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Notice

Decisions in the December 1989 through March 1990 pamphlets were incorrectly paginated. Tables and text of the annual volume 69 will be corrected to reflect the repagination. Decisions for June are accurately numbered.

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Preface

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

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

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

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

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

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

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

Table of Decision Numbers

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Procurement

Payment/Discharge

■ Payment deductions

■■ Propriety

An amendment made by the Civil Aeronautics Sunset Act of 1984 to 31 U.S.C. § 3726(b)(1) does not limit GSA's longstanding authority to deduct overcharges for airline fares from current bills due the airlines. Other authority in 31 U.S.C. § 3726(b)(2), encompassing rates based on all means of contractual arrangements or exemptions from regulation, supports such deductions.

Procurement

Payment/Discharge

■ Payment deductions

■■ Propriety

Section 322 of the Transportation Act of 1940, now codified in 31 U.S.C. § 3726, provides authority for the government to pay its transportation bills prior to audit and recover overcharges administratively determined in the post-payment audit by deduction from other bills. In *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253 (1957), the Supreme Court held that this places the burden on the carriers to provide evidence to support their charges and the burden is not on the government to prove it has been overcharged. Deregulation of domestic air transportation has not changed this relationship.

Miscellaneous Topics

Transportation

■ Air carriers

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Under the airlines' deregulated pricing system the city-pair contract fare, if applicable, or the fare selected by a traveler when a reservation is made or the ticket is issued generally is the applicable fare. GSA's position that the government is entitled to the lowest available fare for the service provided although another fare was requested has no reasonable basis in law. However, if GSA can establish that a lower fare applied and was requested but not furnished, it may apply the lower fare. The burden is then on the carriers to provide evidence to show why such fare was not available, since such evidence is peculiarly within their knowledge and competence.

Matter of: Alaska Airlines, Inc., *et al.*—Effect of Deregulation on Audit and Overcharge Collection—Burden of Proof

Alaska Airlines, Inc., together with 12 other airlines,[1] requests that the Comptroller General, pursuant to 31 U.S.C. § 3726(g)(1) (1988), review certain transportation audit actions taken by the General Services Administration (GSA) which resulted in deductions to recover overcharges from moneys otherwise due the carriers.

The matters presented for our review concern airline fares for passenger transportation between points in the United States and span approximately a 2-year period commencing in early 1985 and ending in late 1986. The airlines presented what they consider to be a representative sample of thousands of overcharges asserted by GSA, and they state that GSA continues to offset from the airlines' current revenues on the same basis. We are asked to consider several issues relating to GSA's audit positions, the answers to which will govern settlement of these thousands of items.

The following is a summary of the issues involved and of our conclusions concerning them. Following that is a detailed presentation of the case and our analysis and conclusions.

Summary

GSA's Audit Positions

Under the current provisions of section 322 of the Transportation Act of 1940, as amended, 31 U.S.C. § 3726 (1988), government transportation bills are paid upon presentation by the carrier prior to audit. GSA then is responsible for performing a post-payment audit of the bills and collecting any overcharges. In performing its audits, GSA takes the position that the government is entitled to the lowest available rate applicable to the type of service furnished by the carrier which provided it.

To determine the fares to be applied in its audits of airline bills, GSA uses the Airline Tariff Publishing Company (ATPCO), which publishes the Official Passenger Tariff listing airfares covering the United States, and the Passenger Interline Pricing/Prorate System (PIPPS), which is a computerized system with a data base similar to ATPCO's. From these sources the GSA auditors select the lowest available fare applicable to the carrier used for which the record shows the travel performed qualified. This fare may be one offered by the airline to the general public or a fare applicable only to government travelers set by contract between the airlines and the government covering travel between specified city-pairs. It is GSA's policy to apply a fare only if the travel meets any specific conditions applicable to the fare. For example, if the lower fare included a condition that the ticket be purchased a specified period in advance of travel, GSA would apply that fare only if the record showed that the time of ticket purchase

[1] Continental, Delta, Eastern, Frontier, Midway, Northwest, Pan Am, Piedmont, Republic, Trans World, United, and USAIR, in conjunction with the Air Transport Association of America. The airlines are represented by counsel, Schnader, Harrison, Segal & Lewis.

met the requirement. In GSA's view, the burden is then on the airline to establish that the lower fare was not available.

A major point of contention between the parties involves GSA's application of so-called controlled-capacity fares. These are discounted fares whose availability can change frequently based on demand and competitive factors. Since at the time of its audit GSA does not have information as to seat availability at these fares, it assumes seats were available and applies these fares if they are the lowest applicable. GSA leaves it to the airlines to furnish evidence to the contrary if they wish to rebut GSA's action. In doing so, GSA applies the rule followed by the Supreme Court in interpreting the Transportation Act of 1940 that the burden is on the carrier to provide the necessary evidence to support its charges, particularly as to matters peculiarly within the carrier's competence and knowledge. GSA considers availability at a controlled-capacity fare to be such a matter.

Airlines' Objections

The airlines object to GSA's audit practices on several grounds. First, they argue that as a result of a 1984 amendment to 31 U.S.C. § 3726, the statutory authority under which GSA conducts its post-payment audits, GSA no longer has authority to collect overcharges it finds on domestic air transportation by setoff and to place the burden of proof on the airlines in reclaiming the amounts collected.

The airlines also disagree with GSA's position that the government is entitled to the lowest applicable fare. They assert that under their deregulated fare systems there are now many allowable fares and the government, like other users of their services, is entitled only to the fare selected at the time the reservation is made. The airlines argue that by presenting tickets showing that transportation at the selected fare was provided they have met the burden of establishing their entitlement to payment and the government cannot reasonably expect them to establish more than this. As to the controlled-capacity fares in particular, they argue that it is impossible for them to provide information on availability of seats at those fares long after the fact because their computerized reservation systems do not store that information after the flight departs.

GAO's Conclusions

While the 1984 legislation to which the airlines refer made some changes in 31 U.S.C. § 3726, those changes only removed an obsolete reference to tariffs filed with the Civil Aeronautics Board (CAB), since the Board was abolished and the airlines are no longer required to publish their rates for domestic transportation in tariffs filed with the government. Those changes were not made for the purpose of affecting, nor did they affect, GSA's authority to audit airline bills for domestic air transportation and to collect overcharges by setoff, with the burden being on the airlines to provide evidence to support their charges. That authority clearly continues to exist under section 3726(b)(2), which covers

charges derived from rates exempted from regulation or provided by contract. Therefore, we conclude that GSA's longstanding offset authority and the burden of proof between GSA and the airlines in that regard remain unchanged.

However, GSA's position that the government is entitled to the lowest applicable fare, whether or not it is the fare selected no longer has a reasonable basis in law. In the deregulated air transportation environment the government, like other passengers, generally is entitled only to the fare selected at time of reservation. If GSA seeks to apply a fare other than that shown on the ticket, it must first establish that the other fare was requested by the government or that the government was contractually entitled to that fare. If GSA does so, it may assert an overcharge based on that fare and collect by offset. The airline then has the burden of proving that such fare was not, in fact, available and justifying the application of the higher fare. This approach is consistent with the post-payment audit statute, as it has long been interpreted, and is reasonable since in most cases only the airlines have access to information necessary to establish non-availability of the lowest fare such as information concerning availability of seats at controlled-capacity fares.

Background

Pursuant to the provisions of 31 U.S.C. § 3726 (1988), derived from section 322 of the Transportation Act of 1940, the government pays most of its bills for transportation services upon presentation by the carrier and prior to audit of the rates charged, subject to a post-payment rate audit performed under the direction of GSA.

GSA's post-payment audit is performed using the information from documents relating to the type of transportation performed and charges for which the carrier was paid. In the case of airline bills for domestic transportation, these documents generally include vouchers and tickets issued by the airline and Government Transportation Requests issued by the government agency involved.

The GSA auditors check the fares charged by the airline against published listings of the airline's fares offered to the public and special fares offered to the government by contract for government travel between various cities in the United States, so-called city-pairs contracts. Thus, in its audit of airline bills GSA uses two major sets of fares, those applicable only to government travel under the city-pairs contracts and those offered to the public.

GSA takes the position that the government is entitled to the lowest fare offered by the carrier for the type of service performed. It therefore reviews the documents applicable to each instance of travel and the fares offered by the airline used, both city-pair contract fares and those offered the public, and applies the lowest fare it finds applicable to the travel. When the GSA auditors find an overcharge on this basis they issue a notice to the airline advising it of the overcharge, and GSA collects it by setoff, if necessary, under authority of 31 U.S.C. § 3726(b). GSA then considers the burden to be on the airline to provide evi-

dence sufficient to overcome the presumption that the lower fare was applicable.

The airlines raise major issues concerning the effects of deregulation of the domestic airline industry in recent years which, they assert, have substantially changed the historic basis upon which GSA may conduct its post-payment audits of airline bills. These issues include the continued applicability of GSA's authority to collect stated overcharges by setoff, the fares applicable to government travel and the proof required to support airline billings.

Applicability of 31 U.S.C. § 3726

In conjunction with deregulation of domestic air transportation, including abolishing the CAB, the Civil Aeronautics Sunset Act of 1984, Pub. L. No. 98-443, § 9(f), 98 Stat. 1707, made a number of miscellaneous amendments to other statutes. These included an amendment to 31 U.S.C. § 3726, the codification of section 322 of the Transportation Act of 1940. Prior to the amendment by the Civil Aeronautics Sunset Act, the pertinent provisions of 31 U.S.C. § 3726 read as follows:

(a) A carrier or freight forwarder presenting a bill for transporting an individual or property for the United States Government shall be paid before the Administrator of General Services conducts an audit. . . .

(b) Not later than 3 years (excluding time of war) after the time a bill is paid, the Government may deduct from an amount subsequently due a carrier or freight forwarder an amount paid on the bill that was greater than the rate allowed under—

(1) a lawful tariff on file with the Interstate Commerce Commission, *the Civil Aeronautics Board,* the Federal Maritime Commission, or a State transportation authority; or

(2) sections 10721-10724 of title 49 or an equivalent arrangement or an exemption. (Italic added.)

The amendment made by section 9(f) of the Civil Aeronautics Sunset Act deleted from 31 U.S.C. § 3726(b)(1) the words "Civil Aeronautics Board" and inserted in lieu thereof the words "Secretary of Transportation with respect to foreign air transportation (as defined in the Federal Aviation Act of 1958)."[2] It made no change, however, to section 3726(b)(2).

The airlines contend that this amendment to 31 U.S.C. § 3726(b)(1) left GSA without authority to offset overcharges for domestic air transportation from bills currently due the airlines. They argue that the offset authority had been established when the allowable fare was readily ascertainable from tariffs filed with the CAB, but after deregulation tariffs were no longer required to be filed with the CAB. They contend that the allowability of a fare is no longer determined by referring to a single published tariff and the government can no longer easily determine the validity of a charge long after payment; therefore, Congress repealed the offset authority as it applied to domestic air transportation. They note that offset was specifically preserved for foreign air transporta-

[2] The requirement for tariffs to be filed for foreign air transportation was not repealed, but the place of filing had been changed from the defunct CAB to the Department of Transportation, effective January 1, 1985. 49 U.S.C. App. § 1551(b)(1)(B) and (b)(2) (1982).

tion since tariffs must still be filed for such transportation, and they contend that if Congress had intended the offset authority to be retained for domestic air transportation, it would have specifically so provided.

In addition, the airlines state that they are not subject to GSA's offset authority under section 3726(b)(2) because that authority refers to rates under 49 U.S.C. §§ 10721-10724, which are provisions of the Interstate Commerce Act to which the airlines are not subject. Nor do their rates fall within the "equivalent arrangement" language of section 3726(b)(2), they argue, because if that were the case, section 3726(b)(1) would never have been necessary, and there is a strong presumption in statutory construction against rendering language meaningless.

GSA disagrees, asserting that the amendment to the statute was only a technical conforming amendment made to remove an obsolete reference to the CAB, which was abolished, and not to affect GSA's authority to audit airline bills and offset overcharges. GSA asserts that it continues to have offset authority applicable to domestic air transportation under the specific provisions of 31 U.S.C. § 3726(b)(2), which covers the deregulated rates the airlines now offer the public as well as special rates they offer the government by contract.

As explained below, we agree with GSA's position on this issue.

The airlines' position means that the amendment made by section 9(f) of the Civil Aeronautics Sunset Act radically changed in favor of the airlines the historical arrangement, in effect since the Transportation Act of 1940 was enacted, under which the government makes payment in advance of audit, then audits and collects overcharges on domestic air transportation. That arrangement was described by the Supreme Court in the case of *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253, 260 (1957), as follows:

> The burden of the carriers to establish the correctness of their charges was to continue unabridged. The carriers were to be paid immediately upon submission of their bills but the carriers were in turn promptly to refund overcharges when such charges were administratively determined. The carrier would then have "to recollect" the sum refunded by justifying its bills to the agency or by proving its claim in the courts. The footing upon which each of the parties stood when controversies over charges developed was not to be changed. The right of the United States to deduct overpayments from subsequent bills was the carriers' own proposal for securing the Government against the burden of having to prove the overpayment in proceedings for reimbursement.

If the airlines' position on this issue were adopted, however, it would mean that the provisions of 31 U.S.C. § 3726(a) authorizing payment before audit of transportation bills would continue to apply to them, but the protection the government originally received in exchange, the right to set off overcharges along with the burden of proof being on the carriers to support their claims for amounts set off, would no longer exist as to domestic air transportation. This would place the government at a distinct disadvantage and accord the airlines substantially more favorable treatment than other carriers and, indeed, other types of government contractors.[3]

[3] We note that Congress, in eliminating the similar requirement for certain freight forwarders to file tariffs with the Interstate Commerce Commission (ICC), made no provision for exempting them from GSA's setoff authority
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We have found nothing in the legislative history of the amendment to section 3726(b)(1), nor has any been cited to us, which supports the airlines' argument that Congress intended to work this result. Rather, the amendment is referred to in the House report only in a section-by-section analysis of miscellaneous amendments, which merely states that:

Conforming changes are also made in a number of other statutes to reflect the termination of the CAB . . . . H.R. Rep. No. 793, 98th Cong., 2d Sess. 15 (1984); 1984 U.S. CODE CONG. & ADMIN. NEWS 2871.

Moreover, our reading of 31 U.S.C. § 3726(b)(1) and (b)(2) indicates that they include generally all-encompassing provisions to allow the government to set off for any overcharges found in its post-payment audit of carriers' rates, fares and charges. The language used was enacted when most carriers' charges were governed by tariffs filed with the appropriate regulatory body and subject to section 3726(b)(1). It was recognized, however, that the government was also entitled to some rates derived from other sources, such as rates allowed under section 22 of the Interstate Commerce Act, 49 U.S.C. §§ 10721 - 10724, or other exemptions from regulation or by contract. Thus, the provisions now found in section 3726(b)(2) were included to provide broad coverage encompassing other such rates. This is made clear by reference to the prior codification, 31 U.S.C. § 244 (Supp. IV 1980), which refers to "rates, fares and charges established pursuant to sections 10721 to 10724 of title 49 or other equivalent contract, arrangement, or exemption from regulation."[4]

This provision was added by the Transportation Payment Act of 1972, Pub. L. No. 92-550, § 1(a), 86 Stat. 1163, Oct. 25, 1972, the legislative history of which shows that it was intended to "encompass all modes of transportation and all means of contractual arrangements or exemptions from regulations" and to "dissipate any concerns that certain segments of the carrier industry are being discriminated against." S. Rep. No. 1026, 92d Cong., 2d Sess. 5 (1972). *See also,* A24222, Jan. 21, 1976, concerning the application of the statute of limitations contained in this statute, where we specifically held that the language was added to give the statute the broad coverage referred to above. Although some of the original language was dropped as surplusage when the statute was recodified and enacted into positive law as 31 U.S.C. § 3726(b), the recodification is not to be construed to change the substance of the provision, and the recodification statute and its legislative history specifically so state.[5]

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under 31 U.S.C. § 3726(b). *See* Surface Freight Forwarders Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993. Since the ICC was not abolished and other carriers continue to file tariffs with it, the removal of the filing requirement for the freight forwarders did not make a technical conforming amendment to 31 U.S.C. § 3726 necessary.

[4] The full pertinent language was as follows:

. . . The term "overcharges" shall be deemed to mean charges for transportation services in excess of those applicable thereto under tariffs lawfully on file with the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission, and any State transportation regulatory agency, and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to sections 10721 to 10724 of title 49 *or other equivalent contract, arrangement, or exemption from regulation* . . . . (Italic added.) 31 U.S.C. § 244 (Supp. IV 1980), previously 49 U.S.C. § 66(a) (1976).

[5] *See* Pub. L. No. 97-258, Sept. 13, 1982, 96 Stat. 877, 1067, which recodified and enacted as positive law title 31 of the U.S. Code. Section 4(a) of Pub. L. No. 97-258 states that its purpose was to "restate, without substantive

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Since the airlines are no longer required to file their tariffs with the CAB, section 3726(b)(1) would no longer apply to them for domestic transportation whether or not the specific reference to the CAB had been removed. It appears to us that the purpose of that change was, as the legislative history indicates, a conforming amendment to remove an obsolete reference to the CAB and to include a current reference to the Secretary of Transportation in recognition of the requirement for airlines to file their rates for foreign transportation in tariffs with that official. Thus, rather than excluding domestic air transportation from GSA's offset authority, the amendment made it clear that such authority continues to apply to foreign air transportation.

The fares the airlines now offer for domestic transportation and the special fares they provide the government under contracts are included in GSA's offset authority as rates established by "other equivalent contract, arrangement or exemption from regulation." In other words, as GSA argues, they are included within the other types of rates meant to be encompassed by section 3726(b)(2).

Basis for Overpayments; Burden of Proof

Having concluded that GSA's right to offset overpayments under 31 U.S.C. § 3726(b) continues after deregulation, we next consider the legal basis on which such overpayments are to be determined for purposes of GSA's audits. As noted previously, section 3726(b) authorizes GSA to deduct by offset "an amount paid on the bill that was greater than the rate allowed under" the pertinent arrangement. The parties differ fundamentally both on how the "rate allowed" under the arrangement is to be determined and who has the burden of proving whether such rate was available.

GSA takes the position that the government is entitled as a matter of law to receive the lowest rate on a particular flight for which its travel met the criteria identified in ATPCO or PIPPS data. According to GSA, it doesn't matter that the officials arranging for the travel may not have requested this fare since such officials have no authority to waive the government's entitlement to the lowest fare. In support of this position, GSA cites a series of judicial decisions and prior decisions of our Office. *See e.g., Great Northern Railway Co. v. United States,* 170 Ct. Cl. 188, 193-194 (1965), and cases cited therein; 58 Comp. Gen. 375 (1979); 57 Comp. Gen. 584, 586 (1978).

GSA concedes that it must establish from the ticket and other travel documents that the government travel met any conditions or restrictions attached to the fare, such as advance purchase requirements. However, GSA contends that once it has satisfied these facial criteria, the carrier has the burden of proving that this lowest fare was not, in fact, available and, therefore, that the carrier was entitled to charge a higher fare. In this regard, GSA cites *United States v. New York, New Haven and Hartford Railroad Co.,* 355 U.S. 253, *supra,* in which the

change, laws enacted before April 16, 1982, that were replaced . . ." and that the restated sections "may not be construed as making a substantive change in the laws replaced." *See also* H.R. Rep. No. 651, 97th Cong., 2d Sess. 140 (1982); 1982 U.S. CODE CONG. AND ADMIN. NEWS 2034.

Supreme Court held that the statutory provisions requiring payment of carrier bills upon delivery subject to post-payment audit and offset did not affect the carrier's burden of proof.

In particular, GSA maintains that if a carrier seeks to avoid application of the lowest fare on the basis that such fare was not available because of controlled-capacity seating restrictions, the carrier must affirmatively establish this fact, both because the carrier in general has the burden of proving its claim to a higher fare and because only the carrier has the information necessary to establish whether or not restricted seating was available.

The airlines first take issue with GSA's position that the government is legally entitled to the lowest applicable fare for a flight. They contend that the government's entitlement to the lowest fare applied only to the former regulated environment in which there generally was only one allowable fare for coach service, which could be readily ascertained from published CAB tariffs and had to be offered to all passengers including the government. However, they maintain that deregulation fundamentally changed this system. According to the airlines, under the competitive practices of the deregulated airline industry, air carriers set a standard coach fare for each flight and multiple discounts to the fare. The size of the discount and the number of seats available at that discount are determined by market forces, primarily demand, and these fares and their availability change frequently. Thus, the airlines assert, a typical flight might have dozens of fare categories, each with corresponding rules of eligibility, several of which may apply to an individual passenger.

According to the airlines, the government, like any other customer, is entitled only to the fare selected at the time the reservation is made. The airlines also note that there are specific provisions in the city-pairs contracts and in government regulations that mandate the procedures to be followed by government employees in purchasing airline tickets. If these procedures are followed, the airlines say, the allowable fare will be selected at the time of reservation.

