. Here, since the Air Force is conducting discussions with General Dynamics, it must also conduct discussions with any other offerors in the competitive range and allow them to revise their proposals if they so desire. Since the Air Force is conducting discussions only with General Dynamics, we sustain the protest.

In reaching this conclusion, we recognize that the Air Force argues that its discussions with General Dynamics are a matter of contract administration and not for review by our Office. The Air Force is correct that normally we do not review matters of contract administration. *See William B. Hackett & Assocs., Inc.*, B-232799, Jan. 18, 1989, 89-1 CPD ¶ 46. However, since the error in General Dynamics's proposal was known to it prior to submission of its BAFO, and

[2] As the Air Force has continued its evaluation of the substitute subsystem, General Dynamics has continued to seek a solution using the originally proposed equipment in a smaller configuration.

the agency's post-award communications with General Dynamics concern its proposed approach for correcting the error and for meeting mandatory specifications, we believe what is occurring here is more appropriately viewed as reopened discussions with an offeror for the purpose of making its proposal acceptable, rather than as simply a matter of contract administration.

In light of our decision, we will not consider what prejudice may have accrued to Federal Data from the apparent waiver of the contract delivery schedule. We also will not consider the acceptability of General Dynamics's substitute subsystem containing Toshiba products. Since compliance with applicable law and regulations is a matter for the Air Force to consider in its evaluation of General Dynamics's proposal and it has not yet made that determination, our consideration of the issue would be premature.

We recommend that the Air Force reopen discussions with all offerors in the competitive range and obtain another round of BAFOs. We also find that Federal Data is entitled to the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

B-230078.2, B-230079.2, January 26, 1990

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Procurement

Competitive Negotiation
■ Offers
■■ Preparation costs

Protester awarded costs in connection with successful protest is entitled to reimbursement for proposal preparation and protest costs incurred or initially paid by prospective subcontractor, where the costs were incurred by the subcontractor acting in concert with and on behalf of offeror and offeror has agreed to reimburse to subcontractor the amount ultimately recovered from the government.

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Where claim for costs of proposal preparation and of filing and pursuing protests is not adequately documented, claimant is not entitled to recovery.

Matter of: TMC, Inc.—Claim for Costs

TMC, Inc., requests that the General Accounting Office (GAO) determine the amount it is entitled to recover from the United States Department of Agriculture (USDA) for proposal preparation costs and the costs of filing and pursuing its protest under request for proposals (RFP) Nos. 1-M-APHIS-88 and 2-M-APHIS-88, issued by USDA for the acquisition of inactive dried yeast.

We determine, as discussed below, that TMC is entitled to recover $19,102.09 for its cost of proposal preparation and filing and pursuing its protest.

Background

In *TMC, Inc.,* B-230078, B-230079, May 24, 1988, 88-1 CPD ¶ 492, we sustained TMC's protest against award to another offeror and found it entitled to recover the costs of preparing its proposal and of filing and pursuing the protest, including attorneys' fees. In the claim submitted to the USDA, TMC claimed costs paid or incurred by TMC's selected subcontractor, the Lake States Yeast Division of Rhinelander Paper Company (Lake States), as well as costs that were paid or incurred by TMC. Specifically, TMC stated that the proposal preparation costs consisted of TMC's costs for direct labor and telephone calls, amounting to $735.00, and Lake States's costs for product samples, freight, and special sample preparation, amounting to $2,029.86. TMC stated that the protest costs consisted of TMC's costs for direct labor, travel expenses, telephone calls, office supplies, and postage, amounting to $2,259.00, and Lake States's costs for direct labor, travel expenses and attorneys' fees, amounting to $18,542.73. The total costs claimed by TMC amounted to $23,566.59.

USDA determined that only the portion of the claimed costs paid by TMC were allowable, that is, $2,994, and that the remainder of the claim, $20,572.59, should be disallowed. It is USDA's position that the remainder of the claimed costs are not properly due TMC since they were incurred and paid, not by TMC, but by Lake States. Since Lake States, as a subcontractor, and not a prospective offeror, lacked standing to protest, USDA believes TMC is unable to recover the costs Lake States incurred in connection with the procurement and protest.

Arguments

TMC maintains it should be permitted to recover all of its and Lake States's costs incurred in connection with proposal preparation and pursuing the protest. In this regard, TMC explains it had a long-standing "teaming arrangement" with Lake States, pursuant to which TMC and Lake States shared the responsibility for submitting offers and filing and pursuing protests. TMC was responsible for preparing and submitting bids, while Lake States was responsible for preparing and submitting yeast samples and any required technical information, and each party initially bore the expense of performing its respective role. Although TMC alone signed the offers, it indicated in its proposals that the

contracts would be performed at Lake States's facilities. Likewise, while the protest was brought in the name of TMC, both firms appeared at a bid protest conference and, according to TMC, both participated in developing protest arguments. TMC states that while each firm bore its own costs, "Lake States agreed to reimburse TMC its attorneys' fees to the extent they were not recovered from USDA, and in fact Lake States paid those fees directly."

Analysis

We find that the protest costs and proposal preparation costs incurred by Lake States generally are recoverable by TMC under this claim.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1) (Supp. V 1987), where our Office determines that the award of a contract does not comply with statute or regulation, we may declare "an appropriate interested party" to be entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees, and of bid and proposal preparation. Our Bid Protest Regulations define "interested party" for the purpose of filing a protest as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. §§ 21.0(a) and 21.6(d) (1989). We have recognized that the recovery of protest costs is allowed in order to relieve parties with valid claims of the burden of vindicating the public interests which Congress seeks to promote. *See Hydro Research Science, Inc.—Claim for Costs,* 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572.

Protest Costs

Here, clearly documented costs were in fact incurred in pursuit of a meritorious protest against an improper award. Although most of these costs were paid by Lake States, the proposed subcontractor (and as such not an interested party eligible under our Bid Protest Regulations to protest in its own right, *Nasatka Barrier, Inc.,* B-234371, B-234378, Mar. 31, 1989, 89-1 CPD ¶ 349), this is not a case where the costs were incurred by a potential subcontractor acting independently of the interested party, TMC, the actual or prospective offeror. Rather, we find the record supports TMC's position that the costs were incurred by Lake States acting in concert with and on behalf of TMC in order to provide TMC with legal representation and technical assistance in the development of its protest arguments. Furthermore, the record indicates that TMC has agreed to reimburse Great Lakes the costs it incurred in pursuit of TMC's protest when TMC recovers payment from the government; thus, this is not a case where TMC might become unjustly enriched by recovering costs it did not incur.

