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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., 64 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 Overruled or Modified

## Decisions of the Court

# November 1989

## B-236187, November 1, 1989

## Procurement

**Contract Types**

■ **Supply contracts**

■■ **Options**

■■■ **Construction contracts**

Protest that solicitation should be for supply contract rather than construction contract is denied where agency, to meet congressional limitation on construction in Philippines, obtains proposals to supply generators with option for construction of power plant and includes clauses applicable to both supply and construction contracts and protester fails to show how it was prejudiced thereby.

## Procurement

**Socio-Economic Policies**

■ **Preferred products/services**

■■ **Domestic sources**

■■■ **Foreign products**

■■■■ **Price differentials**

Allegation that solicitation requirement that materials and supplies be Philippine sourced conflicts with a Balance of Payments Clause which establishes a ceiling of $156,000 for non-qualifying country items is denied, since the clauses read together require Philippine products, then U.S. products and if such items are not available, non-qualifying country products up to $156,000 in value.

## Matter of: Colt Industries

Colt Industries protests solicitation No. N62864-85-R- 0059, issued by the Naval Facilities Engineering Command, as ambiguous and violative of the Federal Acquisition Regulation (FAR).

We deny the protest.

The solicitation is for three diesel engine generators with options for an additional generator and the construction of a power plant building at the Navy Public Works Center, Subic Bay, Philippines. Colt's first basis of protest is that the solicitation has elements of a construction contract but, in reality, is for a supply contract for the generators with an option for the construction of the power plant to house them, which option may never be exercised.

The Navy, agreeing that the solicitation does encompass some construction contract provisions, states that the procurement is for a supply contract and that the hybrid solicitation was utilized so that it could comply with congressional

policy regarding military construction in the Philippines. The funds for this procurement were appropriated by the 1988 Department of Defense Appropriations Act, Pub. L. No. 100-447, 102 Stat. 1829 (1988). The conference report, H.R. Conf. Rep. No. 912, 100th Cong., 2d Sess. 6, contained the following language:

The conferees continue to recognize the importance of the United States military presence in the Philippines; however, there is concern with the apparent negotiating posture of the Philippine Government regarding possible unreasonable concessions in exchange for base rights. Therefore, the Department is directed to defer obligation of funds until such time as the Secretary of Defense has provided to the Committees on Appropriations a report on the status of base rights negotiations and a certification that based on the negotiation status, it is prudent to proceed with the projects.

Regarding this specific project, the report at page 13 reads:

*Philippines-Navy Public Works Center Subic Bay: Power Plant.* The conferees understand that over $20,000,000 of the $27,770,000 for this project is for generators which can be relocated if necessary. Because of the long lead-time for procurement of such generators, the conferees have no objections to early obligation of funds; however, for the construction portion of the project, obligation of funds should be contingent on certain conditions being met as cited earlier in this statement.

Therefore, the Navy states it is procuring the generators, the long lead-time item, and plans to exercise the construction option, which is valid for 365 days, if the congressional requirements are met.

While Colt contends that the solicitation is for a construction contract and the Navy argues it is for a supply contract, the request for proposals clearly contains FAR clauses which are applicable to both types of procurement. For example, Section E contains reference to FAR § 52.242-2, "Inspection of Supplies" and FAR § 52.242-12, "Inspection of Construction." However, we fail to see the impact of the distinction which Colt is arguing. Whether the RFP is considered to be for either a supply or a construction contract solicitation has not been shown by Colt to disadvantage it. Moreover, the structure of the RFP is consistent with the Navy's need to acquire the long leadtime article and to comply with the congressional mandate regarding construction. Our Office is aware of no prohibition in the FAR concerning the use of both types of clauses where necessary to meet the agency's needs in a particular situation, as here. Therefore, this basis of protest is denied.

Colt also protests that Clause H-12 of the solicitation is ambiguous. That clause reads as follows:

H.12 *Philippine Source Requirements*

The Contractor shall, in the performance of this contract, use Philippine sources to the maximum extent feasible for the items required to perform this contract including labor, materials, supplies, services, and equipment *provided* such items meet the contract specifications and standards, will be available at the required locale within the required time limits and are equal or lower in cost than those from other sources. The contractor must be prepared to demonstrate compliance with this requirement upon request.

Colt argues this clause is ambiguous because what constitutes "feasible" is undefined and if this solicitation was properly to result in a supply contract the clause would be inapplicable. Colt contends the matter is further confused by the Navy's establishing a dollar threshold of $156,000 in the "Buy American Act, Trade Agreements Act and the Balance of Payments Program" solicitation

clause, Department of Defense Federal Acquisiton Regulation Supplement § 252.225-7006(b). The clause allows nonqualifying country end products to be supplied up to the inserted dollar limit.

Initially, we note that clause H-12 would apply whether the solicitation was for a supply or a construction contract since it covers labor and materials as well as supplies. Moreover, while Colt argues that "feasible" is undefined, we find it adequately defined by the statement "[items] available at the required locale within the required time limits and . . . equal or lower in cost than those from other sources." Additionally, the clause requires proof of compliance by the contractor. We find this to be a definite test which allows an offeror to determine what items are acceptable.

Also, we fail to see any basis for Colt's confusion regarding the latter clause and the $156,000 limitation. The dollar limitation on nonqualifying country end products applies only when no Philippine source is available and purchases are made from other than a domestic source or a qualifying country source, as is stated in paragraph (b) of the clause.

The protest is denied.

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## B-235569.3, November 2, 1989

## Procurement

**Contract Management**
**■ Contract administration**
**■ ■ Convenience termination**
**■ ■ ■ Administrative determination**
**■ ■ ■ ■ GAO review**

Contracting agency's decision to terminate the contract which it had awarded and to make no award to any other offeror, including the protester, is reasonable where as the result of post-award protests it concludes that no technically acceptable proposal was received.

## Procurement

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

Contracting agency has the authority to decide when the negotiation and offer stage of a procurement is finished and an offeror has no legal right to insist that negotiations be reopened and attempt to modify its technically unacceptable proposal after best and final offers are submitted.

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## Matter of: Independent Business Services Inc.

Independent Business Services Inc. (IBS) protests the failure of the contracting agency to award it a contract under request for proposals (RFP), No. F33600-88-R-0177, issued by the Department of the Air Force for an indefinite

quantity contract for a maximum of 500 high- and low-speed laser printers and associated software, training and maintenance over a 3-year period. The Air Force terminated the contract it had awarded to another offeror and decided to make no award under this solicitation because it determined that none of the offers were technically acceptable. IBS alleges that the low-speed printer it offered did comply with the solicitation's requirements; that it therefore should have received an award under the procurement; and that the Air Force canceled the RFP as a means of eliminating IBS from any further competition.

We deny the protest.

The RFP called for both high- and low-speed printers for use in a warehouse environment for barcoding. Proposals were received from seven offerors. IBS' offer was limited to the RFP's low-speed printer requirements. It proposed to furnish a low-speed printer whose size admittedly exceeded the maximum height requirements stated in the RFP. After a review of its requirements, however, the Air Force relaxed the height specifications so as to include IBS' proposal within the competitive range. Following discussions with the six offerors in the competitive range, the agency requested best and final offers (BAFOs) from five offerors, including IBS. After evaluation of BAFOs the agency awarded the contract to Unisys Federal Information Systems as it offered the lowest evaluated price and technically acceptable equipment.

IBS and Xerox Corporation protested the award challenging Unisys's compliance with the size requirements in the specifications. The Air Force states that its subsequent review of all proposals established that not only did Unisys's proposed machine exceed the maximum dimensions, but so did the machines proposed by all of the offerors. The contracting officer terminated Unisys's contract for the convenience of the government. The Air Force also concluded that none of the printers offered met the solicitation's maximum size requirements, which it needed to re-determine, and that another specification requirement, for an expandable memory, was no longer needed. The Air Force then issued an amendment to the solicitation which canceled it. Xerox withdrew its protest and we dismissed IBS' protest of the award to Unisys as academic.

IBS then filed the instant protest in our Office in which it alleges that the low-speed printer it proposed did meet the dimension requirements, that it therefore should have received an award for the low-speed printer requirement and that the true motive for the Air Force's action was to eliminate IBS from further competition.

In a negotiated procurement, the contracting officer has broad discretion to cancel a solicitation and needs only a reasonable basis upon which to do so. *ACR Elecs., Inc.*, B-232130.2, B-232130.3, Dec. 9, 1988, 88-2 CPD ¶ 577.

Here, after a reexamination of the proposals and the actual needs of the agency, the Air Force concluded that none of the offerors complied with the dimension requirements. The RFP, as amended, indicated that the dimensions of the low-speed, desk-top printers were not to exceed 33 inches by 26 inches by 19 inches high. While it appeared that the offerors in the competitive range complied

with these dimension requirements, the agency discovered during its reevaluation that in calculating the dimensions the offerors excluded attachments such as cassettes, paper trays, connectors and sorters. IBS, in particular, failed to include in its calculation the paper extension trays, which when added, makes the printer it proposed 36.1 inches wide by 12.3 inches high by 17.9 inches deep.

IBS disputes the Air Force's method of measurement, arguing that the Air Force should disregard the size of the paper tray since it can be folded. We disagree, because, as the Air Force points out, if the paper tray is folded down the printer would not comply with another solicitation requirement that there be a straight paper path.

IBS also alleges that the printer it proposed can be modified to comply with the dimension requirements. This is tantamount to a request that it now be permitted to revise its proposal. This modification was only proposed by IBS after BAFOs and after it was notified that all printers exceeded the dimensions. It is the contracting agency's right to determine when the negotiation and offer stage of a procurement is finished, and an offeror has no legal right to insist that negotiations be reopened after BAFOs are submitted. *Marshfield Realty Partners Limited Partnership,* B-227863, Aug. 14, 1987, 87-2 CPD ¶ 159; *Crown Point Coachworks & R&D Composite Structures, et al.,* B-208694, B-208694.2, Sept. 29, 1983, 83-2 CPD ¶ 386.

IBS also alleges that the Air Force's decision to cancel the solicitation was motivated by bad faith: to eliminate IBS as a competitor. A finding of bad faith requires undeniable proof that the procuring activity had a malicious and specific intent to injure the alleging party. *System-Analytics Group,* B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57. IBS offers no support for its allegation other than that the agency failed to earlier conclude that all offerors exceeded the maximum dimensions.

We do not think IBS has shown that the Air Force acted in bad faith. Moreover, the fact that it was only after IBS' first protest that the Air Force concluded that none of the offerors complied with the specifications does not preclude cancellation. An agency may properly cancel a solicitation no matter when the information precipitating the cancellation arises, even if that is not until after BAFOs are submitted and the protester has incurred costs in pursuing the award. *See System-Analytics Group,* B-233051, *supra.* Since all offerors proposed printers that exceeded the maximum dimension requirements in the RFP, the solicitation was properly canceled. *California Microwave, Inc.,* B-229489, Feb. 24, 1988, 88-1 CPD ¶ 189.

The protest is denied.

## B-236408, November 3, 1989

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Shipment**
**■■■■ Risk allocation**

*Bid proposing delivery on an f.o.b. origin basis with freight allowed, contrary to solicitation requirement for delivery on an f.o.b. destination basis, is nonresponsive since it reduces the contractor's responsibility by shifting the risk of loss of or damage to goods during transit from the contractor to the government.*

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Conflicting terms**
**■■■■ Ambiguity**

Bid which is ambiguous—because bidder included conflicting delivery terms in cover letter and bid form—was properly rejected as nonresponsive since under one interpretation the bid takes exception to a material term of the solicitation.

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Conflicting terms**
**■■■■ Ambiguity**

Where bidder creates an ambiguity in its bid by offering different f.o.b. term than required by invitation for bids (IFB), ambiguity may not be waived or corrected as a minor informality, since offering a different f.o.b. term than required by the IFB is a material deviation.

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Determination time periods**

*A bid that is nonresponsive may not be corrected after bid opening to be made responsive, since the bidder would have an unfair advantage over other bidders by being able to choose to make its bid responsive or nonresponsive.*

## Matter of: Taylor-Forge Engineered Systems, Inc.

Taylor-Forge Engineered Systems, Inc., protests the rejection of its bid under invitation for bids (IFB) No. MSFC 8-89-10, issued by the National Aeronautics and Space Administration, Marshall Space Flight Center (MSFC), for a liquid

hydrogen pressure vessel. MSFC interpreted a cover letter submitted with the bid as creating an ambiguity as to whether Taylor-Forge agreed to the IFB requirement for delivery on a f.o.b. destination, and for that reason rejected Taylor-Forge's bid as nonresponsive. Taylor-Forge contends that its bid, when read as a whole, is not ambiguous, and therefore is responsive.

We deny the protest.

The IFB contained Federal Acquisition Regulation (FAR) § 52.247-34, entitled "F.O.B. Destination," a clause which provides that the contractor shall be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract. In this regard, the IFB stated that the "manufacturer shall be responsible for transportation f.o.b. MSFC Huntsville, Alabama." Although Taylor-Forge typed "ok TFES [Taylor-Forge Engineered Systems]" in the IFB section requiring shipment f.o.b. MSFC Huntsville, Alabama, it also submitted a separate cover letter with its bid indicating "F.O.B. Point: Paola, Kansas with rail freight allowed to the jobsite." As a result, the contracting officer concluded that Taylor-Forge's bid was ambiguous since the cover letter indicating shipment on an f.o.b. origin basis was inconsistent with the notation on Taylor-Forge's bid form indicating agreement with the IFB requirement for delivery f.o.b. destination.

Taylor-Forge challenges the rejection of its bid as nonresponsive, maintaining that its bid is not ambiguous. MSFC disagrees, arguing that to the extent that TaylorForge's cover letter submitted with its bid—which specifies that shipment would be f.o.b. origin with rail freight allowed—clearly conflicts with the bid form—in which Taylor-Forge agrees to the IFB's requirement for shipment on an f.o.b. destination basis—the bid is ambiguous and, therefore, nonresponsive. We agree.

A bidder's intention to be bound by the solicitation requirements must be determined from the bid itself, including any unsolicited information such as cover letters or extraneous documents submitted with the bid, at the time of bid opening. *Vista Scientific Corp.*, B-233114, Jan. 24, 1989, 89-1 CPD ¶ 69. If a bid is ambiguous as to a material provision, so that it is nonresponsive under one interpretation and responsive under the other, it cannot be accepted. *J.G.B. Enters., Inc.*, B-219317.2, July 31, 1985, 85-2 CPD ¶ 109, *aff'd*, B-219317.4, Sept. 9, 1985, 85-2 CPD ¶ 280. Specifically, a bid document which indicates that delivery will be on an f.o.b. origin basis when the solicitation requires that bids be submitted on an f.o.b. destination basis renders the bid nonresponsive, since it shifts the risk of loss of or damage to the supplies in transit from the contractor to the government contrary to the terms of the solicitation. *See Stewart-Warner Corp.*, B-220788, Oct. 30, 1985, 85-2 CPD ¶ 494.

Here, Taylor-Forge submitted a bid form indicating that delivery would be on an f.o.b. destination basis. In doing so, Taylor-Forge agreed to be responsible for any loss of and/or damage to the vessel occurring before receipt of the shipment at MSFC Huntsville, Alabama. *See* FAR § 52.247-34. However, by also submitting a separate cover letter with its bid proposing to ship the vessel on an f.o.b.

origin basis with rail freight allowed to the job site, Taylor-Forge created an ambiguity as to its agreement to the IFB requirement for shipment on an f.o.b. destination basis. Specifically, Taylor-Forge's cover letter effectively reduced its responsibility under its bid for the vessel's safety during transit from Paola, Kansas, to Huntsville, Alabama, since under the language of the cover letter, Taylor-Forge agreed only to be responsible for any damage or loss to the vessel occurring before delivery to the carrier in Paola, Kansas. *See* FAR § 52.247-31(a)(4). Accordingly, even assuming, as Taylor-Forge argues, that its bid price reflects shipment on an f.o.b. destination basis, MSFC properly rejected the bid as nonresponsive since Taylor-Forge's cover letter clearly shifted the risk of loss or damage to the vessel during transit from Taylor-Forge to the government contrary to the terms of the solicitation.

Taylor-Forge maintains that there is no material difference in the wording of its bid form and the notation in its cover letter, citing *National Heater Co., Inc. v. Corrigan Co. Mechanical Contractors, Inc.*, 482 F.2d 87 (8th Cir. 1973). We do not find the case Taylor-Forge cites controlling.

The dispute in the *Corrigan* case concerned a sale contract for equipment between two private parties. The court held that the language used by the seller in accepting the buyer's purchase order—"$275,640.00 Total Delivered to Rail Siding"—constituted an agreement to deliver the equipment to the construction site, rather than f.o.b. point of shipment, notwithstanding a printed statement on the seller's acknowledgment providing that "delivery of equipment hereunder shall be made f.o.b. point of shipment *unless otherwise stated.*" (Italic added.) The court held that the seller's specific language agreeing to delivery to the "rail siding," which the parties agreed was at the construction site, not the point of shipment, fell within the "otherwise stated" provision in the seller's printed acknowledgment.

Contrary to Taylor-Forge's contention, the court in *Corrigan* clearly did not hold that a bid offering delivery f.o.b. origin with freight allowed is the equivalent of a bid offering delivery f.o.b. destination. Further, the case is not controlling here, where there are two inconsistent provisions regarding delivery in Taylor-Forge's bid package such that it was unclear whether TaylorForge agreed to the delivery f.o.b. destination requirement in the IFB.

Taylor-Forge also argues that even if its cover letter created an ambiguity, MSFC should nevertheless waive the ambiguity as a minor deviation and, consequently, award the contract to Taylor-Forge. Our Office has consistently held, however, that to the extent that a bidder offers a different f.o.b. term than is required by the IFB, the differing term is not a minor deviation, but in fact is a material deviation going to the substance of the bid. *Infrared Indus., Inc.*, B-181739, Nov. 20, 1974, 74-2 CPD ¶ 272. Consequently, we find that MSFC properly refused to waive this material deviation since such a waiver would be contrary to the competitive system by offering Taylor-Forge what would be, in effect, a different contract than offered other bidders. *Id.*

Taylor-Forge finally contends that it should be allowed to reform the language contained in its cover letter to reflect shipment on an f.o.b. destination basis since reformation would not prejudice the other bidders. It is well-established, however, that a bid that is nonresponsive may not be corrected after bid opening to be made responsive, since the bidder would have the competitive advantage of choosing to accept or reject the contract by choosing to make its bid responsive or nonresponsive. *Stewart-Warner Corp.*, B-220788, *supra.*

The protest is denied.

## B-236117, November 6, 1989

## Procurement

**Sealed Bidding**
**■ Bids**
**■■ Responsiveness**
**■■■ Determination criteria**

Bidder's failure to inspect material from core borings in procurement for excavation work, even where the solicitation so requires, provides no basis to reject an otherwise responsive bid that takes no exception to solicitation requirements.

## Matter of: Construcciones Jose Carro, Inc.

Construcciones Jose Carro, Inc. (Carro), protests the award of a contract to Longo Puerto Rico, Inc. under invitation for bids (IFB) No. DACW17-89-B-0014, issued by the Army Corps of Engineers for the excavation of the Portugues Debris Basin, Puerto Rico, the excavation of two river entrance channels, and additional construction work. Carro contends that Longo's bid should have been rejected as nonresponsive.