The airlines concede that they have the burden of establishing their right to payment for services provided. However, the airlines argue that the documentation they provide when they bill the government is sufficient to establish their right to payment by showing that (1) transportation was requested, (2) a specific flight and fare were selected, and (3) the flight and fare selected were actually used. They argue that they need not, as GSA would have them do, assume the burden of proving in each case that they applied the lowest fare that ever became available. In particular, the airlines contend that information concerning the availability of controlled-capacity seats for a particular flight at various times between reservation and departure is not maintained in their computerized information systems and, therefore, could not be produced to rebut after-the-fact audit offsets by GSA. In any event, they assert that airline reservation systems generally can be relied on to produce accurate information at the time of reservation.

The airlines distinguish *United States v. New York, New Haven and Hartford Railroad Co., supra,* the principal case relied upon by GSA in support of its burden of proof argument. The airlines point out that in this case the government produced evidence showing that it requested shipment of freight under a specific tariff, but that the railroad charged a higher tariff. The airlines say that in the cases here in dispute, they billed the fares applicable at the time of reservation to the service requested and furnished as shown on the documentation provided with their billings, and that the government has not shown otherwise. Thus, they argue that they have provided all that is necessary to prove their claims, and GSA should not demand further proof that it knows they cannot furnish.

With respect to determination of the allowable rates, we note initially that there is no specific basis in the relevant statutes or case law to support the proposition that the government is *per se* entitled to receive the lowest fare applicable to air transportation. Section 3726(b) of title 31, *supra,* provides for recovery of payments "greater than the rate allowed" under an applicable tariff or equivalent arrangement; it does not state that this must be the lowest rate available.

Prior to deregulation the "rate allowed" under CAB tariffs generally did equate to the lowest rate applicable, but that was a result of the regulatory system rather than any rule peculiarly applicable to the government. As the airlines point out, the CAB tariffs contained very few rates for coach service and the application of these rates could be readily ascertained from the tariffs. The tariff system featured a prohibition against discrimination on the part of carriers in the rates they provided to any of their customers. Air carriers were generally precluded from receiving "a greater or less or different compensation for air transportation . . . than the rates, fares, and charges specified in then currently effective tariffs . . . ." 49 U.S.C. App. § 1373(b)(1) (1982). They were also specifically precluded from subjecting any person to any "unjust discrimination." 49 U.S.C. § 1374(b) (1982).

Likewise, the judicial decisions and decisions of our Office relied upon by GSA, all of which arose under the regulated tariff system, stand only for the proposition that the government is entitled to the same fares as those charged the general public for the same or similar services. Therefore, government officers have no authority to contract for *discriminatory* higher fares. These decisions do not suggest that the government ever had a special entitlement to the lowest fare.

In sum, under 31 U.S.C. § 3726(b), the government is now and was prior to deregulation entitled to recover overpayments in excess of the "rate allowed" for air transportation. Prior to deregulation, carriers generally were allowed to charge only one rate "for like and contemporaneous services under substantially similar circumstances and conditions." *Aloha Airlines, Inc. v. Civil Aeronautics Board,* 598 F.2d 250, 263 (D.C. Cir. 1979), and cases cited. However, there are many allowable rates for the same or similar services under the current deregulated system. Given these considerations, the government's fare entitlements must be determined on the basis of the specific contractual and other arrange-

ments which now govern the carriers' provision of air transportation to it. As discussed hereafter, we conclude that these contracts and arrangements do not entitle the government to pay less for air transportation than the specific fares it has contracted for, where applicable, or such other fares as it actually requests and qualifies for.

Much of the government's air travel is covered by the city-pairs contracts, and we understand that a large portion of the individual disputes between the airlines and GSA concern the appropriate fares for city-pair travel. The city-pairs contracts[6] require the contract carriers to offer an unrestricted government contract fare (designated a "YCA" fare) for each covered city-pair and permit contractors to offer an additional restricted government contract fare (designated a "MCA" fare). The contracts provide that if, after award, the contractor offers commercial fares lower than the contract fare, the government "may use" the lower fares in lieu of the contract fare "if otherwise eligible" and provided that selecting the lower fare does not alter the relative position of the contract carriers where progressive awards are made.

The above provisions must be viewed in conjunction with a regulation issued by GSA—Federal Property Management Regulation Temporary Regulation (FPMR Temp. Reg.) A-22--to implement the city-pairs contracts.[7] Paragraph 8 of FPMR Temp. Reg. A-22, captioned "Procedures for Obtaining Service," provides generally that when a reservation for contract air service is requested, the fare basis shall be identified as "YCA" or "MCA," as appropriate, "and the contractor's ticket agent shall be instructed to apply the appropriate fare basis and contract fare." Para. 8(d). It further provides that when a city-pair published in the Federal Travel Directory indicates that only one contract is awarded and the contractor subsequently offers a fare lower than its contract fare, "the ordering agency may elect to use the lower fare if qualifications for obtaining the lower fare are compatible with the agency's travel requirements." Para. 8(f). Paragraph 10 of the regulation provides that when progressive contracts are awarded for a city-pair to more than one contract carrier and a contract carrier offers the general public a fare lower than the contract fare, ordering agencies "may elect" to use the lower fare but only on the basis of specified cost comparisons. Para. 10(b).

The clear effect of these contractual and regulatory provisions is that the government is *legally entitled to receive* "YCA" or "MCA" city-pair fares for which it has contracted, and government travelers are generally expected to request these fares. While the contract terms *permit* the government to use fares lower than the contract fare if the eligibility criteria are met, use of these fares is optional and must be requested by the government. Moreover, in some circumstances use of lower fares is subject to conditions and limitations under the con-

[6] The description here is taken from the city-pairs contract provisions in effect from October 1, 1985, through September 30, 1986. Substantively identical contract provisions applied at all other times relevant to the disputes before us.

[7] We refer here to the version of FPMR Temp. Reg. A-22 in effect from October 1, 1985, through September 30, 1986. Again, substantively identical provisions applied at all other times relevant to the instant disputes.

tract and regulations, such as cost comparisons. Therefore, we do not believe that GSA has any basis to object to city-pair billings at the contract fares unless it can first establish that a lower fare was requested by the government in accordance with the city-pair contracts and FPMR Temp. Reg. A-22.

With respect to travel not covered by the city-pairs contracts, we are aware of no specific statutory, regulatory, or contractual provisions that address the government's entitlements and none has been cited by the parties. Therefore, we conclude that the government's rights here are the same as those of any member of the public who does business with an air carrier. In this regard, the airlines contend—and GSA does not contest—that customers are basically liable to pay the fare selected for the service provided.

It remains to consider the burden of proof issue in a situation where GSA can establish that the government requested the fare its auditors consider applicable and met the stated criteria, but the carrier's failure to provide that fare was based on the unavailability of controlled-capacity seating.

GSA does not dispute the validity of controlled-capacity seating restrictions on discount fares and concedes that the government is not entitled to such a restricted fare if seats were not available at that fare. However, GSA argues that since only the carrier has the information necessary to establish the unavailability of controlled-capacity seating, the carrier must assume the burden of proving this fact by some affirmative evidence. GSA appears willing to accept specific certifications from the carriers that controlled-capacity seating was unavailable on particular flights at any time from reservation to flight departure. GSA is not willing to assume the unavailability of seating based on assurances by the airlines that their reservation systems are reliable.

The airlines' main objection to GSA's position on this point is that they do not, and cannot as a practical matter, maintain information to prove after the fact in response to GSA audits that controlled-capacity seating was not available on past flights. The airlines also object to GSA's position that they must establish that such seating remained unavailable even after the reservation was made.

We believe that when the government has requested a fare and met all eligibility criteria it can ascertain, the carrier must accept the burden of proving its basis for rejecting that fare. In our view, this should be regarded as part of the carrier's general burden to justify its claim to a higher fare. Also, placing this burden on the carrier falls squarely within the rule of *United States v. New York, New Haven and Hartford Railroad Co., supra,* where the Court required the carrier to support its action in charging the government a rate higher than the rate requested. On the other hand, it is not clear on what basis a carrier could be charged with a continuing burden to establish that controlled-capacity seating remained unavailable after the time of fare selection; nor is it clear what practical consequences would follow from such an approach. For example, if seating later became available, how or why would government travelers be favored over other passengers? Therefore, in our view, the carrier need only provide evidence that controlled-capacity seats were unavailable at the time the

fare was selected. We believe that it is both reasonable and practical for carriers to assume this burden.

The airlines and GSA should resolve their individual disputes on the basis of the foregoing conclusions. We recognize that the offsets taken by GSA amount to well over $100 million and that our disposition of the issues probably invalidates most of the offsets. Nevertheless, we see no way to avoid the conclusion that GSA's basic audit positions do not have adequate support in the applicable law and, in some respects, even run counter to provisions GSA has adopted in its city-pairs contracts and regulations. We recommend that GSA either fundamentally alter its audit practices, or, in the alternative, revise its current contractual and regulatory approaches if it is convinced that they are resulting in excessive air travel costs to the government.

B-239573, September 11, 1990

Procurement

Contract Types
■ Fixed-price contracts
■■ Incentive contracts
■■■ Use
■■■■ Administrative determination

Protest that solicitation should provide for a cost reimbursement contract is denied where there is no evidence that the agency's choice of firm, fixed-priced contract type is unreasonable.

Procurement

Contract Types
■ Fixed-price contracts
■■ Offers
■■■ Evaluation
■■■■ Travel expenses

Protest that travel and related expenses should be excluded from the quoted hourly rate and essentially not evaluated in the total cost is denied where the solicitation calls for a firm, fixed-price contract and it would be improper not to evaluate such costs.

Matter of: Spectrum Technologies, Inc.

Peter F. Emmi for the protester.

Daniel Telep, Jr., United States Mint, Department of the Treasury, for the agency.

Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Spectrum Technologies, Inc. protests the terms of request for proposal (RFP) No. USM90-39, issued by the United States Mint, Department of the Treasury. Spectrum challenges the use of a firm, fixed-price type of contract and the agency's refusal to separately reimburse offerors' travel and related costs.[1]

We deny the protest.

The protested solicitation is for certain services which are one component of an effort to remove or abate asbestos containing materials at the United States Mint at West Point, New York. The location, type and extent of such materials at the West Point facility already have been identified as a result of an asbestos hazard survey conducted under a prior contract. The survey results were included in the protested solicitation. The actual abatement of the asbestos containing materials will be accomplished under a second, separate contract. The purpose of this third, protested solicitation is to obtain the services of an industrial hygiene (IH) firm, including a certified industrial hygienist (CIH), to monitor the performance of the asbestos abatement contractor. The abatement work is to be done in 14 different areas, referred to in the RFP as "phases" or "work packages," over a 180-day period. The work to be performed by the IH contractor pursuant to this solicitation was described by a 15-page statement of work (SOW) and by drawings.

Offerors were to submit technical and price proposals. The former were to include the offeror's own estimate of the personnel and asbestos sampling requirements anticipated for the monitoring services to be performed for each phase. As for price, the solicitation's pricing schedule was divided into sections A and B. Section A reflects the fact that a major task under the contract is to collect and analyze samples for the presence of asbestos. Under section A of the pricing schedule, offerors were asked to provide unit and extended prices for certain estimated quantities of samples subdivided into specific sample types and turnaround periods. As for the other services to be performed by the IH contractor in monitoring the abatement contractor's work, section B of the pricing schedule requested offerors to provide hourly and total rates for an estimated 500 hours of weekday work, 80 hours of weekend work, and 40 hours of holiday work by the CIH. The protester has not contended that the quantities shown are not a reasonable approximation of the agency's anticipated needs.

Initially, Spectrum alleged the agency had failed to identify in the solicitation the type of contract contemplated.[2] The protester also noted that although the solicitation's pricing schedule requested prices on a "time and materials basis to cover the cost" of labor and sample analysis, the RFP contained clauses otherwise appropriate for a firm, fixed-price contract. If it were the agency's intention to enter into a time-and-materials contract, the protester asserted, a number of those provisions should be changed. In addition, the protester object-

[1] Spectrum has subsequently protested its exclusion from the competitive range for this procurement (B-239573.2). This matter will be dealt with in a separate decision.

[2] Our review of the original solicitation, however, shows that at clause L-6 it specifically stated that a firm, fixed-price contract was contemplated.

ed to the agency's request that travel and related expenses be included in the offered hourly rate, rather than be separately reimbursable. The protester, based in Schenectady, New York, argued that the failure to provide for separate reimbursement of such costs was prejudicial to offerors such as itself who were not local to the project.

In response to the protest, the Mint amended the solicitation to eliminate the references to a time-and-materials type contract and to restructure the RFP for a firm, fixed-price, indefinite quantity contract. It did, however, explicitly incorporate its previous request that prices quoted include all direct and indirect costs, general and administrative expenses, and profit.

In its comments on the agency report, Spectrum stated that its protest had been directed more to what it perceived as the Mint's failure to identify what type of contract it was contemplating than necessarily to the use of a time-andmaterials type contract, although the protester was not convinced that the contract requirements were suitable for a time-and-materials type contract. On the other hand, it also disagreed with the Mint that the agency was getting a firm, fixed-price contract on the basis that the contract terms entrusted too much discretion to the contractor in determining the work to be done. Spectrum asked that we determine what type of contract the Mint should use; in fact, the firm stated that was the purpose of its protest. The protester also continued to maintain that travel and related costs should be separately reimbursable.

Although Spectrum's protest can be read as expressing some preference for a cost-reimbursement type contract, the protester does not really advocate the use of any particular type of contract and, in fact, seeks for us to make an independent determination as to what "type and form" of contract the Mint should use. The selection of a contract type, however, is in the first instance the responsibility of the contracting agency; our role is not to substitute our judgment for the contracting agency's but to review its actions for compliance with applicable statutes and regulations.

The contracting officer takes the position that a firm, fixed-price type of contract is appropriate since performance uncertainties and their cost impact have been minimized by the prior asbestos hazard survey, and fair and reasonable prices can be established based not only on the competition obtained (more than a dozen proposals were received) but also through a comparison of prices offered here with those offered on a competitive basis in prior contracts for the same services at other Mints.

Spectrum disagrees, alleging that the contract cannot be considered to be at a firm, fixed price because it will provide the contractor with the sole authority to control the number of samples and effort for the contract work. In support of this allegation, Spectrum points to a sentence in the introductory paragraph of the Inspection and Acceptance section of the solicitation which states that "[t]he monitoring frequency will be determined solely by the CIH through good professional judgment."

The protester interprets "solely" as meaning without the need for coordination with, or not subject to control by, the Mint. However, this sentence appears in the context of a paragraph that emphasizes the necessity for the monitoring contractor to be completely independent from the abatement contractor in order to avoid compromising the monitoring contractor's role of protecting the interests of the Mint as well as the health of the workers themselves. The following paragraphs in this section detail what is required of the abatement contractor to prepare an area for final inspection and testing, as well as what will be required of the IH firm under this contract in order to certify as "clean" an area presented for final inspection. Read in this context, we think the word "solely" reflects the independent relationship which is intended to exist between the abatement contractor and the CIH, i.e., that the abatement contractor is not to influence the frequency with which its own work is being monitored.

When the solicitation is read as a whole, it does not, as Spectrum argues, vest unfettered discretion in the contractor to determine the number of samples to take and the number of man-hours needed. The contract provides a firm, fixed-price per hour and sample category, and the final determination of the number and type of samples and hours to be ordered during each phase of the asbestos abatement is made by the government, despite Spectrum's allegations to the contrary.

A consistent theme throughout the RFP's SOW is that the IH contractor is to coordinate its activities with, and is to be monitored by, the Mint's Contracting Officer's Technical Representative (COTR). For example, the SOW does use language similar to that of the Inspection and Acceptance clause in emphasizing the need for the monitoring contractor to be independent of the abatement contractor. In the context of the SOW, however—which is the Mint's description of how this contract is to be performed—the relevant sentence is phrased:

> The monitoring frequency will be determined by the *COTR and* CIH through good professional judgment. (Italic added.)

Among other similar SOW provisions are the following:

> This contract should be viewed as a series of independent tasks (phases). Each task will be undertaken on an agreed to schedule.
>
> It shall be the function of the CIH or IH contractor's coordinator to coordinate with the Mint's coordinator the schedules and requirements of the [support services for each phase].
>
> The IH contractor shall provide full cooperation and support to the COTR and abatement contractor throughout the abatement process.

In addition, we note that it is the "Mint coordinator or COTR," and not the IH contractor, who determines whether the situation requires laboratory samples to be handled under expedited procedures or normal turnaround times. Finally, if a completed work area fails to pass clearance testing procedures, the cost of retesting to meet clearance conditions is to be borne by the abatement contractor and not the Mint. All of these provisions are inconsistent with the protester's position that in its solicitation the Mint has abdicated to its contractor con-

trol over, and therefore the cost of, the work to be performed under the contract.

Spectrum also contends that the solicitation requirement that travel cost be included in the fixed labor rates is prejudicial to firms distantly located. The protester argues that travel and related expenses should be excluded from the quoted hourly rate so as to eliminate any competitive advantage possessed by local firms. In support of its argument Spectrum states that FAR § 31.204-46 makes such an action appropriate. We disagree. The FAR section to which Spectrum refers relates to the allocability and allowability of travel and related expenses to government contracts. It does not, however, direct contracting agencies to reimburse these expenses outside of the firm, fixed-price contract offer.

Accordingly, the protest is denied.

B-239569, September 13, 1990

Procurement

Special Procurement Methods/Categories
■ Service contracts
■■ Options
■■■ Rate changes
■■■■ Restrictions

Agency-drafted clause which places a ceiling on recoverable cost increases during option years as the result of Service Contract Act wage rate increases is inconsistent with Federal Acquisition Regulation clause which allows pass-through of the total increase and allows another clause to be used only if it accomplishes the same purpose. 62 Comp. Gen. 542 (1983) and B-213723, June 26, 1984 overruled in part.

Matter of: IBI Security Service, Inc.

Richard Bie Rowe for the protester.

Mary C. Avera, Esq., General Services Administration, for the agency.

Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

IBI Security Service, Inc. protests invitation for bids (IFB) No. GS-05P-90-GAC-0070, issued by the General Services Administration (GSA) for guard services in the state of Wisconsin. The protester principally objects to the inclusion of a clause which places a 10 percent ceiling on option-year price adjustments for cost increases due to government-mandated increases in wage rates. In IBI's view, the ceiling is inherently restrictive of competition and inconsistent with the Service Contract Act of 1965, 41 U.S.C. §§ 351 *et seq.* - (1988).

We sustain the protest.

The IFB was issued on April 23, 1990, with a bid opening date of May 24. It contemplated the award of a guard services contract, with wages subject to the Service Contract Act, for a base period of 1 year with two successive 12-month option periods. The IFB requested certain per hour and per month prices for the base and option periods. It also included a clause that appears at General Services Acquisition Regulation (GSAR) § 552.222-43, and that in essence provides for adjustments in the hourly and monthly option prices to reflect any increase or decrease in labor costs resulting from changes in Service Contract Act wage rates applicable to the option periods. The clause also provides that only 85 percent of the monthly and hourly option prices are subject to adjustment; the clause further provides that the adjusted prices may not exceed the prices for the preceding 12-month period by more than 10 percent. Finally, the clause requires bidders to warrant that their prices do not include an allowance for any contingency to cover increased costs for which a price adjustment is provided by the clause.

IBI argues that the ceiling on the recovery of Service Contract Act wage increases in the option years, in combination with the required warranty that bid prices not include contingency allowances for increases in labor rates, is restrictive of competition. The protester also argues that this clause violates the Service Contract Act in that, by imposing the ceiling, GSA is interfering with the Department of Labor's authority to establish wage rates for service employees under the Service Contract Act and with the employer's rights to meaningful collective bargaining.

GSA responds that the Service Contract Act only governs wage rates to be paid to service employees under government contracts. The agency maintains that the clause merely governs what portion of the cost increases are recoverable by the contractor in a price adjustment—something which GSA believes is not covered by the Service Contract Act. Further, the agency explains that Federal Acquisition Regulation (FAR) § 22.1006(c)(1) specifically authorizes contracting agencies to use their own clauses in lieu of the price adjustment clause appearing at FAR § 52.222-43 if they accomplish "the same purpose." The clause set forth at FAR § 52.222-43 also provides for price adjustments to allow for changed wage rates but does not establish a ceiling for such adjustments and, while it states that the adjustment should not include any amount for general and administrative costs, overhead and profit, it does not limit the adjustment to a specific portion of the contract price.

In GSA's view, since the purpose of the FAR clause is to permit the adjustment of prices for option years so as to eliminate the need to include contingency allowances in the option prices, its clause is proper because it accomplishes the same end, albeit to a different degree. Finally, GSA relies on two previous decisions, *Echelon Serv. Co.*, 62 Comp. Gen. 542 (1983), 83-2 CPD ¶ 86, and *International Bus. Investments, Inc.*, B-213723, June 26, 1984, 84-1 CPD ¶ 668, in which we did not object to agency-drafted ceilings on the amount of labor costs to be recovered through option-year price adjustments.