In these circumstances, we believe the purpose of the statutory provision allowing recovery of protest costs—to relieve parties with valid claims of the burden of vindicating the public interest—is best effectuated by finding TMC entitled to recover those protest costs incurred or initially paid by Lake States in concert with and on behalf of TMC.

Proposal Preparation

While we generally would not view the costs incurred by a mere potential subcontractor in preparing a quotation to be recoverable by a successful protester as part of its proposal preparation costs, this is not the situation here. Just as we found that TMC and Lake States acted in concert in pursuing the protest, the record establishes that Lake States's relationship with TMC was more than that of only a potential subcontractor. In this regard, Lake States did not merely provide TMC with a quotation for certain work under the solicitations, but rather participated fully in the proposal process by submitting the required samples to the agency on behalf of TMC (indeed, it is the costs associated with these samples that comprise Lake States's portion of the claimed proposal preparation costs). In addition, TMC in its proposals designated Lake States's facility as the place of performance, and the agency advises us that TMC has previously acted as Lake States's dealer, supplying the government with Lake States products, and that it understood TMC to be offering Lake States yeast here. In these circumstances, we view Lake States's proposal preparation costs to have been incurred as part of a joint effort with TMC, and thus as recoverable by TMC under this claim.

Lack of Documentation

We find, however, that TMC has not established its entitlement to recover certain of the costs claimed to have been incurred by it and Lake States. Notwithstanding the agency's request to TMC for documentation of Lake States's claimed costs for direct labor ($1,470.50 for 50 hours of labor) by a Lake States employee in pursuing the protest, we note that TMC has provided no documentation in support of its claim in this regard. Likewise, although the USDA does not challenge TMC's claim of $2,994 as the costs TMC itself incurred in preparing its proposals and pursuing the protest, we note that TMC also has provided no documentation in support of this aspect of its claim. Notwithstanding the agency's initial request to TMC for an "itemized account" of its costs and the agency's subsequent requests for documentation of TMC's claimed costs for direct labor ($2,600 for 52 hours of labor by a TMC vice president), and telephone calls ($143), TMC has failed to provide any evidence to establish the amounts claimed, for what specific purposes these claimed expenses were incurred, or how they relate to the protests. It appears to be TMC's position that either supporting documents "do not exist" or, in the case of telephone expenses, are "not readily available."

The burden is on the protester to submit sufficient evidence to support its claim, and that burden is not met by unsupported statements that the costs have been incurred. *Hydro Research Science, Inc.—Claim for Costs,* 68 Comp. Gen. 506, *supra.* Although we recognize that the requirement for documentation may sometimes entail certain practical difficulties, we do not consider it unreasonable to require a protester to document in some detail the amount and purposes of the claimed effort by a senior employee; to establish that the claimed

hourly rate reflects the employee's usual rate of compensation plus reasonable overhead and fringe benefits, *see generally Ultraviolet Purification Sys., Inc.—Claim for Bid Protest Costs,* B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376; or to provide such customary and usual business records as telephone bills, hotel bills, credit card receipts, and canceled checks. Although we recognize that TMC necessarily incurred some costs in preparing its proposals and pursuing its protest, we do not think that a protester's recovery of such costs should be based on speculation by our Office as to the reasonableness of the claim. *See generally Patio Pools of Sierra Vista, Inc.—Claim for Costs,* 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374.

Based on the foregoing, $1,470.50 of Lake States's protest costs, as well as TMC's claimed $2,259 in protest costs and $735 in proposal preparation costs, have not been established on the record before us, and thus are disallowed. To the extent documentation establishing its own claimed costs becomes available, it should be presented to USDA for its consideration.

Conclusion

TMC's claim thus is allowed in the amount of $19,102.09 ($18,542.73 in protest costs, $559.36 in proposal preparation costs).

B-233404.2, January 26, 1990

Military Personnel

Pay
■ Survivor benefits
■ ■ Annuity payments
■ ■ ■ Offset
■ ■ ■ ■ Social security

When a widow's Survivor Benefit Plan annuity is reduced because she receives social security benefits based on her husband's lifetime earnings, the reduction cannot exceed the amount she actually receives from Social Security.

Matter of: Barbara Schlech—Social Security Offset from SBP

We are asked whether the social security offset against a Survivor Benefit Plan (SBP) annuity should be reduced when the offset exceeds the beneficiary's actual social security entitlement.[1] For the following reasons the offset must be reduced.

Rear Admiral Walter F. Schlech retired from active duty on July 1, 1970. After SBP was enacted, he elected full spouse-only coverage for his wife, Barbara

[1] This request for an advance decision from the Disbursing Officer of the Navy Finance Center in Cleveland was forwarded to us by the Department of Defense Military Pay and Allowance Committee. The Committee assigned number Do-N-1486 to their submission.

Schlech. Admiral Schlech died January 25, 1985; and Mrs. Schlech immediately began receiving an SBP annuity. Apparently, Mrs. Schlech also began receiving widow's social security benefits in November 1985. When she reached age 62 in November 1987, her SBP annuity became subject to a social security offset required by the law.

Admiral Schlech began receiving reduced social security benefits at age 62. As a result Mrs. Schlech, whose social security benefit is based entirely on her husband's earnings, receives reduced social security benefits. Additionally, the social security benefits payable to Mrs. Schlech are further reduced because of her election to receive the widow's benefit prior to the time she reached full retirement age. The Navy computed her offset using the unreduced benefit amount. The offset was then adjusted to reflect Admiral Schlech's reduced social security benefits. However, since Mrs. Schlech received social security benefits prior to full retirement age a further reduction in those benefits was required. As a result the SBP offset is greater than the social security benefits she receives. She contends that the offset should not exceed her actual social security benefit.

In 1972 Congress established SBP (10 U.S.C. §§ 1447-1455) to complement the social security benefits of surviving military dependents. Under the plan a retired member may elect to provide an annuity for his dependents. The member accepts a reduced amount of retired pay during his life, and upon his death an annuity is payable to the eligible survivor. However, when the survivor is eligible for social security benefits based on the member's military service in addition to the SBP annuity, a deduction of an amount equal to the social security benefit is made from the SBP annuity. 10 U.S.C. § 1451. [2]

We addressed the offset issue in *Dora M. Lambert,* 62 Comp. Gen. 471 (1983), which dealt with a widow who received reduced social security benefits because her husband had received social security benefits before he reached age 65. In that decision, we noted that a widow's offset should be calculated so as not to exceed the amount of social security benefit she actually receives. We based our decision on the legislative history of the law, which shows that the offset provision was not intended to reduce the survivor's combined social security benefit and SBP annuity to less than 55 percent of the member's retired pay. By reducing the SBP annuity by more than the widow's actual social security benefit the combined benefit may be reduced to less than 55 percent of the member's retired pay. 62 Comp. Gen. at 472-73.