We deny the protest.

The IFB was issued on February 1, 1989, and bid opening was scheduled on March 28. The IFB contained drawings and specifications indicating the physical condition of the work sites as revealed by agency surveys and core borings. The IFB cautioned bidders that while the borings were representative of subsurface conditions at their respective locations, variations of subsurface materials should be expected and that "the material recovered from the core borings is available for inspection by prospective bidders." Bidders were "strongly urged" to examine the core borings; bidders were also required to record their core examination visit in a record book at the inspection site. The IFB's instructions to bidders stated that "[f]ailure of a bidder to perform and record his core examination visit shall cause rejection of his bid." The IFB also contained clause No. 48, entitled "Differing Site Conditions" (Federal Acquisition Regulation (FAR) § 52.236-2 (FAC 84-45)), which entitles the successful contractor to an equitable adjustment if subsurface conditions at the site differ materially from those indicated in the contract. Finally, the IFB contained clause No. 49, entitled "Site

Investigation and Conditions Affecting the Work" (FAR § 52.236-3 (FAC 84-45)), which we discuss below.

At bid opening, Longo was the low bidder with a base bid price of $6,096,703 and $103,000 for an additive. Carro, second low, submitted a base bid price of $6,120,000 and $91,000 for the additive. Carro thoroughly inspected the core borings prior to submitting its bid; Longo failed to do so. The Corps ultimately determined that Longo had nevertheless submitted the low, responsive bid and made award to the firm. This protest followed.

Carro argues that the IFB requirement that all prospective bidders inspect the results of the core borings was material and mandatory, requiring rejection of Longo's bid. Carro argues that under the terms of clause No. 48, "Differing Site Conditions," the bidder does not assume the risk of subsurface conditions which materially differ from those indicated in the contract; rather, the government retains the risk of differing subsurface site conditions. The net effect of the failure to inspect the borings is to permit a bidder to submit a lower bid while remaining protected by possible recourse to a differing site conditions claim. According to Carro, claims on adjoining sites by other contractors based on differing site conditions support its view. Carro emphasizes (with supporting affidavits) that physical examination of the borings was absolutely essential to formulating a bid (*e.g.*, to know the location, quantity and hardness of the rock on job sites). In this regard, Carro contends that its bid was increased by $24,000 as a result of its examination of the core borings. Carro further argues that, in contrast, by not examining the core borings, Longo (not having actual knowledge of subsurface conditions) could submit a differing site conditions claim based on conditions that would have been revealed by the core borings—something which Carro could not do. In short, Carro argues that the contracting officer did not have the authority to waive this provision and should have rejected the Longo bid as nonresponsive. We are not persuaded by these arguments.

First, Carro has never alleged that Longo, on the face of its bid, took any exception to IFB requirements. Rather, Carro's protest concerns only acts or omissions by Longo in a context outside the bid documents submitted by that firm. The test for responsiveness is whether a bid as submitted represents an unequivocal offer to provide the requested supplies or services. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, the bid is responsive. *Coastal Industries, Inc.*, B-230226.2, June 7, 1988, 88-1 CPD ¶ 538. The determination as to whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. *See Hydro-Dredge Corp.*, B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Longo's bid, taking no exception to IFB requirements, was therefore responsive. In this regard, we have generally held that the failure of a bidder to conduct a pre-bid site inspection, even when one is required by the solicitation, is not a basis for rejecting an otherwise responsive bid since that failure does not limit the obligation undertaken by the bidder by its submission of an unqualified bid. *See, e.g., Edw. Kocharian & Co., Inc.*, 58 Comp. Gen. 214 (1979), 79-1 CPD ¶ 20.

Second, clause No. 49 of the IFB, "Site Investigation and Conditions Affecting the Work," stated as follows:

> The Contractor also acknowledges that it has satisfied itself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

Carro argues that this clause is inapplicable because "exploratory work done by the Government" refers to work present at the inspection site during site investigation by the bidders while the core borings were located off-site in secured buildings and were not part of the site inspection. We reject this argument. The IFB here specifically informed all bidders, including Longo, of the existence of the core borings (subsurface materials). We think that clause No. 49 states a general rule which is applicable whether or not the core borings were present during surface site inspection by the bidders. Specifically, we think that the agency could reasonably determine that a bidder, who is aware of the existence of borings that are material to its bid and who knowingly decides not to inspect such borings, thereby assumes the risk of differing site conditions that such an inspection would have revealed.[1] Accordingly, we think the government is adequately protected under the circumstances here despite Longo's failure to inspect the borings.

The protest is denied.

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**B-235813.2, November 7, 1989**

## Procurement

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

## Procurement

**Competitive Negotiation**
**■ Requests for proposals**
**■■ Evaluation criteria**
**■■■ Cost/technical tradeoffs**
**■■■■ Weighting**

Consideration of quality as an aspect of an evaluation of proposals is not required by the 1987 National Defense Authorization Act and its implementing regulation; statutory and regulatory lan-

[1] We note in passing that Longo's subcontractor for excavation work inspected at least some of the borings 2 years ago in connection with another project.

guage and legislative history indicate that use of quality as a technical evaluation criterion is permissive, not mandatory.

## Matter of: Kilgore Corporation

Kilgore Corporation requests reconsideration of our decision, *Kilgore Corp.*, B-235813, June 19, 1989, 89-1 CPD ¶ 576, in which we dismissed Kilgore's protest of the award of a contract to Maryland Assemblies, Inc., under request for proposals (RFP) No. DAAA09-88-R-1056, issued by the Army for signal flares. We affirm our prior decision.

In its protest, Kilgore argued that the Army improperly awarded the contract based solely on the awardee's lower price without considering technical factors. Kilgore argued that since the RFP evaluation scheme stated that evaluation of offers would be based, "among other factors, upon the total price quoted for all items," the Army was required to consider, in addition to price, other factors such as technical excellence, management capability, prior experience and past performance. Kilgore argued that Federal Acquisition Regulation (FAR) § 15.605(b) requires that "quality" be an evaluation factor in every negotiated procurement and thus should have been a factor under this solicitation.

In dismissing the protest, we stated that FAR § 15.605(b) simply explains how quality may be evaluated when it is to be considered and does not *per se* require the evaluation of quality. Finally, we stated that if Kilgore believed that the RFP should have provided for award based on specific technical factors in addition to price, it was required to so allege before the time for receipt of initial proposals and that, since Kilgore protested only after award, such an allegation was untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989).

Kilgore does not question our dismissal of its protest but requests that we clarify our decision. Specifically, Kilgore argues that we misinterpreted FAR § 15.605(b). That provision states in part:

> The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials. However, price or cost to the Government shall be included as an evaluation factor in every source selection. Quality also shall be addressed in every source selection. In evaluation factors, quality may be expressed in terms of technical excellence, management capability, personnel qualifications, prior experience, past performance, and schedule compliance.

This FAR language was adopted in response to 10 U.S.C. § 2305(a)(3) (1988), which was enacted by section 924 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661. The statutory provision states:

> In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency shall clearly establish the relative importance assigned to the quality of the services to be provided (including technical capability, management capability, and prior experience of the offeror).

In our view, 10 U.S.C. § 2305(a)(3) does not mandate that quality be included as an evaluation factor in every solicitation for competitive proposals. Although the provision refers to "each solicitation for competitive proposals," the rest of the provision, dealing with the "services to be provided," obviously applies to

solicitations for services and to solicitations leading to the award of supply contracts, such as we have in this case. Moreover, since nothing requires that quality be assigned any particular weight as an evaluation factor, we think it is clear that the provision only requires that solicitations state the relative importance of quality when quality is used as an evaluation factor. This view is supported by the legislative history of the provision.. The Senate Armed Services Committee, in S. Rep. No. 331, 99th Cong., 2nd Sess. 266-267 (1986), stated in regard to this provision that "in procuring sophisticated professional and technical services, it is essential that quality of the service be given appropriate weight related to cost and price factors." The Committee further stated that it was adding a new section to the law to "recognize the importance of quality as a factor in professional and technical services procurement. This amendment will clarify the law to indicate such priority for quality is permissible." Thus, we think it's clear from the provision and its legislative history that it applies only to solicitations for services and that giving quality substantial evaluation weight in such solicitations is not mandatory but rather is a matter within the discretion of the contracting agency.

Since the 1987 National Defense Authorization Act did not mandate that quality be listed as an evaluation factor in every solicitation, we do not believe that it is reasonable to conclude that the language in amended FAR § 15.605(b) requires more. In fact, a careful reading of the FAR language establishes that it does not. The FAR requires only that quality be "addressed" in each source selection, and specifies how quality may be addressed when it is encompassed by evaluation factors. There is no requirement that quality actually be an evaluation factor or an element of one in every case. In cases where it is not, the regulation is satisfied, and quality is "addressed," simply by the requirement that the prospective awardee's qualification to perform the contract be established in a responsibility determination prior to award.[1] *See* FAR Subpart 9.1.

The decision is affirmed.

## B-236023, B-236097, November 7, 1989

## Procurement

### Bid Protests

■ **GAO authority**

General Accounting Office (GAO) will consider protest against General Services Administration (GSA) solicitation to provide public pay telephones in government controlled property under GAO's bid protest authority where awards under solicitation will provide a service to government employees and will satisfy GSA mission needs, and thus the solicitation is a procurement of services by a federal agency.

[1] The protester has cited in support of its position a March 15, 1987 memorandum from the Director of the Defense Acquisition Regulatory Council to the Chairman of the Civilian Agency Acquisition Council which states that the act required the "specific consideration of quality as an evaluation factor." Not only do we not agree with the memorandum's conclusion, but we also note the subsequently issued FAR does not include clear language containing such a requirement.

## Procurement

**Specifications**

■ **Minimum needs standards**

■■ **Competitive restrictions**

■■■ **Geographic restrictions**

■■■■ **Justification**

Requirement that offers to provide public pay telephones cover specific General Services Administration regions only unduly restricts competition where requirement excludes Regional Bell Operating Companies from competing in their regular course of business and otherwise is not a legitimate need of the agency.

## Matter of: New York Telephone Company; New England Telephone and Telegraph Company; Bell Atlantic Network Services, Inc.

Bell Atlantic Network Services, Inc. (Bell), and New York Telephone Company, jointly with New England Telephone and Telegraph Company, protest request for proffers (RFP) No. M/PP89-01 issued by the General Services Administration (GSA).[1] The protesters contend that the solicitation unreasonably restricts competition and unfairly discriminates against them. We sustain Bell's protest in part and deny it in part. We deny the joint protest of New York Telephone Company and New England Telephone and Telegraph Company.

The RFP, issued on April 25, 1989, provides for GSA to grant one or more licenses covering the furnishing, installation, maintenance, and operation of public pay telephones on GSA-controlled property nationwide. The license(s) will be for a period of 5 years and GSA receives fixed monthly fees for the license(s). The RFP allowed proffers for service for one or more of the nine GSA regions and further allowed proffers for nationwide service. The RFP provided that award was to be made to the technically qualified profferer(s) offering the highest single proffer for GSA nationwide, or the aggregate of the highest proffers (for each GSA region), whichever was higher. GSA reserved the right to make no selection under the RFP or to select proffers for less than all GSA regions, if GSA determined that the fixed monthly fees offered were unreasonably low or if GSA determined that the rejection of all proffers was in the public interest. Proffers were received on July 7, 1989.

As a preliminary matter, GSA argues that the protests should be dismissed as beyond the jurisdiction of our Office because the solicitation does not involve the procurement of property or services subject to the provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 *et seq.* (Supp. IV 1986). GSA cites our decisions in *San Francisco Bay Brand, Inc.*, B-227988, July 31, 1987, 87-2 CPD ¶ 122, and *Jefferson Bank & Trust*, B-228563, Oct. 23, 1987, 87-2 CPD ¶ 390, in support of its argument.

[1] The joint protesters are two local exchange telephone companies and Bell is a Regional Bell Operating Company. Both were created by the AT&T divestiture agreement. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1013 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom., California v. United States*, 464 U.S. 1003 (1983).

Under CICA, our bid protest jurisdiction encompasses procurement of property or services by a federal agency. *Artisan Builders,* 65 Comp. Gen. 240 (1986), 86-1 CPD ¶ 85; *Monarch Water Sys., Inc.,* 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146. In the two cases cited by GSA, we found that the protests concerning, respectively, a proposed agreement by a private contractor to harvest shrimp on government property and a lease of government office space, were not procurements of property or services.

Here, the RFP states that this procurement of phone services is the result of GSA policy to provide sufficient pay telephones for the personal use of government employees working in government controlled facilities as well as to make phones available to visitors to those facilities conducting business with the government. In this connection, GSA PBSP 5815.2A provides that GSA has a responsibility to arrange for services, including public pay telephones, required for the health, comfort, or efficiency of government employees while on duty. Thus, although ultimately resulting in a license to provide pay telephone service, the RFP will result in service to government employees and is intended to satisfy GSA mission needs. Under these circumstances, we conclude it is a procurement for services for purposes of our bid protest jurisdiction. *See Gino Morena Enters.,* 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121; *T.V. Travel, Inc. et al.—Request for Reconsideration,* 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640.

Bell argues that the RFP requirement is unduly restrictive of competition because the GSA regions listed in the RFP do not conform to the operating territories of the Regional Bell Operating Companies (RBOC). Bell argues that GSA's regional divisions make it difficult for RBOCs to compete in the ordinary course of business, because it is difficult for them to provide services outside their designated regions.

GSA contends that to adopt regional boundaries which correspond to boundaries of the RBOCs would be restrictive of competition. It is GSA's position that to adopt regional boundaries which coincide with those of the RBOCs would automatically put all non-Bell companies at a competitive disadvantage. Furthermore, GSA argues that the protesters are not precluded from offering the services outside their operating areas or RBOC regions and in fact can provide the services outside their area through the use of customerowned, coin-operated telephones (COCTs), subcontracts, joint ventures or cooperative agreements.

Bell acknowledges that it can compete for pay telephone services outside its franchise area through the use of COCTs and joint ventures. Bell argues, however, that the use of non-Bell operated pay telephones is substantially different from the manner in which RBOCs ordinarily provide pay telephone service and that they should not be forced to enter into costly cooperative agreements in order to compete.[2]

[2] For example, using its own facilities, Bell can provide pay telephone service in New Jersey, which is in GSA region 2, but cannot provide pay telephone service using its own facilities in the other areas covered by GSA region 2. (Region 3 would be the same as Bell's geographical coverage if New Jersey was included.) Consequently, the RFP, as issued, prevents Bell, independently, without making subcontracting or cooperative agreements, from submitting a proffer to GSA for pay telephone services in New Jersey, even though it is the incumbent in New Jersey, because it cannot provide the service through the rest of the GSA region in its normal business operations.

Contracting agencies are required to develop specifications in such a manner as to obtain full and open competition, and may include restrictive provisions only to the extent necessary to satisfy the agencies' needs. Restrictions are not unduly restrictive where they are necessary to meet the agencies' minimum needs, rather than merely provide ease of administration. *See Burton Myers Co.*, 57 Comp. Gen. 454 (1978), 78-1 CPD ¶ 354; *Malco Plastics*, B-219886, Dec. 23, 1985, 85-2 CPD ¶ 701. The propriety of a restriction is a matter of judgment and discretion, involving consideration of the services being procured, past experience, market conditions and other factors. *See Plattsburg Laundry and Dry Cleaning Corp. et al.*, 54 Comp. Gen. 29 (1974), 74-2 CPD ¶ 27. In this case, we do not find that GSA has shown that the restriction of offers to GSA regions in this RFP is necessary to meet its minimum needs.

The selected regions contained in the RFP follow already established GSA regional boundaries. The record does not indicate any legitimate need of the agency for these regional boundaries other than for administrative convenience. Rather, GSA's primary justification for requesting proffers on a GSA regional basis is based on GSA's concern that adopting regional boundaries which coincide with those of RBOCs would automatically put all non-Bell companies at a competitive disadvantage. We find this justification unpersuasive.

GSA has not explained how adopting regional boundaries which coincide with the Bell companies place non-Bell companies at a disadvantage. The record shows that no matter how the geographical areas are drawn, the non-Bell companies will be able to compete. This is because the nonBell companies are not limited to the Bell geographic areas in providing service. On the other hand, the RBOCs are permitted to provide service directly only in their operating (franchise) areas. Thus, the record shows that to adopt regional lines that correspond with the RBOC regular operating regions would increase rather than limit competition, because all telephone companies would be able to compete in their normal course of business and on their most profitable basis, without limiting the ability of nonBell companies to compete.

In this connection, while potential competitors such as the RBOCs may through new business arrangements or by entering into new lines of business be capable of surmounting "barriers of competition," the agency still must establish that its geographic divisions justify excluding companies from competing in what it regards as its customary and most efficient manner. *See Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co. — Reconsideration*, B-227850.2, Mar. 22, 1988, 88-1 CPD ¶ 294. GSA simply has not met its burden in this regard.

Next, all protesters request that GSA modify the RFP to permit offers of services within a particular state, rather than across an entire region. Bell also requests that GSA allow firms to offer corridor service in certain northeastern locations without having to proffer on services for an entire GSA established region.

GSA states that it requested proffers for an entire GSA region, as opposed to individual states, in order to insure that GSA obtains services for all its pay

telephones nationwide, especially in those states where there are only a few telephones. With respect to Bell's request that GSA permit proffers for corridor service, GSA argues that there are numerous pay telephone service suppliers which operate in very small, specific areas and to allow one profferer to provide this service in one corridor would require allowing all such providers to do so in other corridors. GSA also asserts that to seek proffers on a state specific basis or to allow Bell to offer corridor services in certain locations would be an unreasonable administrative burden because of the potential number of contracts that would be involved. GSA maintains that to receive, evaluate and administer pay telephone services on these bases would be impracticable and could not be economically justified. GSA also states that while there are a few states in which GSA currently has enough pay telephones that offerors are willing to provide services, there are many other states in which GSA has so few phones that it is likely no one would be willing to provide services for those states.

As indicated above, our Office will object to procurements containing restrictive provisions based solely on ease of administration. *MASSTOR Sys. Corp.*, B-211240, Dec. 27, 1983, 84-1 CPD ¶ 23. However, unlike the GSA regional approach which we find objectionable, the record shows that GSA has legitimate reasons for not permitting proffers on a state or corridor basis. In this connection, we have previously recognized that providing a large enough area of service to assure that there will be sufficient providers interested in competing for the work is a reasonable basis for a solicitation which restricts competition. *See Chicago City-Wide College—Reconsideration*, B-228593.2, July 19, 1988, 88-2 CPD ¶ 64. The agency need not divide a procurement into areas which make no economic sense. The record indicates that a solicitation based on corridor or state service would generate little or no competition in states where GSA has few pay phones. As a result, GSA would not receive complete pay telephone coverage and be compelled to obtain the services on a local or phone by phone basis. The need to use local or phone by phone arrangements undermines GSA's goal to obtain more uniform national coverage which was the primary reason for the solicitation in the first place.