The two cases cited by GSA concerned previous and substantially similar versions of the clause at issue here, establishing ceilings on the amount of a Service Contract Act wage increase that could be passed through to the procuring agency. In each instance, we recognized that the clause imposed a limitation on the total pass-through; nevertheless, since the applicable Federal Procurement Regulations (FPR) provision (at the time, FPR § 1-12.904-3(c)) permitted the use of alternate provisions accomplishing the same purpose as the standard clause, we concluded that the use of the alternate clause was within the agency's discretion.

We have reexamined the position taken in these two cases in the context of the arguments raised in this protest and, as discussed below, conclude that the clause used by GSA is not authorized by the FAR.[1]

FAR § 22.1006(c)(1) requires agencies to use a clause appearing at FAR § 52.222-43, entitled "Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts)," or "another clause which accomplishes the same purpose." The clause reads in part as follows:

(c) The wage determination, issued under the Service Contract Act of 1965, as amended, (41 U.S.C. 351, et seq.), by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract. If no such determination has been made applicable to this contract, then the Federal minimum wage as established by section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 206) current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract.

(d) The contract price or contract unit price labor rates *will be adjusted* to reflect the Contractor's *actual* increase or decrease in applicable wages and fringe benefits *to the extent that the increase is made to comply with* or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The contractor chose to pay $4.10. The new wage determination increases the minimum rate to $4.50 per hour. Even if the Contractor voluntarily increases the rate to $4.75 per hour, the allowable price adjustment is $.40 per hour;

(2) An increased or decreased wage determination otherwise applied to the contract by operation of law; or

(3) An amendment to the Fair Labor Standards Act of 1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law. (Italic supplied.)

The intent of the underscored language and the example contained in section (d)(1) of the clause is clear—it is to shift from the contractor to the government the costs of government-mandated increases in wages or fringe benefits over what the contractor is paying. The predecessor procurement regulation governing implementation of the Service Contract Act prescribed almost the identical

[1] Among the several decisions of the General Services Administration Board of Contract Appeals (GSBCA) which the agency believes support its use of the ceiling clause, one was relevant to our reexamination: *Mr. Klean's Janitor & Maintenance Serv., Inc.*, GSBCA No. 7613, Jan. 27, 1988, *reprinted in* 88-2 BCA ¶ 20,716. That decision also involved the agency's use of a ceiling clause under the FPR, but was decided on the basis of our holdings in *Echelon and International Bus. Investments, Inc.*

clause concerning labor rates in option periods, and stated explicitly that the purpose of the standard clause was "to permit adjustment of service contract prices for option years . . . so as to eliminate the need for contractors to include contingency allowances in the prices for these periods." FPR § 1-12.904-3(a). The underlying purpose of the clause is essentially to eliminate the possibility of contractors overestimating future labor rate increases in order to protect themselves and thereby unnecessarily increasing government contract costs.

As we recognized in *Echelon* and *International Bus. Investments,* in the case of a prospective contractor subject to a collective bargaining agreement, which governs that contractor's Service Contract Act obligations, the GSA clause might help to eliminate cost increases by encouraging the firm in its labor negotiations to limit wage increases to those within the ceiling included in the GSA clause. While the contractor would be required to pay higher negotiated rates, it would not be reimbursed under its government contract. On the other hand, where a firm anticipates that it will be necessary during collective bargaining negotiations to settle for wage rates that will exceed the ceiling, it may provide for such a contingency in its contract price. In these situations, the GSA clause would not accomplish the same purpose as the FAR clause, which was designed to eliminate such anticipated labor rate increases from offered prices.

For a prospective contractor not subject to a collective bargaining agreement and who must therefore abide by the prevailing wage rates in its locality as determined by the Department of Labor, the GSA clause may also not accomplish the same purpose as the FAR clause. When a prospective contractor believes that its future wage rates will exceed an option year ceiling established by GSA, the firm may include contingencies to cover this possibility in its price.

Obviously, the higher the ceiling on labor rate increases under options, the less likely it is that prospective contractors will include labor rate increase contingencies in their offered prices. When the ceiling was at 15 percent, as it was in *Echelon,* contractors assumed less risk than with the current ceiling of 10 percent, or than they might under a recent GSA proposal to use an 8 percent ceiling.[2] Nevertheless, we cannot say that any particular level ceiling would reliably and predictably eliminate the possibility of prospective contractors protecting themselves in their offers from future wage increases that might not be recouped through increased option prices. As discussed above, the GSA clause might result in lower government contract costs by influencing collective bargaining in some cases. It does not, however, apply only in such situations and might result in unnecessarily high contract costs in other cases. Accordingly, it is our view that the GSA clause does not "accomplish the same purpose" as the FAR clause, and we therefore find that the agency had no authority to include the challenged clause in the solicitation. *See* FAR § 22.1006(c)(1). To the extent

[2] 53 Fed. Cont. Rep. (BNA) 578 (Apr. 23, 1990).

that this is inconsistent with our holdings in *Echelon* and *International Business Investments*, those cases are overruled.[3]

In reaching this conclusion, we do not agree with the protester's argument that the Service Contract Act itself is violated by the GSAR clause. The Act itself principally requires the payment of minimum wage rates, as determined by the Secretary of Labor, to service employees under contracts the principal purpose of which are to furnish services to the government. *See* 41 U.S.C. § 351. The Act does not address the extent to which, if at all, a contractor should be reimbursed by the government as the result of any increase in wage rates during the performance of a government contract. The Department of Labor regulations addressing the effect of Service Contract Act wage determinations on option periods do not address the issue. *See* 29 C.F.R. § 4.145(b) (1988). Only the FAR provides for a pass-through to the government of increased contractor costs resulting from increases in requested wage rates during option years. We also disagree with IBI's argument that a ceiling clause itself constitutes an impermissible interference with an employer's right to meaningful collective bargaining. In the abstract, a limit on the amount of increased wages that can be passed through to the government in a price adjustment presents a situation no different from that faced by an employer in the private sector who must bear a degree of risk with respect to its own labor costs in establishing its contractual prices for goods and services.[4]

Finally, IBI argues that the portion of the GSAR clause which provides that the contractor warrants that its contract price does not include an allowance for any contingency to cover increased costs for which the clause provides adjustment is objectionable because it does not permit bidders to allow for certain statutorily mandated increases, such as social security tax increases, unemployment tax increases and other unspecified health and welfare tax increases in developing their prices. In our view, however, the warranty provision only applies to wage rates and fringe benefits and, accordingly, a bidder can include contingencies in its price for the types of costs cited by IBI without violating the terms of the warranty.

We sustain the protest because the solicitation does not comply with FAR § 22.1006. In fashioning an appropriate remedy, we note that an award has been made and that performance is proceeding notwithstanding this protest because the guard services are urgently needed. We recommend that GSA promptly re-

[3] Although the protester does not specifically object to that portion of the GSAR clause which limits the coverage of price adjustments to 85 percent of a contractor's option price, we note that GSA has previously explained that this figure represents the average percentage of labor costs for this type of contract based on its own nationwide survey. Assuming that the data still supports this estimate, we continue to believe that the agency has a reasonable basis for using the 85 percent figure. *See International Bus. Investments, Inc.*, B-213723, *supra*.

[4] In this regard, the protester cites *Res Care, Inc. et al.*, 280 NLRB 670 (1986), for the proposition that GSA's use of the GSAR clause impermissibly restricts an employer's discretion in its negotiations with unions so as to preclude meaningful collective bargaining. In that decision, the National Labor Relations Board considered a Department of Labor cost-reimbursement contract to run a Job Corps Center, under which the agency retained control over wage rates and other matters, even including approval of the contractor's hiring policies. The clause used in this fixed-price IFB does not fall within the ambit of *Res Care* since, even with the 10 percent ceiling on the pass-through, GSA retains no significant degree of control over wage rates paid by the contractor.

solicit its requirements using a solicitation which is in compliance with the FAR and that the present contract be terminated when an award is made under the new solicitation. We anticipate that this resolicitation action will be completed well before the end of the base period of performance under the present contract and we recommend that, in no event, should the agency exercise any options under that contract.

We further find that the protester is entitled to be reimbursed for its reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).

B-239730, September 14, 1990

Procurement

Sealed Bidding
■ Bid guarantees
■ ■ Responsiveness
■ ■ ■ Contractors
■ ■ ■ ■ Identification

Where the legal entity shown on the bid form and the legal entity shown on the bid bond are not the same, and it is not possible to conclude from the bid itself that the two entities intended to bid as a joint venture, the contracting officer properly rejected the bid as nonresponsive.

Matter of: Design for Health, Inc.

Kabir Shefa for the protester.

Johanna Fann for Concord Analysis, Inc., an interested party.

Col. Herman A. Peguese, Department of the Air Force, for the agency.

Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Design for Health, Inc. protests the rejection of its bid under invitation for bids (IFB) No. F04626-90-B0018, issued by the Department of the Air Force for analysis and removal of asbestos at Travis Air Force Base, California. Design for Health contends that the Air Force improperly rejected its low bid for a defective bid bond.

We deny the protest.

The solicitation, issued on February 12, 1990, was set aside for small disadvantaged businesses and required a bid guarantee in the form of a bid bond or certified check in the amount of 20 percent of $1,400,000, or $280,000, the minimum quantity of work which would be required under the contract.

Of the eight bids received by the April 12 bid opening, Design for Health was the low bidder with a total bid price of $2,159,495. In the bid form, the bidder was identified as "Design for Health," at a San Diego, California, address and the bid was signed by Virginia L. Shefa, its Vice President and General Manager. In the representations and certifications under "Type of Business Organization," Design for Health completed the section as follows:

The bidder, by checking the applicable box, represents that (a) it operates as ——X—— a corporation incorporated under the laws of the State of *California,* ——— an individual, ——— a partnership, ——— a nonprofit organization, ——— a joint venture, or ——— a corporation, registered for business in ———.

(country)

In the same section, Design for Health also checked that it was a women-owned/disadvantaged small business concern.

With its bid, Design for Health submitted a cashier's check for $61,750. The bid was also accompanied by a bid bond, issued by a corporate surety, which referred to the instant IFB and had a penal sum of 20 percent of the bid price. The bond, however, identified "Performance Abatement Services, Inc.," of Lenexa, Kansas, as the principal. On the bond, the principal was to indicate under "Type of Organization" whether it is an individual, partnership, joint venture, or corporation. These spaces, however, were left blank.

The Air Force determined that the bid guarantee submitted by Design for Health was defective because its cashier's check was not in the required amount of $280,000. The agency therefore rejected Design for Health's bid as nonresponsive and notified Design for Health of this rejection in a letter dated April 27. Design for Health protested to the agency in a letter dated May 1, arguing that its bid was responsive because it and Performance Abatement Services had a joint venture relationship and that was why the bid included a bid bond made out to Performance Abatement. Design for Health said that the cashier's check was only for 20 percent of the laboratory fees.

The Air Force denied the protest because, in its view, the bid was submitted by Design for Health and was not supported by an adequate bid guarantee. The cashier's check which had been purchased by Design for Health was in an insufficient amount and the bid bond named a different entity, Performance Abatement, as principal. The agency noted that there was nothing in the bid which would indicate that there was a joint venture relationship between the two companies since (1) Design for Health had not represented that it was a joint venture; (2) no representative of Performance Abatement had signed the bid; and (3) Design for Health was not listed as one of the principals on the bid bond.[1]

[1] The Air Force also questions whether the protester qualifies as a disadvantaged small business concern. This is academic if the bid is nonresponsive for lack of an adequate bid guarantee and, in any event, as the Air Force recognizes, would be a matter to be resolved by the Small Business Administration and not our Office.

Design for Health filed a protest with our Office on May 17.[2] The protester argues that it did provide an acceptable bid guarantee and states that its failure to check "joint venture" in the representations and certifications was merely an administrative omission. The protester seems to suggest that its status as a joint venture was clear from the documents submitted because a representative of Performance Abatement signed the bid bond. Moreover, the protester contends that the agency could have easily clarified the relationship between Design for Health and Performance Abatement by seeking explanation from the parties after bid opening.

We agree with the Air Force that the bid was nonresponsive because of the discrepancy between the bidder and the principal shown on the bid bond. Bid bond requirements are a material part of the IFB and a contracting officer cannot waive a failure to comply with such provision. *C.W.C. Assoc., Inc. and Chianelli Contracting Co.,* 68 Comp. Gen. 164 (1988), 88-2 CPD ¶ 612. The sufficiency of a bid bond depends on whether the surety is clearly bound by its terms at the time of bid opening; when the liability is not clear, the bond is defective. This rule is prompted by the rule of suretyship that no one incurs a liability to pay the debts of another unless he expressly agrees to be bound. *G&C Enters., Inc.,* B-233537, Feb. 15, 1989, 89-1 CPD ¶ 163. For this reason, the principal listed on the bid bond must be the same as the nominal bidder. *Opine Constr.,* B-218627, June 5, 1985, 85-1 CPD ¶ 645. A bid bond which names a principal different from the nominal bidder is deficient and the defect may not be waived as a minor informality. *A.D. Roe Co., Inc.,* 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194.

In this case, the entity named on the bid was different from the entity named on the bid bond and, reading all of the bid documents together without resort to post-bid opening explanations, we cannot interpret the bid as having been submitted by Design for Health and Performance Abatement as a joint venture. The bid itself is wholly consistent as a bid solely by Design for Health, a California corporation. There is no reference to Performance Abatement anywhere on the bid and the bid is not signed by any Performance Abatement representative. In addition, the bidder certified that it was a California corporation, not a joint venture. Conversely, there is no reference to Design for Health on the bid bond; the spaces on the bid bond for designating the organization type of the principal were left blank. Given these circumstances, we cannot conclude that the surety named on the bid bond would be liable for the default of Design for Health. Because the legal entity listed on the bid is not the same as the legal entity listed on the bid bond, the government is not protected.

The protester's explanation that its intent was to bid as a joint venture on this procurement, coming as it did after bid opening, cannot be considered in determining whether the bond as submitted is responsive to the solicitation. *Minority Enters., Inc.,* B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. A nonresponsive bid

[2] Subsequently, the agency canceled this solicitation after it concluded that the only bid other than the protester's still under consideration for award also was nonresponsive. That bidder's protest of the cancellation is the subject of another protest (B-239730.3) to be later decided.

cannot be made responsive after bid opening through a change or explanation of what was intended. *Id.*

We deny the protest.

B-239847, September 18, 1990

Procurement

Sealed Bidding
■ Bid guarantees
■ ■ Responsiveness
■ ■ ■ Liability restrictions

Where a commercial bid bond form limits the surety's obligation to the difference between the amount of the awardee's bid and the amount of a reprocurement contract, the terms of the commercial bond represent a significant departure from the rights and obligations of the parties as set forth in the solicitation, which renders the bid bond deficient and the bid nonresponsive.

Matter of: W.R.M. Construction, Inc.

Richard L. Basinger, Esq., Basinger & Morga, P.C., for the protester.

E.L. Harper, Department of Veterans Affairs, for the agency.

Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

W.R.M. Construction, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 649-09-90, issued by the Department of Veterans Affairs, for construction of an outpatient clinic and related work.

We deny the protest.

The IFB was issued on January 8, 1990 and required the submission of a bid guarantee. Amendment 2, which became effective February 23 and extended the bid opening date to March 20, amended certain specifications and incorporated FAR § 52.228-11 (FAC 84-53). This provision requires, among other things, that individual sureties on a bid guarantee who pledge real estate provide evidence of title in the form of a certificate of title prepared by a title insurance company and provide a copy of the lien filed in favor of the government. FAR § 52.228-11(b)(2)(i) (FAC 84-53). By letter dated April 18, the agency notified W.R.M. that its bid was rejected for failure to provide evidence of title in the form of a certificate of title prepared by a title insurance company and a copy of the lien filed in favor of the government. W.R.M. filed its protest with our Office on May 29, alleging that it was not aware of the requirements specified above.

In the agency report, the Department of Veterans Affairs states that W.R.M.'s bid was also rejected because it submitted a defective bid bond form. In its comments to the agency report, W.R.M. argues that it was never informed that its commercial bond form would not be acceptable and asserts that the agency should have provided it the standard form. We have reviewed the record and find that W.R.M. offered a deficient bid bond, and that this rendered its bid nonresponsive. We therefore need not review W.R.M.'s allegations regarding the agency's other basis for rejection of its bid.

The IFB contained a bid guarantee clause which provided that "in the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference."[1] The IFB further cautioned that a bidder's failure to furnish a bid guarantee in the proper form and amount might be cause for rejection of the bid. W.R.M. submitted a bid bond on a commercial form.

The VA determined that W.R.M.'s bid bond was unacceptable because it did not afford the government the necessary protection. In an April 19 letter from the Director, Acquisition Management Service, to the Director, VA Medical Center, Prescott, Arizona, the agency stated that since the bond used by W.R.M. did not cover "any cost" that the government might incur in reprocuring the work in the event of a default, the bid should be rejected as nonresponsive.

A bid guarantee assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. When the guarantee is in the form of a bid bond, it secures the liability of a surety to the government if the holder of the bond fails to fulfill these obligations. *O.V. Campbell and Sons Indus., Inc.,* B-216699, Dec. 27, 1984, 85-1 CPD ¶ 1. The guarantee also is available to offset the cost of reprocurement of the goods or services in question. *See Kiewit Western Co.,* 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. A bidder's use of a commercial bid bond form, rather than the standard government form, is not *per se* objectionable, since the sufficiency of the bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in the IFB. *See Allgood Elec. Co.,* B-235171, *supra.*

W.R.M.'s bond, by its express terms, stated that the surety would only be liable for the difference between the amount of W.R.M.'s bid and the amount contracted for with another firm to perform the same work, provided that such amount does not exceed the penal sum. The surety's liability, as set forth in this bond, thus significantly differs from that required under the explicit terms of the IFB, which provide for the government to recoup "any cost of acquiring the work that exceeds its bid." We have viewed this language as permitting the government to recover, for example, administrative costs or the cost of performing in-

[1] Default in this context means the successful bidder's failure to execute any post-award contractual documents and furnish payment and performance bonds. *Allgood Elec. Co.,* B-235171, July 18, 1989, 89-2 CPD ¶ 58.

house. Consequently, W.R.M.'s promise merely to cover the difference in prices provides insufficient protection to the government. *Id.*

As stated above, this deficiency in the bid bond alone renders the bid nonresponsive, and we need not decide the propriety of the additional rejection ground stated by the VA.

The protest is denied.

B-239672, B-239672.2, September 19, 1990

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Procurement

Competitive Negotiation
■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Evaluation errors

Exclusion of proposal from the competitive range is not reasonable where the deficiencies cited are minor in relation to the scope of work and the revisions necessary to correct them; the deficiencies, in some cases, have been corrected during discussions but the corrections apparently have been overlooked; and discussions, in certain cases, were not sufficiently specific to advise offeror of the needed corrections.

Matter of: Intertec Aviation

Bruce Babbitt, Esq., and Thomas P. Barletta, Esq., Steptoe & Johnson, for the protester.

Roger G. Lawrence, Esq., Department of the Navy, for the agency.

Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Intertec Aviation protests the Department of the Navy's exclusion of its proposal from the competitive range under request for proposals (RFP) No. N68520-89-R-0029. The RFP was issued by the Navy for various repair and maintenance programs for Navy and Air Force aircraft. Intertec contends that the deficiencies cited as the basis for the Navy's rejection of its proposal are minor and susceptible of correction, do not reflect the actual requirements under the solicitation, or are attributable to the agency's failure to conduct meaningful discussions with Intertec. We sustain the protest.

The RFP, issued on September 29, 1989, required offerors to submit six-volume proposals for the labor, materials, and facilities needed to accomplish standard depot-level maintenance, periodic depot maintenance, and mid-term inspection of Navy C-9B/DC-9 and Air Force C-9A aircraft. The RFP solicited a firm, fixed-price requirements contract. Award was to be made on the basis of the proposal offering the best value to the government, price and other factors considered. The proposals were to include a separate volume for each of the following areas: management/experience, production/facilities, quality, flight safety, industrial safety, and cost/price. These areas were listed in descending order of their importance for evaluation purposes with the first three approximately equal in weight. The RFP advised offerors that an unsatisfactory rating in any of the five technical areas would render the proposal unsatisfactory overall. In addition, each proposal was to be rated as presenting low, medium, or high risk. Technical proposals were to be evaluated separately from cost proposals.

Seven firms, including Intertec, submitted proposals by the closing date. The proposals were evaluated by the technical evaluation team (TET), which found all proposals to be unacceptable, but susceptible of being made acceptable with risk factors ranging from high to low. Intertec received a risk factor of medium. Requests for additional information were sent to all offerors with instructions to respond by April 10. Intertec responded with an initial submission on April 6, which it supplemented by facsimile on April 9. On April 7, the TET reconvened to evaluate the offerors' responses. After this evaluation, only two firms were found to be in the competitive range. The contracting officer informed Intertec by letter of April 18 that its proposal was "technically unacceptable and not capable of being made acceptable without a major rewrite," and that Intertec was therefore not in the competitive range.