A related case, *Lucille Eaton,* 65 Comp. Gen. 813 (1986), dealt with a widow who received reduced social security benefits because she applied for social security

[2] We note that in amending 10 U.S.C. § 1451 through legislation contained in Public Law 99-145, § 711, November 8, 1985, 99 Stat. 583, 666, Congress eliminated the social security offset and established a two-tier system under which the survivor would receive 55 percent of retired pay before age 62 and 35 percent thereafter in recognition of entitlement to social security. *See* H.R. Rep. No. 81, 99th Cong., 1st Sess. 251, *reprinted in* 1985 U.S. Code Cong. & Ad. News 472, 527-528. Provision was made, however, to retain the social security offset for persons who, like Mrs. Schlech, were eligible Plan beneficiaries on October 1, 1985, if that were advantageous to them. *See* 10 U.S.C. § 1451(e) (1988).

before she reached age 62. For similar reasons, we said in that decision that a SBP offset may not exceed the amount of social security benefit the survivor actually receives.

In the present situation, the fact that Mrs. Schlech's social security benefit is subject to reduction because both she and her husband began receiving Social Security benefits before full eligibility age does not change our decision that a widow's offset may not exceed the amount of social security she actually receives.

Accordingly, Mrs. Schlech's SBP annuity should be adjusted, effective November 1987, so that the offset does not exceed her actual social security benefit.

B-233841, January 26, 1990

Civilian Personnel

Travel

■ Lodging

■ ■ Reimbursement

■ ■ ■ Government quarters

■ ■ ■ ■ Availability

Defense Department civilian employee on temporary duty who left government quarters which she considered inadequate and moved into commercial lodgings may not be reimbursed her commercial lodging costs where installation officials determined that the government quarters were adequate and therefore declined to issue a statement of non-availability pursuant to 2 JTR para. C1055. GAO will not substitute its judgment for that of officials who are responsible for determining adequacy of government quarters absent clear evidence that their determination was arbitrary or unreasonable.

Matter of: Shirley Oliveira—Reimbursement for Commercial Lodgings

Ms. Shirley Oliveira, a civilian employee of the Defense Logistics Agency, Department of Defense, was assigned to temporary duty to attend a training course conducted at a government installation, the Defense Electronic Supply Center (DESC) in Dayton, Ohio, from February 29 through March 11, 1988. Government quarters were reserved for Ms. Oliveira at the DESC. From Sunday, February 28, until the morning of Wednesday, March 2, the heat and hot water in Ms. Oliveira's quarters went off several times and repairs had to be made. Ms. Oliveira also had difficulty with the maid service at the government quarters. When Ms. Oliveira complained to officials at the DESC installation about her government quarters, they advised her that, while she was free to leave, they would not issue a statement that the quarters were inadequate and therefore unavailable.

On the morning of March 2, Ms. Oliveira called her supervisor at her permanent duty station to advise him of the conditions she was experiencing. Based on the conditions she described, he instructed her to secure hotel accommodations. Shortly after 11 a.m. on March 2 Ms. Oliveira vacated the governmen

quarters and checked into a hotel. Evidently the heat and hot water were restored to the government quarters on the afternoon of March 2.

As a result of annual appropriation limitations implemented by para. C1055 of Volume II, Joint Travel Regulations (JTR), civilian employees of the Defense Department on temporary duty may not be reimbursed for commercial lodging costs if adequate government quarters are available but not used. The general rule is that unless the employee can produce a statement of non-availability of government quarters, as prescribed by para. C1055 of the JTR, it is assumed that adequate government quarters were available; therefore, reimbursement for commercial quarters is not allowed. *See Henry L. Huffmann, Jr.,* B-225082, Sept. 3, 1987, and cases cited. The determination of whether adequate government quarters are available is entrusted to officials at the installation where the quarters are located, not the supervisor at an employee's permanent duty station, and our Office will not substitute its judgment as to the adequacy of government quarters for that of the installation officials. *Jerry Cardinal,* B-191297, Aug. 2, 1979; *Ronald Miele,* B-192271, Nov. 8, 1978.

It appears in the instant case that the government quarters provided to Ms. Oliveira were deficient during the several days she stayed there due to the periodic loss of heat and hot water. Had these conditions persisted, they may well have provided a basis for a determination that the government quarters were inadequate. However, it is undisputed that the heat and hot water problems were remedied on the same day that Ms. Oliveira vacated her government quarters. Ms. Oliveira's other complaint was that adequate linens were not available at the government quarters and that daily maid service was not provided. However, the DESC officials state that adequate linen was available and that maid service was provided every other day. In these circumstances, we do not believe that the refusal of the DESC officials to issue a statement of nonavailability to Ms. Oliveira at the time she relocated to commercial lodgings was arbitrary or unreasonable.

Finally, the fact that Ms. Oliveira's supervisor at her permanent duty station instructed her to seek commercial lodgings does not provide a basis for concluding that the government quarters were inadequate. As noted previously, the determination as to the adequacy of the government quarters is the responsibility of officials at the installation concerned. In any event, the record contains a statement by Ms. Oliveira's supervisor that his instructions were based solely on her account of the conditions at her government quarters and that he did not know the government quarters had been repaired on the day that she left those quarters.

In view of the foregoing, we conclude that the DESC officials acted reasonably in declining to issue a statement of non-availability to Ms. Oliveira. Accordingly, her claim for commercial lodgings may not be allowed.

B-237054, January 29, 1990

Procurement

Competitive Negotiation
■ Contract awards
■■ Administrative discretion
■■■ Cost/technical tradeoffs
■■■■ Technical superiority

Procuring agency made a proper cost/technical analysis in determining to make award to a higher technically rated, higher cost offeror over protester's significantly lower rated, lower cost proposal where the record shows that the agency reasonably found that the protester's low cost approach may not allow for the quality of work and personnel contemplated by the solicitation as indicated by the protester's entry level labor rates and excessive hours proposed to accomplish the sample task.