Further, given the number of possible awards that would be involved if offers were received on individual state basis or on corridor service basis as requested by the protesters, we do not find objectionable GSA's conclusion that the additional time and resources necessary to evaluate, manage and support these multiple awards would be an unreasonable administrative burden and outweigh the benefits of further breaking out this procurement.

The Bell protest is sustained in part and denied in part. The joint protest of New York Telephone and New England Telephone and Telegraph Company is denied.

Since we find that GSA failed to show that the regional boundaries as stated in the RFP are necessary to meet its minimum needs, by letter of today, we are recommending that GSA amend the solicitation to conform to the RBOCs operating regions and to permit competition on this revised basis. In addition, we

find that Bell is entitled to the costs of filing and pursuing the protest, including attorneys' fees.

## B-236041, November 7, 1989

## Procurement

**Competitive Negotiation**
**■ Offers**
**■■ Evaluation errors**
**■■■ Evaluation criteria**
**■■■■ Application**

Protest is sustained where agency evaluation gave greater weight to technical factors than was reasonably consistent with the solicitation evaluation criteria by using a scoring formula which accorded only 10 percent to price, and 90 percent to technical, which resulted in award to a firm whose price was 67 percent higher than the protester's but whose technical score was only 9 percent higher than the protester's.

## Matter of: Coastal Science and Engineering, Inc.

Coastal Science & Engineering, Inc. protests the award of a contract to Woodward-Clyde Corporation under request for proposals (RFP) No. CX5000-9-0023, issued by the National Park Service, Department of the Interior, for a study of changes in the Cumberland Island marsh, mudflat and tidal creek morphology and sediment accretion rates. Coastal alleges that 1) the award to a substantially higher-price offeror was unjustified, 2) adequate discussions were not conducted, 3) its offer was misevaluated and not credited for Coastal's small business status as required under the RFP, and 4) that the statement of work under the RFP was insufficiently defined.

We sustain the protest on the basis that the award selection was inconsistent with the evaluation criteria.

The RFP provides for acceptance of the offer which is most advantageous to the government, price and other factors considered, and states that "technical quality is more important than cost or price." The RFP also provides for consideration of other listed factors secondary to technical quality and price. The other listed factors include a provision for giving credit for an offeror's small business status. The RFP is for a one year contract for phase I of the project and provides for possible negotiation with the awardee of payment for subsequent phases of the project.

Three initial proposals were received by the closing date, including Coastal's and Woodward's. Since Coastal submitted its proposal without having protested that the statement of work was insufficiently defined, this allegation is untimely under our Bid Protest Regulations, which require that a protest alleging an apparent solicitation impropriety must be filed prior to the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1989).

A technical evaluation panel (TEP) evaluated the initial proposals and determined that all three were technically acceptable and should be included in the competitive range. Coastal had proposed a cost-plus-fixed-fee contract, with an estimated total cost of $53,668. Woodward had proposed a firm fixed price of $81,000.

In its best and final offer, Coastal proposed a firm fixed price of $47,093. Woodward's proposed price was $78,773. The TEP reevaluated the technical proposals and arrived at a final technical score of 141.8 (out of a possible 180) for Woodward's proposal and 130.1 for Coastal's proposal. The contracting officer states that a technical score value of 90 was considered to constitute an "adequate" proposal while a score value of 144 was considered "good." Hence both proposals received technical scores within the point range designated by the agency as adequate. The contracting officer applied a formula to these results which attributed a weight of 90 percent to the technical scores and 10 percent to the prices. Coastal's low price received a price score of 20 which, under this formula, resulted in a total combined score of 150.1; Woodward received a price score of 11.4, which resulted in a total score of 153.2.[1] The contracting officer concluded that Woodward's proposal was more advantageous to the government. He indicated that the technical advantages are "clearly evident in the evaluation, primarily a larger more expert team of researchers with more varied backgrounds." He concluded that these advantages outweigh the higher cost "as evidenced by a markedly higher overall ranking; the greater number of higher technical rankings for the individual criteria most important to the success of the project . . . and the ratio of man hours by more qualified personnel as compared to the other proposals."

In a negotiated procurement, the contracting agency has broad discretion in determining the manner and extent to which it will make use of the technical and cost evaluation results. *TRW, Inc.*, 68 Comp. Gen. 511 (1989), 89-1 CPD ¶ 584. Cost/technical tradeoffs may be made and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation criteria. *Id.* However, here we find the tradeoff unjustified and inconsistent with the stated criteria. In particular, we find that while the solicitation indicated that technical was more important than price, it did not offer any suggestion of the magnitude of the disproportion between the weights actually assigned—90 percent versus 10 percent. In our view, merely indicating that one factor is more important than another may not reasonably be construed to accord the factor nine times the importance of the other factor. *See BDM Servs. Co.*, B-180245, May 9, 1974, 74-1 CPD ¶ 237. Furthermore, because here this differential so minimizes the potential impact of price that it makes a nominal technical advantage essentially determinative, irrespective of an overwhelming price premium, we also question whether such a formula is consistent with the requirement under the Competition in Contracting Act (CICA) that

[1] We note that while the RFP evaluation formula called for some credit for small business status, this factor was not considered at all by Interior, which treated it as only a tie-breaking consideration. Had small business status been afforded as little as 2 percent weight under Interior's formula, Coastal, which is a small business, would have received a point total higher than Woodward, which apparently is not a small business.

price be one of the significant factors in the evaluation of competitive proposals. 41 U.S.C. §§ 253a(b)(1); 253b(d)(4) (Supp. IV 1986). We note that if the formula utilized by the agency had afforded price even a 15 percent weighing factor, Coastal would have received a higher total score than Woodward.

Moreover, irrespective of the total point scores, the contracting officer's suggestion that the Woodward proposal was sufficiently technically superior to warrant payment of the cost premium involved is not substantiated by the record. Both best and final proposals received technical scores in the point range which was denominated "adequate," and the contracting officer states of Coastal's proposal that the TEP found that "the problem is well understood and the methods well defined; the firm is well organized and has a feasible work plan with appropriate emphasis on marshes and sediments, [and] the team is highly qualified with a demonstrated excellence." The TEP indicated as technical weaknesses of Coastal's proposal that "presentation is weak" and that there was "uncertainty regarding results of the investigation that the offeror appears to believe can be resolved on a statistical level." However, these concerns are inconsistent with the above-cited favorable assessment of Coastal's understanding, methods and work plan. In addition, while the contracting officer expressed concern about Coastal's low price, as the technical evaluation makes clear, Coastal's low price does not reflect any lack of understanding of the scope of the study, or of the work required. Further, Coastal's price was afforded the maximum possible score (20), by Interior, which indicates that the agency did not question Coastal's price realism.

In effect, the contracting officer used Coastal's low price as an indication that the proposal was lacking in technical merit. However, a low fixed price offer such as Coastal's cannot be downgraded by virtue of its low price, and the fact that an offeror's price is considered unusually low does not provide a valid basis for rejecting a technically acceptable fixed price proposal, absent a finding of nonresponsibility, which is not present here. *Ball Technical Products Group*, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465.

Interior has advised that the awarded first year initial phase of the project has been substantially performed by Woodward. Suspension of contract performance was not required under CICA because the protest was filed in our Office more than 10 days after the award was made. Accordingly, termination of the contract is not a feasible remedy. However, we recommend that no awards for any additional phases of the study be negotiated with Woodward pursuant to this contract. Since the agency's improper actions deprived the protester of a fair opportunity to compete for the award, Coastal is entitled to recover its proposal preparation costs. 4 C.F.R. § 21.6(d)(2); *Rotair Indus., Inc.*, B-232702, Dec. 29, 1988, 88-2 CPD ¶ 636. Coastal is also entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

## B-236217, November 7, 1989

## Procurement

**Special Procurement Methods/Categories**
**■ Architect/engineering services**
**■■ Contractors**
**■■■ Evaluation**

Protest that firm was improperly excluded from further consideration in architect-engineer acquisition is denied where record shows that preselection committee had reasonable basis for recommending firms which it ultimately recommended to the source selection board and judgment of preselection committee was consistent with stated evaluation criteria.

## Procurement

**Contractor Qualification**
**■ Responsibility**
**■■ Contracting officer findings**
**■■■ Negative determination**
**■■■■ GAO review**

Protest that agency made an improper *de facto* determination of nonresponsibility is denied where record shows that firm's disqualification resulted from technical finding that firm was less qualified and experienced than other firms based on the stated evaluation criteria. Fact that certain evaluation criteria encompassed traditional elements of responsibility does not serve to convert technical finding to finding of nonresponsibility.

## Procurement

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

Allegation that procurement should have been set aside for small business is dismissed as untimely where not filed prior to date set for submission of architect-engineer qualifications statements.

## Matter of: Nomura Enterprise, Inc.

Nomura Enterprise, Inc. (NEI) protests the rejection of its qualifications statement under solicitation No. N62467-89-R-0522 issued by the Naval Facilities Engineering Command (NAVFAC) for the acquisition of value engineering studies and training. NEI argues that the Navy improperly evaluated its submission, that the Navy made an improper *de facto* nonresponsibility determination in rejecting the firm and that the solicitation was improperly issued on an unrestricted basis and should have been set aside for small businesses.

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

This procurement action is for the acquisition of architect-engineer (A-E) services and, consequently, is being conducted pursuant to the procedures outlined in the Brooks Act, 40 U.S.C. § 541 *et seq.* (1982), as amended by Pub. L. No. 100-656, § 742, 102 Stat. 3853 (1988) and Pub. L. 100-679, § 8, 102 Stat. 4055

(1988), and its implementing regulations, Federal Acquisition Regulation (FAR) part 36.6 (FAC 84-45). In accordance with the regulations, the Navy, on May 26, 1989, published a notice in the *Commerce Business Daily* (CBD) identifying the requirement and inviting firms to submit standard form (SF) 254 and SF 255 on which firms provide their qualifications. The CBD notice also stated that firms submitting their qualifications would be evaluated under six criteria, listed in order of their relative importance. The six evaluation criteria were, in order, as follows:

(1) qualifications of the people assigned to do the work including professional registration and previous design experience;

(2) recent experience of these people in conducting value engineering studies and value engineering training;

(3) awards from all DOD agencies within the past 12 months with the objective of trying to distribute contracts among all qualified firms including those that are minority owned or have not had prior contracts;

(4) ability to do several projects concurrently;

(5) professional capacity to accomplish the work starting Nov 89 and completing Nov 91; and

(6) past performance on DOD contracts.

The CBD notice also provided that the procurement was not set aside for small businesses.

By the closing date provided in the CBD notice, the Navy had received a total of 17 responses, including the protester's submission. The Navy convened a preselection or "slate committee" pursuant to NAVFAC procedures for purposes of selecting a "slate" of firms for recommendation to the selection board. After reviewing the submissions of all 17 firms who had responded to the CBD notice, the slate committee selected six firms for recommendation to the selection board, all of whom were considered to be the most highly qualified under the published evaluation criteria. NEI was not among the firms recommended for consideration by the selection board, and this protest followed.

NEI first argues that the Navy's actions in excluding it from consideration by the slate committee were arbitrary and capricious. Specifically, NEI alleges that the Navy, rather than evaluate NEI consistent with the stated evaluation criteria, chose instead to evaluate it comparatively vis-a-vis the other firms in the competition. NEI asserts that it met the agency's "minimum requirements" and, thus, should have been recommended to the selection board.

The Navy responds that, contrary to NEI's allegations, it did in fact carefully consider the firm based on the stated evaluation criteria. The Navy states, simply, that there were other firms that, when compared to the same criteria, were found to be superior to the protester. The Navy reports that the selected firms had better qualifications than the protester and also had more recent relevant NAVFAC experience. For example, the Navy notes that NEI had only one

"certified value specialist" on staff, whereas the firms selected had two or more certified value specialists on staff.

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. *Engineering Sciences, Inc.*, B-226871, July 29, 1987, 87-2 CPD ¶ 109; *Arix Corp.*, B-195503, Nov. 6, 1979, 79-2 CPD ¶ 331. Further, it is not the function of our Office to make our own determination of the relative merits of the submissions of A-E firms. The procuring officials enjoy a reasonable degree of discretion in evaluating such submissions and we will not substitute our judgment for that of the procuring agency by conducting an independent examination. *Y.T. Huang & Assocs., Inc.*, B-217122; B-217126, Feb. 21, 1985, 85-1 CPD ¶ 220.

Here, we are satisfied, based upon our review of the record, that the Navy did not act unreasonably in excluding NEI. The preselection committee specifically found that the firms which it recommended had better qualifications and more recent and extensive NAVFAC and Department of Defense experience than those firms not recommended.[1] The committee also found that the recommended firms all had assigned individuals to do the work who had extensive value engineering experience, the primary work to be performed under this solicitation. In addition, the preselection committee found that the recommended firms had design experience which was particularly relevant to the contract requirement in question. Also, consistent with the evaluation criteria, the agency considered, in selecting its slate of six firms for negotiation, that these firms had a better ability to perform several projects concurrently in the near future. Finally, the Navy's decision considered the agency's overall distribution of contracts to qualified firms. While NEI disagrees with the Navy's evaluation and preselection decision, it has failed to establish that the Navy's determinations were unreasonable or inconsistent with the stated evaluation criteria.

NEI next contends that the Navy's exclusion of it from further consideration constituted a *de facto* determination of nonresponsibility which should have been referred to the Small Business Administration for consideration under the certificate of competency (COC) program. In this regard, NEI alleges that it was found less qualified and experienced in general responsibility areas such as experience outlined in FAR § 9.104-1 (FAC 84-13) and was therefore found to be nonresponsible.

We disagree with the protester that the Navy's exclusion of NEI was a *de facto* nonresponsibility determination. The record shows that the Navy found NEI less qualified in those areas listed in the evaluation criteria relating to previous experience, design experience and personnel qualifications. However, it is not improper, within the context of a negotiated procurement, to include traditional responsibility factors among the technical evaluation factors, *Pacific Computer Corp.*, B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292, and such factors may include

[1] Contrary to NEI's allegation, the record shows that each firm was independently considered in light of the evaluation criteria by each member of the preselection committee.

experience and personnel qualifications. *B & W Service Indus., Inc.*, B-224392.2, Oct. 2, 1986, 86-2 CPD ¶ 384. So long as the factors are limited to areas which, when evaluated comparatively, can provide an appropriate basis for a selection which will be in the government's best interest, COC review procedures do not apply to such technical deficiencies. *Arrowsmith Indus., Inc.*, B-233212, Feb. 8, 1989, 89-1 CPD ¶ 129. We therefore deny this basis of NEI's protest.

Finally, NEI alleges that this procurement should have been set aside for small businesses. We dismiss this contention as untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989), require that protests against alleged deficiencies in a solicitation, be filed before responses to the solicitation are due. The synopsis clearly stated this procurement was not a set-aside. If NEI believed that this procurement should have been set aside for small businesses it should have filed its protest prior to the time and date set for the submission of qualifications statements. *Encon Management, Inc.*, B-233044, Dec. 9, 1988, 88-2 CPD ¶ 579.

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

## B-232503, November 9, 1989

## Civilian Personnel

**Relocation**

**■ Travel expenses**

**■ ■ Privately-owned vehicles**

**■ ■ ■ Mileage**

A transferred employee claims reimbursement for 3,541 miles for relocation travel based on his odometer reading for the route he traveled. The claim is limited to 2,853 miles which represents the most reasonably direct point-to-point routing between his old and new duty stations based on a standard highway mileage guide.

## Civilian Personnel

**Relocation**

**■ Per diem**

**■ ■ Reimbursement**

**■ ■ ■ Amount determination**

Entitlement to relocation travel per diem under paragraph 2-2.3d(2) of the Federal Travel Regulations is not dependent on the actual distance the employee traveled each day. Per diem is allowed on the basis of the actual time used to complete the entire trip, not to exceed the number of days established by dividing the total authorized mileage by not less than 300 miles a day.

## Civilian Personnel

**Relocation**
**■ Temporary quarters**
**■ ■ Interruption**
**■ ■ ■ Actual expenses**
**■ ■ ■ ■ Temporary duty**

A transferred employee, while occupying temporary quarters at his new permanent duty station, was required to perform several days temporary duty away from that duty station. He retained his temporary quarters during that absence and seeks reimbursement as part of his temporary quarters subsistence expenses in addition to per diem received for his temporary duty. His claim for temporary quarters lodging expenses may be allowed if the agency determines that the employee acted reasonably in retaining those quarters. 47 Comp. Gen. 84 (1967); and B-175499, Apr. 21, 1972, are overruled.

## Matter of: Paul G. Thibault—Relocation Expenses—Mileage, Per Diem, and Temporary Quarters Expenses

This decision is in response to a request from an Authorized Certifying Officer, National Finance Center, Department of Agriculture.[1] It concerns the entitlement of an employee of the Animal and Plant Health Inspection Service to be reimbursed certain travel and temporary quarters subsistence expenses incident to a permanent change of station.

## Background

Mr. Paul G. Thibault was transferred from Los Angeles, California, to Scotia, New York, and he traveled by privately owned vehicle to the new duty station during the period July 22 to July 29, 1987. Mr. Thibault claimed 3,541 miles for his mileage expenses, but the agency determined that, based on the Standard Highway Mileage Guide, the distance between Los Angeles, California, and Scotia, New York, was 2,808 miles, and reimbursed Mr. Thibault on that basis. Mr. Thibault contends that, since he was authorized to perform relocation travel by privately owned vehicle, and since no special route was indicated on his travel authorization, he could choose any route he desired and be reimbursed accordingly.

Mr. Thibault also claimed temporary quarters at his new duty station from August 16 to September 5, 1987. During this time, he performed temporary duty in Frankfort, Kentucky, for a period of 5 days, August 24 to 28, 1987. The agency denied his claim for lodging cost at his new duty station for the period August 24 to 28, 1987, on the basis that he could not be paid both temporary quarters and per diem expenses during the same period. Mr. Thibault contends that he retained his temporary lodging at his new duty station during his period of temporary duty for two reasons. First, he had to have a place to store the bulk of the belongings he carried with him when he relocated. Second, he was informed by the lodging manager that, if he gave up his room during his

[1] W. D. Moorman, reference FSD-2 WDM.

period of temporary duty, he might not be able to reacquire it or another room upon his return.

## Opinion

Sections 5724 and 5724a of title 5, United States Code (1982), authorize the reimbursement of travel and transportation expenses incident to a permanent change of station. Among the expenses authorized are mileage, travel per diem, and temporary quarters subsistence expenses. The regulations governing these entitlements are contained in chapter 1, parts 4 and 7 and chapter 2, parts 2 and 5 of the Federal Travel Regulations (FTR).[2]

### Mileage

The first question concerns Mr. Thibault's mileage reimbursement. Paragraphs 2-2.1 and 1-4.1a and b of the FTR state that use of a privately owned vehicle which is approved as advantageous to the government shall be reimbursed on a mileage basis for distances between points traveled as shown in standard highway mileage guides or actual miles driven as determined from odometer readings. Any substantial deviation from distances shown in the standard highway mileage guide shall be explained. Since the officially recognized mileage figure for automobile travel between Los Angeles, California, and Scotia, New York, is 2,853 miles, based on the use of interstate and U.S. highways whenever possible, Mr. Thibault should be reimbursed on that basis. We find no basis to allow Mr. Thibault the additional 688 miles he claims.