Intertec protested this decision to the Navy by letter of April 25.[1] This protest, on the identical basis, followed. When this protest was filed, the Navy withheld awarding the contract pending the resolution of the protest, as required under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c) (1988). The Navy later determined, however, that urgent and compelling circumstances existed that significantly affect the interest of the United States, requiring the Navy to award the contract. In order to minimize the impact of awarding the contract in light of the pending protest, the Navy limited itself to issuing a delivery order for a maximum of two Air Force C-9 aircraft until the protest is resolved.

The contracting officer's decision to remove Intertec's proposal from the competitive range because the proposal allegedly would require a major rewrite in order to be considered acceptable was based on the TET's report of its final evaluation of the proposal. In addition to this report, the TET chairman summarized the team's evaluation for the contracting officer although she apparently did not receive this summary until after she had rejected Intertec's proposal. The TET chairman also prepared further comments about the evaluation in re-

[1] The Navy characterizes this submission as an administrative appeal rather than a protest and challenges the timeliness of Intertec's protest to us, which was not filed until May 14, on this basis. We find that the protester's submission to the agency on April 25 was a timely protest and that this protest was therefore also timely filed.

sponse to this protest. This document reduces the number of reasons for rejection and provides more specifics. In our discussion below, we primarily rely upon this last document as representing the agency's final position about the acceptability of Intertec's proposal.

The agency has identified eight alleged deficiencies that would require a major revision of Intertec's proposal in order to be considered acceptable.[2] The protester contends that the evaluation was unreasonable and does not support the rejection of Intertec's proposal.

The contracting officer is required by the Federal Acquisition Regulation (FAR) to include in the competitive range all proposals that have a reasonable chance of being selected for award. FAR § 15.609 (FAC 84-5). The record does not demonstrate a reasonable basis for the rejection of Intertec's proposal at this stage in the procurement. *See Data Sys. Division of Litton Sys.*, B-208241, Sept. 29, 1982, 82-2 CPD ¶ 297.

In volume one, management/experience, the RFP listed eight topics, one of which was supply management. Under this heading, the RFP required offerors to describe the procedures and methods they would use to assure supply support would be accomplished in a timely and economic manner, specifying 16 areas of supply. In the discussion questions that the Navy submitted to Intertec in response to its initial proposal, Intertec was instructed to clarify generally how it would meet the supply management requirement. The Navy now alleges that Intertec's proposal was deficient because it did not adequately address 1 of the 16 sub-areas, cannibalization procedures. The discussion questions had not given any indication that this particular aspect of Intertec's proposal was incomplete or otherwise deficient.

In this context, "cannibalization" refers to the use of parts from one aircraft to service another. Intertec's proposal labeled these procedures "robbed parts" and discussed them in volumes one and three. Although the TET chairman states in his response to the protest that no additional data on these procedures was included in Intertec's response to the discussion questions, we find that Intertec's initial proposal included procedures describing the steps required to "rob" an aircraft part, account for its removal, and control replacement action; it referenced the tags and forms that would be used in the process. The agency provides no explanation of why it finds that the information Intertec provided was insufficient. In the absence of such an explanation, we find no support for the agency's deficiency finding here, nor can we see why the alleged deficiency could be considered sufficiently material to warrant the rejection of the proposal.

In volume two, production/facilities, the RFP required offerors to submit information concerning nine different areas, one of which was bonded storage. The

[2] Although some 13 deficiencies were initially alleged, we find that only 8 remain in the latest report. The report concedes that two deficiencies alleged in the management/experience area met the requirements of the RFP, and one alleged in connection with a supplier quality assurance program was not unacceptable. We therefore need not discuss these.

Navy's discussion questions directed Intertec to provide a detailed description of its bonded storage area dimensions and how it would be secured. The RFP required certain minimum storage requirements for different types of storage, which it listed by total square feet. The requirement called for 3,200 square feet of inside bin storage, 2,200 square feet of inside bulk storage and 5,000 square feet of outside bulk storage. Intertec's initial proposal provided approximate dimensions which met these minimum requirements. Although Intertec did not include the exact dimensions in its proposal, it did include the total square footage measurements to indicate that it met the RFP's stated requirement. It also included charts that showed the configuration and location of its storage areas. In response to the discussion question, Intertec reiterated its total dimensions but removed two references to the word "approximate" for inside and outside storage. The "approximate" dimension which remained exceeded requirements by 2,200 square feet. Although the TET report alleges that the "response did not contain area dimensions of the bonded storage area," we fail to see what was lacking in Intertec's response.[3]

In another of the nine areas included in this volume, the RFP required a description of the offeror's facilities and procedures for liquid gaseous oxygen storage, servicing and purging. Intertec's initial proposal did not comply with this requirement and it was raised as a deficiency during discussions. In its initial response to discussion questions, Intertec stated that it did not possess the required liquid oxygen servicing capability. However, it revised this response in a facsimile transmission dated April 9, stating that it had located a liquid oxygen supplier and providing certifications for its personnel who had received liquid oxygen servicing training. The TET report continues, nonetheless, to state that Intertec would not have liquid oxygen capability and would not acquire the necessary equipment. In his conference comments, the TET chairman alleges that the supplemental response was not timely received,[4] and that it was in any case incomplete because it did not include safety, security, and quality program data.

In our view, it is not reasonable to find that this lack of information was so material that it would require a major revision of the proposal or otherwise render the proposal unacceptable. Intertec's response proposed a subcontractor who could provide liquid oxygen and certifications for Intertec's personnel who had liquid oxygen servicing and handling training. Intertec also committed to add required safety, security, and quality programs. Since Intertec had personnel certified and experienced in handling liquid oxygen and a supplier, the

[3] The TET chairman's comments also question when the storage area will be available. Intertec's initial proposal had acknowledged that it was in the process of refurbishing one of its hangars and that the improvements were scheduled to be completed by the time of the first scheduled aircraft arrival. Although it was not raised as a deficiency during discussions, this assurance was reiterated in Intertec's discussion response. The protester was never given any indication that this was a deficiency or that further assurances of timely completion were required. Further, Intertec was rated low risk for technical facilities.

[4] The protester's submission shows a transmission date of April 9 at 12:38 p.m. The deadline for receipt was April 10. The Navy does not discuss its allegation of untimeliness. It does not explain, for example, when it received the transmission or how it received the information if not on April 9. The record shows, on the other hand, that the TET reconvened on April 7 to begin evaluating Intertec's discussion responses, before the closing date and thus may have considered Intertec's revisions before the transmission arrived. We find no evidence in the record to support the claim of untimely receipt.

omission of specific procedures for handling the liquid oxygen was informational only and readily correctable. We think this is especially true where, as here, Intertec's proposal contained procedures for handling materials including hazardous waste and explosives. Further, we reviewed *in camera* the two proposals that were found acceptable after discussions were held. One of these offerors also had failed to meet this requirement in its initial proposal. This firm's discussion response states that it, too, would provide liquid oxygen through another vendor. Although this offeror did include one sentence giving a very general description of its plans for storing the liquid oxygen when not in use, the remainder of its response appears to us no more complete than Intertec's. We therefore conclude that Intertec's response either was not unacceptable, or that it could be made acceptable with minimal corrections.

In volume three, quality, the RFP required offerors to address 11 separate areas relating to quality. One of these requirements was for a quality assurance plan, including a quality control/assurance procedures manual. The Navy's discussion questions alleged, generally, that Intertec had not complied with this requirement. The TET report alleged that Intertec's response had not shown compliance with paragraphs 3.3 and 3.5 of MIL-Q-9858A, and had not provided information about work instructions.

In its response to a discussion question in this area, the protester stated that "Intertec Aviation operates under written and documented quality procedures in conformance with MIL-I-45208A and MIL-Q-9858A, paragraphs 3.3 and 3.5, as required by the solicitation." Intertec also stated that the firm was prepared to confirm such compliance. The proposal included as an attachment its Inspection Policy and Procedures Manual, explaining the firm's internal inspection system in detail, and its Federal Aviation Authority Certified Repair Station Manual, which set forth the work instructions covering each of the 11 quality control/assurance areas. In its response to the discussion questions, Intertec submitted cross-references to provisions of its repair station manual that cover the 11 quality-related requirements at issue. The protester argues that if the agency's criticism is that the work instructions were to be collected in a separate manual, it would be a simple process to spell out the instructions that were referenced, and would not require a rewrite of the proposal. We note that the RFP limited this portion of proposals (which included 11 topics) to 60 pages and stated that manuals could be submitted as an attachment.

The agency's criticism of Intertec's proposal in this area does not appear to relate to the protester's understanding of the requirement, but only to the manner of implementation. We do not see why the preparation of a separate manual should be considered material under these circumstances, and the agency has failed to show why the information submitted in the proposal as revised was not sufficient.

The next deficiency alleged was that the proposal did not address the methods or procedures for responding to customer deficiency reports as required under the RFP. Intertec's initial proposal included relevant information in a section entitled "Customer Liaison Program," and in its "Corrective Action & Disposi-

tion" section, where it set forth the protester's policies and procedures for corrective action to identify, segregate and properly dispose of nonconforming material and to ensure that positive corrective action is taken to prevent, minimize and eliminate nonconformances in the workstation. It did not, however, include a separate section addressing customer deficiency reporting. In discussion questions, Intertec was asked to provide its methods/procedures for responding to customer deficiency reports. Intertec responded by referring to the program it had described in its initial proposal.

While Intertec's response in this area appears less than complete, the Navy considered Intertec's customer liaison program to be a particular strength in its initial evaluation. Its failure to separately address one procedure, which relates to one subpart of one of 11 topics under the area of quality, does not seem to reasonably support the rejection of its proposal. We found that one of the other initial proposals of a firm subsequently found acceptable also failed to address this matter to the Navy's satisfaction; that offeror's discussion response referred to two paragraphs in the offeror's standard practice instructions relating to nonconforming materials. We cannot see any material difference between the two proposals in this respect. The other acceptable proposal covered this topic in some six sentences in its initial submission. In short, we do not find that the Navy had a reasonable basis for rejecting Intertec's proposal because of its response in this area.

For volume four, flight safety, the RFP required offerors to submit a plan for a comprehensive aviation safety program. Offerors were required to provide an Air Operations Manual, the detailed standard for which was contained in this section of the RFP. In discussion questions, the agency asked Intertec to clarify how its proposal met the RFP requirements in some areas in which Intertec allegedly had not provided sufficient information (planning and mission procedures, pre-mishap plan procedures and compliance with NAVAIR instructions). Intertec in its protest referred to the areas in its proposal where this information appears. The TET chairman responds in a rather general manner that "it was the judgment of the Government Flight Representative that Intertec did not either address/provide any information or did not provide adequate information to ensure that it had the correct procedures and met the requirements of the RFP. . . . Although Intertec may be an FAA Repair Station, [this] does not mean this meets all the requirements of the RFP." The only deficiency specifically raised in the agency comments is the allegation that Intertec failed to address pilot certification and training. However, amendment Nos. 1 and 2 to the RFP state that the Navy and Air Force would provide the pilots and flight crews required, rather than the contractor. Thus, pilot certification and training procedures were not required under the RFP and, in any event, the issue was never raised during discussions. We again fail to see how this could constitute a material deficiency which justified rejection of the offer.

In volume five, industrial safety, the RFP required offerors to address 10 separate topics. For one topic, offerors were to provide information on the qualifications, certification, and training program of personnel involved in engine runs,

aircraft taxi operations, aircraft tow operations and servicing operations. The Navy's discussion questions required Intertec to clarify, generally, how its procedures in this area met the requirements of the RFP. Intertec's initial proposal had provided the rather general information that its personnel receive safety training as part of their initial employment processing; it did not address the qualifications and training for these particular personnel in this volume. However, in volume four, flight safety, it did address training and testing requirements for ground personnel, as well as the record-keeping procedures involved. In its response to the discussion question, Intertec stated that it is developing a formal program for run-up, taxi, and towing procedures and certification, and that it would be incorporated into its Repair Station Manual. The response stated that qualified personnel are individually trained and certified by each air carrier or customer, as required, rather than under a formal program. The response also indicated that Intertec maintains training and certification records. The TET comments allege that the proposal is deficient because it did not indicate compliance with the requirements of NAVAIRINST 3710.7 "as specified in the RFP."[5] While a discussion question requested evidence that Intertec's flight operations manual met the requirements of the instruction, there was no discussion question or RFP requirement, for that matter, under industrial safety requiring compliance with this instruction. The agency has not shown any specific deficiency based on this instruction or that any information needed would require a major rewrite of Intertec's proposal.

Also included in this volume was a requirement for a plan for the fire protection systems and fire-fighting equipment for the offeror's facilities. The discussion question referred to this requirement and generally requested evidence of compliance. Intertec's initial proposal stated that its fire protection system is in compliance with all state and local requirements. It explained that the facility is owned by the City of Phoenix and that the Goodyear/Phoenix Fire Department provides on-call fire protection services and inspects Intertec's fire procedures, facilities and fire-fighting equipment and systems. It provided additional details in response to the discussion question and provided a fire protection system diagram. The TET comments report, however, that Intertec failed to demonstrate its fire protection system's compliance with NAVAIR 00-80R-14, which governs aircraft hangars. Intertec did not specifically mention this standard.

The protester argues that it met the substance of the requirement, and that any failure to exactly meet this requirement, which was a subportion of one of 10 separate requirements in the area of industrial safety, the least important of all five technical areas, cannot reasonably be considered to be of such weight that it renders the proposal technically unacceptable and not susceptible of correction. In the absence of any explanation from the agency about what the protester's proposal specifically lacked, we also fail to find a material deficiency incapable of correction here.

[5] Naval Instruction 3710.7 provides requirements for flight operations and other tasks at an aircraft maintenance facility.

At a bid protest conference held in our Office, the protester discussed each of the deficiencies cited in the agency's protest report. The Navy was asked to respond to the protester's general complaint that none of the deficiencies were material or of such magnitude to render the entire proposal unacceptable and not susceptible of being made acceptable. The agency has declined to further elaborate on this issue, stating that its grading of all proposals for this acquisition followed the procedures in the source selection plan and applied the evaluation criteria uniformly and fairly to all offerors. The Navy asserts that the protester has failed to meet its burden of showing that the agency's conduct in the source selection process was so arbitrary and capricious or so inherently unfair to the protester that an overturning of the agency's judgment is warranted.

We find that the record does not provide a reasonable basis for the Navy's finding that Intertec's proposal was so deficient that it had no reasonable chance of award. We point out, in this connection, that the five technical volumes of material that were submitted were in excess of 300 pages, plus attachments; the discussion responses increased the total submission by approximately 50 percent. The agency's evaluation shows that the vast majority of this information met the RFP standards. While we do not offer any comment on the technical merit of the protester's proposal, based on the record we find that the deficiencies that the Navy attributes to Intertec's proposal are relatively minor, both individually and collectively, in relation to the scope of work and the extent of revisions necessary to correct them. Moreover, the competition is seriously diminished by the exclusion of one offeror when that exclusion leaves only two firms in the competitive range. Also Intertec's proposal offered a price that was competitive with the two firms that remained in the competition.

We recommend that the Navy reopen negotiations with Intertec included in the competitive range and then request a new round of best and final offers. Following evaluation, the Navy should terminate the contract it already awarded, if appropriate.[6] Further, we find that Intertec is entitled to the cost of pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990); *see Falcon Carriers, Inc.*, 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

[6] Intertec also protests the agency's failure to notify the firm that it was proceeding with the award for two aircraft pending resolution of this protest. By letter of August 6, 1990, we were advised that the agency intended to proceed with award of delivery orders for maintenance on two aeromedical evacuation aircraft for urgent and compelling reasons. The agency reported that the aircraft would be grounded for safety reasons because required maintenance cannot be accomplished. We have no reason to object to this determination and therefore our recommendation pertains to all further delivery orders under the contract.

B-240450.2, September 19, 1990

Procurement

Bid Protests

■ GAO procedures

■■ Interested parties

General Accounting Office (GAO) affirms prior dismissal based on the determination that the protester was not an interested party entitled to protest under GAO Bid Protest Regulations, where the protester knowingly took itself out of the competition by disbanding its proposal team prior to filing its protest and disclaiming any interest in the award.

Matter of: Signal Corporation—Reconsideration

R.H. Mody, for the protester.

Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Signal Corporation requests reconsideration of our dismissal of its protest of the decision of the National Institute of Allergy and Infectious Diseases, Department of Health and Human Services (HHS), to exclude Signal's proposal from the competitive range, under request for proposals No. NIAID-DAIDS-90-26. We dismissed Signal's protest in *Signal Corp.*, B-240450, Aug. 8, 1990, 69 Comp. Gen. 659, 90-2 CPD ¶116, because it was not an interested party entitled to protest under our Bid Protest Regulations. 31 U.S.C. § 3551(2) (1988); 4 C.F.R. § 21.0(a) (1990).

We affirm our prior dismissal.

Signal alleged that in its protest the agency had erroneously excluded it from the competitive range because of (1) weaknesses related to factors that were not specified in the solicitation, and (2) factual errors committed by the evaluation committee. Signal stated in its protest letter that:

> Because of the [HHS] errors, the Signal team has been disbanded. We have found it necessary to release our Principal Investigator, . . . and our teammate, A&T Inc., from their commitments. Consequently, it would serve no useful purpose to request that our proposal be reevaluated, or that Signal be restored to the competitive range since we would be unable to conduct effective discussions. Therefore, Signal Corporation hereby requests that GAO direct the [HHS] to reimburse Signal Corporation for the costs of preparing this protest, and for our bid and proposal preparation in accordance with [Federal Acquisition Regulation] FAR 33.104(h).

We understood this to mean that Signal had voluntarily released its proposed team and unequivocally rejected any corrective action involving Signal's reinstatement in the competition, or acceptance of contract award in the event its protest was sustained. We therefore dismissed Signal's protest because Signal was not an interested party under our Bid Protest Regulations, that is, it was not considered an "actual or prospective bidder or offeror whose direct economic

interest would be affected by the award of the contract or by failure to award the contract." *Id.*

Signal requests that we reverse our dismissal. The crux of its argument is that it did not voluntarily release its team and there was no basis in the record before us to conclude otherwise. Signal states that its principal investigator terminated her contingency employment agreement with Signal following an HHS debriefing conducted before Signal protested to our Office and that her withdrawal made "it necessary to release" both her and A&T. Signal urges that the agency's erroneous evaluation of Signal's proposal caused the principal investigator's departure, and that Signal's proposed effort could not proceed without her. Signal contends that it is an interested party because it was an actual offeror whose direct economic interest was affected by the award or non-award of the contract until the agency action effectively caused its team to disband.

Signal concedes that it did not request award or reinstatement in the competition because it disbanded its team prior to filing the protest. Signal only disagrees with our characterization of its withdrawal from the competition as voluntary. However, whether or not Signal considers its withdrawal from the competition to be voluntary, it was Signal's business decision to release its team from their commitments and claim no further interest in the award. Signal has not explained why it did not consider finding a replacement for the released principal investigator. In any event, by its own actions, Signal knowingly removed itself from the competition prior to filing its protest, and affirmatively relinquished any chance of receiving the contract. Under the circumstances, we find that Signal ceased to be an actual offeror whose direct economic interest would be affected by the award or failure to award the contract. In other words, Signal's decision to not pursue award of the contract caused it to lose its status as an interested party eligible to protest the agency's actions.

We note that our decision is consistent with the views of the Court of Appeals for the Federal Circuit, which recently interpreted the identical definition of "interested party" for purposes of protests before the General Services Administration Board of Contract Appeals. That court held that a party who knowingly disavows an award prior to filing its protest is not an interested party entitled to protest a procurement action. *Federal Data Corp. v. United States,* No. 89-1280 (Fed. Cir. Aug. 9, 1990).

The dismissal is affirmed.

B-240137, September 20, 1990

Procurement

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

Agency improperly rejected a bid that failed to acknowledge a solicitation amendment which was not material because it merely relaxed the agency's requirements by extending the time for performance from 30 to 60 days.

Matter of: Pro Alarm Company, Inc.

David F. Riddle, for the protester.

Roberta M. Truman, Esq., Department of Justice, for the agency.

Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Pro Alarm Company, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 247-0001, issued by the Federal Bureau of Prisons, Federal Prison Camp, Nellis Air Force Base, Nevada, for the installation of a building fire and smoke alarm system. Pro Alarm complains that the Bureau improperly rejected its bid as nonresponsive because the firm had failed to acknowledge the sole amendment to the IFB.

We sustain the protest.

The solicitation, issued on May 18, 1990, called for bid opening at 2:00 p.m. on Monday, June 18. By an amendment dated June 6 but not mailed until Tuesday, June 12, the Bureau extended the contract completion time from 30 to 60 days and included as an attachment the minutes of the prebid conference. The bid opening date was not extended.