Matter of: EER Systems Corporation

EER Systems Corporation protests the award of a contract to SFA, Inc., Frederick Manufacturing Division, under request for proposals (RFP) No. DAAD05-88-R-5227, issued by the U.S. Army Aberdeen Proving Ground Support Activity, Department of the Army. The RFP contemplated award of a cost-plus-fixed-fee contract to provide engineering and technical supporting tasks for instrumentation development for a base year plus 2 option years. EER protests that the award was not consistent with the RFP evaluation criteria. EER contends that cost and technical factors have equal weight under the RFP, and that EER should have been selected for award as the low acceptable offeror.

We deny the protest.

The RFP provides that "the government will select for award that proposal offering the best value for the Government with equal consideration given to each evaluation factor and subfactor." The evaluation factors listed in the RFP are: (1) qualification of personnel, (2) adequacy of facilities and equipment, (3) offeror's response to the sample task, and (4) geographic locations. The evaluation subfactors are listed as: (1) experience, (2) staffing, (3) facilities, (4) management/organizational approach, and (5) quality of services. The RFP also states that to receive consideration for award an offer must be rated acceptable for each factor and subfactor, and that in order to determine whether each factor or subfactor is acceptable the proposals must demonstrate: (1) understanding of the technical requirements and the means required to fulfill the technical requirements; (2) completeness of the offeror's analysis of each factor and subfactor; and (3) feasibility of performance to all the terms and conditions of the offer within the total cost proposed by the offeror. Finally, the RFP states that proposals will be evaluated on a cost realism basis to evaluate the prospective contractor's understanding of the scope of work and his ability to organize and perform the proposed contract. Cost is not otherwise mentioned in the evaluation criteria.

The Army received eight proposals and five were included in the competitive range with EER's proposal having the lowest rating of the five. Discussions were held with the technically acceptable offerors, and best and final offers (BAFOs) were received. The record shows that a cost and quantitative/qualitative analysis, and a best value analysis were performed on the BAFOs. SFA received a final technical score of 96 compared to EER's score of 74.[1] EER's final evaluated cost proposal for the base year and 2 option years was the lowest at $7,175,830, as compared with SFA's proposal of $8,364,401.[2] SFA was selected for award on September 13, 1989.

Our Office has consistently held that agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results and, therefore, agency decisions regarding cost/technical tradeoffs are subject only to the tests of rationality and consistency with the established evaluation factors. *Encon Management Inc.,* B-234679, June 23, 1989, 89-1 CPD ¶ 595.

Here, as shown in the source selection documentation, the Army specifically found that while EER proposed significantly lower costs, these possible cost savings were outweighed by SFA's 22 point technical advantage. The Army determined that SFA's technical advantage was in the areas of qualified personnel—where EER's less qualified personnel could have detrimental impact on contract performance—and the sample task, where EER proposed significantly more labor hours than the government estimate.[3]

The Army also concluded that even though EER proposed the lowest cost, it may not provide the lowest cost to the government due to its inefficiency and less qualified personnel. In this regard, we have consistently found that where a cost reimbursement contract is to be awarded, the offerors' proposed estimated costs of performance should not be considered as controlling, since they may not provide valid indications of the actual costs which the government is, within certain limits, required to pay. *Bendix Field Eng'g Corp.,* B-230076, May 4, 1988, 88-1 CPD ¶ 437.

The record confirms that the proposal evaluation board, from the submission of initial proposals, was concerned about the low cost of EER's offer because it contained "entry level" labor rates, which made the agency question whether EER could deliver quality personnel and work as demanded by the contract. This concern about the possible high cost and lack of efficiency of EER was reinforced by EER's response to the sample task which included 36 percent more

[1] The other three offerors received technical scores of 98, 96, and 82.

[2] The protester contends that the Army improperly evaluated the cost of this RFP work only upon the base year costs and not upon the base year and option year costs as provided in the solicitation. However, the record establishes that proposals were evaluated based on the cost of the base year plus the option years.

[3] To the extent that EER contests the details of the technical evaluation of its proposal in its comments to the agency report, these objections are untimely under our Bid Protest Regulations. In this regard, a protest must be filed within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1989). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the latter raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. *Id.; Joseph L. De Clerk & Assoc., Inc.,* B-233166.3, Apr. 6, 1989, 89-1 CPD ¶ 357.

labor than the government estimate.[4] During discussions, these concerns were expressly brought to EER's attention. However, EER only made minor adjustments in the hours in the sample task proposal. Additionally, EER included the following paragraph in response to the agency's concerns, which EER stated applied to its overall proposal and specifically to the labor assignment and the sample task:

> The persons identified by name in our sample task are presently at EER Systems. These individuals are available and are intended to provide an overview and review function for the work being performed under this sample task. The labor rates identified in the cost proposal reflect the rates of the individual who will be performing the day-to-day work.

The Army reasonably interpreted EER's response to mean that EER's proposal contained no commitment of actual personnel who would be performing the day-to-day tasks of the contract. This statement reinforced the agency's concern that EER could not deliver that quality of work and personnel required to successfully accomplish the contract work. Consequently, the Army reasonably concluded that EER's proposed costs were unrealistically low. The Army determined that any cost savings alleged by EER were speculative at best, and that there was a significant risk that EER would not be able to provide uninterrupted high quality work and remain cost effective.

Moreover, contrary to EER's contentions, this evaluation gave the consideration to cost that was contemplated by the RFP. In this regard, the concern for cost realism was pervasive in all aspects of the RFP evaluation criteria and subcriteria. Notwithstanding the Army's concern about EER's low costs expressed during discussions, EER persisted with its low cost approach. Under the circumstances, and given the agency's well documented cost/technical tradeoff analysis, we conclude that the Army gave appropriate weight to cost in accordance with the RFP evaluation criteria.

We also do not agree with EER's "alternative" argument that award was required to be made to the low cost technically acceptable offeror under this RFP. While it is true that the RFP stated that proposals would be rated acceptable or unacceptable under each evaluation criteria and subcriteria, this does not mean the award selection must be based on low proposed cost, particularly in view of the fact that the RFP does not state this to be the award selection basis. We think the listing of the criteria's relative weight and the statement that the award would be based on the best value to the government indicates that the RFP contemplated a relative rating of the technical proposals based on the stated evaluation criteria, and the record indicates that the award selection was made in accordance with the RFP evaluation scheme.

The protest is denied.

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[4] This should be compared with awardee's 4 percent variance from government estimate.

Procurement

Sealed Bidding
■ **Contract awards**
■■ **Propriety**
■■■ **Performance specifications**
■■■■ **Waiver**

Protest that bidder's proposed roofing system did not satisfy a solicitation requirement that the roof have a Class A fire rating is denied where record indicates that the roofing system in fact satisfied the requirement.

Matter of: Perrill Construction, Inc.