### Travel Per Diem

The next question concerns the proper way to calculate travel per diem since the mileage Mr. Thibault traveled each day varied significantly and on 2 days he did not travel a minimum of 300 miles as stated in FTR, para. 2-2.3d(2).

Paragraph 2-2.3d(2) of the FTR does not establish a requirement that an employee must actually travel 300 miles each day. It provides only that per diem will be allowed based on actual time used to complete the trip, but not to exceed the number of days established by dividing the total mileage by not less than 300 miles per day. *Oscar Hall,* B-212837, Mar. 26, 1984. In the present case, that means that a maximum of 9-3/4 days would have been authorized for travel. Since Mr. Thibault completed his journey in 7-1/4 days, his actual travel was well within that prescribed maximum, and he is entitled to per diem for those 7-1/4 days.

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

**Temporary Quarters Lodging Expenses**

The last question is whether Mr. Thibault is entitled to receive the lodging portion of temporary quarters for the days he was performing temporary duty in Frankfort, Kentucky. The agency denied payment based on paragraph 2–5.2i of the FTR which provides:

> i. *Duplication of other allowances.* In no case shall subsistence expenses under these provisions be allowed which duplicate, in whole or in part, payments received under other laws or regulations covering similar costs . . . .

Our decisions have held that when an employee is reimbursed for per diem for temporary duty away from his new permanent duty station where he is occupying temporary quarters, the employee may not be reimbursed for temporary quarters those same days. 47 Comp. Gen. 84 (1967); B–175499, Apr. 21, 1972. Our decisions have also held that the cited regulation does not preclude reimbursement for temporary quarters and per diem on the day of arrival at the new duty station so long as each claim is not for the same expense. *Robert M. Crowl,* B–193935, June 18, 1979; *Nancy D. Doll,* B–198357, Mar. 12, 1981.

It is clear that where per diem and temporary quarters entitlements overlap, in whole or in part, for the same expense on the same day and location, only one reimbursement may be made under FTR, para. 2–5.2i since to permit otherwise would result in a double reimbursement for a single expense. However, our decisions also suggest that where an employee reasonably incurs separate and distinct expenses on the same day but at different locations pursuant to official travel, a different conclusion regarding expense reimbursement may be reached.

Thus, in *Milton J. Olsen,* 60 Comp. Gen. 630 (1981), we considered a situation in which an employee incurred dual lodging expenses because during a period of temporary duty at one location, he was required to perform several days temporary duty at a second location. Since he was scheduled to return to the first location at the conclusion of the temporary duty at the second location, he retained his lodging at the first location. Citing to 51 Comp. Gen. 12 (1971); *Snodgrass and Van Ronk,* 59 Comp. Gen. 609 (1980); and *Rainey and Morse,* 59 Comp. Gen. 612 (1980), we concluded that, if the agency determines that the employee acted reasonably in continuing to incur lodging costs at the first location, but was unable to occupy such lodging because of conditions beyond his control, he may be reimbursed for these lodging costs to the extent they would have been paid except for the interim temporary duty. Moreover, we held that the payment would be in addition to per diem or actual expenses payable for the travel actually performed.

By analogy, we believe the principle stated in *Olsen* is applicable here. Mr. Thibault was in temporary quarters for less than 2 weeks when he was ordered to perform a short period of temporary duty elsewhere. Since he actually incurred lodging costs at both locations, we do not consider the prohibition of FTR, para. 2–5.2i to be applicable and our decisions 47 Comp. Gen. 84, *supra;* and B–175499, *supra,* will no longer be followed. It is our view that if the agency should conclude that Mr. Thibault acted reasonably in retaining temporary quarters at his

permanent duty station, the expense of the lodging not occupied during the period August 24-28 would be appropriately reimbursable as temporary quarters subsistence expenses.

## B-236275, November 13, 1989

## Procurement

**Sealed Bidding**

■ **Sureties**

■ ■ **Financial capacity**

■ ■ ■ **Misleading information**

Agency properly rejected low bid on the basis that the individual bid bond sureties were not responsible where the contracting officer reasonably determined that the proposed sureties claimed excessively overvalued assets and supported those claims with documents containing material omissions and inconsistencies.

## Matter of: Leeth Construction, Ltd.

Leeth Construction, Ltd., protests the rejection of its bid under invitation for bids (IFB) No. DAHA44-89-B-0003, issued by the United States Property and Fiscal Officer, Virginia Army National Guard for construction of an armory at Sandston, Virginia. The National Guard rejected Leeth's bid based on its finding that Leeth's individual bid bond sureties were nonresponsible.

We deny the protest.

The IFB required each bidder to provide a bid guarantee in an amount equal to 20 percent of the bid price or $3 million, whichever was less. In the event the required bid bond named individuals as sureties rather than a corporation, two or more responsible sureties were required to execute the bid bond, and the bidder was required to provide a completed Standard Form (SF) 28, Affidavit of Individual Surety, for each individual. See Federal Acquisition Regulation (FAR) § 28.202-2(a) (bid guarantee requirements can be satisfied by the submission of bid bonds by two individual sureties, so long as each surety has sufficient net worth to cover the penal amount of the bid bond). SF 28 includes a Certificate of Sufficiency that must be executed by specified bank officers or government officials.

At bid opening, on June 8, 1989, 12 bids were received ranging from a high of $3,275,000 to the apparent low bid of $2,266,602, submitted by Leeth. In response to the requirements of the IFB, Leeth submitted three bid bonds guaranteed by three individual sureties: Harry C. Perry, Delbert E. Cook, and Phil W. Hatch. An Affidavit of Individual Surety was submitted for each surety indicating a net worth of $21,445,458 for Mr. Perry, $1,263,940 for Mr. Cook, and $22,384,818 for Mr. Hatch. Each of the three sureties also provided a fully-executed Certificate of Sufficiency.

By letter dated July 14, the National Guard determined that Leeth's bid was unacceptable because all three of its individual bid bond sureties were nonresponsible. The contracting officer's determination was based on a finding that each of the affidavits and accompanying financial statements and audit reports contained excessively inflated values for assets, and numerous material inconsistencies, contradictions and omissions. The contracting officer decided these findings raised reasonable questions about the credibility and integrity of the sureties and the independent auditor who prepared the financial statements attached to each surety's affidavit.

On July 21, Leeth protested the rejection of its bid. According to Leeth, the National Guard (1) improperly determined that the individual sureties were nonresponsible because Leeth provided sufficient financial information to permit the agency to conclude that each surety had a net worth in excess of the penal amount of the bond; (2) inadequately investigated the financial position of each surety; (3) improperly concluded that individuals signing the Certificates of Sufficiency were required to affirmatively investigate or verify the veracity of the Affidavits of Individual Surety; (4) improperly determined that joint ownership of property with a spouse decreased the net value of such property; (5) mistakenly concluded that the individual sureties had withheld information when such information was provided in supporting documents; and (6) improperly determined that assets set forth in the Affidavits of Individual Surety were overvalued.

A bid guarantee is a firm commitment from a bidder that if its bid is accepted it will execute the contractual documents and provide the payment and performance bonds required in the contract. *See* FAR § 28.101. Its purpose is to secure the surety's liability to the government for excess reprocurement costs in the event the bidder fails to honor its bid in these respects.

The FAR permits bidders to use two individual sureties, rather than a corporate surety, provided each individual surety completes an Affidavit of Individual Surety. See FAR § 28.202-2(a). The contracting officer is then required to make an affirmative determination of responsibility based upon the financial acceptability of the surety before an award is made. FAR § 28.202(a); *Cascade Leasing, Inc.*, B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20. Contracting officers are vested with a wide range of discretion and business judgment when determining responsibility, and we will defer to their determinations unless the protester can demonstrate that those decisions are made in bad faith or without a reasonable basis. *Allied Production Management Co., Inc.*, B-235686, Sept. 29, 1989, 89-2 CPD ¶ 297.

The contracting officer made a determination in this case that Leeth's bid was not acceptable because the three sureties proposed lacked sufficient integrity to assure the government that its reprocurement costs would be covered if the bidder failed to execute the contract and provide the necessary payment and performance bonds. Based on our review of the record, we find that the contracting officer's determination was reasonable.

For the first surety, Perry, the financial statement listed the fair market value of real estate, described as three single-family residences ($1.9 million), a mobile home park ($1.4 million), eight duplex lots ($169,500), and forty townhouses ($3.4 million); Perry claimed these properties were subject to mortgages and encumbrances of $3,500,000. Perry also claimed 50 percent ownership of two closely-held real estate investment companies, with his interest valued at $15,780,412, an undivided one-half interest in three real estate projects, with his interest valued at $2,126,890, and cash assets of $168,656.

The contracting officer questioned the claimed fair market value of $1.9 million for the three single-family homes constructed by Perry. The supporting documents indicate the homes were built on lots purchased for $481,825, but include no evidence to substantiate the claim of a sales value of $1.9 million, no evidence that construction ever took place on the lots, no evidence of any construction loans or liens against the property, and no evidence of releases for certain trusts listed on the settlement sheet for the purchase of the lots. A report from a real estate listing service provided by Perry also indicates that this property was owned by Perry jointly with his wife; however, there is no mention of joint ownership in the affidavit or elsewhere in the documents, and no explanation of the discrepancy. The contracting officer further noted that the Perry documents assert Perry is the sole owner of a mobile home park, yet the official who certified Perry's affidavit informed the contracting officer's representative that it was her belief that Perry was not the sole owner of the mobile home park. Since the certifying official states that she believes the facts provided in the Affidavit of Individual Surety are true, to the best of her knowledge, her statement raised questions about both Perry's and her credibility. Upon reviewing these facts and documents, the contracting officer concluded that Perry's assets were excessively overvalued, and that the documents submitted contained sufficient inconsistencies to tarnish the credibility of Perry's affidavit, and thus, the responsibility of Perry as a surety.

The second surety, Cook, claimed a total net worth of $1,263,940. Cook stated that his personal residence, two residential lots, 9.95 acres of commercially-zoned land, and a welding/metal fabrication shop had a fair market value of $1,146,000, less mortgages and encumbrances of $138,180. Cook also claimed ownership of miscellaneous other property with a net value of $256,120. With respect to the 9.95 acre parcel of land, the contracting officer noted a six-fold difference in value between the claimed value in the affidavit, supported by a 1985 appraisal report indicating a fair market value for the land of $600,000, and a 1987 tax report assessing the property at $102,906. In addition, a May 6, 1988, title report on this land indicates the presence of three deeds of trust against the land that are not disclosed in the affidavit, or otherwise explained. The contracting officer also noted that the affidavit fails to disclose that all three properties listed by Cook are jointly owned with his spouse.

The third surety, Hatch, claimed a net worth of $22,384,818, consisting mainly of his personal residence ($49,750), and stock in the Zona Gold Corporation ($22,317,306). Zona Gold Corporation is a Nevada corporation, wholly-owned by

Hatch and his wife, engaged in real estate development and mining in the state of Arizona. The contracting officer questioned the credibility of Hatch's affidavit after noting that the value of the Zona Gold Corporation, Hatch's only asset of sufficient worth to meet the penal value of the bid bond, was valued four times greater than claimed in an affidavit submitted on a different procurement 7 months earlier. In addition, the contracting officer observed that 77 percent of the assets of the Zona Gold Corporation were tied to the Golden Wonder Mine Claim, for which Zona Gold Corporation had only a 3-year lease, which the corporation's financial statement failed to mention. The financial statement also does not reveal the monthly lease fee and royalty commitment. The contracting officer also noted that Hatch had failed to disclose a prior bid guarantee supported by the same assets.

In addition to the above, all three sureties listed in Leeth's bid submitted an audited financial statement and an independent auditor's report prepared by the same Certified Public Accountant (CPA), Richard L. Widger. The contracting officer concluded that the inconsistencies and omissions in the affidavits and financial statements called into question the credibility of both the sureties and the CPA who prepared the audited financial statement. As a result of this information, the contracting officer forwarded the three affidavits and accompanying financial statements to the appropriate government authorities for criminal investigation.[1]

Leeth argues that the contracting officer acted unreasonably in rejecting its sureties because even discounting the assets the contracting officer found questionable, each surety provided sufficient financial information to show a net worth in excess of the penal amount of the bond. Once the accuracy of the sureties' representations reasonably has been called into question, however, the agency is justified in rejecting the sureties, notwithstanding the adequacy of other assets. *Hughes & Hughes*, B-235723, Sept. 6, 1989, 89-2 CPD ¶ 218. This reflects the great reliance an agency is entitled to place on the accuracy, thoroughness, and verity of surety financial information provided for government procurements. *See Farinha Enters., Inc.*, B-235474, Sept. 6, 1989, 68 Comp. Gen. 666, 89-2 CPD ¶ ———.

Leeth also contends that the contracting officer based his determination on an inadequate review of the financial positions of each surety. We have specifically held that a contracting officer may rely on the initial and subsequently furnished information regarding net worth submitted by the surety without further conducting an independent investigation. *See KASDT Corp.*, B-235620, Aug. 21, 1989, 89-2 CPD ¶ 162. In the instant case, however, the record shows the contracting officer went well beyond the sureties' documents in attempting to verify the responsibility of the sureties. The contracting officer's representative contacted each official who signed the Certificate of Sufficiency submitted with the affidavit, and in one case was given information that contradicted the

[1] Although not indicated in the record of this protest, we note that Mr. Widger, the CPA who prepared the audited financial statements in this case, is the subject of an active federal investigation into allegations that he submitted false or fictitious financial statements to a federal agency on a different procurement.

certificate and the affidavit; the contracting officer researched other government sources regarding the responsibility of the sureties; and the contracting officer contacted, or attempted to contact, the sureties themselves. In our view, the record here reflects a reasonable basis for the contracting officer's determination that the sureties were nonresponsible. Further, with respect to Leeth's assertion that, contrary to the contracting officer's conclusion, individuals signing a Certificate of Sufficiency are not required to personally investigate the accuracy of information provided on the Affidavit of Individual Surety, that argument has no bearing on the reasonableness of the contracting officer's determination that the sureties otherwise are not responsible.

Leeth also argues that the contracting officer improperly concluded that the net value of certain assets stated in the affidavits was incorrect because the assets were jointly owned with a spouse. All three affidavits failed to reveal joint ownership with spouses of property claimed to be solely-owned. Although we agree with Leeth's assertion that this omission does not render the stated net worth of the property inaccurate, we find that it is relevant to the credibility of the sureties' affidavits. Although the omissions, taken by themselves, might not alone support a finding of nonresponsibility, they are appropriately considered with other evidence to determine the responsibility of the sureties.

Leeth further contends that the contracting officer acted improperly in concluding that the individual sureties had withheld information when such information in fact was provided in supporting documentation, and in concluding that the assets were overvalued. We disagree. First, the supporting information provided by the sureties highlighted material omissions and inconsistencies in the affidavits. The contracting officer appropriately based a finding of nonresponsibility on these omissions and inconsistencies. The fact that the sureties themselves provided the information that revealed the omissions and inconsistencies does not change the fact that such omissions and inconsistencies, once noted, raise serious questions about the accuracy of the affidavits. Second, as previously discussed, the contracting officer clearly had a reasonable basis for concluding that many of the assets claimed by the sureties were overvalued.

Finally, in its comments on the agency report, Leeth for the first time argues that the contracting officer acted in bad faith in finding Leeth's sureties nonresponsible. According to Leeth, the contracting officer's investigation focused on finding information which would justify rejecting the sureties. Leeth's bare assertions of bad faith on the contracting officer's part simply are not supported by the record; on the contrary, the numerous inconsistencies and omissions in the documents clearly support the contracting officer's determination that Leeth's sureties are nonresponsible.

The protest is denied.

## B-236550, November 13, 1989

## Procurement

**Sealed Bidding**
**■ Low bids**
**■■ Error correction**
**■■■ Price adjustments**
**■■■■ Propriety**

Agency's decision to permit correction of low bid will not be questioned unless it lacks a reasonable basis. Correction is proper where the work sheets submitted to support the allegations of mistake establish the mistake and the claimed intended bid by clear and convincing evidence.

## Matter of: Humphrey Construction, Inc.

Humphrey Construction, Inc., the second-low bidder, protests the Army Corps of Engineers' decision to allow correction of three mistakes, alleged after bid opening, in the low bid of Morgen & Oswood Construction Co., Inc., under invitation for bids (IFB) No. DACW68-89-B-0034, for the construction of the Clearwater Fish Hatchery, Orofino, Idaho.

We deny the protest.

Of the three bids received in response to the IFB, Morgen & Oswood's bid of $15,583,040 was low, and Humphrey's bid of $16,697,050 was next low. The government estimate was $16,083,099. At bid opening, the contracting officer corrected three obvious clerical errors in Morgen & Oswood's bid, resulting in a bid of $15,583,840. The following day, Morgen & Oswood alleged three additional errors: (1) Omission of bond costs, insurance and Tribal Employment Reservation Ordinance (TERO) tax allowance in item 1; (2) erroneous labor burden costs in bid item 17; and (3) omission of overhead costs in bid item 18.

To support its claim, Morgen & Oswood submitted a sworn affidavit from its vice-president describing the nature and validity of the errors, and the original certified summary work sheets.

The Corps determined that Morgen & Oswood had submitted clear and convincing evidence of its mistakes, the manner in which they occurred and the intended bid amounts. The Corps therefore allowed Morgen & Oswood to correct its bid upward by $539,000, resulting in a bid of $16,122,840, noting that this corrected bid was still 3.4 percent below Humphrey's next low bid. Humphrey, which has not been provided with a copy of Morgen & Oswood's workpapers, argues that there appears to be insufficient evidence of the intended bid to permit correction.[1]

[1] Humphrey contends that the agency should have released the documents upon which the determination to permit correction was made. The Army withheld Morgen & Oswood's workpapers from the protester, however, on the basis that they contained proprietary information. The Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. IV 1986), does not require the disclosure of a firm's proprietary information. *See Lash Corp.*, 68 Comp. Gen. 232 (1989), 89-1 CPD ¶ 120. However, our Office has examined all of the evidence relied on by the agency in determining to permit correction.

An agency may permit upward correction of a low bid before award, to an amount that still is less than the next low bid, where clear and convincing evidence establishing both the existence of a mistake and the bid actually intended. Federal Acquisition Regulation (FAR) § 14.406-3; *Lash Corp.*, 68 Comp. Gen. 232, *supra*. Whether the evidence meets the clear and convincing standard is a question of fact, and we will not question an agency's decision based on this evidence unless it lacks a reasonable basis. *DeRalco, Inc.*, B-228721, Oct. 7, 1987, 87-2 CPD ¶ 343. In this respect, in considering upward correction of a low bid, worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. *BAL/BOA Servs., Inc.*, B-233157, Feb. 9, 1989, 89-1 CPD ¶ 138.