Pro Alarm sent its bid via Federal Express to Nellis on Friday, June 15, and received the amendment on Saturday, the 16th. Unable to reach the contracting officer on Saturday, a representative of Pro Alarm called the contracting officer on Monday morning, stated that the protester had not received the amendment before it mailed its bid, and asked if a facsimile-transmitted acknowledgment would be acceptable. The contracting officer stated that it would not be necessary to "fax" an acknowledgment; he would simply notate Pro Alarm's acknowledgment on the bid form.

Of the five bids submitted, Pro Alarm's was the lowest at $33,655; the second low bid was $42,088. Pro Alarm, however, was the only bidder failing to ac-

knowledge receipt of the amendment. When notified that its bid was rejected as nonresponsive for this reason, Pro Alarm filed this protest.

Pro Alarm argues that it is being unfairly penalized because of a mistake made by the contracting officer. The protester says that it inquired as soon as possible after receiving the amendment as to the best way to acknowledge its receipt in a timely manner, and notes that it offered to "fax" an acknowledgment and send a hard copy later, but was told by the contracting officer that he would simply note the oral acknowledgment on the bid form. Since the amendment required no adjustment to its bid price, Pro Alarm states, it believed that no other acknowledgment was necessary. Pro Alarm also argues that it did not have enough time in which to acknowledge receipt of the amendment because the Bureau failed to mail it sufficiently in advance of bid opening.

The Bureau argues that it treated all prospective bidders equally by mailing the amendment to them simultaneously, and in adequate time for them to respond, as shown by the fact that four of the five timely acknowledged receipt of the amendment. The protester also could have done so, the agency suggests, if on Saturday it had sent an acknowledgment by overnight mail rather than waiting until Monday to speak to the contracting officer. Although the Bureau concedes that the contracting officer erred when he advised Pro Alarm that on the basis of the firm's telephone call he could notate an acknowledgment on its bid form, the agency argues that the protester was not prejudiced by this advice because by the time it was given it was too late for the protester to have submitted a written acknowledgment.[1] The agency maintains that since the protester bore the responsibility for acknowledging the amendment, since it did not do so, and since the amendment made a material change in the terms of the solicitation by extending the time for performance, Pro Alarm's bid properly was rejected as nonresponsive.

We need not decide the issue of whether the agency allowed sufficient time for bidders to respond to the amendment because we conclude it was not material and Pro Alarm's failure to acknowledge it may therefore be waived.

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected because absent such an acknowledgment the bidder is not obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. *Gulf Elec. Constr. Co., Inc.,* 68 Comp. Gen. 719 (1989), 89-2 CPD ¶ 272. However, the failure of a bidder to acknowledge receipt of an amendment may be waived or allowed to be cured by the bidder where the amendment has either no effect or merely a negligible effect on price, quantity, quality, or delivery. FAR § 14.405(d)(2); *Gentex Corp.,* B-216724, Feb. 25, 1985, 85-1 CPD ¶ 231. Whether a change required by an amendment is more than

[1] The IFB included the "Amendments to Invitation for Bids" clause found at Federal Acquisition Regulation (FAR) § 52.214-3 (FAC 84-56), which provides that bidders shall acknowledge receipt of an amendment (1) by signing and returning the amendment, (2) by identifying the amendment number and date in the space provided for this purpose on the form for submitting a bid, (3) by letter or telegram, or (4) by facsimile, if facsimile bids are authorized in the solicitation. Facsimile bids were not authorized by this solicitation.

negligible is based on the facts of each case. *De Ralco, Inc.,* 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327.

In this case, the only change to the specifications made by the amendment was an extension of the time for contract performance from 30 to 60 days. Under the original solicitation, the contractor had to complete the installation of the fire and smoke alarm system within 30 days of receipt of the notice to proceed. Under the amended IFB, the contractor may take up to 60 days to complete the installation. Thus, the amendment, by allowing more time for contract performance, lessened the solicitation's requirements. Since Pro Alarm's bid was low even though it was based on the original, more stringent delivery requirement, award to Pro Alarm would not prejudice any other firm. *Comet Cleaners Co.,* B-219993.2, Dec. 24, 1985, 85-2 CPD ¶ 707; *Patterson Enters. Ltd.,* B-207105, Aug. 16, 1982, 82-2 CPD ¶ 133.

We find that the agency's primary reliance on *Reliable Bldg. Maintenance, Inc.,* B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344 and *Customer Metal Fabrication, Inc.,* B-221825, Feb. 24, 1986, 86-1 CPD ¶ 190, is misplaced. In these cases, amendments were determined to be material because they placed additional obligations on contractors. In *Reliable,* an amendment incorporated by reference, among other clauses, a liquidated damages clause. Without a contractor's express agreement to the amendment, the firm would not be contractually bound to comply with that clause. Similarly, the amendment at issue in *Customer Metal Fabrication* extended the effective period during which the government could issue delivery orders for winches by an additional 93 days and advanced the cut-off date after which the contractor was no longer required to make deliveries. Without acknowledging the amendment, a firm would not be bound to deliver any winches ordered after the last date for such orders as initially set by the IFB; nor would the firm be obligated to make deliveries through the advanced cut-off date for required performance established under the amendment.

In the case here, however, the amendment imposed no additional obligation on the contractor; it simply relaxed a portion of the agency's requirement by doubling the time available to the contractor to complete the work.

We therefore conclude that the amendment was not material and Pro Alarm's failure to acknowledge it was a minor informality in its bid which could be waived by the contracting officer. FAR § 14.405(d)(2); *Loren Preheim,* B-220569, Jan. 13, 1986, 86-1 CPD ¶ 29.

We recommend that the Bureau award the contract to Pro Alarm, if otherwise appropriate. We also find the protester to be entitled to the costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990). Pro Alarm should submit its claim directly to the agency.

B-239825, September 21, 1990

Procurement

Socio-Economic Policies

■ Small business set-asides

■■ Use

■■■ Administrative discretion

Protest is sustained where agency based decision not to set guard services procurement aside for small business concerns on conclusion that small businesses likely would not have resources to perform satisfactorily and on another agency's difficulties in obtaining offers from responsible small businesses, where (1) agency did not investigate any small business's capability to perform, and (2) the other agency's facility is outside the immediate area in which the subject building is located, and information relied upon was from procurement conducted 3 years ago, so that the small business competition in that instance was not a reasonable basis for comparison.

Matter of: Stay, Incorporated

Karl Dix, Jr., Esq., and Lisa Pender Morse, Esq., Smith, Currie & Hancock, for the protester.

Howard Shecter, Esq., and Gary L. Brooks, Esq., National Archives and Records Administration, for the agency.

Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Stay, Incorporated protests a determination by the National Archives and Records Administration (NARA) not to set aside for exclusive small business competition request for proposals (RFP) No. NAMA-N2-P-0003, for security guard services at the National Archives Building in Washington, D.C. Stay contends that there was sufficient reason to expect adequate competition by small businesses at reasonable prices to require a small business set-aside.

We sustain the protest.

An acquisition of services, such as here, is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. *FKW Inc. Sys.*, 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32. However, an agency must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the capabilities to perform the work, and we will review a protest to determine whether an agency has done so. *The Taylor Group, Inc.*, B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129.

NARA reports it concluded it was unlikely that at least two offers from small businesses would be received, because (1) the Department of Justice (DOJ) told NARA that no small businesses submitted offers under a recent set-aside for similar security guard services at a DOJ facility in Rockville, Maryland; (2) NARA had difficulty obtaining quality performance from the small businesses responsible for guard services at certain presidential libraries (Gerald R. Ford and Herbert Hoover); and (3) it was unlikely that a small business would have sufficient expertise and financial resources to meet the contract requirements, including providing a trained professional staff of at least 50 security officers.

NARA proceeded to publish a synopsis in the *Commerce Business Daily* (CBD) on April 5, 1990, announcing that the solicitation for guard services at NARA would be issued on an unrestricted basis. In response, NARA received approximately 70 letters requesting solicitation packages, at least 4 of which specifically identified the requesting firms as small businesses. Proposals received by the June 6 closing date have been held unopened, pending our decision here.

We find NARA did not reasonably determine that there was no likelihood of receiving offers from at least two responsible small businesses.[1] First, the mere fact that DOJ may have been unsuccessful in generating small business competition at a facility in Rockville, Maryland, does not warrant a conclusion that no small businesses would compete for the requirement at the National Archives Building in Washington, D.C., a different jurisdiction some distance from Rockville. This is particularly the case given that the record shows NARA did not even contact DOJ prior to making its determination here. Rather, NARA relied on information DOJ had furnished in connection with NARA's award of a contract to the current incumbent, Vance International, in 1987, 3 years earlier.

NARA states its determination also was based on information furnished by the Library of Congress and the Smithsonian Institution, but the record similarly shows that the contracting officer did not contact the Library until after the RFP was issued on a non-set-aside basis (NARA never actually contacted the Smithsonian). Moreover, the information furnished was only that the guard services at those buildings were provided by government personnel (the information concerning the Smithsonian reportedly had been received in prior years), not that recent attempts to secure acceptable small business competition had been unsuccessful. Again, we fail to see how this information, which in any case is undocumented in the record, suggests that no adequate small business competition would be received for the current procurement.

NARA's concerns based on its experiences at the Ford and Hoover Libraries also did not justify the decision not to set the procurement aside. The agency generally describes only broad performance problems at the libraries, except for two specific points concerning the Hoover Library—problems obtaining guard certifications from the state, and delays in the contractor's obtaining a COC—

[1] The NARA Office of Inspector General (OIG) has initiated a review of alleged improprieties in connection with this procurement. The review has not been completed, but the OIG has furnished information from its investigation to our Office.

neither of which appears to be a matter within the contractor's control. More fundamentally, even if we accept that certain small business performance problems have arisen at the libraries, NARA has not attempted to explain why problems with small businesses in Iowa or Michigan would have any bearing on small business performance, or, more to the point, on the likelihood of receiving adequate small business competition, in Washington, D.C.

NARA's general belief that it would have difficulty obtaining offers from small business concerns capable of providing a professional staff of at least 50 guards and meeting the other technical requirements was not a valid basis for its decision not to set the requirement aside. There is no indication in the record that the agency ever investigated or considered whether any small business would be able to meet the performance requirements under this IFB, *see The Taylor Group, Inc.*, B-235205, *supra,* and the factors the agency did take into account, discussed above, in no way supported such a conclusion. Nor has NARA presented any evidence in connection with the protest that now would support its conclusion. Rather, NARA merely assumed that the requirements under the RFP here were so stringent that no small business likely could meet them. Not only do we find no support for this assumption, but NARA's own prior experience with this guard services requirement belies NARA's position that small businesses would be incapable of performing based on factors related to their small size; Vance, the incumbent contractor, was a small business (it apparently recently became large) when it initially was awarded the contract for this requirement, and apparently has been providing satisfactory service under a virtually identical statement of work.

The record strongly indicates that a principal motivation behind NARA's determination not to set this requirement aside was its desire to avoid potential delays from the need to refer a small business nonresponsibility determination to the Small Business Administration (SBA) for a Certificate of Competency (COC) review.[2] Such a potential delay was not a basis for deciding not to set the requirement aside. Again, this concern reflects an unjustified presumption that any small business bidder would be found nonresponsible in the first instance. Absent some proper factual basis for a conclusion that small businesses would be unable to perform the requirement satisfactorily, there was no basis for proceeding as if that were the case.

As the record does not establish any basis for concluding that small business bidders would not be capable of performing or would not offer reasonable prices, NARA's determination not to set the requirement aside was improper. As indicated above, four small business firms, plus Stay, now have expressed interest in competing for the contract. Therefore, by separate letter to the Archivist of the United States, we are recommending that the agency cancel the RFP and resolicit on a small business set-aside basis. We also find Stay entitled to be re-

[2] In a July 2, 1990 NARA OIG interview, an agency official stated that "[f]irst and foremost was the desire to make sure the contract would be awarded on October 1, 1990 . . . . A major concern was that obtaining a [COC] . . . generally takes 60 days . . . ."

imbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1990); *see Falcon Carriers, Inc.* 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

The protest is sustained.

B-235468, September 25, 1990

Civilian Personnel

Compensation
■ Reduction-in-force
■■ Compensation retention

Civilian Personnel

Compensation
■ Reduction-in-force
■■ Grade retention

A grade GS-9 employee was given a specific reduction-in-force (RIF) notice providing for his separation effective September 18, 1981. On September 17, 1981, the agency offered him a grade GS-5 position, which he accepted, but advised him that salary could not be set higher than grade GS-5, step-10, because it was outside his competitive area set under RIF procedures. The agency committed an unjustified and unwarranted personnel action when it erroneously denied him grade and pay retention on the basis that the employee did not receive a demotion pursuant to a RIF but was reassigned to a lower-graded position. The employee met the requirements for retained grade and pay since the employee had received a specific RIF notice and the grade GS-5 position was offered at the initiative of management.

Civilian Personnel

Compensation
■ Classification
■■ Appeals
■■■ GAO review

Civilian Personnel

Compensation
■ Reduction-in-force
■■ Procedural defects

A grade GS-7 employee was given a general reduction-in-force (RIF) notice informing him that the installation where he was then currently employed was targeted for closure. Subsequently he was reassigned to a position at the same grade and step. Since this reassignment neither was pursuant to a specific RIF notice nor resulted in a demotion, it does not appear to have resulted in any adverse consequences which would be subject to remedial action. Further, employee was subsequently laterally reassigned to a different position at the same grade and step. However, employee notes that new position was reclassified from GS-9 to GS-7 concurrent with his reassignment to it and questions this action. The Office of Personnel Management is required to review and correct agency classification and its corrective action is binding. *See* 5 U.S.C. § 5110, 5112. Hence, we are without jurisdiction to issue any ruling or decision concerning the classification of positions.

Matter of: Frank X. Kartch—Reduction in Force—Retained Grade and Pay

Mr. Frank X. Kartch, a former employee of the Fish and Wildlife Service (Service), Department of the Interior, requests a decision on his entitlement to retained grade and retained pay. For the reasons that follow, we find that the Service's denial of grade and pay retention to Mr. Kartch incident to his reassignment in September 1981 constitutes an unjustified or unwarranted personnel action which entitles him to relief under the Back Pay Act, 5 U.S.C. § 5596 (1988). However, we find no basis to grant him similar relief for two later reassignments.

Mr. Kartch was employed by the Service as a Realty Specialist, grade GS-9, step 3, in Aberdeen, South Dakota, when he received a specific notice in July 1981 of a pending reduction in force (RIF). The RIF notice informed Mr. Kartch that his position would be abolished effective September 18, 1981, because of a shortage of funding, and, because there were no positions in the legally defined competitive area, he would be separated effective September 18, 1981. However, on September 17, 1981, a vacant grade GS-5 Fishery Biologist position in Spearfish, South Dakota was identified by the agency as a position for which Mr. Kartch qualified. Mr. Kartch was offered this position with the caveat that his salary could not be set higher than grade GS-5, step 10. On the day that the offer was made to him, Mr. Kartch communicated his acceptance in writing, acknowledging that the position may be at the entry level grade GS-5, step 10.

The Service determined that Mr. Kartch did not qualify for grade or pay retention because his placement in the GS-5 position was not the result of RIF procedures.

An employee who is placed in a lower grade as a result of RIF procedures is entitled to grade and pay retention under the provisions of 5 U.S.C. §§ 5362, 5363 (1988). The Fish and Wildlife Service determined that Mr. Kartch was not eligible for grade and pay retention because his placement in the grade GS-5 position was outside his competitive geographic area set under the RIF regulations, and therefore was processed as a change to lower grade under internal placement procedures found in 5 C.F.R. Part 335 (1981). The agency explains that this decision was based on the RIF regulations found in part at 5 C.F.R. §§ 351.701-705 ("Assignment Rights"). Although no specific provision is referenced, the agency states that: "According to 5 C.F.R. 351.701-705, 'placement in a position through reduction-in-force' requires exercise of assignment rights to bump or retreat into a position occupied by an employee with lower retention standing or an equivalent position. This was not the means by which Mr. Kartch was placed into the grade GS-5 Fishery Biologist position."

We believe that the Service erred in its interpretation and application of these provisions.

Section 5362 of title 5, United States Code (1988), governs entitlement to grade retention and provides in pertinent part:

(a) Any employee—

(1) who is placed as a result of reduction-in-force procedures . . . to another position . . . which is in a lower grade than the previous position, and

(2) who has served for 52 consecutive weeks or more in one or more positions . . . at a grade or grades higher than that of the new position, is entitled . . . to have the grade of the position held immediately before such placement considered to be the retained grade of the employee in any position he holds for the 2-year period beginning on the date of such placement.

Mr. Kartch was placed in a lower-graded position and had served for more than 52 consecutive weeks in a position at a higher grade than that of the new position. Hence, the issue for our decision is whether or not he was placed in the lower-graded position as a result of RIF procedures.

Guidance applicable to this case is found in the Federal Personnel Manual Supplement 990-2, Book 536, Subchapter S3, paragraph S3-1a(1) (June 10, 1981) which provides in pertinent part as follows:

An employee is also considered to have been placed as a result of reduction-in-force procedures if he or she is placed in a position other than that offered in the specific reduction-in-force notice, provided two conditions are met. The first condition is that the position to which the employee is downgraded was offered at the initiative of management. The offer must be in writing, and it may be at any grade level. The second condition is that reduction-in-force procedures must have been followed to the extent that the employee, whose entitlement to grade retention is being determined, has received a *specific* reduction-in-force notice. (Italic in original.)

Mr. Kartch's downgrade meets both of these conditions, as the grade GS-5 position was brought to Mr. Kartch's attention by the Service and discussed with him at the agency's initiative after Mr. Kartch had received a specific RIF notice as defined in the Federal Personnel Manual, chapter 351, para. 6-2 (July 7, 1981).[1] The offer of the grade GS-5 position was apparently not made in writing. However, the purpose of OPM's guidance that the offer be in writing is to aid in making a determination after the fact as to whether the position offered was at the initiative of management. Since Mr. Kartch accepted this position in writing on the same day upon which it was offered and the agency does not dispute the specifics of the offer and since the record is conclusive that it was made at the agency's initiative, Mr. Kartch's written acceptance serves the purpose of the requirement that the record be documented.[2]

Also, we disagree with the agency's determination that since the position offered to Mr. Kartch was not in his legally defined competitive area his reassignment to that position was not pursuant to RIF procedures. We are not aware of any regulation which supports such an interpretation, and there is nothing in

[1] A specific RIF notice, among other things, apprises the employee of the particular personnel action to be taken against him, and its effective date, in contrast to a general notice which merely informs the employee that a RIF action may be necessary but a specific action has not yet been determined. *See* 5 C.F.R. §§ 351.802 and 351.803; and *Carmen G. Benabe and Howell E. Bell,* 66 Comp. Gen. 609 at 611 (1987).

[2] We informally contacted OPM regarding this point, and it concurred in this view. Further, OPM advises that its guidance that the offer be in writing was never intended to be used as a bar to grade retention when the record is otherwise clear that the offer was at management's initiative.

the language of paragraph S3-1a(1), *supra* to so restrict its application. That is, the fact that an employee has specific reassignment or bumping rights within his competitive area under a RIF situation does not preclude his entitlement to grade and pay retention when he is placed in a position outside his competitive area under the conditions outlined in paragraph S3-1a, *supra.*[3]

Under section 5363(a)(1) and (b) of title 5 an employee who ceases to be entitled to grade retention under 5 U.S.C. § 5362 by reason of the expiration of the 2-year period becomes entitled to a period of pay retention. This statute provides a specific formula for computing an employee's retained pay. Accordingly, Mr. Kartch is entitled to pay at his retained grade for the initial 2-year period of his downgraded employment beginning September 20, 1981, and to retained pay after this period computed under the provisions of 5 U.S.C. § 5363.

Therefore, the Department of the Interior committed an unjustified or unwarranted personnel action when it erroneously denied Mr. Kartch his retained grade and retained pay, as authorized by pertinent statutes and regulations. Accordingly, Mr. Kartch is entitled to backpay as specified in this decision under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1988).

Mr. Kartch has also requested our review of a reassignment he received effective March 20, 1983, following the receipt of a general RIF notice dated January 11, 1982, informing him that the Spearfish Fisheries Center, where he had been most recently employed as an Outdoor Recreation Planner, grade GS-7, step-10, had been targeted for closure. The reassignment was to a position of Wildlife Biologist, grade GS-7, step-10, at the Des Lacs Refuge Complex, Kenmore, North Dakota. Since this reassignment neither was pursuant to a specific RIF notice nor resulted in a demotion, it does not appear to have resulted in any adverse consequences which would be subject to remedial action.