Perrill Construction, Inc., protests the Army's award of three contracts to O.V. Campbell & Sons Industries, Inc., under invitation for bids (IFB) Nos. DAEA18-89-B-0017, DAEA18-89-B-0021, and DAEA-89-B-0025, for reroofing various units of government housing at Fort Huachuca, Arizona. Perrill contends that Campbell's bids should have been rejected for failure to satisfy a requirement concerning the fire rating of the proposed roofing system.

We deny the protests.

Each of the IFBs called for a built-up roofing system, consisting basically of underlayment, insulation, roofing membrane, and aggregate (gravel) surfacing. With respect to the gravel cover to be applied over the membrane, the solicitations specified a maximum weight of 450 pounds per 100 square feet. Further, the IFBs required the roofing system to have a Class A fire rating. Each IFB required submission with bids of a certification, executed by the manufacturer, identifying the offered system, and certifying that: (1) it had reviewed the specifications for the required built-up roofing system; (2) the system identified in the certification was suitable for use with the roof system construction required for the project as it relates to normal wear and tear; (3) the bidder is a licensed applicator of the manufacturer's roofing system able to obtain its 15-year warranty; and (4) the system was in fact subject to a material and workmanship warranty for 15 years. Finally, the IFBs required that test reports be submitted from an independent testing laboratory attesting that the identified roofing system met all specifications, including the specified Class A fire rating.

Perrill asserts that the roofing system identified in Campbell's certification did not meet the IFB requirement for a Class A fire rating; Perrill maintains that the test report provided by Campbell prior to award indicated that its proposed roof, in order to achieve a Class A rating, requires the use of 500 pounds of gravel per 100 square feet of roofing membrane, an amount that exceeds the permissible maximum specified in the IFBs by 50 pounds.

We find that Campbell's roofing system met the fire rating requirement. As required by the IFBs, Campbell submitted with its bid the certification that its proposed roofing system met all IFB requirements, and there is nothing on the

face of the information furnished with the certification, or in the rest of the bid, indicating that the offered roofing system will not satisfy the fire rating requirement. *See Westec Air, Inc.*, B-230724, July 18, 1988, 88-2 CPD ¶ 59. Further, in confirmation that Campbell's roofing system met this requirement, the Army has provided an Underwriters' Laboratories test report, completed shortly after the protests were filed, indicating full compliance of Campbell's proposed roofing system with all of the specifications at issue here. The roof, according to the report, received a Class A rating with only 400 pounds of gravel, 50 pounds less than the maximum permitted by the IFBs.

Perrill maintains that the IFBs required that an independent laboratory attest to compliance with the Class A fire rating standards prior to award, and that the postaward test data is insufficient. We disagree. The IFBs did require the submission of satisfactory fire rating test reports, but nowhere indicated that the reports had to be submitted with the bids or as a precondition of award. Rather, each IFB, at Section C-5, Paragraph 7, provided that,

[F]ollowing application of flood coat, 400 to 450 pounds of aggregate per 100 square feet shall be placed in a manner so as to form a continuous compact embedded overlay. *Completed* roof system shall have a Class A fire rating . . . which shall be verified by an independent laboratory and submitted to the Contracting Officer. (Italic added.)

This language indicates that the agency required the test reports, not as a precondition of award, but as a confirmation of that the installed system actually met the Class A rating requirement. The Army's reference to the test report after award here was merely an attempt to determine the accuracy of Campbell's bid certification prior to performance; the report in fact indicated that the system met the fire rating requirement, as Campbell had certified. *See generally GEBE Gebaeude und Betriebstechnik, GmbH*, B-231048, July 7, 1988, 88-2 CPD ¶ 20.

The protests are denied.

B-237282, January 29, 1990

Procurement

Socio-Economic Policies

■ Preferred products/services

■■ Domestic products

■■■ Construction contracts

Under a construction contract, elevator dispatching system which is to be incorporated into the building constitutes construction material under the Buy American Act. Therefore, awardee's foreign made group overlay controls, as components of the system, do not violate the act's prohibition against the use of foreign construction material.

Procurement

Competitive Negotiation
■ Contract awards
■■ Administrative discretion
■■■ Cost/technical tradeoffs
■■■■ Technical superiority

Award to higher priced, higher technically rated offeror is not objectionable where technical considerations outweighed cost in solicitation's award criteria, and the agency reasonably concluded that the awardee's superior proposal provided the best overall value.

Matter of: Mid-American Elevator Co., Inc.

Mid-American Elevator Co., Inc., protests the award of a contract to Armor Elevator Company, Inc., under request for proposals (RFP) No. 89-B-15, issued by the United States Railroad Retirement Board (RRB), for elevator modernization. Mid-American contends that Armor's proposal does not meet the Buy American Act provisions in the solicitation and that Mid-American should have received the award based on its lower priced proposal.

We deny the protest.

The RFP solicited proposals for renovating and placing in service two passenger elevators and replacing the existing elevator dispatching system for the bank of eight elevators. The RFP evaluation formula noted that technical factors had twice the weight of price. Technical proposals were to be evaluated under two major factors, technical capabilities and equipment, and experience and qualifications. Each of these factors consisted of several subfactors.

After discussions were held with all offerors, award was made to Armor on September 28, 1989, at a price of $702,000. Mid-American's best and final offer was $678,312. Armor received a final technical score of 200 and Mid-American's technical score was 182.22 points. The total weighted point score for both technical and price for Armor was 296.63 and 282.22 for Mid-American.

Mid-American's first basis of protest is that Armor proposes to furnish group overlay controls, which are a part of the elevator dispatching system, made in Finland. The protester argues that these controls are a separate article and exceed the 50 percent cost limitation on components imposed by the act.

Under construction contracts, like the one at issue here, the act requires that only domestic construction materials be used. Under the implementing regulations, construction materials mean items that are brought to the work site for incorporation into the building. Federal Acquisition Regulation § 25.201. Under the regulations, domestic construction materials mean items manufactured in the United States if the cost of its components exceed 50 percent of the cost of all its components. *Id.* Thus, in order for the act to apply to the group overlay controls they must be considered construction materials and they also must contain foreign components of the requisite value.

Based on the awardee's certification that it offered domestic items and on the information it submitted to the agency concerning the nature of the group overlay controls and the cost of its foreign components, we think that the agency properly accepted Armor's proposal.