Our examination of Morgen & Oswood's workpapers and the affidavit furnished by the firm provides no basis to question the Corps' determination that Morgen & Oswood submitted clear and convincing evidence that it intended to include in its bid $174,525 for bond, risk insurance and TERO tax costs, and that its total intended bid for item 1 should have been $611,600, as claimed. The $78,600 Morgen & Oswood alleges as the estimated cost for performance and payment bonds is corroborated by its pre-bid opening working papers and its bid sheet entitled "Bond-License-FeesInsurance." The latter sheet also indicates that risk insurance costs were calculated at $20,935, and TERO tax was calculated at $75,000. The three amounts total $174,525, which amount is reflected in the bid recapitulation spread sheets from which Morgen & Oswood prepared its bid. Adding the company's 10 percent markup (consistently applied to other bid items) to this figure results in an intended rounded off total of $611,600 for the first bid item.

The record also supports Morgen & Oswood's allegations that it incorrectly calculated its total payroll tax for item 17, and that its intended bid amount for the item should have been $3,699,900. The work sheets show two separate payroll taxes of $288 and $130,731, which total $131,019, rather than the $13,359 total indicated on the work sheets. Morgen & Oswood appears to have inadvertently added $288 to $13,071, rather than to $130,731. The intended bid price of $3,699,900 for item 17 is ascertainable by adding the $117,660 ($131,019 − $13,359 = $117,660) by which total payroll taxes were understated plus the company's 10 percent markup for this figure, to the submitted bid item amount of $3,570,500.

The record also indicates that the Corps reasonably determined that Morgen & Oswood omitted $200,000 in overhead costs when calculating its bid amount for item 18, and that its bid price of $1,277,300 should be increased by $220,000 ($200,000 plus 10 percent markup). The firm failed to add the $200,000 entered on its bid recapitulation spreadsheet as overhead for item 18 to a subtotal for item 18. As a result, the total cost for item 18 was understated by $200,000, plus the 10 percent markup. That Morgen & Oswood intended to included the $200,000 in overhead is supported by reference to its general estimate sheet for job "overload" (overhead). The general estimate sheet includes $1,157,475 as overhead for items 1, 4, 14, 17, 18, 20 and 23. This amount is consistent with

allocating $200,000 in overhead to item 18, since the amounts entered on the bid recapitulation spreadsheets for the other items total $957,475. Based on this information, we believe the Corps reasonably permitted correction upward in the amount of $220,000 for item 18 to reflect the intended bid amount of $1,497,300 claimed by Morgen & Oswood.

The record thus provides a reasonable basis for the Corps' determination to allow correction. Since Morgen & Oswood's bid as corrected remains low, the award was proper.

The protest is denied.

## B-237068.2, November 13, 1989

### Procurement

**Competitive Negotiation**
**■ Contract awards**
**■ ■ Errors**
**■ ■ ■ Corrective actions**
**■ ■ ■ ■ Moot allegation**

Dismissal of protest challenging award to other than the low offeror without discussions is affirmed where, shortly after filing of protest, agency corrected deficiency by opening discussions with all offerors in the competitive range and requesting best and final offers; although protester's requested relief was award of contract to itself, since such relief was not appropriate, dismissal of protest as academic based on agency's appropriate corrective action was proper.

### Procurement

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

Claim for proposal preparation and protest costs where agency took corrective action remedying alleged procurement defect in response to protest is denied since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement.

## Matter of: Maytag Aircraft Corporation—Request for Reconsideration; Claim for Protest Costs

Maytag Aircraft Corporation requests reconsideration of our October 16, 1989, dismissal of its protest of the award to K & M Maintenance Services, Inc., under request for proposals (RFP) No. F33601-89-R-9002, issued by the Air Force for personnel, equipment and services concerning fuels management and distribution. Maytag requests that its protest be reinstated, that a decision be issued on the merits, and that it be awarded proposal preparation costs and the costs of pursuing the protest.

We affirm our dismissal and deny the claim for costs.

In its protest filed with our Office on September 22, Maytag, the apparent low-priced offeror, asserted that award to K & M on the basis of its higher priced initial proposal, without discussions with Maytag and other offerors, violated the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4)(A)(ii) (1988), which allows acceptance of an initial proposal without discussions where the award would result in the lowest overall cost to the government. After the protest was filed, but before submission of the agency report, the agency informed our Office by memorandum of October 13, of its intent to initiate discussions with all offerors and thereafter to request best and final offers. In consideration of the agency's proposed action, which would eliminate the alleged deficiency, we dismissed the protest as academic.

In its request for reconsideration, Maytag argues that since the relief it requested, *i.e.*, termination of K & M's award and award of a contract to itself, was not granted, the firm's protest in fact was not academic and should be reinstated, and decided on the merits.

There is no basis for reopening the file. The agency's decision to open discussions with all offerors and then request best and final offers did render the protest— which challenged the propriety of an award without discussions to other than Maytag, the low offeror— academic. *See Storage Technology Corp.*, B-235308, May 23, 1989, 89-1 CPD ¶ 495. Notwithstanding that Maytag requested different relief, the corrective action taken by the agency was appropriated for the deficiency alleged; this would have been precisely the relief we would have recommended had we decided the merits. *See Kaufman Lasman Assoc., Inc., et al.*, B-229917, B-229917.2, Feb. 26, 1988, 88-1 CPD ¶ 202, *aff'd on reconsideration*, B-229917.3, Mar. 16, 1988, 88-1 CPD ¶ 271. Under these circumstances, no useful purpose would be served by further consideration of the protest, and it therefore is academic. *See Associated Professional Enters. Inc.*, B-231766, Oct. 12, 1988, 88-2 CPD ¶ 343.

We also find no basis for Maytag's claim for proposal preparation and protest costs, including attorneys' fees. We have consistently held that a protester is not entitled to reimbursement of its cost where the protest is dismissed as academic, so that we do not issue a decision on the merits. *See, e.g., Service Ventures, Inc.*, B-233740.3, Aug. 24, 1989, 68 Comp. Gen. 642, 89-2 CPD ¶ 172; *Teknion, Inc.— Claim for Protest Costs*, 67 Comp. Gen. 607 (1988), 88-2 CPD ¶ 213; *Technology & Management Servs., Inc.*, B-231025.4, June 1, 1988, 88-1 CPD ¶ 531.[1]

The dismissal is affirmed and the claim is denied.

[1] In this regard, we recently published in the *Federal Register* (see 54 Fed. Reg. 14351 (1989)), a notice announcing a review of our protest regulations and inviting the public to comment on how we might improve the protest process. As part of that review, we will consider comments pertaining to the award of costs. *See Storage Technology Corp.*, B-235308, *supra*.

## B-234828, November 14, 1989

## Appropriations/Financial Management

**Accountable Officers**
**■ Disbursing officers**
**■■ Records management**
**■■■ Computer software**

The provisions of 31 U.S.C. § 3528(a)(1) governing the responsibilities of a certifying official and 31 U.S.C. § 3325(a) governing the responsibilities of a disbursing official would not preclude Treasury disbursing officials from using an automated software system to correct addresses and ZIP Codes contained in certified payment vouchers to qualify checks processed for mailing for reduced Postal Service rates.

## Appropriations/Financial Management

**Accountable Officers**
**■ Disbursing officers**
**■■ Relief**
**■■■ Illegal/improper payments**
**■■■■ Computer software**

In the rare event that a disbursing official incurs liability for an improper payment that results from the use of a reliable automated address and ZIP Code correction software system, we may relieve a disbursing official from liability under the provisions of 31 U.S.C. § 3527. If relief is to be granted, the improper payment cannot result from bad faith or a lack of due care. Disbursing officials can demonstrate due care by showing that the automated system made payments that were accurate and legal, functioned properly, and was reviewed at least annually to ensure its effectiveness.

## Appropriations/Financial Management

**Accountable Officers**
**■ Disbursing officers**
**■■ Relief**
**■■■ Illegal/improper payments**
**■■■■ Computer software**

Because the liability of disbursing officials for improper payments is governed by federal statutory provisions contained in 31 U.S.C. § 3325(a) and 31 U.S.C. § 3527 a proposed memorandum of understanding between the Treasury and client agencies to shield Treasury disbursing officials from liability for improper payments would be ineffectual.

## Matter of: Improper Payments Resulting from the Use of an Automated Address-Correction System

By letter of March 13, 1989, the Acting Chief Disbursing Officer, Operations Group, Financial Management Service (FMS), Department of the Treasury, asked whether federal disbursing officers may independently implement the "ZIP + 4" postal savings system without incurring liability for errors incidental to use of the automated system. Although there is a narrow set of circumstances under which a disbursing officer may incur liability, such occasions should be rare. In the rare event that the disbursing officer incurs liability as a

result of using the new system, we may relieve the disbursing officer from liability pursuant to 31 U.S.C. § 3527(c) when the payment did not result from bad faith or a lack of due care, and the automated system made accurate and legal payments, functioned properly, and was reviewed at least annually to ensure its effectiveness.

## Background

The Department of the Treasury has asked whether its disbursing officers may independently implement the new "ZIP + 4" postal savings system. Treasury is concerned that errors incidental to the operation of the automated system may increase the incidence of liability faced by its disbursing officers. Although the system will increase the efficiency of the disbursing process and save the government millions of dollars yearly, it also is likely to cause a small number of disbursements to be misdelivered that otherwise would not be. The potential for liability associated with deliveries to persons other than the intended payees is the major issue raised by the Treasury request.

The Postal Service offers a half cent discount to mailers who provide presorted mail, 85 percent of which contains nine digit ZIP Codes. The Postal Service refers to this program as the "ZIP + 4" system. FMS proposes to implement "ZIP + 4" by means of computer software. After reading the address, the software will add four digits to a correct ZIP Code. The additional four digits make the ZIP Code more geographically descriptive, allowing mail to be sent closer to its final destination and sorted less frequently. If the ZIP Code does not match the street and house numbers for the addressed city and state, the software may modify the ZIP Code. In some situations, changing the ZIP Code may cause a deliverable check to become either undeliverable or delivered to the wrong address.[1] Nevertheless, we understand that the instances in which this might occur are unavoidable given the current technology and will be so few as to be negligible when compared to the number of checks which will be correctly delivered as a result of the "ZIP + 4" system.

## Discussion

There are several statutory provisions relevant to FMS' authority to correct the address and ZIP Codes contained in duly certified payment vouchers. First, 31 U.S.C. § 3528(a)(1) makes the certifying official responsible for the accuracy of the information stated in the certificate, voucher, and supporting records. However, we have not construed this provision to make the certifying official strictly liable for the accuracy of the addresses contained in the voucher and supporting records since addresses are frequently changed either by administrative action

[1] For example, if an address contains the correct street name and number, city, and ZIP Code, but the wrong state, the software may change the ZIP Code to conform to the state. In such a case, there is a possibility that the check will be delivered to an incorrect address or eventually returned to the Treasury as undeliverable. If the ZIP Code were not changed, it is likely that the letter would be delivered to the correct address even though the name of the state was incorrectly given.

of the Postal Service or the municipality, or by the physical relocation of the addressee himself. Generally, the certifying official would not receive advance notice of these address changes. Nor is it feasible for the certifying official to physically verify the accuracy or currency of addresses contained in the voucher. For these reasons, we have construed section 3528(a)(1) to only make the certifying official responsible for insuring that the address information contained in the voucher is the most current payee address information reasonably available to the agency. Implicitly, 31 U.S.C. § 3528 recognizes that some certified addresses may not be complete or correct.

The other relevant statutory provisions are 31 U.S.C. §§ 3325(a)(2)(A) and 3325(a)(3). Section 3325(a)(2)(A) requires a disbursing official in the executive branch to examine a voucher and determine whether it is "in proper form" and section 3325(a)(3) holds him accountable for performing this and other functions. We interpret these provisions to require the disbursing official to review a voucher to insure it is properly prepared and correct on its face. In furtherance of these duties, a disbursing officer can review the address contained in the voucher to insure it is complete and correct to the extent feasible and practicable for him to do so. Should he find an incomplete or incorrect address, we think the disbursing officer may complete or correct the addresses based on reliable and reasonably accurate information available to him. Accordingly, we believe the provisions of 31 U.S.C. §§ 3325(a)(2)(A) and 3325(a)(3) would not preclude FMS' use of a reliable automated software system to correct addresses and modify ZIP Codes contained in certified vouchers submitted to it for payment by other federal agencies.

FMS also asks whether its disbursing officials could be relieved from liability for improper payments that may result, should the address-correction function of the "ZIP + 4" software misdirect a check to an unauthorized recipient, who mistakenly or fraudulently negotiates it. Pursuant to 31 U.S.C. § 3527(c), we may relieve a disbursing official from liability for an improper payment when we determine that the payment was not the result of bad faith or lack of reasonable care on the part of the disbursing official.

The instances in which the use of the "ZIP + 4" address-correcting software will cause an improper payment should be rare. The typical case involving an improper payment will occur where a check is sent to an incorrect address and is either mistakenly or illegally negotiated. However, simply because a check is incorrectly delivered does not make a disbursing official liable. Liability arises only upon a loss of funds. Although changes to the address or the ZIP Code may lead to an improper payment, an erroneous payment does not occur until the unauthorized recipient cashes or otherwise negotiates the check.

We addressed the problems of examination, certification, and disbursement of payments by automated systems in our report entitled: *New Methods Needed for Checking Payments Made by Computer,* GAO/FGMSD-76-82, Nov. 7, 1977. In that report we set forth certain criteria that an agency using automated payment systems should satisfy. We expressed the view that: (1) in automated systems, evidence that the payments are accurate and legal must relate to the

system rather than to the individual transaction; (2) certifying and disbursing officials should be provided with information showing that the system on which they are largely compelled to rely is functioning properly; and (3) reviews should be made at least annually, supplemented by interim checks of major system changes, to determine that the automated system is operating effectively and can be relied on to make accurate and legal payment. *Id.* at 17-18. Thus, basic to any question of a certifying or disbursing official's liability under an automated system is the reasonableness of his reliance on the system to continually produce legal and accurate payments. B-178564, Jan. 27, 1978.

Under these criteria, FMS disbursing officials seeking relief from liability for improper payments stemming from the use of "ZIP + 4" software must demonstrate their exercise of reasonable care and lack of bad faith by showing that the software was generally reliable and functioned properly and that it was tested and reviewed periodically for accuracy. Of course, the traditional requirements that reasonable care be exercised in making the payments and that diligent efforts be made to recoup an improper payment will still be considered in any request for waiver of liability. 59 Comp. Gen. 597 (1980). Requests for relief of disbursing officials will be handled in accordance with these principles, and relief from liability normally can be expected when the criteria outlined above are satisfied.

Finally, FMS has asked us whether a Memorandum of Understanding (MOU) with its client certifying agencies, explicitly authorizing it to add "ZIP + 4" digits and make other address corrections, would be sufficient to shield its disbursing officials from any liabilities for improper payments that may result from the use of the automated address-correction system.

We are of the opinion that such an MOU would not shield FMS disbursing officials from liability for improper payments. Since the duties and liabilities of disbursing officials are governed by statute, see 31 U.S.C. § 3325(a) and § 3527, an MOU that attempts by agreement to alter or shift these duties and liabilities is void and unenforceable. *See* 17 Am. Jur. 2d Contracts § 165.

## Conclusion

An automated "ZIP + 4" address-correction system effectively utilizes information accessible to the government for the purpose of improving and correcting addresses and ZIP Codes. A disbursing official's use of such information by means of a generally reliable software system is in the furtherance of his duty to deliver to the payee checks issued as payment for government obligations. 16 Comp. Gen. 840 (1937). There will only be rare occasions when the system may lead to an improper payment, and, under appropriate circumstances, disbursing officials exercising reasonable care and good faith can be relieved from any resulting liability.

## B-236168, November 14, 1989

## Procurement

**Competitive Negotiation**

**■ Offers**

**■ ■ Evaluation errors**

**■ ■ ■ Allegation substantiation**

Contracting agency reasonably evaluated awardee's offer based on its proposed use of a component manufactured by protester, where protester refused to formally agree before award that it would make the component available, but the record, including a fact-finding conference, establishes that the protester made statements to the agency before award from which the agency reasonably concluded that the protester would make the component available in the event of an award to another firm.

## Matter of: Magnavox Advanced Products and Systems Company

Magnavox Advanced Products and Systems Company protests the award of a contract to Electrospace Systems, Inc. (ESI), under request for proposals (RFP) No. N00039-88-R-0274(Q), issued by the Navy's Space and Naval Warfare Systems Command (SPAWAR), for satellite communications terminals. Magnavox principally disputes SPAWAR's evaluation of proposals.

We deny the protest.

The solicitation requested fixed-price proposals for quantities of AN/WSC-6(V) Super High Frequency Satellite Communications Terminals and stand-alone OM-55/USC Satellite Communications Modems. One version of the terminal is deployed on board the Navy's small, noncombatant T-AGOS ships; the terminals transfer data to satellites for relay to onshore terminals in connection with the detection, classification and tracking of enemy submarines. Another version of the terminal is deployed on major combatants such as aircraft carriers and battleships, and incorporates the OM-55 modem.

In prior procurements, the agency separately contracted with a number of firms for major components of the system (including Magnavox for the OM-55 modem and Raytheon Company for the high power amplifier (HPA) used in the terminals), and then provided these components as government furnished equipment (GFE) to ESI, which had been selected to act as the system integrator. In this procurement, however, the solicitation contemplated award of a single prime contract under which the awardee would be responsible for both providing and integrating the components. The solicitation provided that the use of non-developmental items was the preferred method of satisfying the agency's operational requirements; it required offerors to demonstrate how they would provide for the full compatibility and the physical and functional interchangeability of the new terminals with the previously supplied terminals. The solicitation further required offerors to identify proposed subcontractors, provide a clear statement of their capabilities and experience, furnish firm commitments from these subcontractors, and identify the methods that would be used to control subcontractors' performance and schedule.

The solicitation provided for proposals to be evaluated on the basis of three evaluation criteria, as follows: (1) price (with an undisclosed evaluation weight of 55 points); (2) technical (35 points), including understanding of technical requirements, schedule, technical approach, and production approach and facilities; and (3) management (10 points), including related experience and past performance, personnel, and adequacy of the production management system.

Two teams prepared proposals for submission by the scheduled September 23, 1988 closing date for receipt of proposals, one headed by Magnavox and another headed by ESI, which included Raytheon. Magnavox solicited Raytheon for a proposal to supply the HPA it had previously furnished the agency, but by letter of August 2 Raytheon conditioned submission of such a proposal on Magnavox's acknowledgment of Raytheon as the sole source for the HPA in the event of award to Magnavox. Magnavox responded that it was unable to meet this condition unless SPAWAR designated Raytheon as a sole source; however, the agency already had decided against designating Raytheon as the sole supplier for the HPA. By letter of August 22, Magnavox furnished the agency with copies of its correspondence with Raytheon and requested a 30-day extension of the closing date so that it could obtain viable alternative sources; in response, the closing date was extended to October 24.

When ESI likewise subsequently refused to respond to Magnavox's request for a proposal for certain components it had previously manufactured unless designated a sole source, Magnavox advised Raytheon and, by letter of September 30, the agency that it had determined that "it must decline to bid the fabrication of the OM-55 modem equipment to the Raytheon ESI team" so as to keep "the competition on an even technical basis." Moreover, it stated that it had developed second sources for Raytheon's HPA and ESI's components and was "committed to those sources" for this proposal due to remaining time until the closing date. Raytheon subsequently offered to bid the HPA to Magnavox without the sole-source precondition, but by letter of October 5 Magnavox reiterated that insufficient time remained to modify its proposal effort.