Additionally, Mr. Kartch points out that he was laterally reassigned effective February 5, 1984, from his Wildlife Biologist grade GS-7, step 10, position at Des Lacs to a Refuge Manager position at the same grade and step. However, Mr. Kartch notes that the full performance level of this position had apparently been at the grade GS-9 level at the time of his reassignment but concurrently reclassified down to a grade GS-7 level with his reassignment to that position. Mr. Kartch asks our review of this action. The record discloses that Mr. Kartch did receive a promotion to grade GS-9, step 5, effective December 9, 1984, while serving in the Refuge Manager position as a result of additional duties and responsibilities.

We note that under 5 U.S.C. § 5107, individual agencies have authority to place positions in appropriate classes and grades in conformance with standards published by OPM. *See* 5 C.F.R. part 511 (1989). As a result, because statutory authority to establish appropriate classification standards and to allocate positions subject to the General Schedule rests with the agency concerned and the OPM, the General Accounting Office has no authority to settle claims on any basis

[3] OPM also informally concurred in this view.

other than the agency or OPM classification. The Office of Personnel Management is required to review agency classification actions and correct those which are not in accordance with published standards, and its correction certifications are "binding on all administrative, certifying, payroll, disbursing, and accounting officials." 5 U.S.C. §§ 5110, 5112. Hence, we are without jurisdiction to issue any ruling or decision concerning the classification of positions. *Paul W. Braun,* B-199730, Jan. 18, 1983. Further, the United States Supreme Court has ruled that federal employees may not maintain claims for backpay on the basis of assertions that they were misclassified and improperly deprived of equal pay for equal work. *United States v. Testan,* 424 U.S. 392, 399-400 (1976).

B-239740, September 25, 1990

Procurement

Sealed Bidding
■ Bid guarantees
■■ Responsiveness
■■■ Signatures
■■■■ Powers of attorney

Agency properly determined a bid bond was defective and the bid therefore nonresponsive under a sealed bid procurement where the bond indicated that it was executed by the bonding agent 3 days before power of attorney authorized the bonding agent to sign the bond on behalf of the surety.

Matter of: A.W. and Associates, Inc.

William A. Bausch, Esq., Lyon, Golibersuch & Bausch, for the protester.

Herbert F. Kelley, Jr., Esq., Captain Sophia L. Rafatjah, and Fredrick M. Lewis, Esq., Department of the Army, for the agency.

Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

A.W. and Associates, Inc. (AW) protests the rejection of its low bid and the award of a contract to another firm under invitation for bids (IFB) No. DAFK23-90-B-0036 issued by the Department of the Army for refurbishing a gymnasium floor at Fort Campbell, Kentucky.

AW submitted the low bid of the IFB, but there was a discrepancy between the dates of AW's bid bond, dated April 20, 1990, and its power of attorney, dated April 23, 1990.[1] The dates on the face of the documents indicated that the bond-

[1] The surety's power of attorney authorized the named attorney-infact/bonding agent to sign the bid bond on the surety's behalf binding the surety to the bond's terms.

ing agent may have executed AW's bid bond 3 days before the corporate surety granted the agent the power to do so. This caused the Army to question the validity of AW's bid bond and to reject AW's bid as nonresponsive. AW submitted a post bid opening letter from the bonding agent stating its intention to honor the bond and explaining that the date on the bid bond was a typographical error.

When required by a solicitation, a bid bond is a material part of the bid which must be furnished with it. *A.D. Roe Co., Inc.,* 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. The bid bond secures the surety's liability to the government thereby providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the awardee fails to fulfill its obligations. *See* 14 Comp. Gen. 305, 308 (1934). Under the law of suretyship, no one incurs a liability to pay the debts or to perform the duties of another unless that person expressly agrees to be bound. *Andersen Constr. Co.; Rapp Constructors, Inc.,* 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279.

When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. 38 Comp. Gen. 532 (1959); *Minority Enters., Inc.,* B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. A bid bond's sufficiency depends on whether the surety is clearly bound by its terms. *Truesdale Constr. Co., Inc.,* B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. For example, a bid bond submitted with an invalid power of attorney may render the bid nonresponsive. *See, e.g., Baldi Brothers Constructors,* B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418; *Desert Dry Waterproofing Contractors,* B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268. The determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bond is enforceable against the surety should the bidder fail to meet its obligations.

AW first alleges that the agency should have waived the discrepancy in the dates as a minor informality because the bid's timely submission and the propinquity of the dates on the two instruments (the bid bond and the power of attorney) show that the discrepancy in the dates is just a typographical error that occurred in the bond's preparation.

We disagree. Reading all of the bid documents together, we believe there was at best an uncertainty regarding the bonding agent's authority to sign a bond binding the surety before the surety granted the bonding agent a power of attorney; at worst, the documents indicate that the surety's agent acted without authority in executing the bond. Nothing in the bid documents refutes the dates on the two instruments or indicates that the bond was actually signed by the bonding agent following the surety's execution of the power of attorney. Since the responsiveness of a bid must be determined solely from the bid documents, the fact that the bonding agent claims to have signed the document after receiving authority from the surety is of no consequence. *See Baldi Brothers Constructors,* B-224843, *supra; Nova Group, Inc.,* B-220626, Jan. 23, 1986, 86-1 CPD ¶ 80. It is not proper to consider the reasons for a bid's nonresponsiveness, whether due to mistake or otherwise. *A.D. Roe Co., Inc.,* 54 Comp. Gen. 271, *supra.*

AW next claims that even if the dates on the instruments are correct the discrepancy is merely a matter of form and of no consequence since the surety's April 23 power of attorney would operate as a ratification of the bonding agent's execution of the bond presuming he executed it on April 20. Under this theory, AW asserts that the bonding agent had actual authority to bind the surety on April 23, well before the April 30 bid opening, which eliminates any uncertainty as to the bond's validity at the time of bid opening. AW asserts that the power of attorney can be viewed as a ratification because it grants the bonding agent broad powers to bind the surety subject only to two limitations—that the agent cannot execute bonds in excess of $100,000, and the bond must be executed before December 31, 1990.

Powers of attorney, although strictly construed, should be given construction which will give effect to intent of the parties. *J.W. Bateson Co., Inc.,* B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. We think it was the surety's intent when it issued the power of attorney to have a third limitation on the power of attorney, that being that the agent cannot act for the surety until appointed by an officer of the surety. In this regard, the power of attorney states that only certain officers of the company may appoint attorneys-infact or agents "who shall have authority to issue bonds in the name of the Company." On April 23, one of the surety's named officers appointed the bonding agent who executed the bid bond at issue here.

At bid opening, the contracting officer was confronted with a bond which he knew, from the power of attorney, may have been executed before the bonding agent's receipt of authority from the surety. In this regard, Stearns, *The Law of Suretyship* § 2.13 (5th ed. 1951) instructs that:

> Since surety companies are generally considered to be similar to insurance companies, statutes relating to agents of surety companies are construed by the courts similarly to statutes relating to agents of insurance companies. Such statutes normally are construed to prohibit the insurance company from claiming that the agent had no authority or exceeded his authority, where the agent had authority to execute or deliver a bond which the obligee accepted in good faith. *But where the obligee can be charged with knowledge or notice of limitations on the agent's authority, the statute does not apply.* (Italic supplied.) (Footnotes omitted.)

Here, the obligee in suretyship is the government, and at bid opening the government was clearly on notice of the possible limitation on the bonding agent's authority. Given the agency's notice of the discrepancy and its possible consequences, we think that at bid opening there was an open question whether the surety could escape liability by claiming the bonding agent had no authority to execute the bid bond.

Moreover, we do not agree that the surety ratified the bid bond. In order to bind a principal (here, the surety) in an agency relationship by ratification, "a knowledge of the material facts surrounding the ratified transaction must be brought home to [the principal]; he must have been in possession of all of the facts and must have acted in light of such knowledge." 3 Am. Jur. 2d, Agency § 189 (1986). There is no evidence in the bid document that the surety had any knowledge that the bonding agent executed an unauthorized bond.

Even if the surety had such knowledge, it could only cure the flaw by conveying its ratification of the bonding agent's action to the contracting officer before bid opening, which was not done here. In this regard, a ratification of the existence of an agency relationship for a transaction must be affirmed by the principal (here, the surety) before a third party (here, the government) has manifested its withdrawal from the transaction, either to the purported principal or to the agent, and before the offer or agreement has otherwise terminated or has been discharged. 3 Am. Jur. 2d, Agency § 185 (1986). In this case, since the surety did not ratify the bid bond prior to bid opening, the bid was, on its face nonresponsive and required to be rejected. Under agency terms, this required the government to withdraw from the transaction. The post bid opening explanations and commitments by the surety and bonding agent to honor the bid bond cannot be considered in determining bid responsiveness. *A.D. Roe Co., Inc.,* 54 Comp. Gen. 271, *supra.*

AW cites our decisions B-168666, Jan. 26, 1970, and *J.W. Bateson Co., Inc.,* B-189848, *supra,* in urging that it is improper to base responsiveness determinations on the dates inserted by the bidder on either Standard Form 24 (SF-24) bid bonds or on powers of attorney because (1) the SF-24 date box is only intended to identify the bond to the bid and not to delimit the term of the bond, and (2) a bond is acceptable even if both the bid bond and the power of attorney are submitted undated since the missing dates do not diminish the surety's liability on the bond.

In B-168666, *supra,* although the bid bond was dated 2 days after bid opening, the bond was furnished with the bid at bid opening and must have been executed before bid opening despite its post bid opening date. We did find that the purpose of the box "Bid Date" on the SF-24 bid bond form was not to specify the duration of the surety's liability— which could only commence with the government's decision to award the contract—but to identify the bid covered by the bond. The date on the bid bond did not raise any legitimate questions concerning the bond's enforceability. Here, the Army was presented with more than a misdated bond; it received a bond evidently signed before the bonding agent had the power to legally obligate the surety. The discrepancy in the date on AW's bond clearly could affect the government's right to enforce the bond.

J.W. Bateson Co., Inc., B-189848, *supra,* also is inapposite. That case concerned a situation where the bid bond was executed not by a bonding agent—whose authority derives from the surety through a power of attorney—but by an officer (an assistant secretary) of the surety, and delivered under the corporate seal. We found the lack of a date on the certificate of the surety's power of attorney a waivable informality since the government was adequately protected by a bond under seal executed by an officer of the surety which correctly identified the solicitation and the principal. Here, the contracting officer at bid opening was confronted with a bid bond that appeared to be executed by an individual before that individual became an agent of the surety, and which the surety, if it so elected, could have disavowed. We believe the Army properly concluded that this could leave the government without the protection of the bond.

The protest is denied.

B-238953.4, September 28, 1990

Procurement

Contractor Qualification
■ **Responsibility**
■■ **Financial capacity**
■■■ **Contractors**

Procurement

Socio-Economic Policies
■ **Small businesses**
■■ **Responsibility**
■■■ **Competency certification**
■■■■ **Negative determination**

Where solicitation did not advise offerors that financial condition would be considered in the evaluation of proposals, small business concern's financial condition related solely to its responsibility; accordingly, agency's rejection of its proposal on the basis of inadequate financial capacity but under the guise of a comparative, "best value" evaluation effectively constituted a finding of nonresponsibility which the agency was required to refer to the Small Business Administration.

Procurement

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

Where solicitation provided for evaluation of "any other costs to the government attributable to the offeror's proposal," agency was required to take into account in its evaluation of price the relative cost to the government of providing fuel for contractor-furnished aircraft.

Matter of: Flight International Group, Inc.

Richard J. Conway, Esq. and William M. Rosen, Esq., Dickstein, Shapiro & Morin, for the protester.

Kenneth B. Weckstein, Esq., Epstein Becker & Green, P.C., for Sabreliner Corporation, an interested party.

Margaret A. Olsen, Esq., and Mark O. Wilkoff, Esq., Department of the Navy, for the agency.

David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Flight International Group, Inc. protests the Department of the Navy's award of a contract to Sabreliner Corporation, under request for proposals (RFP) No. N00019-88-R-0137, for flight training services in support of the Undergraduate Naval Flight Officer (UNFO) Training Program. Flight International challenges the evaluation of its proposal and contends that Sabreliner failed to comply with certain mandatory solicitation requirements.

We sustain the protest.

The solicitation requested proposals for a firm, fixed-price contract to provide flight training services for naval flight officers for 5 base years and up to 3 option years; the services to be provided include contractor-furnished pilots flying contractor-owned aircraft (modified business jets), the use of radar training devices, maintenance and support, and instructor training. The RFP required offerors to furnish sufficient information to verify the performance and technical characteristics of the proposed aircraft, including: (1) structural design criteria and a plan for substantiation of the structural integrity of the aircraft; (2) aircraft fatigue criteria, a summary of fatigue test results and a fatigue analysis; (3) a strength summary and report on operating restrictions; and (4) a "structural flight demonstration plan including the performance of mission profiles," as set forth in the Functional Description incorporated in the solicitation. The solicitation provided for award to the offeror whose proposal offered the "best value" to the government, as determined on the basis of three evaluation factors; two of the factors were technical approach and price, which were of equal weight and significantly more important than management, the third factor.

Three proposals were received in response to the solicitation and all were included in the competitive range. After written and oral discussions with offerors, the agency requested best and final offers (BAFOs).

Based upon evaluation of BAFOs, the Navy's Source Selection Advisory Council (SSAC) determined that Sabreliner's proposal offered the overall best value to the government. Sabreliner proposed to purchase for performance of the contract used Sabreliner 40 and 40A aircraft manufactured between 1963 and 1974. The SSAC found that this approach offered "medium risk" and necessitated "special contractor emphasis and close government monitoring" because of possible difficulty in accounting for the past and remaining fatigue life of used aircraft, and because of the agency's concern with respect to demonstration of the structural strength of the Sabreliner 40 and 40A aircraft and their ability to meet the specification requirement for maneuvering capability. Notwithstanding its concern in these areas, however, the SSAC adopted the Source Selection Evaluation Board's (SSEB) conclusion that Sabreliner's proposed aircraft met or exceeded all flying qualities and performance requirements. In addition, the SSAC noted that Sabreliner's evaluated price ($241,584,400) was approximately $10.5 million lower than Flight International's ($252,040,900), the next lowest price, and that Sabreliner's management proposal was rated highly satisfactory with low risk.

The SSAC found Flight International's technical proposal to be highly satisfactory and characterized by low risk. The SSAC adopted the SSEB's determination that the aircraft—new Lear M-35A business jets—and radar proposed by Flight International afforded performance that "significantly exceeds" all performance and endurance requirements and that the proposed ground-based training system would provide "very realistic training." Nevertheless, the SSAC concluded that Flight International's overall proposal was characterized by management risk arising from certain financial considerations and that, as a result, award to Flight International was not justified.

In this regard, the initial preaward survey undertaken by the cognizant Defense Contract Administration Services Management Area (DCASMA) after the submission of initial proposals found Flight International's financial capability satisfactory and recommended complete award. According to the contracting officer, however, she became aware (possibly prior to the December 27, 1989, request for BAFOs) of an October 2 newspaper report stating that Flight International had withdrawn its financial statements for fiscal year 1989 and "was considering options to meet liquidity problems"; upon consulting DCASMA, she was advised that its evaluation of Flight International remained the same. Transcript (TR) at 42-43.[1] On January 12, the contracting officer requested a second preaward survey based upon newspaper reports on December 12 that Flight International was engaged in discussions concerning the possible sale of the company, and on December 22 that the firm had failed to make debt payments due in December. Subsequently, in its January 22 BAFO, Flight International referred to "widespread discussions about [its] continued viability"; nevertheless, it expressed confidence in its continued ability to provide quality products and services.

On February 16, however, DCASMA, based on its resurvey, recommended to the contracting officer against award to Flight International. DCASMA noted that the firm's long-term debt had been converted to short-term debt upon its default under its loan agreements and that, as a result, Flight International possessed current assets amounting to approximately 10 percent of its current liabilities and possessed none of the estimated $131 million in working capital required for contract performance. Until Flight International could secure the additional financial backing for which it claimed to be negotiating, DCASMA viewed its financial capability as unsatisfactory.

Subsequently, as reflected in the SSEB report and in her presentation to the SSAC, the contracting officer made a preliminary determination that Flight International was nonresponsible due to lack of financial capability. In her presentation to the SSAC, the contracting officer noted not only the DCASMA recommendation against award, but also several changes made by Flight International in its BAFO. Specifically, Flight International advised the government that while it was offering a fixed price to fly up to the 19,000 hours annually specified in the solicitation, it had based its cost and pricing on the expectation

[1] A conference on the written record was conducted to aid in our consideration of this matter. References are to the transcript of that conference.

that actual demand would amount to no more than 15,000 flight hours annually; any additional hours would be funded from reduced profit.[2] Further, Flight International included in its estimated costs a "fee" factor of zero percent; it explained that its projected profit would be derived from the residual market value of the assets (e.g., aircraft) acquired to perform the contract, assets whose acquisition cost would be amortized over only 5 of the potential 8 contract years, and that any requirement for additional funds to support the cost of performance could be met by extending the repayment schedule for the assets.

In informing the SSAC of her findings, the contracting officer cautioned that since Flight International is a small business, the agency would be required to refer a nonresponsibility determination to the Small Business Administration (SBA) for final consideration under its certificate of competency (COC) procedures. According to a memorandum prepared by the chairman of the SSAC after the filing of Flight International's protest, the members of the SSAC were advised by counsel that consideration of Flight International's responsibility would be inappropriate; they therefore subsequently agreed not to consider the question of responsibility in their deliberations, and instead reexamined the conclusion of the SSEB management team that Flight International's proposed management was "*Highly Satisfactory* with low risk." As documented in the SSAC's contemporaneous evaluation:

> The SSEB indicated that their rating focused on the team specifically assigned to the UNFO program. The SSAC expressed concern regarding where the program-specific management team for UNFO ends and where the corporate-level management begins. In particular, the SSAC noted that while [Flight International's] price was about $10.5 million more than the lowest offer, [Flight International] had stated that the price was based on only 15,000 flight hours per year, instead of the 19,000 hours called out in section B of the RFP, and that, furthermore, [Flight International] proposed no fee to perform this contract. The SSAC felt that *[Flight International] was putting itself at considerable financial risk*, and by extension, the UNFO program. The higher price, in combination with the management risk, did not justify an award to [Flight International], despite the technical merit of their offer. (Italic added.)

The third proposal, submitted by Cessna Aircraft Company, was found "unsatisfactory" because of exceptions taken to the technical requirements. In addition, Cessna's price ($306,134,700) was more than $64 million higher than Sabreliner's. Concurring with the SSAC's recommendation, the SSA thereupon selected Sabreliner for award. Upon learning of the subsequent award, Flight International filed this protest with our Office.

Flight International maintains that the Navy improperly considered its responsibility under the guise of conducting a comparative evaluation so as to avoid the necessity for referring the question of Flight International's responsibility to the SBA for consideration under its COC procedures. According to Flight International, the SSA was concerned that award to Flight International would result in unacceptable delay. Flight International notes that its management proposal was evaluated by the SSEB as highly satisfactory with low risk and was only questioned after the contracting officer, having advised the SSAC of

[2] The Navy has recently advised our Office that its requirement has been reduced from 19,000 flight hours annually to 15,000 hours, and that Sabreliner's contract will be modified accordingly.

her intention of finding Flight International nonresponsible for lack of financial capability, cautioned that a nonresponsibility determination would necessitate referral to the SBA. In this regard, Flight International points out that the SSA has stated that the cognizant Navy training authority had identified this procurement as "key to accomplishing his mission," and that the "training mission will tolerate few delays in the availability of equipment and services." According to the SSA:

> We were getting hounded by the [training authority] that he needed the services. He was very, very upset. We were already running behind schedule.
>
> * * * * *
>
> I sure didn't relish the idea of having anything disrupt the contract so that we could get on with the services.

TR at 71-72. Flight International further questions why, if the SSAC in fact had decided not to consider Flight International's responsibility, the SSA nevertheless was advised that Flight International preliminarily had been determined to be nonresponsible on the basis of lack of financial capability and that as a small business, it would be entitled to apply to the SBA for a COC. TR at 60-61, 63.

The Navy denies that the evaluation under the management factor was based upon Flight International's financial condition. The agency argues that instead, the determination of management risk resulted from its concerns: (1) that Flight International's attempts to address its financial problems would lead to a change in ownership and a consequent change in management; and (2) that the firm's decision to forego a fee and base its price on only 15,000 flight hours annually could place it in a loss situation and thereby diminish its incentive to perform properly. In this regard, the SSA has stated that, although he was advised of the preliminary nonresponsibility determination, he "wiped it out of the record, from my mind"; according to the SSA, he was concerned not with the adequacy of Flight International's financial resources, but instead with whether a contractor losing money on a contract would seek to minimize its losses by offering degraded service. TR at 52, 54, 61.