According to the RFP, the contractor is required to install a new group dispatching system for the eight elevators. A part of that system is the group system controls, otherwise known as group overlay controls. While the awardee admits that a significant part of the group overlay controls are of foreign manufacture, the information supplied by that firm shows that the group overlay controls are a part of the overall group dispatching system. According to the awardee, the group dispatching system is assembled from the group overlay controls and other components at the firm's Louisville facility and it is programmed and tested there. Since the entire system is assembled and then transported to the construction site for incorporation into the building, the entire control system, rather than the group overlay controls, constitutes the construction material to which the percentage test must be applied. *See* 46 Comp. Gen. 813 (1967).

Based on the cost figures supplied to the agency by Armor, it is clear that the group overlay controls do not exceed 50 percent of the cost of the end product—the dispatching system. This basis of protest is therefore denied.

As noted earlier, technical considerations were weighted twice as important as price under the RFP evaluation scheme. Award to a higher-rated, higher-priced technical proposal is not objectionable where, as here, the solicitation award criteria makes technical considerations substantially more important than price, and the agency reasonably concludes the awardee's superior proposal provided the best overall value. *Pan Am World Serv., Inc.,* B-235976, Sept. 28, 1989, 89-2 CPD ¶ 283. The agency, in its recommendation for award, noted that Armor had the highest technical rating and was only 3.4 percent higher in price than the lowest priced proposal received and that award to Armor was most advantageous to the RRB. We have no basis to object to the award decision.

Finally, Mid-American contends that Armor's proposal was improperly evaluated under two criteria regarding compatibility with other equipment and software documentation. Mid-American argues that if the proposals were properly evaluated, its technical proposal would have received a higher score than that of Armor.

We have reviewed the scoring of the proposals and in the two areas of concern to Mid-American, Mid-American did receive the same or a higher score than Armor. Moreover, the issues of compatibility and software documentation were discussed by the agency with Armor during negotiations and the agency determined that Armor's revised best and final offer complied with the RFP's requirement. We have carefully reviewed the evaluation record and we find no basis upon which to object to the agency's technical judgment in the scoring or evaluation of the proposals. *See Physical Sciences Inc.,* B-236848, Jan. 10, 1990, 90-1 CPD ¶ 42.

The protest is denied.

B-233742.4, January 31, 1990

Procurement

Competitive Negotiation
■ Contract awards
■■ Propriety
■■■ Evaluation errors
■■■■ Materiality

Procurement

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

Award to offeror whose proposal in negotiated procurement failed to conform to material specification requirement concerning computer workstation was improper where waiver of requirement resulted in competitive prejudice.

Matter of: Martin Marietta Corporation

Martin Marietta Corporation protests the Department of the Air Force's award of a contract to Honeywell Federal Systems, under request for proposals (RFP) No. F19628-88-R-0038, for microcomputer workstations for the World-Wide Military Command and Control System's Information System (WIS). Martin Marietta challenges the agency's evaluation of its proposal and contends that Honeywell failed to comply with certain mandatory solicitation requirements.

We sustain the protest on the ground that Honeywell failed to satisfy the RFP requirement for multi-tasking.

WIS is a worldwide communications network for use by the Department of Defense and other government agencies. The solicitation requested proposals for a 5-year, indefinite quantity contract to deliver, install and maintain advanced, reliable computer workstations, and associated software, intended to provide both computer resources for local users and access to WIS. Specifically, the solicitation defined four broad classes of required application software providing: (1) host access support services, to permit the workstations to communicate with existing Honeywell mainframe computers in the WIS system; (2) system and applications development support services, to be used to support the development and execution of software; (3) user support services, including wordprocessing, spreadsheet, database management and graphics applications; and (4) advanced computational support services, to provide simulation, modelling and artificial intelligence capabilities.

A separate, general section of the specification, "Target [Required] Workstation Operating System Software," required that the workstations "be capable of exe-

cuting correctly a multi-tasking operating system that meets the requirements of 3.1.4.2.1" of the specification. However, the definition of the required multi-tasking capability was not set forth in this general section of the specification. Rather, the definition, in paragraph 3.1.4.2.1, "Multi-Tasking Operating System Services," was a subsection of the software section describing the required system and applications development support services, one of the four broad classes of application software. This paragraph defined the required multi-tasking capability as the ability to support the concurrent execution of a minimum of 10 "tasks," and specifically stated that the system must be capable of providing at least 10 windows on the computer screen.

The solicitation provided for award to be made to the offeror whose proposal was "most advantageous" to the government, technical and price factors considered. It required offerors to furnish for a live test demonstration (LTD) the system described in their technical proposals, and provided for the technical proposals to be evaluated on the basis of four technical criteria of equal weight—reliability and maintainability, workstation architecture (including compliance with the multi-tasking operating system requirements), capabilities demonstrated at the LTD, and logistics—and one criterion of lesser weight, management. The solicitation described price as less important than the technical factors, but nevertheless as a "significant" factor; it provided for price to be evaluated on the basis of offerors' fixed prices for the Air Force's projected quarterly workstation ordering—a total of 500 workstations, including 400 of the required, more powerful "target" workstations and 100 optional, less powerful "basic" workstations—as well as software, delivery, installation and maintenance.

Four offerors, including Martin Marietta, Honeywell, C3 Corporation and International Technology Corporation (ITC), submitted proposals by the December 1, 1988 closing date for receipt of initial proposals. Prior to the closing date, ITC filed a protest with our Office challenging portions of the specification as either inadequate, impossible to meet, or unduly restrictive of competition. When we subsequently denied its protest, *see International Technology Corp.,* B-233742.2, May 24, 1989, 89-1 CPD ¶ 497, ITC withdrew its proposal. Meanwhile, the remaining three offerors underwent the required LTD demonstration in January 1989. Only Honeywell was found to have successfully demonstrated a workstation meeting all specification requirements tested at the LTD; several of the software applications tested by C3 and Martin Marietta exhibited deficiencies and Martin Marietta failed to demonstrate any security labelling capability. However, both offerors proposed to remedy these deficiencies, the agency's Source Selection Evaluation Board (SSEB) concluded that the offerors had "shown real solutions that could be produced to meet Government delivery requirements," and the Source Selection Advisory Council determined that the results of the LTD "were not in and of themselves considered reason to eliminate offerors from consideration for award." Accordingly, discussions were opened with all offerors and all were subsequently requested to submit best and final offers (BAFOs).