On October 7, ESI wrote SPAWAR to request that, in view of Magnavox's refusal to make the OM-55 modem available to the ESI team, the agency either modify the solicitation to designate Magnavox as a directed source for the modem, and thereby require Magnavox to offer the modem to all offerors, or provide the modem as GFE. ESI explained that it believed there was no other credible source for the modem. In response, SPAWAR's Contract Award Review Panel (CARP) directed SPAWAR's contract negotiator to contact the ESI and Magnavox teams to clarify their intention with respect to making components they had previously produced available to other offerors.

An October 13 memorandum documenting the negotiator's contacts with the offerors indicates that the negotiator advised ESI on October 11 that there was insufficient time to provide the OM-55 modem as GFE and that designating Magnavox as the sole source for the modem would pose unacceptable problems. The memorandum also states that during an October 13 telephone call from the negotiator to the Magnavox contracts manager, the manager:

confirmed that Magnavox had developed alternate sources to Raytheon and ESI. They [Magnavox] will not quote to either [Raytheon or ESI] nor accept any bids from them (returning them, if any, unopened) to avoid potential problems. However, if selected for award, Magnavox would ask each for a quote, and, if unsuccessful, Magnavox would submit a bid to either for its OM-55.

According to the agency, the negotiator briefed the CARP on October 13 and the panel concluded that the matter was adequately resolved.

Only Magnavox and ESI submitted proposals by the October 24 closing date. Both firms were included in the competitive range and, after discussions, were requested to submit best and final offers (BAFOs). These BAFOs were found to include conditions inconsistent with the solicitation, so the agency reopened negotiations, advised offerors of the areas deemed unacceptable, and requested submission of second BAFOs.

Magnavox's revised BAFO price of $145,987,666 was $4,406,300 (approximately 3 percent) less than ESI's price of $150,393,966, but ESI received a higher overall combined score—91.3 points—than Magnavox—87.5 points—primarily because of ESI's perceived relative technical superiority. In particular, agency evaluators considered it a proposal strength (under the subcriteria for understanding technical requirements, schedule, production approach and facilities, and related experience and past performance) that ESI, which had proposed Magnavox OM-55 modems, was offering components produced by the manufacturers that had previously furnished the system components under the program. By contrast, the CARP concluded that

the overriding concern . . . with [Magnavox's] offers throughout this competition has been the inherent technical and schedule risks posed by [Magnavox's] steadfast decision to go to new vendors rather than incumbent sources for certain subsystems: high power amplifier (HPA), local operation control center (LOCC), remote operation control center (ROCC), cesium beam frequency standard . . . and LNA [low noise amplifiers]. Specifically, the HPA is an extremely complex, major portion of the AN/WSC-6(V). There are no reprocurement drawings available, and certain portions in the existing HPA are proprietary, necessitating redesign which is bound to be complicated by interchangeability requirements. The new vendor (MCL, Inc.) is also untested in producing militarized HPAs. All new subassemblies will require first article approval and an interchangeability demonstration for acceptance . . . the Government remains highly skeptical that [Magnavox] could master the technical and schedule challenges using new vendors, especially for the HPA.

Accordingly, the source selection authority (SSA) concluded that ESI's proposal "provides the most sound technical approach to production and presents the least risk in meeting the critical delivery schedule." Finding that these considerations offset Magnavox's lower price, the SSA selected ESI for award. Upon learning of the resulting award, Magnavox filed this protest with our Office.

## Evaluation Of Magnavox's Proposal

Magnavox disputes the evaluation of its proposal, first arguing that the agency unreasonably concluded that it had made a "steadfast decision" to obtain the HPA from a new vendor, MCL. In this regard, the protester notes that in its September 15 letter to SPAWAR, it stated that although it had assembled a team of suppliers for the HPA and other components, it was its intent that the ultimate selection of the component suppliers would be based on a post-award

competition. Magnavox also advised SPAWAR's contract negotiator that it intended to solicit quotations from Raytheon after award. In addition, Magnavox notes that, although it indicated in its proposal that it had "selected" MCL to provide the HPA, it also listed Raytheon as an "alternate source" and stated that the "final selection of each subcontractor will occur subsequent to contract award and [BAFOs] from our potential contractors."

In reviewing the propriety of an evaluation, we will not make an independent determination of the merits of the technical proposals; rather, we will examine the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. *Pitney Bowes,* 68 Comp. Gen. 249 (1989), 89-1 CPD ¶ 157. Applying this standard, we find that the evaluation of Magnavox's proposal with respect to the furnishing of the HPA was reasonable.

As discussed above, the solicitation emphasized the agency's preference for nondevelopmental items, and required offerors to demonstrate how they would provide the necessary physical and functional interchangeability with previously supplied components; where an offeror proposed to furnish products from a subcontractor, the solicitation required a description of the proposed subcontractor's capabilities and experience. Although Magnavox's proposal left open the possibility of selecting another subcontractor, including Raytheon (based on the assumption that Raytheon ultimately would agree to furnish Magnavox its HPA), for the HPA after award, the proposal furnished information only with respect to MCL's capabilities and experiences; the agency thus considered only MCL's capability for producing the HPA to be relevant. We think this was a reasonable conclusion.

While, arguably, the agency could have evaluated Raytheon's obvious ability to perform satisfactorily (as the firm that previously had furnished the HPA) without a lengthy, detailed proposal treatment, evaluating the proposal on this basis would have entailed ignoring the detailed proposal treatment of MCL in favor of a mere possibility. In this regard, Magnavox adopted a strategy of proposing a specific alternate source for the HPA (as well as for other less important components Raytheon and ESI had not agreed to furnish), while providing that a different subcontractor could be used, depending on the results of a price competition after award. The agency was not required to evaluate Magnavox's proposal based on the possibility that components from another subcontractor ultimately would be used.

As for the propriety of the evaluation of MCL, during negotiations SPAWAR specifically questioned Magnavox concerning MCL's experience in manufacturing HPAs of the type being procured under the requirements of the applicable military specification (MIL-E-16400H), which establishes and incorporates stringent standards for the performance and testing of electronic equipment. The agency also requested a further explanation of Magnavox's assessment of only a low risk assessment in this area. Although in response Magnavox described MCL's experience in producing HPAs for military use ashore and for commercial shipboard use, it failed to list any military shipboard experience. Rather,

Magnavox acknowledged that MCL would need to move from its "present design level to MIL-E-16400 [which] will be mainly in the area of more rugged mechanical design to meet shock and vibration requirements." Accordingly, in view of MCL's lack of experience in meeting the applicable military standard and the difficulties likely to be encountered by any new firm in manufacturing the highly complex component, we believe that the agency reasonably concluded that the proposal of MCL to supply the HPA represented a significant risk.

Magnavox questions the adequacy and specificity of discussions with respect to this perceived weakness in its proposal, but we think the discussions, as indicated above, clearly led Magnavox into the area of the weakness sufficiently to permit it to respond; SPAWAR specifically questioned Magnavox as to MCL's experience and as to the risk involved in using MCL. Further, the agency's failure to raise the matter again in its request for revised BAFOs did not render the discussions inadequate. The adequacy of discussions is judged by whether the offeror is informed of the deficiency and had an opportunity to revise its proposal; Magnavox had such an opportunity in its first BAFO. An agency is not required to help an offeror, through a series of negotiations, improve its technical rating until it equals that of the other offerors. *See Aydin Vector Div. of Ayden Corp.,* B-229569, Mar. 11, 1988, 88-1 CPD ¶ 253.

## Evaluation Of ESI's Proposal

Magnavox also contends that SPAWAR improperly evaluated ESI's proposal by unreasonably assuming in its evaluation that ESI could supply OM-55 modems manufactured by Magnavox. In particular, Magnavox denies that its contracts manager ever advised the SPAWAR contract negotiator that Magnavox would make its OM-55 modem available to the awardee if Magnavox were not the successful offeror.[1]

In connection with the protest, we held a fact-finding conference under our Bid Protest Regulations, 4 C.F.R. § 21.5(b) (1989), to determine what information the SPAWAR contract negotiator received during his October 13 discussions with Magnavox's contracts manager concerning Magnavox's willingness to bid the OM-55 modem to ESI after award. Based upon a preponderance of the evidence from both the conference and the written record, we find that Magnavox's contracts manager did provide the agency contract negotiator with information from which he reasonably could conclude that Magnavox, while unwilling to openly agree to make the OM-55 modem available to ESI prior to award, nevertheless would do so if ESI were the successful offeror.

[1] We have previously recognized that a contracting agency in evaluating proposals may consider evidence obtained from sources outside the proposals so long as the use of extrinsic evidence is consistent with established procurement practice, *Western Medical Personnel, Inc.,* 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310, and indeed, in appropriate circumstances, the contracting officer *should* consider extrinsic evidence when evaluating proposals. *Univox California, Inc.,* B-210941, Sept. 30, 1983, 83-2 CPD ¶ 395; *see G. Marine Diesel; Phillyship,* B-232619; B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90; *Inlingua Schools of Languages,* B-229784, Apr. 5, 1988, 88-1 CPD ¶ 340.

Based on the fact-finding conference we specifically find as follows. As of October 13, Magnavox had not yet determined not to bid the OM-55 modem to ESI if that firm were selected for award. The Magnavox contracts manager testified that he never advised SPAWAR that Magnavox would not be willing to bid the modem to ESI if that firm received the award, Transcript (TR) at 23, and the cognizant Magnavox senior vice president/general manager (VP/GM) testified that the decision not to bid the modem after award was made by him only after the source selection. TR at 59, 76-77. Although the Magnavox contracts manager denied he ever stated that Magnavox *would* bid the modem to ESI if that firm was awarded the contract, TR at 12, he conceded that he did advise the SPAWAR negotiator that, "downstream, management may review this and take another look at it," and that it was "very possible," TR at 8, and he did then offer to supply the modem directly to SPAWAR for provision to the ultimate contractor as GFE. TR at 9.[2]

The SPAWAR negotiator's account of Magnavox's position as revealed to him on October 13 also is consistent with what we find was a reasonable interpretation of a conversation the Magnavox senior vice president/general manager (VP/GM) had with an ESI division manager on or about October 14; while refusing at that time to submit a bid to ESI for the OM-55 modem, the VP/GM indicated that after award Magnavox would sit down with ESI and "do what's right," or "do the right thing," which the ESI division manager interpreted as a statement of Magnavox's willingness to negotiate after award for the supply of the components manufactured by each firm. TR at 69, 76, 120.

Based on these statements and the information in the written record, as discussed previously, we think the agency reasonably concluded that Magnavox would furnish the modem to ESI.[3] It follows that the agency reasonably evaluated ESI's offer favorably based on its proposed use of the highly regarded Magnavox modem.

Moreover, we do not find SPAWAR's evaluation in this regard to have been inconsistent with its conclusion that the primary weakness in Magnavox's offer was that firm's proposal of a new source, MCL, for the HPA. Although we recognize that the possibility existed that Magnavox might have used Raytheon in the event of award, SPAWAR could not reasonably have evaluated Magnavox's proposal on that basis given Magnavox's different approach of proposing both MCL and other alternate sources, subject to selecting the ultimate subcontractor based on a post-award competition. Since Magnavox retained the discretion to make award to MCL and only discussed at any length that firm as a source

[2] We consider it significant that while the SPAWAR negotiator prepared his memorandum the day of the conversation with the Magnavox contracts manager, TR at 94, when presumably his recollection of the conversation was still fresh in his mind, the Magnavox contracts manager testified that he had no notes on the conversation, TR at 10, and was testifying from memory concerning a conversation that occurred approximately 8 1/2 months prior to award.

[3] Although we do not think this arrangement amounted to a "firm commitment" of the subcontractor, as called for by the RFP, we think it is clear that the agency did not contemplate a commitment in the form of an actual subcontractor legal obligation, as evidenced by its similar consideration of Magnavox's proposal of MCL without a firm commitment of that firm's facilities.

for the HPA, SPAWAR relied on the best information available and acted reasonably in evaluating Magnavox on the basis of its proposal of MCL. In contrast, because ESI firmly proposed using Magnavox's modem (and, as determined above, SPAWAR determined that the modem would be available), it was proper to evaluate ESI's proposal on that basis.

The protest is denied.

## B-235787, November 20, 1989

### Civilian Personnel

**Relocation**
**■ Relocation service contracts**
**■■ *Eligibility***

### Civilian Personnel

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

An agency policy limiting temporary quarters to 30 days for all transferred employees who elect relocation services is contrary to the Federal Travel Regulations and should not be enforced. An employee's claim for an additional period of temporary quarters, denied on the basis of the agency policy, is remanded to the agency for reconsideration in light of the employee's particular circumstances.

## Matter of: Rosemary A. Smith—Relocation Services—Temporary Quarters Subsistence Expenses

This is in response to a request from the Forest Service, United States Department of Agriculture (USDA), for a review of a claim submitted by Ms. Rosemary A. Smith for an additional 30 days of temporary quarters subsistence expenses (TQSE). The claim was denied by the agency based on a USDA policy which limits TQSE to 30 days when the relocation service is used. For the reasons stated below, we find that the USDA policy is contrary to the Federal Travel Regulations, and we remand the case to the agency for reconsideration of Ms. Smith's claim based on her particular circumstances.

### Background

Ms. Smith transferred to Ketchum, Idaho, from Boise, Idaho, in June 1988, and was entitled to reimbursement for relocation expenses. However, Ms. Smith elected to use the relocation services, including home sale services, offered by her agency. Her request for authorization acknowledged her understanding of an agency policy that when an employee elected relocation services TQSE would

be limited to 30 days. On the basis of that policy, intended to hold down relocation costs, the agency approved Ms. Smith's request and limited her to 30 days TQSE.

Ms. Smith later requested an extension of temporary quarters. Her justification was that there was a delay of approximately 30 days in the agency award of a new relocation services contract, and consequently she did not receive an offer on her residence from the new contractor until after her approved TQSE period ended. Her request for additional days of TQSE was denied by the agency based upon the same policy reasons that limited her initial period to 30 days, *i.e.*, to hold down relocation costs.

Ms. Smith questions the validity of the initial 30-day limitation and the agency's denial of her request for an extension. On the premise that the temporary quarters allowance is not an entitlement, the agency contends that it properly exercised its discretion in limiting the allowance to 30 days when an employee elects to use relocation services.

## Opinion

It is within an agency's discretion to determine whether to authorize temporary quarters and for what length of time. *See* 5 U.S.C. § 5724a(a)(3) (Supp. IV 1986) Federal Travel Regulations (FTR), chapter 2, part 5 (Supp. 10, March 13, 1983), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1988); *Meryl Bullard,* B-221978, Apr. 2, 1986. This Office will not challenge an agency's exercise of this discretion unless its determination is arbitrary, capricious, or contrary to law. *Alexander Bell,* B-201382, Aug. 26, 1981. The issue here is whether the agency's actions were consistent with law and the implementing regulations.

The law provides that when a transfer occurs the government may pay "subsistence expenses of the employee and his immediate family for a period of 60 days while occupying temporary quarters when the new official station is located within the United States . . . ." 5 U.S.C. § 5724a(a)(3). The same law provides that the period may be extended for an additional 60 days upon the determination by the agency that there are compelling reasons for the continued occupancy of temporary quarters.

Paragraph 2-5.2 of the FTR, implementing 5 U.S.C. § 5724a(a)(3), provides for an initial period of temporary quarters of "not more than 60 consecutive days" when such occupancy is determined to be necessary, and an additional period "not to exceed 60 consecutive days" may be allowed upon a determination of compelling reasons. Thus, agencies may allow varying periods of TQSE. However, FTR, para. 2-5.1 provides that procedures prescribed by agencies for administering the provisions relating to TQSE must assure that "the administrative determination as to whether the occupancy of temporary quarters is necessary and the length of time for occupancy shall be made on an individual-case basis."

The USDA policy restricting TQSE for employees using relocation services is defined in the Forest Service Handbook Interim Directive No. 42, 2-12.2b(1)(c)(ii) (June 15, 1988) in pertinent part as follows:

(ii) *Temporary Quarters.* Employees requesting relocation services are limited to reimbursement of a maximum of 30 days temporary quarters. This limitation does not mean that the employees would only be in temporary quarters 30 days. If the employee is in temporary quarters longer than 30 days, the expenses are personal to the employee.

We know of no provision in FTR, chapter 2, part 12 (Supp. 11, July 25, 1984), regarding the use of relocation service companies, which would authorize such a restrictive TQSE policy for employees using relocation services. To the contrary, we believe such a policy is in conflict with the FTR requirement that determinations of TQSE necessity and duration be made on an individual-case basis. *See William Beavers,* B-233653, decided today. *See also William D. Dudley,* 67 Comp. Gen. 310 (1988).

It is our view that while the use of relocation services may be a factor to be taken into consideration in determining an employee's need for and duration of TQSE, since use of the service may generally be easier and faster than private residence sale, an individual employee's situation may involve other factors demonstrating a need for an extended use of temporary quarters. Ms. Smith's claim presents just such a situation—a 30-day delay in the award of a new relocation services contract by her agency.

Accordingly, we remand Ms. Smith's claim to the agency for reconsideration under FTR, para. 2-5.2a(2) on the basis of her case in accordance with the requirements of the FTR.

## B-236160, November 20, 1989

## Procurement

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

Protest allegation that agency failed to synopsize sole-source procurement properly, not filed until after award of the contract, is untimely and therefore not for consideration under the Bid Protest Regulations of the General Accounting Office.

## Procurement

**Noncompetitive Negotiation**
**■ Contract awards**
**■■ Sole sources**
**■■■ Propriety**

Agency decision to award sole-source contract to the only known qualified source is proper where agency does not have the necessary data to conduct a competitive procurement or sufficient time to test an unproven product.

## Procurement

**Noncompetitive Negotiation**

■ **Alternate offers**

■■ **Rejection**

■■■ **Propriety**

Protester has the responsibility of demonstrating that its product is an acceptable alternative to the designated sole-source item, and where agency has reviewed protester's submittal and reasonably concluded that acceptability of the firm's product cannot be determined without testing, agency has fulfilled its obligation to consider protester's proposal and need not conduct discussions with the offeror.

## Procurement

**Noncompetitive Negotiation**

■ **Amendments**

■■ **Issuance**

■■■ **Lacking**

Protest of agency's correction of an apparent solicitation ambiguity, after receipt of proposals submitted in response to a sole-source procurement, without issuing an amendment is denied since the protester, which submitted a nonconforming proposal, was not prejudiced by the agency's action.

## Procurement

**Noncompetitive Negotiation**

■ **Alternate offers**

■■ **Rejection**

■■■ **Propriety**

Where protester failed to offer an acceptable product in response to a sole-source procurement, neither the contracting agency's delay, if any, in advising protester of the contract award, nor its decision not to conduct a debriefing, which are procedural matters, affect the propriety of its rejection of the protester's proposal.