It is clear, however, that the Navy's concern extended beyond simply the risk of poor performance should Flight International be forced to furnish additional flight hours; the Navy was concerned with whether the firm could finance the additional contract effort. Although the SSA has denied that he considered Flight International's financial capacity, the contemporaneous documentation of the evaluation indicates that Flight International's financial position in fact was considered in the evaluation with which he concurred. TR at 52; *see Lucas Place, Ltd.*, B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398. The SSAC's recommendation noted not only Flight International's reliance upon flying fewer hours than specified, but also its proposal of no fee. TR at 47. Since Flight International's BAFO clearly indicated that it expected to earn a specified substantial level of profit from the post-contract sale of the assets acquired for performance, the agency's concern with the firm's failure to propose an annual fee or profit factor in its cost estimate could only amount to a concern with how the firm would finance any additional costs of performance during the course of the

contract. In this regard, we note that the SSAC determined that Flight International had placed both itself and the training program *"at considerable financial risk"* (italic added) by relying on flying fewer hours than specified and proposing no fee. This language likewise suggests a concern with Flight International's financial condition.

This conclusion is further corroborated by the statement of agency officials that their concern arose from the fact that Flight International's profit appeared to be predicated upon the sale of assets at the end of the contract, and that therefore it was unclear how the firm could use the profits to finance ongoing performance; specifically, it was unclear "how easy or difficult it would be for Flight to restructure those payments [on the assets], so we thought that was risky." TR at 197-198, 200, 204-206. In other words, according to the chairman of the SSEB, the issue raised was one of "ready cash"; it was "not obvious how prepayment of a loan is going to help a cash flow problem." TR at 205.

Contracting agencies are required by statute to include in solicitations all significant evaluation factors and their relative importance. 10 U.S.C. § 2305(a)(2)(A) (1988). Federal Acquisition Regulation § 15.605(e) also requires that solicitations disclose "any significant subfactors" to be considered in the award decision, and inform offerors of the "minimum requirements that apply to particular evaluation factors and significant subfactors." However, a contracting agency need not specifically identify the subfactors comprising the evaluation criteria if the subfactors are reasonably related to the stated criteria, *Washington Occupational Health Assocs., Inc.,* B-222466, June 19, 1986, 86-1 CPD ¶ 567, and the correlation is sufficient to put offerors on notice of the additional criteria to be applied. *Kaiser Elecs.,* 68 Comp. Gen. 48 (1988), 88-2 CPD ¶ 448; *Hoffman Management, Inc.,* 69 Comp. Gen. 579, B-238752, July 6, 1990, 90-2 CPD ¶15.

In this case the solicitation provided for a comparative evaluation under the management factor of "the extent to which the offeror's proposal shows the ability to manage the program required by the solicitation." The subfactors were identified as the "ability to meet the published schedule requirements of the Government at an acceptable level of risk" and "performance potential and management dedication," which was described as including an assessment of management organization, key personnel, management controls, and demonstrated past performance. The solicitation did not specifically advise offerors that financial condition would be considered in the evaluation of proposals.

Traditionally, when management is identified as an RFP evaluation criterion, agencies evaluate such factors as: management philosophy, methodology and technique, *see, e.g., De La Rue Giori, SA,* B-225447, Mar. 19, 1987, 87-1 CPD ¶ 310; management structure and organization, *see, e.g., Esco, Inc.,* 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450; chain of command and lines of communication, *see, e.g., DRT Assocs., Inc.,* B-237070, Jan. 11, 1990, 90-1 CPD ¶ 47; *Tracor Marine, Inc.,* B-226995, July 27, 1987, 87-2 CPD ¶ 92; planning and reporting, *see, e.g., The Associated Corp.,* B-225562, Apr. 24, 1987, 87-1 CPD ¶ 436; experience of proposed management personnel, *see, e.g., Institute of Modern Procedures, Inc.,* B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93; and demonstrated ability of

management to perform. *See, e.g., Pacific Architects and Eng'rs Inc.*, B-236432, Nov. 22, 1989, 89-2 CPD ¶ 494. Thus, a solicitation notice that management will be an evaluation factor does not itself place offerors on notice that an offeror's financial condition will be included in the evaluation of proposals.

Although we have expressed concern over the use of financial condition as an evaluation factor, see *Andover Data Sys., Inc.*, B-209243, Mar. 2, 1983, 83-1 CPD ¶ 465, in special circumstances financial condition may be used to assess the relative merits of individual proposals. *See E. H. White & Co.*, B-227122.3; B-227122.4, July 31, 1988, 88-2 CPD ¶ 41. Here, however, the solicitation did not explicitly establish financial condition as an evaluation criterion or subfactor, and we do not believe it did so implicitly. *Cf. Delta Data Sys. Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984).

We think that offerors, reading the management evaluation criterion and its reference to the "ability to meet the published schedule requirements," would expect the evaluation to encompass the ability of an offeror to manage corporate resources so as to meet the required schedule, as demonstrated by management philosophy, methodology and technique, management structure and organization, chain of command and lines of communication, planning and reporting, experience of proposed management personnel, and demonstrated ability to perform. Not only did this RFP not establish financial condition as an evaluation factor or subfactor, but the agency has not shown any special circumstances here that would warrant consideration of financial condition in the evaluation of proposals. Accordingly, the Navy could not properly evaluate financial condition under the RFP evaluation criteria.

Since financial condition could not properly be considered in the evaluation of proposals, it could be considered only in connection with an offeror's responsibility. *Uniserv Inc.; Marine Transp. Lines, Inc.*, B-218196; B-218196.3, June 19, 1985, 85-1 CPD ¶ 699. Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), the SBA has conclusive authority to determine the responsibility of a small business concern. When a procuring agency finds that a small business is nonresponsible, the agency is required to refer the matter to the SBA for a final determination under the COC procedures. *See Sanford and Sons Co.*, 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. An agency may not find that a small business is nonresponsible under the guise of a relative assessment of responsibility factors and thereby avoid referring the matter to the SBA. *Id.*

Based on our finding that the Navy relied upon concerns with respect to Flight International's ability to finance contract performance to exclude the firm from consideration, we must conclude that the Navy effectively made a determination of nonresponsibility which the agency was required to refer to the SBA.

Furthermore, we find that the evaluation of proposals was otherwise flawed. Flight International contends that the Navy failed to properly consider the superior fuel efficiency of its proposed Lear jets relative to that of the Sabreliner aircraft. The solicitation provided that in evaluating price, "any other costs to the Government attributable to the offeror's proposal will be included in the

total price to the Government." Under the intended contract, the agency and not the contractor would be responsible for the cost of fuel. The Navy reports that it did not plan to evaluate exact fuel costs, believing that actual fuel consumption could not be objectively evaluated because of uncertainty as to typical flight profiles and the effect of modifications on the aircraft. The Navy states, however, that an estimate of the additional fuel usage and costs attributable to the Sabreliner aircraft, nevertheless, was furnished to the SSAC; the estimated $4 million in additional cost to the government was deemed by the SSAC to be "insignificant." As a result, according to the SSA, relative fuel costs were not taken into consideration in evaluating overall cost to the government. TR at 81-82.

We conclude that since the solicitation provided for considering "any other costs to the government," the Navy was clearly required to take into consideration in evaluating the price to the government the fact that award to Sabreliner would result in additional fuel costs to the government. Our conclusion, in this regard, is consistent with the understanding of the contracting officer, who has stated her belief that it was necessary to examine the cost of fuel in order to determine the best value to the government. TR at 219-220.

Furthermore, we find that the impact of considering the additional fuel costs would have been significant. The agency now concedes that under the contract as awarded, depending on the mix of missions flown, and based on the current cost of fuel without consideration of possible inflation over the 8-year contract, award to Sabreliner will result in $7.5 million to $10.8 million in additional fuel costs to the government.[3] Flight International, on the other hand, contends that the fuel factor to be imputed to Sabreliner's price must take into account the likely actual, inflated cost of fuel in future contract years; according to Flight International, award to Sabreliner will result in at least $12 million in additional fuel costs at current prices and at least $16 million in additional costs when Department of the Air Force projections of future fuel price escalation are taken into consideration.

We question the Navy's failure to make any allowance for inflation in its estimate of fuel costs. The contract price to the government is otherwise calculated on the basis of the actual dollars to be paid in future contract years, and we see no basis for not likewise calculating fuel costs. In any case, it is clear that under any reasonable approach to calculating fuel costs, the additional cost to the government resulting from the lesser fuel efficiency of the Sabreliner aircraft would have largely eliminated Sabreliner's evaluated cost advantage over Flight International.

Flight International further contends that Sabreliner's proposed aircraft fail to satisfy specification requirements concerning performance of mission (flight) profiles, maneuverability, and approach to assuring continued structural integrity. For example, Flight International notes that the Sabreliner aircraft carry insufficient fuel to be able to fly all of the mission profiles included in the solici-

[3] The Navy's estimate reflects the prices then current and precedes recent developments in the Middle East.

tation; Sabreliner concedes that its aircraft can fly only 5 of the 12 mission profiles, while Flight International claims that the Sabreliner aircraft, in fact, can fly only 4 mission profiles. The mission flight profiles were described in the Functional Description under paragraph 3.1.2:

Aircraft Performance. The aircraft shall be capable of achieving performance levels outlined in paragraphs 3.1.2.1 through 3.1.2.6 . . . . The [mission] profiles in Appendix I are examples of the typical operational environment in which the aircraft will be flown.

The solicitation's instructions to offerors required offerors to furnish a "structural flight demonstration plan including the performance of mission profiles in the Functional Description in accordance with the requirements stated in Attachment (5) of the RFP."

We do not agree with Flight International that the inability of the Sabreliner aircraft to fly all of the mission profiles renders Sabreliner's proposal unacceptable. Initially, we note that although the Functional Description required that "the aircraft be capable of achieving" certain specified performance levels, it did not include language of a similar, mandatory nature when referring to the mission profiles. In any case, we consider determinative, in this regard, the agency's response to an offeror's preproposal question as to whether "proposed aircraft [are] required to meet the complete range of mission profiles." The agency responded by amending Attachment No. 5 to the solicitation, cited above in paragraph 3.1.2 of the Functional Description. This attachment originally required that a test plan be prepared by the contractor for tests demonstrating that the aircraft and associated radar meet several minimum requirements, *"including the complete range of mission profiles as reflected in the Functional Description."* (Italic added.) As amended, however, the underlined reference to mission profiles was deleted, thereby indicating, in our view, that they were not mandatory requirements.

On the other hand, we conclude that the agency was required to consider in its comparative evaluation of proposals the ability to fly the mission profiles. The solicitation requirement that offerors document their plan for performance of the mission profiles, when considered with the solicitation technical evaluation criterion for evaluating "the extent to which the proposed aircraft . . . satisfies the . . . Functional Description," clearly indicates that the extent to which the aircraft could fly the mission profile would be subject to comparative evaluation. We find no evidence that the evaluation of SSAC took into consideration the fact that the Sabreliner aircraft could fly no more than 5 of the 12 mission profiles. In particular, we question why Sabreliner was rated as meeting or exceeding all flying qualities and performance requirements without any qualification concerning its inability to fly most of the mission profiles, which were described by the solicitation as examples of the typical operational environment and by agency technical personnel as the missions currently being flown. TR at 232.

We therefore find that Sabreliner's evaluation under the technical factor lacked a reasonable basis and, as a result of the failure to properly take into account Sabreliner's weakness in this regard, that Flight International's superiority

under the technical factor was understated. Again, Sabreliner's perceived advantage with respect to price—the other most important evaluation factor—was in error. Since the management factor was significantly less important than technical and cost, we find no basis in the evaluation record for concluding that any weakness of Flight International's management proposal offset Flight International's superiority under the significantly more important technical factor. Thus, absent consideration of financial capability, award to any offeror other than Flight International would be an abuse of discretion.

The Navy had a legitimate concern that Flight International lacked the financial resources to perform the contract. This concern properly was for consideration in the context of a responsibility determination, with any finding of nonresponsibility referred to the SBA for consideration under its COC procedures. The agency's action in effectively rejecting Flight International's proposal on the basis of a lack of financial capacity but under the guise of a comparative, "best value" evaluation was improper.[4]

The protest is sustained.

By letter of today to the Secretary of the Navy, we are recommending that the agency determine the responsibility of Flight International, and, if the firm is found nonresponsible, refer the matter to the SBA. If the SBA issues a COC to Flight International, the contract awarded to Sabreliner should be terminated for the convenience of the government and award should be made to Flight International. In any case, we find that Flight International is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1990); *see Falcon Carriers, Inc.*, 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

B-239800, September 28, 1990

Procurement

Specifications
■ Minimum needs standards
■ ■ Competitive restrictions
■ ■ ■ GAO review

Protest that requirement for 128 kilobytes (128K) of memory for transient digitizers unduly restricts competition is sustained where the record fails to show that the specification is reasonably related to contracting agency's current needs, since the 128K memory capacity cannot be utilized by the agency given current technology and even if the necessary technology becomes available in the near future, the agency lacks any definite plans to use it.

[4] In view of our conclusion, we need not address Flight International's remaining contentions that Sabreliner's proposed aircraft fail to meet other allegedly mandatory specification requirements.

Procurement

Specifications
■ Minimum needs standards
■■ Competitive restrictions
■■■ GAO review

Contention that requirement for a DR11 compatible high speed parallel port for transient digitizers improperly restricts competition is sustained where the contracting agency in effect concedes that compatibility feature is not required to meet its minimum needs.

Matter of: Hewlett-Packard Company

Rand L. Allen, Esq., Wiley, Rein & Fielding, for the protester.

David C. Rickard, Esq., Defense Nuclear Agency, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Hewlett-Packard Company (HP) protests any award under invitation for bids (IFB) No. DNA002-90-B-0032, issued by the Defense Nuclear Agency (DNA) for transient digitizers to convert electronic signals received from sensors used in underground nuclear test detonations to digital data, and to transmit such data to DNA computers. HP contends that two of the salient characteristics included in the specifications set forth in the IFB exceed DNA's minimum needs and unduly restrict competition.

We sustain the protest.

The IFB, issued on a brand name or equal basis, called for bidders to provide 100 Tektronix, Inc. Transient Digitizers, Model No. RTD 720, or equal. In addition, the IFB listed 24 salient characteristics of the Tektronix device in order to permit potential bidders and the government to evaluate whether other digitizers are equal to the Tektronix model specified.

After the IFB was issued, HP filed written inquiries with DNA, and eventually filed an agency protest, challenging several of the salient characteristics included in the IFB as overly restrictive. According to HP's initial inquiry, the list of salient characteristics appeared to be "a condensed version of the applicable Tektronix data sheet, rather than a clear and understandable statement of the government's needs for this procurement." Although DNA amended the IFB to address some of the questions raised, HP's agency protest was denied on May 15, 1990.

On May 23, 1 day prior to bid opening, HP protested to our Office. HP's protest asserts that two of the requirements included in the salient characteristics for an "equal" product—that each digitizer possess 128 kilobytes (128K) of waveform memory and that each digitizer be equipped with a DR11 compatible high

speed parallel port—are unduly restrictive of competition and exceed DNA's minimum needs.

On May 24, DNA proceeded with bid opening. The agency received only 1 responsive bid—from the manufacturer of the specified brand name equipment. The other bid, from a different digitizer manufacturer, acknowledged, on its face, that it did not comply with the salient characteristics, and challenged the specifications as unduly restrictive.

Background

The digitizers sought by DNA in this procurement are used in monitoring underground nuclear test detonations conducted in tunnels mined into mesas at a Nevada test site. At these underground sites, DNA constructs a test bed consisting of the source phenomena—i.e., the explosive device and the objects or materials subjected to the explosion or the effects thereof—and the sensors and gauges that convert measurements to electronic signals.

In configuring such test events, great distances are required between the instruments that measure the effects of a test and the computers that record and analyze the electronic signals generated by the measuring equipment. The electronic signals are initially transmitted from the sensors and gauges via coaxial cable; such signals, when carried great distances via coaxial cable in an underground nuclear test environment, deteriorate rapidly. Thus, DNA feeds the signals into digitizers (also underground, and located as close to the gauges and sensors as possible) that convert the data to a digital format. In digital format, the signals generated by the sensors are less subject to degradation and interference as they are transported by fiber optic cable through the tunnel and out of the mesa to a recording station 7 miles away. At the recording station the digital signals are recorded on tape for analysis by computer.

The digitizers used by DNA are also required to "multiplex" signals from more than one sensor before transmitting the signals to the recording site. Multiplexing of signals by digitizers requires that the digitizer possess sufficient memory to delay (and remember) signals for a very short time until a group of signals are collected. After collecting a group of signals, the digitizer then transmits the group (in converted digital format) to the recording station. According to both parties, gathering, delaying, and transmitting eight signals from a single digitizer, with a microsecond of delay between each signal, requires 16K of memory.

128K Memory Requirement

Parties' Positions

In its challenge to the salient characteristics included in the IFB, HP focuses first on the requirement that each digitizer have 128K of waveform memory. According to HP, none of the needs cited to date by DNA, either in response to

HP's initial inquiry or in response to HP's protest to the agency, supports a requirement for more than 16K of memory, as opposed to the 128K of memory established in the IFB.[1]

In support of its claim that it needs 128K of memory, DNA first explains, in general terms, that its requirements for recording test data far exceed its current capability. It notes that even with the addition of the digitizers that are the subject of this procurement, DNA will not be able to record all of the data generated. Also, DNA claims that the limitation on its ability to record data "[I]s directly related to the quantity of memory available to the digitizers . . . since additional memory per digitizer allows the recording of additional signals."

More specifically, DNA argues that it has a need for increased multiplexing of sensor and gauge signals into a single digitizer, and hence a need for larger memories in its digitizers.[2] In this regard, DNA explains that by using fiber optic delay lines the agency could multiplex as many signals as possible with a single digitizer. DNA also argues that HP overlooks the agency's ongoing need for greater resolution and better fidelity of the signals it transmits, asserting that both are significantly improved by sampling at a faster rate, requiring larger memories. Finally, at the hearing on the protest, DNA's technical witness for the first time asserted that DNA has a Strategic Defense Initiative (SDI) requirement to record the effect of nuclear radiation on a mirror and to measure the mirror's recovery period. DNA's witness explained that recording this experiment could require sampling for 70 microseconds;[3] he further explained that sampling at a rate of 1-2 gigasamples (1-2 billion samples) per second, for 70 microseconds, would require 70K-140K of memory to record the associated signals.

With respect to the need for increased multiplexing, HP counters that current technology bars multiplexing the quantity of signals needed to utilize 128K of memory. Specifically, HP claims, and DNA agrees, that using current measuring procedures and technology, the 8:1 multiplexing described above—i.e., transmitting eight signals from a single digitizer with a microsecond of delay between each signal—is the maximum number of signals that can be multiplexed with a single digitizer.

DNA counters that recent and developing advances in technology should permit increased multiplexing capability. In particular, DNA points to research with fiber optic delay lines performed at Sandia National Laboratories indicating

[1] In its protest to the agency, HP asserted that DNA needed no more than 8K of memory in its digitizers. DNA's May 15 response to HP's agency protest enumerated three reasons why a digitizer with an 8K memory would not meet the agency's minimum needs. According to DNA, a digitizer with an 8K memory (1) would not be able to replace DNA's model 6880 digitizers; (2) would not be able to substitute for lower class digitizers; and (3) would not meet the intended multiplexed recording need. HP now abandons its earlier contention regarding 8K memory capacity, but argues that 16K of memory will meet each of these enumerated needs.

[2] In its response to the protest, DNA initially reiterated the three requirements stated in its response to HP's agency protest, one of which was the need for increased multiplexing. The agency has since conceded that the other two requirements— replacing the model 6880 digitizers, and substituting for lower class digitizers—can be met by a digitizer with 16K of memory.

[3] A microsecond equals 1 millionth of a second.

that significant signal delays—allowing for greater numbers of signals to be multiplexed to a single digitizer—are achievable with fiber optic technology. In addition, DNA claims that on or about June 13, during the pendency of this protest, it successfully conducted a feasibility demonstration of an analog fiber optic delay line that could be used between the sensors and the digitizers. As a result of its demonstration, DNA asserts that achieving sufficient signal delay to utilize 128K of memory in a digitizer is feasible, although the agency offers no objective evidence of any intent to use fiber optic delay lines in this capacity in the near future.

In rebuttal to DNA's claims of possible technological advancements that would permit multiplexing at the level needed to utilize 128K of waveform memory—i.e., 64:1 multiplexing—HP argues that DNA has no serious or concrete plans to realize a 64:1 multiplexing capability, and has not shown that a multiplexing capability greater than 8:1 is reasonably achievable in the near term. Further, HP argues that even if DNA could achieve 64:1 multiplexing, the possibility that failure of one digitizer or signal could result in a loss of 64 channels of data is inconsistent with DNA's stated goal of minimizing risk of data loss.