Based on the results of the LTD and the evaluation of BAFOs, the Air Force determined Honeywell's proposal to be technically superior to the others. The agency found that the proposal offered significant technical strengths and, under the agency's color-coded evaluation scheme, evaluated the proposal as "blue," or exceptional, under the criteria for reliability/maintainability and workstation architecture; in particular, the agency viewed it as a strength that the proposal offered a substantially higher meantime-between-failure/corrective maintenance action and a longer warranty than was required by the solicitation, as well as applications software with additional capabilities beyond those required. Furthermore, the agency considered Honeywell's proposal to offer the lowest risk to the government, since Honeywell had successfully demonstrated a compliant workstation at the LTD. In contrast, although the Air Force considered both Martin Marietta's and C3's proposals to be "basically compliant with the requirements of the solicitation," and evaluated both as "green," or acceptable, under all criteria, it viewed the proposals as representing a "high risk," since the firms had failed to demonstrate all of the required software capabilities at the LTD, and the agency questioned whether their proposed considerable development efforts would enable them to correct the deficiencies in time for the first deliveries (as early as 30 days after award). With respect to Martin Marietta's proposal, the agency considered the greatest risk to result from the firm's schedule for the development and integration of the required security labelling capabilities.

As for the cost evaluation, although Martin Marietta offered the lowest fixed price for the evaluated BAFO quantity (approximately $143.2 million), the agency concluded that an item of hardware listed as an option in Martin Marietta's BAFO price proposal was in fact needed to meet a solicitation requirement (*i.e.,* low resolution video processing capabilities) and, accordingly, increased the firm's price by more than $120 million, giving it the highest evaluated price ($266.3 million) of any offeror. Since the evaluated price of Honeywell's proposal ($164.4 million) was significantly less than the evaluated price of C3's proposal ($232.1 million) and, more importantly, was viewed as technically superior, the Air Force determined that award to Honeywell would be most advantageous. Upon learning of the resulting award, made on August 14, 1989, Martin Marietta filed this protest with our Office.

Martin Marietta contends that Honeywell's proposed workstation failed to comply with the solicitation requirement for a multi-tasking operating system and with certain of the specification requirements for a database management system and access to the WIS Honeywell mainframe computers. In addition, Martin Marietta challenges the addition without adequate discussions of over $120 million to its fixed price BAFO; it argues that during discussions the Air Force mistakenly overlooked its proposal of a new item of hardware, to be included in its base proposal, which it advised the agency in writing would satisfy the specification requirement for low resolution video processing capabilities (thereby avoiding the need to increase the firm's price by $120 million).

With respect to the requirement for multi-tasking, Martin Marietta contends that Honeywell's proposed workstation is noncompliant because it lacks the current capability to initiate and simultaneously execute multiple user support services applications.

Honeywell, which offered an Apple Corporation Macintosh IIx computer, proposed to meet the specification requirements in the user support services area for wordprocessing, spreadsheet and graphics capabilities with Macintosh Operating System (MAC/OS) applications. Honeywell proposed to supply, at time of award, an "interim," "transitional" solution which did not offer a multi-tasking capability with respect to multiple user support services applications. Specifically, only one MAC/OS software application could be run at a time in the required secure operating mode, but multiple system and applications development support services, which are not MAC/OS applications, could be executed simultaneously. Honeywell proposed to subsequently supply an upgrade of its operating system which would enable the operating system to launch multiple MAC/OS applications. The Air Force found the proposed upgrade to be "a superior offering which would be of great benefit to the government" and for this reason gave Honeywell's proposal a "plus" under the evaluation factor for operating system, a subcriterion under system architecture; the agency subsequently explained, at the conference conducted on this protest at our Office, that the value offered to the government by the upgrade was the capability to run multiple user support services applications simultaneously on windows on the computer screen. Conference Transcript (CT) 386.

The Air Force and Honeywell agree that the workstation which Honeywell was proposing to supply at the time of award did not offer a multi-tasking capability with respect to multiple MAC/OS user support services applications. They argue, however, that Martin Marietta has misinterpreted the specification concerning multi-tasking. Since the detailed definition of the required multi-tasking capability is found only in a subsection of the section describing the required system and applications development support services, they argue, the multi-tasking requirement only applies to system and applications development support services applications.

We agree with Martin Marietta. In our view, the Air Force's interpretation of the RFP ignores the fact that the general provisions of the specification described the required operating system for the workstation as one "capable of executing correctly a multi-tasking operating system that meets the requirements of 3.1.4.2.1;" likewise, it ignores the fact that a general section of the specification further provides that the required user support services software shall execute "within, and under the control of the native environment supplied by the Target Workstation multi-tasking operating system." In this regard, we note that the specification's detailed definition of the required multi-tasking found in paragraph 3.1.4.2.1 defined the required multi-tasking in broad terms, referring only to the requirement to support the simultaneous execution of a minimum of 10 "tasks;" neither that paragraph nor any other provision of the solicitation excluded user support services applications from the broad sweep of

the language of the general and specific provisions regarding multi-tasking. In our view, the specification when read as a whole described a single operating system, not a separate operating system for each class of applications software, and generally required the operating system offered for the initial deliveries to be capable of initiating and simultaneously executing up to 10 of the proposed software applications; as read by us, the specification did not envision that the overall requirement for multi-tasking could be frustrated by allowing an offeror to propose a class of software that does not permit multi-tasking.

The Air Force's interpretation based on the organization of the specification also ignores the fact that the same paragraph setting forth the specific multi-tasking definition also establishes security requirements which clearly govern the operating system as a whole, and not merely the system and applications development support services software. This is confirmed by the agency's own actions during the evaluation; when Honeywell proposed that user support services applications could be run in an unsecured mode, the Air Force categorically rejected the possibility that the security requirements would not apply at all times for all software.

We note that our broad interpretation of the multitasking requirement is consistent with the initial interpretation of the Air Force's own technical consultant, Mitre Corporation. The Mitre consultant to the SSEB for system architecture stated at the protest conference, and the agency then confirmed, that he unsuccessfully attempted to convince the agency that Honeywell's approach to multitasking was deficient. CT 342-343, 347.

Martin Marietta states that had it known of the agency's interpretation of the multi-tasking requirement—*i.e.,* as only requiring multi-tasking with respect to system and applications support services applications—it could have offered different software packages, hardware or a workstation which would have avoided some of the perceived deficiencies or weaknesses in its proposed approach to workstation architecture (where Honeywell was rated exceptional and Martin Marietta only acceptable) and in its performance at the LTD, while also enabling it to reduce its price. We note that the requirement in question concerns a critical, central characteristic—the capability for multitasking—of the operating system, itself a fundamental element of the workstation; we find it reasonable that the multi-tasking requirement could influence the choice of operating system, and thereby also influence the overall choice of hardware and software.