## Matter of: Piezo Crystal Co.

Piezo Crystal Company protests the award of a sole-source contract to Hewlett-Packard Company (H-P) by the Defense Electronics Supply Center (DESC), Defense Logistics Agency (DLA), under request for proposals (RFP) No. DLA900-89-R-A096. The RFP was issued for 900 to 7,200 each crystal controlled oscillators to be supplied in variable quantities, as ordered. The protester contends that the agency violated federal regulations governing sole-source procurements and, otherwise, acted to improperly exclude it from the procurement. It seeks award of the contract on the basis that it offered the lowest price and a product which it contends meets the government's needs.

We deny the protest.

## Background

A crystal oscillator is a component of an electronic counter (a testing device) used in the calibration of electronic frequencies and circuits of various defense aircraft. Because of the purpose for which it is used, the required crystal oscillator must be capable of maintaining its established frequency with a high degree of accuracy over at least a 24-hour period after calibration. The record indicates that H-P manufactures the electronic counters that have been and are now being used by the user services. Although H-P also manufactures crystal oscillators for use with the electronic counters it manufactures, the government has previously purchased replacement oscillators manufactured by the General Dynamics Corporation (GD) or built to the specifications of GD Drawing No. 6010504, and designated as national stock number (NSN) 5955-00-571-9496 (hereinafter, NSN -9496).

To facilitate the calibration, checking and aligning of more sophisticated aircraft, however, H-P upgraded its electronic counters and manufactured a different oscillator, H-P part number (P/N) 59991A-K74, and designated as NSN 5955-01-289-1212 (hereinafter, NSN -1212) for use with the upgraded electronic counter. The user services subsequently discovered that NSN -9496, built in accordance with GD Drawing No. 6010504, no longer met the frequency stability requirements of the upgraded counters because it failed to retain the established frequency range over the necessary period of time and, consequently, required recalibration approximately every 2 hours. According to the record, the frequency of the new H-P oscillators is almost twice that of NSN -9496. For this reason, the engineering activity determined that NSN -9496, the oscillator built to the GD drawings, was not adequate to meet the calibration requirements of the testing equipment. Because H-P has not released the technical data by which potential alternates to its new oscillator could be evaluated, the engineering activity also determined that H-P is the only approved source capable of providing the required oscillators and accordingly notified DESC, which has the supply management responsibility for purchasing the part.

In March 1989, a proposed procurement was synopsized in the *Commerce Business Daily* (CBD) for the supply of crystal oscillators, NSN -1212. The RFP for this procurement was issued for the H-P oscillator "[in accordance with General Dynamics] Drawing NR....6010504...."

Piezo and H-P submitted proposals in response to the RFP. Piezo proposed, as the "exact product" required by the RFP, P/N 2310007-11, which it manufactures in accordance with the GD drawing, at a price of $473.70 per unit for 1,800 units (the quantity upon which cost and pricing data was to be based and for which the contract was ultimately awarded). H-P proposed its P/N 59991A-K7 (NSN -1212) at a price of $786.75 per unit for 1,800 units.

Shortly after the closing date for the receipt of proposals, the contracting office requested the Engineering Support Activity (ESA) to evaluate as an "alternate item" the oscillator which Piezo proposed. When, after approximately 2 weeks, Piezo learned that its proposed oscillator was being evaluated as an alternate

item, it informed the agency, by letter dated May 17, that the oscillator it proposed was not offered as an alternate item, but as the exact item called for by the solicitation, since the item does not deviate from the GD drawing. There is no indication of record that the agency responded to this letter.

On May 30, the ESA's rejection of the oscillator Piezo proposed was forwarded to the contracting office and, in response to the protester's telephone inquiry on the same day, was communicated to Piezo's representative. When Piezo's representative next inquired on June 7 concerning the status of the procurement, a contracting official informed him that "the [procurement] file contained a [justification and authorization for other than full and open competition]." The protester states that the contracting official made reference at that time to "a possible sole source award."

The protester then, by letter dated June 7, expressed disagreement with the agency's actions in "needlessly making the [s]ubject RFP a sole source procurement." Piezo suggested in that letter that the agency fulfill its "critical" need for 1,800 units by making a "split award" to it and to H-P, and further requested that the agency purchase no more units through this procurement than were critically needed, and reserve the balance of its stock requirement for competitive procurement at a later date.

The agency did not respond to Piezo until, by letter dated July 5 (received by the protester on July 10), it informed the protester that its offer was rejected and award was made to H-P,[1] whose oscillator was specified in the RFP. Citing 10 U.S.C. § 2304(c)(1) as authority for the restricted competition, the agency stated further that the acquisition was conducted by other than full and open competition because of equipment modifications that require the unique features of H-P's oscillator. Following its receipt of the notice of award, Piezo filed this protest, essentially contesting the award of the contract on a sole-source basis.

## The Protest

The protester objects to the sole-source award of the contract on the basis that the agency did not properly synopsize the procurement as a sole-source requirement, failed to demonstrate that the product was available from only one source, and did not develop specifications for the oscillator so as to foster competition on the basis of performance requirements. The protester also contends that the "scope and terms" of the RFP exceed the agency's minimum needs.

Piezo maintains that the synopsis did not identify the intended source and state the reason justifying the use of other than competitive procedures, as required by the applicable statutes and implementing regulations. The protester further maintains that the synopsis was improper and misleading because it contained

[1] The record indicates that award was made on June 29.

a reference to standard note 26, and not to standard note 22 which is to be included if a sole-source procurement is proposed.[2]

The agency maintains that the synopsis of the procurement substantially complied with all applicable legal requirements, with the exception that it did not state the reason justifying the use of other than full and open competition procedures, but that the purpose of publicizing proposed sole-source procurements (including the justification for using other than competitive procedures) were fully met since Piezo had an opportunity to submit a proposal showing that its product would meet the agency's needs.

The agency also acknowledges that the synopsis did not "explicitly" inform potential offerors that it proposed to make an award based on the H-P oscillator, but maintains that the protester "had clear notice" from the solicitation, in conjunction with the synopsis, that the requirement was for the H-P oscillator. Concerning its inclusion in the synopsis of note 26 as opposed to note 22, the agency states that Piezo's objection is academic because Piezo was given the same benefit—consideration of its proposal—that it would have been entitled to by the inclusion of note 22.

The procurement synopsis stated:

OSCILLATOR CRYSTAL CONTROL, Sol DLA900-89-R-A096. Due abt 12 Apr 89....[NSN] 5955-01-289-1212 Del 90 days. Calling state name addr and sol nr. See Note 26. All resp sources submit offers which DESC shall consider....

In Section B-1 (Schedule of supplies and services) the solicitation listed the requirement as:

NSN 5955-01-289-1212 Oscillator, Crystal Controlled (28480) Hewlett-Packard P/N 5991A-K74 I/A/W Drawing NR. 12436 6010504

* * * * *

Type Number 6010504-002.

The synopsis did not specifically call out H-P as the intended source; it did, however, cite the NSN -1212 designation which, according to the record, was established for the H-P oscillator in late 1988. The synopsis also advised potential offerors of the opportunity to compete in the procurement.

Initially, we note that when the protester requested and received a copy of the solicitation, it knew or should have known that either the agency specifically sought the H-P oscillator or that the item description in Section B-1 of the RFP was ambiguous on its face, because it called for the H-P product by its brand name and exclusive product number (as well as by its NSN which, as previously stated, also appeared in the synopsis), built "in accordance with" the GD draw-

[2] Standard note 26 states: Complete data not available. Available specifications, plans or drawings relating to the procurement described do not fully provide all necessary manufacturing and construction detail.
Standard note 22 advises that the government intends to negotiate with only one source; provides interested parties with a 45-day period in which to identify their interest and capability to respond to the requirement or to submit proposals; and states that based on the information received, the government will determine whether to conduct a competitive procurement.

ings. This is an apparent inconsistency because the H-P oscillator is not built in conformance with the GD drawings, as are those oscillators which have recently failed to meet the government's needs, and since the drawings for the specified H-P oscillator are held by the manufacturer as proprietary information. In addition, as we noted above, the CBD synopsis advised that the "available . . . drawings . . . do not fully provide all necessary manufacturing and construction detail." Since Piezo could not provide the H-P oscillator, it reasonably should have requested clarification as to what the agency, in fact, solicited, in light of this obvious ambiguity. In our view, it was not reasonable for the protester to assume, without more information, that P/N 281007-11 which it proposed was, as it stated, the "exact product" called for by the solicitation.

Despite the ambiguity inherent in the solicitation requirement as stated in Section B-1 and even though the synopsis did not explicitly so state, Piezo knew or should have known, based on the information provided by the solicitation when read as a whole, that the agency intended to purchase the H-P oscillator, and that the oscillator it proposed was not the exact item required by the RFP. The solicitation explicitly states that it is to be read in conjunction with the 1986 DESC master solicitation, and that it incorporates the full text of the referenced paragraphs of that master solicitation. Clause H-2 of the solicitation requires that the offer specify whether it is offering the exact product or an alternate to that required by the solicitation. Clause H-2 of the master solicitation states:

> The product described by the MANUFACTURER'S NAME AND PART NUMBER IN SECTION B of this solicitation [which includes the schedule of supplies/services] is that product which the Government has determined to be acceptable. . . . *Exact product* means the identical product cited in Section B manufactured by the manufacturer cited in Section B or manufactured by a firm who manufactures the product *for* the manufacturer cited in Section B. Any product not meeting this criteria is considered an *alternate product* . . . any product offered must be either identical to or physically, mechanically, electrically and functionally interchangeable with the product cited in Section B." (Italic in original; other emphasis added.)

This clause makes it clear that the H-P crystal oscillator, P/N 59991A-K74 (the product described by the *manufacturer's name and part number in Section B* of the solicitation), is the exact product which the solicitation calls for and which the agency had determined to be acceptable. Further, even though the schedule of supplies as set forth in Section B-1 is, standing alone, ambiguous as stated because it references the GD drawings, Clause H-2 makes it clear that anything other than the H-P oscillator P/N 59991A-K74 is an alternate product, concerning which the solicitation requires the offeror to provide information sufficient for the agency to determine whether the product is acceptable. Piezo therefore should have known from a reading of the solicitation (and, therefore, prior to the closing date for the receipt of proposals) that the RFP specifically called for the H-P oscillator.

If Piezo believed that its oscillator, P/N 281007-11 would meet the government's needs, it should have protested the synopsis, as well as the sole-source procurement, before the closing date when it responded to that solicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). Thus, we conclude that Piezo's protest of

the inadequacies of the synopsis, including the citation of note 26 instead of note 22, filed after award of the contract, is untimely.

By the same rationale, Piezo's allegations that the agency failed to demonstrate that the product it required was available from only one source and to promote competition by developing performance specifications for its oscillator requirement are also untimely, since the protester knew or should have known prior to the closing date that the procurement was being conducted on a restricted basis. We note, however, that the agency properly executed a justification for the sole-source procurement. Further, the agency has explained that the technical information which supports the required H-P oscillator, and which the government needs for the development of performance specifications, is not available to the government because that information is held as proprietary data by H-P, the product manufacturer. In our view the agency reasonably concluded that only one source was available and has provided adequate justification for conducting the procurement on a sole source basis. *See Mine Safety Appliances Co.*, B-233052, Feb. 8, 1989, 89-1 CPD ¶ 127.

Similarly, Piezo's objection to the "scope and terms" of the solicitation is also untimely. The protester challenges the agency's determination that it needs to purchase a quantity of 1,800 oscillators under the subject procurement, stating that this quantity (which Piezo says represents "the total of all purchase requests currently on file") is "overbroad." Piezo expresses the view that the agency only needs to purchase on a sole-source basis the number of units that might be delivered during the compatibility testing of its oscillator.

Although the RFP requested prices for 5 different quantities of the units, 900 to 1,799 units is the minimum quantity for which pricing information was requested, and Section B-1 of the solicitation states that cost and pricing data should be based on 1,800 units. Since the scope of the procurement was apparent from the solicitation but Piezo's protest was not filed until after award, this protest basis also is not for consideration. 4 C.F.R. § 21.2(a)(2).

The protester next asserts that the agency ignored the *possibility* that Piezo *could* demonstrate the compatibility of its product and failed to consider its proposal. This assertion is based on the agency's statement in the administrative report that it did not have "the necessary data" to conduct compatibility testing on the oscillator Piezo proposed.

This argument does not take into account certain information and instructions in the solicitation. The protester was on notice that the agency did not have complete data (specifications, plans or drawings) that would provide the necessary production details for the evaluation of the acceptability of products other than that specified in the solicitation (Section H-2, paragraph C of the master solicitation and note 26 in the synopsis). Section H of the solicitation also advised Piezo that unless it offered the exact item called for, it must, itself, provide *with its offer* sufficient data covering the design, materials, performance, interchangeability, testing criteria, etc., of both the product it offered and the product called out by the solicitation. This information is the "necessary data"

which the agency states it did not and does not have to test Piezo's oscillator, and Piezo has not asserted that it provided all of this data as required, or that it established the compatibility of its product with the specified product.

The record states, however, that the contracting entity did forward the information Piezo submitted concerning its product to the engineering support staff, which determined, based on the information available to it, that Piezo's product would not meet the agency's requirement. The agency explains that the only other method by which it can evaluate Piezo's product for compatibility is through actual testing, which, because of the urgent need for the requirement, time will not permit under this procurement. Furthermore, paragraph F of Section H-2 in the master solicitation states that consideration of an alternate product may be precluded by the offeror's failure to provide information to establish the acceptability of the product offered, and if the government cannot determine whether the product is acceptable prior to the expected award date, the alternate product proposed may be considered technically unacceptable for award under the subject solicitation.

We have recognized that a proper basis for a sole-source award exists where adequate data is not available to the agency to conduct a competitive procurement within the time available, and we will object to such an award only where the agency's action is shown to have no reasonable basis. *Aerospace Eng'g and Support, Inc.*, B-222834, July 7, 1986, 86-2 CPD ¶ 38. In light of the circumstances present here, we find that absent additional informational and testing resources which the agency has stated are necessary for the evaluation of an alternate product, the protester's proposal received consideration consistent with the government's expressed capabilities. Since the protester's disagreement is insufficient to establish that the agency's determination was unreasonable, we conclude that the protester has not met its burden of proof on this protest basis.

The protester further alleges that the agency did not give it a "meaningful opportunity to discuss all relevant aspects of its proposal." The protester states that if the agency had any questions about its capabilities to provide conforming oscillators, it should have requested specific technical information and afforded Piezo an opportunity to discuss, explain and revise or modify its proposal and show how it would meet the RFP specifications.

We do not think that under the circumstances here the agency was obligated to conduct discussions in order to fairly consider the protester's proposal. A potential offeror has the responsibility to demonstrate that its product is an acceptable alternate to the designated solesource item. *Cytec Corp.*, B-231786, Sept. 28, 1988, 88-2 CPD ¶ 294. The record shows that the agency properly evaluated all the information submitted by the protester and concluded that the protester's product was not acceptable. The agency states that this determination was not dependent on information which could have been provided by the protester but on a lack of data which needs to be obtained through compatibility testing.

Piezo also objects to the agency's deletion of the references in Section B-1 of the RFP (Schedule of supplies) to the GD drawings, a change made pursuant to an "exception to the solicitation" taken by H-P after the closing date. Piezo contends that because the agency did not make this change by an amendment to the RFP and allow Piezo to respond to the "changed requirements," the deletion constituted an impermissible material change to the solicitation, as a result of which it was deprived of the opportunity to compete on an equal basis.

Although Piezo contends that the deletion of the reference to the GD drawings from the RFP eliminated the specifications upon which Piezo had relied in submitting its proposal, the change actually eliminated the ambiguity in the RFP's listing of the requirement, since as previously stated, the reference to the GD drawings was totally inconsistent with the requirement of the H-P oscillator. The protester's objection constitutes a tacit admission of the noncompliance of its proposal, because therein Piezo admits that it relied upon the obviously incorrect reference to the GD drawings, and not the named manufacturer and part number which, according to Clause H-2 of the RFP, is *the* item the agency determined to be acceptable. Since Piezo's proposal was unacceptable as submitted and the protester does not indicate that it would have offered some other conforming oscillator had the correction or "change" been made by an amendment to the RFP, the protester was not prejudiced by the deletion of the reference to the GD drawings. *Astro-Med, Inc.—Request for Reconsideration*, B-232131.2, Dec. 1, 1988, 88-2 CPD ¶ 545, at 2. The protest is denied on this basis.

Finally, the protester alleges that the DLA deprived it of its remedies under the Competition in Contracting Act of 1984, as implemented by 4 C.F.R. § 21.4, by failing to provide it with notice of the contract award within 10 calendar days of when it was made. In addition, the protester objects to the agency's denial of its request for a debriefing. To the extent that there was a delay in notifying the protester of the award, the propriety of the agency's rejection of Piezo's proposal is not affected by any such delay or by the agency's declination to provide the protester a debriefing. *COHU, Inc.*, B-233172, Feb. 3, 1989, 89-1 CPD ¶ 114; *Senior Communications Servs.*, B-233173, Jan. 13, 1989, 89-1 CPD ¶ 37.

The protest is denied.

## B-236416.2, November 22, 1989

## Procurement

**Sealed Bidding**

■ **All-or-none bids**

■■ **Responsiveness**

Standard clause in invitation for bids providing that bids for supplies or services other than those specified will not be considered does not constitute a prohibition on "all or none" bids so as to render nonresponsive a bid containing an "all or none" qualification.

## Procurement

**Sealed Bidding**
**■ Bids**
**■ ■ Acceptance time periods**
**■ ■ ■ Expiration**
**■ ■ ■ ■ Reinstatement**

Expiration of bid acceptance period is tolled where bidder files protest challenging rejection of its bid and award to another bidder within the original bid acceptance period.

## Matter of: Phillips Cartner & Company, Inc.

Phillips Cartner & Company, Inc. protests the award of a contract to Shoals American Industries, Inc., under invitation for bids (IFB) No. N47408-89-B-2511, issued as a total small business set-aside by the Naval Facilities Engineering Command, Naval Construction Battalion Center, Port Hueneme, California, for full and half-height open-top storage and shipping containers. Phillips Cartner alleges that award to Shoals was improper because Shoals submitted an "all or none" bid in violation of the terms of the IFB, and because Shoals's bid had expired at the time of contract award.

We deny the protest.

The Navy initially rejected Shoals's low bid as nonresponsive for reasons unrelated to this protest, and made split awards to Phillips Cartner and TransTac Management Corp. Shoals contested the Navy's decision to reject its bid and filed a bid protest with our Office on August 3, 1989. Upon reviewing Shoals's arguments, the Navy concluded that its initial rejection of Shoals's bid was improper, terminated the contracts awarded to Phillips Cartner and TransTac, and awarded the contract to Shoals on August 5.[1] Shoals then withdrew its protest to our Office. On August 7, Phillips Cartner protested the award to Shoals.

The IFB calls for bids on four contract line items (CLINs); Shoals's bid included two qualifications, "All or none of CLIN 0001" and "All or none of CLIN 0003." Phillips Cartner protests that Shoals's bid was improperly accepted because the IFB prohibits "all or none" bid qualifications. Phillips Cartner further argues that the "all or none" qualification in Shoals's bid was inconsistent with the evaluation criteria of the IFB, and that the placement of the qualification on Shoals's bid form rendered ambiguous the bid for one subitem in CLIN 0001.