HP also challenges DNA's claims regarding resolution and fidelity, and the need to observe the effects of radiation on a mirror for the SDI program. Addressing resolution and fidelity, HP argues that paragraph 9 of the salient characteristics in the IFB sets forth the requirements for sampling resolution, and that if DNA needed greater resolution or fidelity, then the specifications should have so stated. With respect to the SDI requirement, HP notes that despite the extensive record developed in this protest, there is no mention of SDI, or of any tests to be performed in support of SDI. In addition, HP argues that the measurements from such a test could easily be handled by a digitizer with 16K of memory because the deformation and recovery of a mirror is a physical phenomenon requiring sample speeds exponentially smaller than 2 gigasamples per second.[4]

Analysis

When a protester challenges a salient characteristic included in a brand name or equal solicitation as unduly restrictive of competition, we will review the record to determine whether the restrictions imposed are reasonably related to the contracting agency's minimum needs. *DataTeam, Inc.,* 68 Comp. Gen. 368 (1989), 89-1 CPD ¶ 355. We find that the record in this case shows that the requirement for 128K of memory is not reasonably related to DNA's minimum needs since the 128K memory capacity cannot be utilized by DNA given current technology, and even if the necessary technology becomes available in the near future, DNA has no definite plans to use it.

[4] During the hearing, HP's technical witness suggested that there would be no need to sample measurements of mirror degradation and recovery at the 2 gigasamples per second rate established as the maximum sample speed for these digitizers. HP suggested that a more appropriate sample speed would be many thousand times slower. DNA's technical witness did not disagree with this assessment when given the opportunity to do so.

As a preliminary matter, HP claims that the salient characteristics in the IFB appeared to have been taken from the applicable Tektronix data sheet; internal agency documents provided in response to this protest substantiate HP's allegation. Nonetheless, the fact that specifications are based upon a particular product is not improper in and of itself; nor will an assertion that a specification was "written around" design features of a particular product provide a valid basis for protest if the record establishes that the specification is reasonably related to the agency's minimum needs. *Infection Control and Prevention Analysts, Inc.*, B-238964, July 3, 1990, 90-2 CPD ¶ 7.

In evaluating HP's challenge and DNA's attempt to establish its minimum needs for digitizer memory, we first reviewed the stated purpose and intended use of digitizers in the test environment. During the hearing on the protest, DNA's technical witness explained that the only purpose for a digitizer is to convert electronic signals to digital data for fiber optic transmission. Thus, the memory requirements for digitizers are established by the capacity necessary to gather, delay, and transmit signals, not to store signals for later retrieval—i.e., a digitizer is not an underground computer for storing signals.[5] DNA's technical witness also explained the barriers to multiplexing signals beyond the current 8:1 level: a need for long delay lines between sensors and digitizers, and a need for larger digitizer memories to gather, delay, and transmit signals.

Although the agency, to date, is only capable of 8:1 multiplexing, DNA claims that the requirement for 128K of memory is justified by its potential ability to develop long delay lines by taking advantage of recent technological developments in fiber optic transmission. Prior to the hearing, DNA had only offered evidence of success at Sandia National Laboratories in achieving 20 microseconds of delay with fiber optic delay lines—a delay of 64 microseconds would appear to be necessary to utilize 128K of memory. During the hearing, DNA's technical witness explained that the agency had conducted its own "feasibility determination" of the use of such lines, concluding that a delay of 66 microseconds is feasible. HP responds that the agency has fallen far short of showing that the use of such long delay lines is possible in the near future.

Although we agree with HP's concerns regarding whether DNA will actually realize the technological advances necessary to utilize such delay lines, even if we assume that DNA will be able to make such progress, the extensive record developed in this case includes no documentary evidence of any intended or planned signal multiplexing at a level of 64:1. In fact, when asked if the agency based its claimed need of 128K of memory on a 64:1 multiplexing capability, the agency witness replied that he did not intend to build a 64:1 multiplexer unless or until an event or experiment required such a multiplexer. Nor did he identify an event or experiment that might require such a capability. Also, the

[5] DNA's witness did state, however, that in the event of a communications failure that interrupts transmission of the digital signals to the recording station, larger memories in digitizers could permit manual retrieval of more information than might otherwise be obtained. Such retrieval could only be made after radiation levels in the tunnel dropped sufficiently to permit manual access to the digitizer.

agency made no other showing of how 128K of memory might be related to increased multiplexing needs.

Since DNA has not articulated any tangible need for the memory, and the effect here is to significantly limit competition, we find that the record does not adequately justify the requirement.[6] In reaching our conclusion here, we are not barring agencies from determining that their minimum needs include the ability to take advantage of developing technology. *Cf. Government Sys. Integration Corp.*, B-227065, Aug. 7, 1987, 87-2 CPD ¶ 137 (agency reasonably specified salient characteristic for equal ADP equipment that included additional capacity for increased future needs). Rather, we find that in this case, DNA has not sufficiently articulated any concrete need—current or future—for the memory requirement.

We also find no relation between DNA's claimed need for greater resolution and better fidelity of signal recording and the requirement for 128K of memory. The requirement for improved recording capability does not arbitrarily translate to 128K, as opposed to 100K or 200K, of digitizer memory. The record here offers no reason why 128K is preferable to any other increase in memory capability. In addition, as HP claims, the specifications already establish requirements for resolution and for sample speed. If DNA needs higher capabilities in this area, then the increased need should be reflected in those specifications.

With respect to the requirement for recording measurements of deformation and recovery of a mirror subjected to nuclear radiation, we again find DNA has not shown that such an exercise requires 128K of digitizer memory. Initially, we note that DNA made no mention of this requirement until the hearing on this protest.[7] In response, HP challenged the assumption that measuring such changes to a mirror would require high sample speeds. HP's technical witness suggested that much slower sample speeds would adequately record physical phenomena such as this and countered that, at the appropriate sampling speed, a digitizer with 16K of memory would meet the agency's requirement. Not only did DNA's technical witness fail to disagree with this assessment when asked, but the agency made no attempt to rebut the assertion or provide documentary evidence in support of the existence of the need in its post-conference comments. Under these circumstances, we have no basis to conclude that DNA's SDI requirement justifies the restriction that only digitizers with 128K of memory will meet the agency's needs.

In conclusion, we find that the record fails to show any reasonable relationship between the agency's minimum needs and the requirement that any digitizer offered as an equal to the Tektronix model possess 128K of waveform memory.

[6] As noted above, agency documents support HP's contention that the salient characteristics in the solicitation were largely copied from the applicable Tektronix data sheet. While such reliance is not *per se* improper, when combined with a record that does not establish any independently articulated need for the memory, it suggests that the agency failed to adequately examine its minimum needs.

[7] The agency failed to mention this need in the agency report, the contracting officer's statement, or in any of the documents appended to the agency report in support of the solicitation requirements. Further, the agency has not provided any documentary support for this claimed need since the hearing.

First, of the three reasons originally given by DNA in support of its requirement, the agency now concedes that two of the reasons claimed do not support the requirement for 128K of memory; only the assertion that the need for increased multiplexing of signals to a single digitizer remains. Second, DNA has not established that its general need to record more information than it has the capability to record is reasonably related to a specific requirement for any particular memory capacity. Finally, we find that DNA has not established a reasonable relationship between its needs for fidelity and resolution, or its SDI requirements, and the claimed need for 128K of digitizer memory.

DR11 Compatible High Speed Parallel Port Requirement

HP also challenges the solicitation requirement for a DR11 compatible high speed parallel port. Paragraph 20 of the salient characteristics in the IFB, entitled "Interfaces," requires two electronic interfaces: a GPIB, IEEE-488 port for instrument control and waveform data output; and a high speed parallel port, "DR11 compatible for waveform data output only." Although DR11 compatible ports are used throughout industry, HP claims that only Tektronix manufactures such ports for this class of digitizers. The salient characteristics also require that all products offered as equal to the Tektronix model must be production units, and that prototypes are not acceptable.

DNA responds that it has a valid requirement for a separate output-only port because ports that can both input and output data—like the IEEE-488 port on HP's digitizers—can malfunction in an underground nuclear test environment. The agency explains that, in the past, ports that both input and output data have interpreted test bed noise as a command and have caused the machine to lose data. Thus, DNA explains that between its dry run test and the actual test event, the digitizer must be converted to strictly one-way—output only— operation, and must become autonomous.

In our view, HP's challenge to the solicitation's port requirement is, in essence, a challenge to the requirement for DR11 compatibility, not the requirement for an output-only port. HP stated in the hearing that its IEEE-488 port is capable of serving as an output-only port.[8] DNA responds, in its post-hearing comments, that given this capability, it appears likely that HP's port will meet the agency's minimum need for an output-only port.

We are persuaded that DNA must assure that ports not be subject to interference that might cause loss of data during the test event, and that an output-only port is required. However, the need for an output-only port does not translate into a requirement for DR11 compatibility as well. While the specification requires DR11 compatibility, and in addition requires an output-only port, from our review of the record it is clear that DNA's requirement is solely for an output-only port. DR11 compatibility is simply a characteristic required to

[8] HP's technical witness explained that "there are switches on our boxes where it could only be output, and if that's what their desire is, we can do that."

achieve an output-only capability with the Tektronic brand-name equipment. This feature is in no way related to the agency's general minimum need for an output-only port.

Given DNA's admission that an IEEE-488 port—which is not DR11 compatible—may adequately address the agency's requirement for an output-only port, we find that the requirement for a DR11 interface exceeds the agency's minimum needs. Thus, we sustain HP's challenge to the specification with respect to the requirement for a DR11 interface.

Recommendation

By letter of today to the Director of the Defense Nuclear Agency, we are recommending that DNA cancel the IFB, amend the specifications in the IFB in accordance with this decision to accurately reflect the agency's minimum needs and reissue the IFB with the revised specifications. In addition, we find that HP is entitled to the costs of filing and pursuing its protest, including attorneys' fees. *Data-Team, Inc.,* 68 Comp. Gen. 368, *supra.* HP should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e) (1990).

The protest is sustained.

HP's initial inquiry or in response to HP's protest to the agency, supports a requirement for more than 16K of memory, as opposed to the 128K of memory established in the IFB.[1]

In support of its claim that it needs 128K of memory, DNA first explains, in general terms, that its requirements for recording test data far exceed its current capability. It notes that even with the addition of the digitizers that are the subject of this procurement, DNA will not be able to record all of the data generated. Also, DNA claims that the limitation on its ability to record data "[I]s directly related to the quantity of memory available to the digitizers . . . since additional memory per digitizer allows the recording of additional signals."

More specifically, DNA argues that it has a need for increased multiplexing of sensor and gauge signals into a single digitizer, and hence a need for larger memories in its digitizers.[2] In this regard, DNA explains that by using fiber optic delay lines the agency could multiplex as many signals as possible with a single digitizer. DNA also argues that HP overlooks the agency's ongoing need for greater resolution and better fidelity of the signals it transmits, asserting that both are significantly improved by sampling at a faster rate, requiring larger memories. Finally, at the hearing on the protest, DNA's technical witness for the first time asserted that DNA has a Strategic Defense Initiative (SDI) requirement to record the effect of nuclear radiation on a mirror and to measure the mirror's recovery period. DNA's witness explained that recording this experiment could require sampling for 70 microseconds;[3] he further explained that sampling at a rate of 1-2 gigasamples (1-2 billion samples) per second, for 70 microseconds, would require 70K-140K of memory to record the associated signals.

With respect to the need for increased multiplexing, HP counters that current technology bars multiplexing the quantity of signals needed to utilize 128K of memory. Specifically, HP claims, and DNA agrees, that using current measuring procedures and technology, the 8:1 multiplexing described above—i.e., transmitting eight signals from a single digitizer with a microsecond of delay between each signal—is the maximum number of signals that can be multiplexed with a single digitizer.

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Although we agree with HP's concerns regarding whether DNA will actually realize the technological advances necessary to utilize such delay lines, even if we assume that DNA will be able to make such progress, the extensive record developed in this case includes no documentary evidence of any intended or planned signal multiplexing at a level of 64:1. In fact, when asked if the agency based its claimed need of 128K of memory on a 64:1 multiplexing capability, the agency witness replied that he did not intend to build a 64:1 multiplexer unless or until an event or experiment required such a multiplexer. Nor did he identify an event or experiment that might require such a capability. Also, the

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agency made no other showing of how 128K of memory might be related to increased multiplexing needs.

Since DNA has not articulated any tangible need for the memory, and the effect here is to significantly limit competition, we find that the record does not adequately justify the requirement.[6] In reaching our conclusion here, we are not barring agencies from determining that their minimum needs include the ability to take advantage of developing technology. *Cf. Government Sys. Integration Corp.*, B-227065, Aug. 7, 1987, 87-2 CPD ¶ 137 (agency reasonably specified salient characteristic for equal ADP equipment that included additional capacity for increased future needs). Rather, we find that in this case, DNA has not sufficiently articulated any concrete need—current or future—for the memory requirement.

We also find no relation between DNA's claimed need for greater resolution and better fidelity of signal recording and the requirement for 128K of memory. The requirement for improved recording capability does not arbitrarily translate to 128K, as opposed to 100K or 200K, of digitizer memory. The record here offers no reason why 128K is preferable to any other increase in memory capability. In addition, as HP claims, the specifications already establish requirements for resolution and for sample speed. If DNA needs higher capabilities in this area, then the increased need should be reflected in those specifications.

With respect to the requirement for recording measurements of deformation and recovery of a mirror subjected to nuclear radiation, we again find DNA has not shown that such an exercise requires 128K of digitizer memory. Initially, we note that DNA made no mention of this requirement until the hearing on this protest.[7] In response, HP challenged the assumption that measuring such changes to a mirror would require high sample speeds. HP's technical witness suggested that much slower sample speeds would adequately record physical phenomena such as this and countered that, at the appropriate sampling speed, a digitizer with 16K of memory would meet the agency's requirement. Not only did DNA's technical witness fail to disagree with this assessment when asked, but the agency made no attempt to rebut the assertion or provide documentary evidence in support of the existence of the need in its post-conference comments. Under these circumstances, we have no basis to conclude that DNA's SDI requirement justifies the restriction that only digitizers with 128K of memory will meet the agency's needs.

In conclusion, we find that the record fails to show any reasonable relationship between the agency's minimum needs and the requirement that any digitizer offered as an equal to the Tektronix model possess 128K of waveform memory.

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[6] As noted above, agency documents support HP's contention that the salient characteristics in the solicitation were largely copied from the applicable Tektronix data sheet. While such reliance is not *per se* improper, when combined with a record that does not establish any independently articulated need for the memory, it suggests that the agency failed to adequately examine its minimum needs.

[7] The agency failed to mention this need in the agency report, the contracting officer's statement, or in any of the documents appended to the agency report in support of the solicitation requirements. Further, the agency has not provided any documentary support for this claimed need since the hearing.

First, of the three reasons originally given by DNA in support of its requirement, the agency now concedes that two of the reasons claimed do not support the requirement for 128K of memory; only the assertion that the need for increased multiplexing of signals to a single digitizer remains. Second, DNA has not established that its general need to record more information than it has the capability to record is reasonably related to a specific requirement for any particular memory capacity. Finally, we find that DNA has not established a reasonable relationship between its needs for fidelity and resolution, or its SDI requirements, and the claimed need for 128K of digitizer memory.

DR11 Compatible High Speed Parallel Port Requirement

HP also challenges the solicitation requirement for a DR11 compatible high speed parallel port. Paragraph 20 of the salient characteristics in the IFB, entitled "Interfaces," requires two electronic interfaces: a GPIB, IEEE-488 port for instrument control and waveform data output; and a high speed parallel port, "DR11 compatible for waveform data output only." Although DR11 compatible ports are used throughout industry, HP claims that only Tektronix manufactures such ports for this class of digitizers. The salient characteristics also require that all products offered as equal to the Tektronix model must be production units, and that prototypes are not acceptable.

DNA responds that it has a valid requirement for a separate output-only port because ports that can both input and output data—like the IEEE-488 port on HP's digitizers—can malfunction in an underground nuclear test environment. The agency explains that, in the past, ports that both input and output data have interpreted test bed noise as a command and have caused the machine to lose data. Thus, DNA explains that between its dry run test and the actual test event, the digitizer must be converted to strictly one-way—output only— operation, and must become autonomous.

In our view, HP's challenge to the solicitation's port requirement is, in essence, a challenge to the requirement for DR11 compatibility, not the requirement for an output-only port. HP stated in the hearing that its IEEE-488 port is capable of serving as an output-only port.[8] DNA responds, in its post-hearing comments, that given this capability, it appears likely that HP's port will meet the agency's minimum need for an output-only port.

We are persuaded that DNA must assure that ports not be subject to interference that might cause loss of data during the test event, and that an output-only port is required. However, the need for an output-only port does not translate into a requirement for DR11 compatibility as well. While the specification requires DR11 compatibility, and in addition requires an output-only port, from our review of the record it is clear that DNA's requirement is solely for an output-only port. DR11 compatibility is simply a characteristic required to

[8] HP's technical witness explained that "there are switches on our boxes where it could only be output, and if that's what their desire is, we can do that."

achieve an output-only capability with the Tektronic brand-name equipment. This feature is in no way related to the agency's general minimum need for an output-only port.

Given DNA's admission that an IEEE-488 port—which is not DR11 compatible—may adequately address the agency's requirement for an output-only port, we find that the requirement for a DR11 interface exceeds the agency's minimum needs. Thus, we sustain HP's challenge to the specification with respect to the requirement for a DR11 interface.

Recommendation

By letter of today to the Director of the Defense Nuclear Agency, we are recommending that DNA cancel the IFB, amend the specifications in the IFB in accordance with this decision to accurately reflect the agency's minimum needs and reissue the IFB with the revised specifications. In addition, we find that HP is entitled to the costs of filing and pursuing its protest, including attorneys' fees. *Data-Team, Inc.*, 68 Comp. Gen. 368, *supra*. HP should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e) (1990).

The protest is sustained.

Civilian Personnel

Compensation
■ Classification
■■ Appeals
■■■ GAO review

A grade GS–7 employee was given a general reduction-in-force (RIF) notice informing him that the installation where he was then currently employed was targeted for closure. Subsequently he was reassigned to a position at the same grade and step. Since this reassignment neither was pursuant to a specific RIF notice nor resulted in a demotion, it does not appear to have resulted in any adverse consequences which would be subject to remedial action. Further, employee was subsequently laterally reassigned to a different position at the same grade and step. However, employee notes that new position was reclassified from GS–9 to GS–7 concurrent with his reassignment to it and questions this action. The Office of Personnel Management is required to review and correct agency classification and its corrective action is binding. *See* 5 U.S.C. § 5110, 5112. Hence, we are without jurisdiction to issue any ruling or decision concerning the classification of positions.

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■ Reduction-in-force
■■ Compensation retention

A grade GS–9 employee was given a specific reduction-in-force (RIF) notice providing for his separation effective September 18, 1981. On September 17, 1981, the agency offered him a grade GS–5 position, which he accepted, but advised him that salary could not be set higher than grade GS–5, step–10, because it was outside his competitive area set under RIF procedures. The agency committed an unjustified and unwarranted personnel action when it erroneously denied him grade and pay retention on the basis that the employee did not receive a demotion pursuant to a RIF but was reassigned to a lower-graded position. The employee met the requirements for retained grade and pay since the employee had received a specific RIF notice and the grade GS–5 position was offered at the initiative of management.

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■ Reduction-in-force
■■ Grade retention

A grade GS–9 employee was given a specific reduction-in-force (RIF) notice providing for his separation effective September 18, 1981. On September 17, 1981, the agency offered him a grade GS–5 position, which he accepted, but advised him that salary could not be set higher than grade GS–5, step–10, because it was outside his competitive area set under RIF procedures. The agency committed an unjustified and unwarranted personnel action when it erroneously denied him grade and pay retention on the basis that the employee did not receive a demotion pursuant to a RIF but was reassigned to a lower-graded position. The employee met the requirements for retained grade and pay since the employee had received a specific RIF notice and the grade GS–5 position was offered at the initiative of management.

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■ **Reduction-in-force**

■■ **Procedural defects**

A grade GS-7 employee was given a general reduction-inforce (RIF) notice informing him that the installation where he was then currently employed was targeted for closure. Subsequently he was reassigned to a position at the same grade and step. Since this reassignment neither was pursuant to a specific RIF notice nor resulted in a demotion, it does not appear to have resulted in any adverse consequences which would be subject to remedial action. Further, employee was subsequently laterally reassigned to a different position at the same grade and step. However, employee notes that new position was reclassified from GS-9 to GS-7 concurrent with his reassignment to it and questions this action. The Office of Personnel Management is required to review and correct agency classification and its corrective action is binding. *See* 5 U.S.C. § 5110, 5112. Hence, we are without jurisdiction to issue any ruling or decision concerning the classification of positions.

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Miscellaneous Topics

Transportation
■ Air carriers
■■ Excursion rates
■■■ Availability

Under the airlines' deregulated pricing system the city-pair contract fare, if applicable, or the fare selected by a traveler when a reservation is made or the ticket is issued generally is the applicable fare. GSA's position that the government is entitled to the lowest available fare for the service provided although another fare was requested has no reasonable basis in law. However, if GSA can establish that a lower fare applied and was requested but not furnished, it may apply the lower fare. The burden is then on the carriers to provide evidence to show why such fare was not available, since such evidence is peculiarly within their knowledge and competence.

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Procurement