Furthermore, Martin Marietta's assertion that the agency's interpretation of the specification would have permitted it to offer more fully developed, though perhaps less advanced, equipment is especially significant here where: (1) the Air Force repeatedly expressed its preference for offerors to propose items requiring the least development so as to assure their ability to meet the requirement for initial deliveries commencing as early as 30 days after award; (2) the agency reaffirmed this position in responding to ITC's protest against the specifications; (3) the agency downgraded Martin Marietta's proposal under both the criteria for workstation architecture and the LTD because of its concern with the extent of development which remained to be completed and the consequent

risk that Martin Marietta would be unable to meet the 30-day delivery requirement; and (4) the agency viewed as a significant strength of Honeywell's proposal that it offered a workstation which required only limited additional development in order to meet the specification. In these circumstances, we find that the record suffices to establish prejudice to Martin Marietta from the agency's waiver of the multi-tasking specification.[1]

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. *See Consulting and Program Management,* 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229. The fact that Honeywell proposed to supply the full extent of the required multitasking capability for the workstation (including software) months after award did not render its proposal acceptable. The specification required offerors to select hardware and software on the basis that requirements had to be met at the time of award. The agency's waiver of this requirement in favor of Honeywell placed its competitors at a competitive disadvantage. Accordingly, we find the award to Honeywell to have been improper. In view of this conclusion, we need not address Martin Marietta's remaining grounds for questioning the award.

The protest is sustained on the ground that Honeywell failed to satisfy the RFP requirement for multi-tasking. Martin Marietta requests that we recommend that the Air Force immediately terminate Honeywell's contract and make award to Martin Marietta. We decline to do so since, in light of our finding that Honeywell's offered system did not meet the multi-tasking requirement and the Air Force's acceptance of the system, we cannot find that award to Martin Marietta at this juncture would best serve the government's needs.

We recommend that the Air Force reopen negotiations with the offerors in the competitive range, clearly state what capabilities are necessary to satisfy its actual minimum needs with respect to multi-tasking (and to any other provisions that should be clarified to assure that offerors are provided with an opportunity to compete on a common basis), and then request a new round of BAFOs. Following evaluation, the Air Force should terminate its contract with Honeywell if appropriate. Further, we find Martin Marietta to be entitled to the cost of pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1989); *see Falcon Carriers, Inc.,* 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

[1] We note that even under the interpretation of the specification finally adopted by the agency, proposals were misevaluated. Honeywell's proposal to supply, months after award, a modification still under development that would permit the launching of multiple MAC/OS user support services applications, resulted in the proposal receiving a "plus" under the evaluation criterion for system architecture, and thereby contributed to its exceptional rating under that criterion. By contrast, Martin Marietta, which was evaluated as only acceptable under workstation architecture, apparently received no additional credit for offering an existing system with this capability.

Appropriations/Financial Management

Judgment Payments

■ **Permanent/indefinite appropriation**

■ ■ **Availability**

A court order finding defendant agency guilty of discrimination and directing the specific administrative action of developing new, nondiscriminatory employment systems is not a money judgment for which 31 U.S.C. § 1304, the Judgment Fund, is available as a source of funding. The fees and expenses of an expert paid for by defendant agency to help develop the new systems were neither "costs" of the litigation nor part of the plaintiffs' attorney fees. Accordingly, the expert's fees and expenses are properly paid for out of agency appropriations, not the Judgment Fund.

114

Civilian Personnel

Travel
■ Lodging
■■ Reimbursement
■■■ Government quarters
■■■■ Availability

Defense Department civilian employee on temporary duty who left government quarters which she considered inadequate and moved into commercial lodgings may not be reimbursed her commercial lodging costs where installation officials determined that the government quarters were adequate and therefore declined to issue a statement of non-availability pursuant to 2 JTR para. C1055. GAO will not substitute its judgment for that of officials who are responsible for determining adequacy of government quarters absent clear evidence that their determination was arbitrary or unreasonable.

159

Military Personnel

Procurement

Bid Protests
■ Allegation
■■ Abandonment

Contention that agency should have held discussions with protester before requesting best and final offers so that protester could revise its proposal to correct any deficiencies is considered abandoned where agency reported that discussions were not necessary because protester's initial proposal was technically acceptable, and protester did not rebut or otherwise comment upon agency's assertion.

126

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

Offeror whose direct economic interest would be affected by award of a contract under protested procurement is an interested party for purposes of protesting that preproduction evaluation clause deviates from Changes clause required by Federal Acquisition Regulation and should be deleted from solicitation.

126

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

Protester is an interested party under Bid Protest Regulations to protest that agency improperly evaluated its proposal and that request for proposals (RFP) was improperly canceled on the basis that no acceptable proposals were received, even though the protester's proposal was among the lowest ranked and highest priced.

108

■ GAO procedures
■■ Preparation costs
■ GAO procedures
■■ Preparation costs

Where claim for costs of proposal preparation and of filing and pursuing protests is not adequately documented, claimant is not entitled to recovery.

153

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

Protest is considered timely where it was filed in the General Accounting Office (GAO) within 10 working days after agency's initial adverse action on agency-level protest (issuance of amendment demonstrating that agency was not going to delete solicitation clause as requested by protester). Even though agency denied agency-level protest by letter more than 10 working days before protest-

sions to permit offeror to modify its proposal, it must conduct discussions with all offerors in the competitive range.

150

■ **Offers**
■■ **Designs**
■■■ **Evaluation**
■■■■ **Technical acceptability**

Preproduction evaluation clause requiring contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is to be read in conjunction with Changes clause which was incorporated into the solicitation as required by the Federal Acquisition Regulation (FAR), and therefore does not represent a deviation from the FAR Changes clause or a new procurement regulation requiring publication for public comment.

126

■ **Offers**
■■ **Designs**
■■■ **Evaluation**
■■■■ **Technical acceptability**

Use in production contract of preproduction evaluation (PPE) clause in order to shift burden to contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is proper where the contractor will be compensated for its PPE efforts as part of the overall contract price.

127

■ **Offers**
■■ **Evaluation**

Protest that agency failed to properly follow the source selection plan (SSP) in evaluating offers is denied since SSPs are merely internal agency instructions which do not vest outside parties with rights, and agencies are only required to adhere to the evaluation scheme outlined in the solicitation.

136

■ **Offers**
■■ **Evaluation**
■■■ **Downgrading**
■■■■ **Propriety**

Downgrading of protester's proposal under one of 19 evaluation subcriteria during the best and final offer evaluation was not prejudicial to the protester because it did not materially affect source selection decision.

136