Bidders may condition acceptance upon award of all, or a specified group of items, unless the solicitation provides otherwise. Federal Acquisition Regulation (FAR) § 14.404-5. Accordingly, where a solicitation does not expressly prohibit "all or none," or similarly restricted bids, a bidder may properly place such conditions on award. *Tritech Field Eng'g,* B-233357, Feb. 27, 1989, 89-1 CPD ¶ 207.

[1] The Navy had initially rejected Shoals's bid for failure to certify that all end items to be furnished would be manufactured or produced by a small business. In a recent decision, we held that the failure to so certify does not render the bid nonresponsive where, as here, the IFB includes the standard clause requiring the successful bidder to furnish only small business end items. *See Concorde Battery Corp.,* 68 Comp. Gen. 523 (1989), 89-2 CPD ¶ 17.

Here, the protester claims that paragraph L.5(d) of the IFB constitutes a prohibition against "all or none" bids. This provision, found in FAR § 52.214-12, states that, "[b]ids for supplies or services other than those specified will not be considered unless authorized by the solicitation." The provision merely prohibits consideration of bids that offer physical goods or services that differ from the goods or services sought by the IFB. The protester's assertion that the clause prohibits "all or none" bids is simply not supported by the language of the clause. Thus, since the instant solicitation does not expressly prohibit such bid qualifications, Shoals's "all or none" qualification did not render its bid nonresponsive.

Phillips Cartner further argues that Shoals's bid was inconsistent with the evaluation scheme set out in the IFB. Paragraph M.2(b) of the IFB states:

(b) Award(s) will be made under this solicitation as follows:

EITHER

(1) One award based on the lowest aggregate total of Line Item Nos. 0001 through 0004

OR

(2) Two awards, one based on the lowest aggregate total of Line Item Nos. 0001 plus 0002 AND one based on the lowest aggregate total of Line Item Nos. 0003 plus 0004.

Shoals's qualification of its bid—"All or none of CLIN 0001" and "All or none of CLIN 0003"—in no way changed the Navy's ability to exercise either of these award options. Rather, in the event the Navy decided that it wanted to award a contract for only part of CLINs 0001 or 0003, Shoals's qualification gave the Navy notice that it would not accept such an award. We fail to see any inconsistency between Shoals's bid qualification and the evaluation criteria.

In its post-conference comments, the protester for the first time argues that Shoals's placement on the bid form of its "all or none" bid qualification for CLIN 0001 rendered the bid ambiguous. Specifically, Phillips Cartner argues that placement of the qualifying language between sub-CLIN 0001AC (the production quantity of the item) and sub-CLIN 0001AD (the warranty for the items) made it unclear whether Shoals intended to exclude the required warranty. This argument is untimely, as Phillips Cartner could have, but did not, raise it in its initial protest. *See Amtron Corp.*, B-233978.2, Mar. 2, 1989, 89-1 CPD ¶ 226. In any event, we do not agree that Shoals's bid was ambiguous. Shoals stated that its bid covered all or none of CLIN 0001; there is no indication of any intention to exclude subCLIN 0001AD. Rather, the qualification, placed directly beneath the production quantity at sub-CLIN 0001AC, simply indicated that Shoals would not accept an award for fewer than the total production quantity.

Phillips Cartner also argues that Shoals's original bid had expired by the time the Navy awarded a new contract to Shoals on August 5, and that the Navy's decision to ask Shoals to extend its bid violated the integrity of the competitive procurement system. As a preliminary matter, we note that the record reflects that Shoals's bid was valid for the standard 60 days, or from the June 5 submission date until midnight on August 4, and that Shoals filed its protest with this

Office on August 3. In such cases, we have held that the filing of a protest against an award made prior to the expiration of the protester's bid, has the effect of tolling expiration of the bid. *See Mission Van & Storage Co., Inc., and MAPAC, Inc., a Joint Venture,* 53 Comp. Gen. 775 (1974), 74-1 CPD ¶ 195; *Professional Materials Handling Co., Inc.,* B-205969, Apr. 2, 1982, 82-1 CPD ¶ 297, *aff'd,* B-205969.2, B-205969.3, May 28, 1982, 82-1 CPD ¶ 501.

In any event, we do not find persuasive the protester's argument that the Navy's decision to ask only Shoals to extend its bid compromised the integrity of the competitive procurement system. A legitimate concern arises about the integrity of the competitive procurement system in cases where a bidder provides a bid acceptance period shorter than the period requested in the IFB, and is subsequently permitted to extend its bid. *See Mid Atlantic Label Inc.,* B-234120, Mar. 31, 1989, 89-1 CPD ¶ 338. In such instances a bidder obtains an unfair advantage over competitors because that bidder is exposed to the risk of the marketplace for a shorter period of time, and is thus taking less risk than other bidders. Here, in contrast, Shoals's bid was valid for the standard 60-day period requested by the IFB, and there is no abbreviated bid acceptance period at issue by which Shoals could gain an advantage over other bidders.

Further, the Navy had already awarded a contract to Phillips Cartner and TransTac, and was reviewing the propriety of that award in light of the Shoals protest challenging rejection of its bid as nonresponsive. At that juncture, award to Shoals depended on the outcome of its protest, a matter over which Shoals had little direct control. Allowing extension of the bid acceptance period under these circumstances was proper, since, if the protest challenging the rejection of the protester's bid were found to have merit, the appropriate remedy would be to make award to the protester.

The protest is denied.

## B-236345, November 30, 1989

## Procurement

**Competitive Negotiation**
**■ Discussion reopening**
**■ ■ Propriety**
**■ ■ ■ Best/final offers**
**■ ■ ■ ■ Price adjustments**

Determination of whether the reopening of negotiations based on a late proposal modification is in the government's best interest is within the contracting officer's discretion; decision to reopen where the late modification showed the availability of prices significantly lower than those received in best and final offers does not constitute an abuse of discretion.

## Matter of: Weeks Marine, Inc./Bean Dredging Corp., a Joint Venture

Weeks Marine, Inc./Bean Dredging Corp., a joint venture, protests the award of a contract to Great Lakes Dredge & Dock Co., under request for proposals No. N62472-87-R- 0040, issued by the Naval Facilities Engineering Command, Northern Division, for phase 2 dredging at Naval Weapons Station Earle, in Colts Neck, New Jersey.

We deny the protest.

By the May 2, 1989, closing date, Weeks submitted an initial proposal at a price of $18,499,415, and Great Lakes submitted a proposal for $19,572,750. In late June, well after the RFP closing date, Great Lakes submitted an unsolicited proposal modification reducing its price to approximately $17,200,000. Subsequently, Weeks was informed that its proposal was within the competitive range, and that best and final offers (BAFOs) were due by June 30. Weeks states that the Navy did not advise Weeks that a late modification received from Great Lakes had influenced the Navy to seek BAFOs. Weeks asserts that no technical discussions were held, and the Navy did not notify Weeks that its proposal was deficient in any regard.

Weeks contends that because only Great Lakes knew that its late modification had precipitated another round of BAFOs, Great Lakes was at a competitive advantage and, as a result, submitted a BAFO of $16,390,500, approximately $3 million lower than its initial offer. Weeks states that it did not reduce its BAFO price because it had submitted its most favorable price in its initial offer, and because it did not know of Great Lakes's late modification. Weeks contends that the Navy improperly considered Great Lakes's modification to its proposal in violation of Federal Acquisition Regulation (FAR) §§ 15.412(c) and (d), because the late modification did not satisfy the conditions under which late modifications or proposals may be accepted. Weeks also contends that Great Lakes had become aware that Weeks had submitted a proposal as the result of a conversation between Great Lakes's subcontractor and Weeks's joint venture partner. Finally, Weeks protests the Navy's use of negotiated procurement procedures.

The Navy maintains it did nothing improper here. It explains that since both initial proposals exceeded the original government estimate of $16,845,000, and because the two proposals were significantly disparate on an item by item basis, it contacted the two offerors to allow them to explain the basis for some of the unit costs and how they intended to perform the work. As a result of these discussions, the government estimate was increased to $19,488,282. Then, roughly 6 weeks after receipt of initial proposals, Great Lakes submitted an unsolicited late modification to the Navy, which the Navy did not open. Great Lakes then telecopied an unsolicited late modification to its proposal in which Great Lakes lowered its price to $17,171,250, which was $1,326,165 lower than Weeks's offer and almost $2-1/2 million lower than its own initial proposal.

The Navy states that, since Great Lakes's telecopied modification indicated the potential for significant cost savings, the contracting officer determined that holding discussions and requesting BAFOs would be in the government's best

interest. The Navy contends that since both offerors were afforded the opportunity to revise their proposals, neither offeror received a competitive advantage over the other.

In its comments on the Navy's report Weeks points out that a business clearance memorandum had recommended award to Weeks; before this recommendation was acted on, Great Lakes submitted its late modification. Weeks asserts that Great Lakes's late modification was prompted by its concern over competition from Weeks. Weeks also asserts that once the Navy realized that the government could achieve substantial price savings by conducting another round of discussions, it was incumbent on the Navy to advise Weeks that its price proposal substantially exceeded the Navy's reasonable expectations.

We have held that an agency may, but is not automatically required to, reopen negotiations where one offeror submits a late modification that reduces its price. *Rexroth Corp.*, B-220015, Nov. 1, 1985, 85-2 CPD ¶ 505. The decision whether to reopen negotiations is within the contracting officer's discretion and essentially should be based on whether the late modification fairly indicates that negotiations would be highly advantageous to the government. *Nelson Elec., Marine Div.*, B-227906, Sept. 21, 1987, 87-2 CPD ¶ 286. Thus, although Great Lakes had no legal right to a reopening of discussions, the contracting officer was not precluded from reopening based on the firm's late modification. *Id.* In view of the significant ($1,326,165) savings Great Lakes's modification showed could be obtained, we find that the contracting officer's decision to reopen negotiations and request BAFOs was reasonable.

Weeks's argument that the FAR precluded the Navy's action here is without merit. The cited provisions relate only to the acceptance of late proposals or modifications. The Navy did not accept Great Lakes's late modification; rather, it reopened negotiations with both offerors and gave both an opportunity to submit BAFOs. We have specifically rejected the argument that these FAR provisions preclude a contracting officer from reopening negotiations after the receipt of a late modification. *Nelson Elec., Marine Div.*, B-227906, *supra.* Further, there was no duty on the part of the contracting officer to tell Weeks of the late modification, and the fact that Great Lakes apparently learned from Weeks's partner that Weeks may have submitted a proposal on this RFP has no bearing on whether or not the contracting officer could exercise his discretion to reopen negotiations, since there is no evidence that this information was provided by government officials.

With respect to the extent of discussions conducted, we have held that a request for BAFOs, in itself, constitutes meaningful discussions where, as here, a proposal contains no technical uncertainties. *Industrial Airsystems, Inc.—Reconsideration,* B-231479.2, Sept. 22, 1988, 88-2 CPD ¶ 276. Further, the government has no responsibility to tell an offeror that its price is too high unless the government has reason to think the price is unreasonable. *Id; see Price Waterhouse,* 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54. Since Weeks's initial price was substantially lower than Great Lakes's initial price, and in view of the revised government cost estimate and the Navy's view that the dredging industry was un-

dergoing a volatile market, there was no basis for the Navy to advise Weeks that its initial price was unreasonable.

Finally, Weeks did not respond to the Navy's rebuttal of Weeks's allegation that negotiated procurement procedures should not have been used so we consider this issue abandoned. In any event, this protest ground concerns an alleged apparent solicitation impropriety which is untimely since it was not filed until after the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1989).

Weeks claims entitlement to recovery of the costs of preparing its proposal and pursuing its protest; this claim is denied in view of our resolution of the protest. *Encon Management Inc.,* B-234679, June 23, 1989, 89-1 CPD ¶ 595.

The protest is denied.

# Appropriations/Financial Management

# Civilian Personnel

**Relocation**
**■ Per diem**
**■■ Reimbursement**
**■■■ Amount determination**

Entitlement to relocation travel per diem under paragraph 2-2.3d(2) of the Federal Travel Regulations is not dependent on the actual distance the employee traveled each day. Per diem is allowed on the basis of the actual time used to complete the entire trip, not to exceed the number of days established by dividing the total authorized mileage by not less than 300 miles a day.

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

An agency policy limiting temporary quarters to 30 days for all transferred employees who elect relocation services is contrary to the Federal Travel Regulations and should not be enforced. An employee's claim for an additional period of temporary quarters, denied on the basis of the agency policy, is remanded to the agency for reconsideration in light of the employee's particular circumstances.

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**■ Temporary quarters**
**■■ Interruption**
**■■■ Actual expenses**
**■■■■ Temporary duty**

A transferred employee, while occupying temporary quarters at his new permanent duty station, was required to perform several days temporary duty away from that duty station. He retained his temporary quarters during that absence and seeks reimbursement as part of his temporary quarters subsistence expenses in addition to per diem received for his temporary duty. His claim for temporary quarters lodging expenses may be allowed if the agency determines that the employee acted reasonably in retaining those quarters. 47 Comp. Gen. 84 (1967); and B-175499, Apr. 21, 1972, are overruled.

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

A transferred employee claims reimbursement for 3,541 miles for relocation travel based on his odometer reading for the route he traveled. The claim is limited to 2,853 miles which represents the

most reasonably direct point-to-point routing between his old and new duty stations based on a standard highway mileage guide.

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# Procurement

## Bid Protests

### ■ GAO authority

General Accounting Office (GAO) will consider protest against General Services Administration (GSA) solicitation to provide public pay telephones in government controlled property under GAO's bid protest authority where awards under solicitation will provide a service to government employees and will satisfy GSA mission needs, and thus the solicitation is a procurement of services by a federal agency.

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### ■ GAO procedures

### ■ ■ Preparation costs

Claim for proposal preparation and protest costs where agency took corrective action remedying alleged procurement defect in response to protest is denied since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement.

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### ■ GAO procedures

### ■ ■ Protest timeliness

### ■ ■ ■ Apparent solicitation improprieties

Allegation that procurement should have been set aside for small business is dismissed as untimely where not filed prior to date set for submission of architect-engineer qualifications statements.

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### ■ GAO procedures

### ■ ■ Protest timeliness

### ■ ■ ■ Apparent solicitation improprieties

Protest allegation that agency failed to synopsize sole-source procurement properly, not filed until after award of the contract, is untimely and therefore not for consideration under the Bid Protest Regulations of the General Accounting Office.

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## Competitive Negotiation

### ■ Best/final offers

### ■ ■ Modification

### ■ ■ ■ Acceptance criteria

Contracting agency has the authority to decide when the negotiation and offer stage of a procurement is finished and an offeror has no legal right to insist that negotiations be reopened and attempt to modify its technically unacceptable proposal after best and final offers are submitted.

51

■ Contract awards
■■ Errors
■■■ Corrective actions
■■■■ Moot allegation

Dismissal of protest challenging award to other than the low offeror without discussions is affirmed where, shortly after filing of protest, agency corrected deficiency by opening discussions with all offerors in the competitive range and requesting best and final offers; although protester's requested relief was award of contract to itself, since such relief was not appropriate, dismissal of protest as academic based on agency's appropriate corrective action was proper.

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■ Discussion reopening
■■ Propriety
■■■ Best/final offers
■■■■ Price adjustments

Determination of whether the reopening of negotiations based on a late proposal modification is in the government's best interest is within the contracting officer's discretion; decision to reopen where the late modification showed the availability of prices significantly lower than those received in best and final offers does not constitute an abuse of discretion.

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■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Contracting agency reasonably evaluated awardee's offer based on its proposed use of a component manufactured by protester, where protester refused to formally agree before award that it would make the component available, but the record, including a fact-finding conference, establishes that the protester made statements to the agency before award from which the agency reasonably concluded that the protester made statements to the agency before award from which the agency reasonably concluded that the protester would make the component available in the event of an award to another firm.

89

■ Offers
■■ Evaluation errors
■■■ Evaluation criteria
■■■■ Application

Protest is sustained where agency evaluation gave greater weight to technical factors than was reasonably consistent with the solicitation evaluation criteria by using a scoring formula which accorded only 10 percent to price, and 90 percent to technical, which resulted in award to a firm whose price was 67 percent higher than the protester's but whose technical score was only 9 percent higher than the protester's.

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tion criteria encompassed traditional elements of responsibility does not serve to convert technical finding to finding of nonresponsibility.

69

**Noncompetitive Negotiation**
**■ Alternate offers**
**■■ Rejection**
**■■■ Propriety**

Protester has the responsibility of demonstrating that its product is an acceptable alternative to the designated sole-source item, and where agency has reviewed protester's submittal and reasonably concluded that acceptability of the firm's product cannot be determined without testing, agency has fulfilled its obligation to consider protester's proposal and need not conduct discussions with the offeror.

98

**■ Alternate offers**
**■■ Rejection**
**■■■ Propriety**

Where protester failed to offer an acceptable product in response to a sole-source procurement, neither the contracting agency's delay, if any, in advising protester of the contract award, nor its decision not to conduct a debriefing, which are procedural matters, affect the propriety of its rejection of the protester's proposal.

98

**■ Amendments**
**■■ Issuance**
**■■■ Lacking**

Protest of agency's correction of an apparent solicitation ambiguity, after receipt of proposals submitted in response to a sole-source procurement, without issuing an amendment is denied since the protester, which submitted a nonconforming proposal, was not prejudiced by the agency's action.

98

**■ Contract awards**
**■■ Sole sources**
**■■■ Propriety**

Agency decision to award sole-source contract to the only known qualified source is proper where agency does not have the necessary data to conduct a competitive procurement or sufficient time to test an unproven product.

97

**Sealed Bidding**

**■ All-or-none bids**

**■ ■ Responsiveness**

Standard clause in invitation for bids providing that bids for supplies or services other than those specified will not be considered does not constitute a prohibition on "all or none" bids so as to render nonresponsive a bid containing an "all or none" qualification.

105

**■ Bids**

**■ ■ Acceptance time periods**

**■ ■ ■ Expiration**

**■ ■ ■ ■ Reinstatement**

Expiration of bid acceptance period is tolled where bidder files protest challenging rejection of its bid and award to another bidder within the original bid acceptance period.

106

**■ Bids**

**■ ■ Responsiveness**

**■ ■ ■ Conflicting terms**

**■ ■ ■ ■ Ambiguity**

Bid which is ambiguous—because bidder included conflicting delivery terms in cover letter and bid form—was properly rejected as nonresponsive since under one interpretation the bid takes exception to a material term of the solicitation.

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**■ Bids**

**■ ■ Responsiveness**

**■ ■ ■ Conflicting terms**

**■ ■ ■ ■ Ambiguity**

Where bidder creates an ambiguity in its bid by offering different f.o.b. term than required by invitation for bids (IFB), ambiguity may not be waived or corrected as a minor informality, since offering a different f.o.b. term than required by the IFB is a material deviation.

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**■ Bids**

**■ ■ Responsiveness**

**■ ■ ■ Determination time periods**

A bid that is nonresponsive may not be corrected after bid opening to be made responsive, since the bidder would have an unfair advantage over other bidders by being able to choose to make its bid responsive or nonresponsive.

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